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The 2022 Alabama Executions and the Crisis of American Capital Punishment

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THE 2022 ALABAMA EXECUTIONS AND THE CRISIS OF AMERICAN CAPITAL PUNISHMENT

Alexandra L. Klein *

The Death Penalty Information Center described 2022 as “the year of the botched execution” in its 2022 Annual Report. Alabama’s execution errors were especially serious: it attempted to execute four people, botched three of its four executions, and ultimately called off two executions. Alabama’s 2022 executions and its errors are the culmination of common problems in capital punishment across the United States. A full understanding of capital punishment requires an analysis of individual cases, including executions, and analysis of how that case fits within the system of capital punishment. Evaluating a single case may reveal unfairness and arbitrariness, but tracking those trends across multiple cases demonstrates broader system failures. Alabama’s 2022 executions present a useful case study for understanding the flaws in execution practices and capital punishment more broadly.

This Article documents the 2022 Alabama executions and makes three contributions. First, it summarizes the events in Alabama surrounding the executions of Matthew Reeves and Joe James, and the failed executions of Alan Miller and Kenneth Smith. It reviews some issues associated with each capital sentence and appeals process. Second, it explores points of commonality among each of the four cases: non-unanimous jury sentencing and judicial overrides, inadequate legal representation and resources, the role the Supreme Court played in the cases, and the problems associated with Alabama’s execution protocols. Finally, it addresses the outcome of Alabama’s decision to suspend executions and offers recommendations intended to protect the Eighth Amendment rights of people facing executions if Alabama’s elected officials are unwilling to take the necessary step to abolish the death penalty.

The problems this Article describes are not unique to Alabama, but events in Alabama afford an opportunity to bring fresh scrutiny to these issues. The Supreme Court’s willingness to authorize executions regardless of the merits of an individual case makes it more likely that errors like this will continue to happen. Alabama is not the whole story of 2022’s botched execu-

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tions, but what happened in Alabama illustrates just how pointlessly cruel the process of capital punishment is.

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INTRODUCTION

The Death Penalty Information Center accurately described 2022 as the “Year of the Botched Execution.”¹ States attempted to execute twenty people and seven of those executions were “visibly problematic.”² Even if states did not botch their executions, their policies and practices highlighted the cruelty of capital punishment. Oklahoma scheduled *twenty-five* executions between August 2022 and December 2024, and steadily carried them out until the pace of executions became too difficult for corrections employees to endure.³ Missouri executed Kevin Johnson for a crime committed when he was nineteen and refused to allow his daughter to attend her father’s execution

¹ *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2022), <https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2022.pdf> [<https://perma.cc/BXS4-QFF2>].

² *Id.*

³ *Oklahoma Court Schedules 25 Executions Between August 2022 and December 2024*, DEATH PENALTY INFO. CTR. (July 6, 2022), <https://deathpenaltyinfo.org/news/oklahoma-court-schedules-25-executions-between-august-2022-and-december-2024> [<https://perma.cc/529D-A4HL>]; Amanda Watts, *Oklahoma’s Attorney General Says ‘the Current Pace of Executions is Unsustainable’ and Wants to Space Them Out*, CNN (Jan. 18, 2023, 12:55 PM), <https://www.cnn.com/2023/01/18/us/oklahoma-pace-executions-unsustainable/index.html> [<https://perma.cc/2VW2-68EQ>].

because she was nineteen.⁴ Justice Ketanji Brown Jackson's dissent from the Supreme Court's decision to let Johnson's execution go forward pointed out potential evidence of racially biased behavior by the trial prosecutor.⁵ Texas tried to execute severely mentally ill people like Scott Panetti,⁶ and Andre Thomas—a man who removed both of his eyes and ate one of them.⁷ Thomas's trial was also infected with racial bias.⁸ Tennessee put its executions on hold because it discovered that the Tennessee Department of Corrections had not been complying with its own protocols since 2018.⁹ Idaho planned to execute Gerald Pizzuto, who is terminally ill, until it was unable to obtain lethal injection drugs.¹⁰ Arizona has executed three people and had difficulty with each execution;¹¹ at one point Frank Atwood assisted the people trying to kill him to find a vein.¹² Alabama, however, may have had the worst 2022 of all. Alabama attempted four executions and botched three, leaving two of the men still alive.¹³ Eventually the Governor requested that the At-

⁴ *US Federal Judge Denies 19-Year-Old's Request to Attend Her Father's Execution*, GUARDIAN (Nov. 26, 2022, 1:36 AM), <https://www.theguardian.com/us-news/2022/nov/26/missouri-kevin-johnson-execution-judge-denies-daughter-request> [<https://perma.cc/KG7C-JHJ5>].

⁵ See *Johnson v. Missouri*, 143 S. Ct. 417, 418–19 (2022) (Jackson, J., dissenting from denial of application for stay).

⁶ Jolie McCullough, *Texas Tries Again to Prove That Scott Panetti is Just Sane Enough to Be Executed*, TEX. TRIB. (Oct. 28, 2022, 5:00 AM), <https://www.texastribune.org/2022/10/28/texas-execution-scott-panetti/> [<https://perma.cc/VP6K-HWZA>].

⁷ *Andre Thomas' Attorneys Respond to Texas Setting Execution Date*, LEGAL DEF. FUND (Nov. 11, 2022), <https://www.naacpldf.org/press-release/andre-thomas-attorneys-respond-to-texas-setting-execution-date/> [<https://perma.cc/A528-Z7LE>].

⁸ *Id.*

⁹ Jonathan Mattise, *Tennessee Execution Pause Through 2022 Could Last Longer*, AP NEWS (June 13, 2022, 8:42 AM), <https://apnews.com/article/politics-executions-tennessee-e4c90328bb6317c11bd98bf9dcdeb68a> [<https://perma.cc/AJ6Q-U6AW>].

¹⁰ Maurice Chammah & Keri Blakinger, *They Are Terminally Ill. States Want to Execute Them Anyway*, MARSHALL PROJECT (May 6, 2021, 6:45 PM), <https://www.themarshallproject.org/2021/05/06/they-are-terminally-ill-states-want-to-execute-them-anyway> [<https://perma.cc/2XCT-DZRS>]; Ruth Brown, *Idaho Inmate Pizzuto's Execution Canceled, State Doesn't Have Lethal Injection Chemicals*, IDAHO CAP. SUN (Nov. 30, 2022, 2:27 PM), <https://idahocapitalsun.com/2022/11/30/idaho-inmate-pizzutos-execution-canceled-state-doesnt-have-lethal-injection-chemicals/> [<https://perma.cc/5W9T-8LZ8>].

¹¹ *Murray Hooper Execution in Arizona: Protesters at the State Capitol Stand United with Hooper*, AZCENTRAL, <https://www.azcentral.com/story/news/local/arizona/2022/11/16/arizona-death-row-murray-hooper-execution/10702863002/> [<https://perma.cc/2NRC-ZA93>] (Nov. 16, 2022, 5:14 PM).

¹² *Witness: In 'Surreal' Event, Possibly Innocent Death-Row Prisoner Helped Arizona Executioners Find a Vein After They Failed to Set IV Line*, DEATH PENALTY INFO CTR. (June 15, 2022), <https://deathpenaltyinfo.org/news/witness-in-surreal-event-possibly-innocent-death-row-prisoner-helped-arizona-executioners-find-a-vein-after-they-failed-to-set-iv-line> [<https://perma.cc/4N48-3369>].

¹³ See ASSOCIATED PRESS, *Alabama is Pausing Executions After a 3rd Failed Lethal Injection*, NPR (Nov. 21, 2022, 2:36 PM), <https://www.npr.org/2022/11/21/1138357929/alaba>

torney General suspend seeking execution warrants so the Alabama Department of Corrections (“ADOC”) could review its procedures.¹⁴

Alabama is not the first state to suspend executions in the wake of errors. Tennessee suspended its executions after discovering that its personnel had not followed execution protocol requirements for testing drugs.¹⁵ An independent report revealed systemic errors in Tennessee’s execution practices.¹⁶ Oklahoma suspended executions from 2015 until 2022 after serious execution errors.¹⁷ Arizona resumed executions after a years-long hiatus only to suspend them in January 2023 after its newly elected governor established an Independent Review Commissioner to assess Arizona’s execution protocol and practices.¹⁸ Patterns of botched executions illustrate significant flaws in state capital punishment practices. But Alabama’s death penalty problems run far deeper than botched executions.

Alabama’s executions and its errors are the culmination of common problems in capital punishment across the United States. These events are not outliers, but symptoms of the larger issues of capital punishment in the United States. A full understanding of capital punishment requires an analysis of individual cases, including executions, and analysis of how that case fits within the system of capital punishment. Evaluating a single case may reveal unfairness and arbitrariness, but tracking those trends across multiple cases demonstrates broader system failures. The four executions described in this Article highlight the flawed procedures, arbitrariness, and indifference

ma-executions-pause-lethal-injection [https://perma.cc/6VYQ-GEZM].

¹⁴ Ivana Hryniw, *Gov. Kay Ivey Orders Moratorium on Executions in Alabama*, AL.COM <https://www.al.com/news/2022/11/gov-kay-ivey-orders-moratorium-on-executions-in-alabama.html> [https://perma.cc/TC4B-KSXA] (Nov. 22, 2022, 12:33 PM). Alabama has insisted that the suspension was not a moratorium, but a review of protocols that will be completed quickly. ASSOCIATED PRESS, *Marshall: Execution Review Should Happen Quickly*, U.S. NEWS (Dec. 5, 2022), <https://www.usnews.com/news/best-states/alabama/articles/2022-12-05/marshall-execution-review-should-happen-quickly> [https://perma.cc/8DAU-BF9R].

¹⁵ Nicholas Bogel-Burroughs, *Tennessee Halts Executions After Failing to Test Lethal Injection Drugs*, N.Y. TIMES (May 2, 2022), <https://www.nytimes.com/2022/05/02/us/tennessee-executions-lethal-injection.html> [https://perma.cc/YE54-Q6AL].

¹⁶ See TENNESSEE LETHAL INJECTION PROTOCOL INVESTIGATION: REPORT AND FINDINGS 34, 36 (2022); see also *id.*; Maya Yang, *Top Tennessee Pair Fired After Damning Review of State’s Execution Protocol*, GUARDIAN (Jan. 21, 2023, 06:00 AM), <https://www.theguardian.com/us-news/2023/jan/21/tennessee-officials-fired-lethal-injection-protocol> [https://perma.cc/2JKN-4HWU].

¹⁷ See Dakin Andone, *Oklahoma, With a History of Botched Lethal Injections, Prepares to Start Executing a Man a Month*, CNN (Aug. 20, 2022, 3:02 AM), <https://www.cnn.com/2022/08/20/us/oklahoma-botched-executions-history/index.html> [https://perma.cc/M66V-ERUF].

¹⁸ See GOVERNOR OF ARIZ., EXEC. ORD. 2023-05, ESTABLISHING A DEATH PENALTY INDEPENDENT REVIEW COMMISSIONER (2023); *Arizona Seeks to Resume Executions After 7-Year Hiatus*, AP NEWS (Feb. 24, 2022, 4:24 PM), <https://apnews.com/article/arizona-executions-arizona-supreme-court-079ba89b936f9c0668af5491a31ff7f5> [https://perma.cc/86QK-9GAK].

to rights that are characteristics of the American system of capital punishment. Alabama's 2022 executions present a useful case study for understanding the flaws in execution practices and capital punishment more broadly.

This Article addresses Alabama's 2022 executions and what they mean for the future of the death penalty. The events in Alabama afford an opportunity to bring fresh scrutiny to the problems of capital punishment. In some ways, what happened in Alabama this year is exceptional—it is unusual for a state to have two failed executions in a row. And yet, as an analysis of these four cases reveals, what is happening is not unusual in U.S. capital punishment. The Supreme Court's willingness to authorize executions regardless of the merits of an individual case makes it more likely that errors like these will continue to happen. Alabama is not the whole story of 2022's botched executions, but what happened in Alabama demonstrates just how pointlessly cruel the process of capital punishment is.

Part I of this Article summarizes what happened in each of the four executions Alabama attempted to carry out in 2022. This Part addresses the constitutional challenges each man brought during his postconviction appeals process and method-of-execution challenges. I also describe the execution process based on publicly accessible information, reporting, and court records. This is not an exhaustive record of each case, rather it focuses on significant problems in these cases and how courts responded.

Part II addresses four recurring issues in each of these men's cases that reflect ongoing problems in capital punishment. First, Alabama's capital punishment scheme has some unusual features that increase the risk of arbitrary and biased sentencing. Alabama permits nonunanimous juries to impose a death sentence and, at the time all four men were sentenced to death, it permitted judges to override jury recommendations.¹⁹ Second, Alabama, like many other jurisdictions, has inadequate resources for indigent defense and low standards for capital trial representation.²⁰ Those resources and standards were even lower at the time all four men were sentenced to death. Third, although three of the four men received stays of execution from the Eleventh Circuit, the Supreme Court lifted the stays and authorized executions.²¹ The Court's willingness to authorize executions in the face of meritorious claims, significant risks of pain, and detailed fact-finding by district courts illustrates the escalating problem of the "shadow docket" and the current Court's indifference to method-of-execution claims. Fourth, Alabama's lethal injection errors, like other states, are a predictable result of poorly written execution protocols, inadequate training, and excessive judicial deference to state decisions.

¹⁹ See *infra* Section II. A.

²⁰ See *infra* Section II. B.

²¹ See *infra* Section II. C.

Part III of this Article addresses what all of this means for capital punishment. The Supreme Court continued authorizing executions even after all the evidence suggested that Alabama would keep botching executions. Alabama grounded its decision to suspend executions on victim interests rather than acknowledge that something was wrong in its death chamber. Alabama's decision to suspend executions was aimed at protecting capital punishment rather than preventing unconstitutional suffering. Alabama's quick and vague efforts at reforming its execution protocols are inadequate to permanently resolve its errors—instead, its primary reform provided greater discretion to executive officials to decide when and how to carry out executions. This Article concludes by offering some recommendations to provide greater protection for the Eighth Amendment rights of condemned persons if Alabama is unwilling to end its unjustified reliance on capital punishment.

I. FOUR DEATH WARRANTS

Alabama attempted to execute four men in 2022: Matthew Reeves, Joe James, Jr., Alan Miller, and Kenneth Smith.²² At the end of the year, Miller and Smith had survived their own attempted executions.²³ Reeves and James were dead.²⁴ The circumstances surrounding James's execution, however, indicate that his execution was botched and that he probably suffered like Miller and Smith. This Part reviews each of these four men's cases and their executions. These are not exhaustive narratives of each man's case—each took over twenty years to work their way through the labyrinth of postconviction review. Instead, these summaries focus on similarities across these cases that reflect common problems of capital punishment in Alabama and the ongoing challenges of executions in Alabama, particularly the state's foray into nitrogen gas executions and its execution errors.²⁵ Some of these problems are unique to Alabama, such as the state's capital jury practices, but they present a warning to jurisdictions that have adopted similar practices. Others are endemic to capital punishment: inadequate legal represen-

²² See Ivana Hrynkiw, *Alabama Faces Uncertainty in 2023 After Year of Death Penalty Troubles*, AL.COM (Dec. 28, 2022, 7:14AM), <https://www.al.com/news/2022/12/alabama-faces-uncertainty-in-2023-after-year-of-death-penalty-troubles.html> [<https://perma.cc/2PHQ-64GE>].

²³ *Id.*

²⁴ *Id.*

²⁵ Dr. Joel Zivot, an expert on executions, has explained that “nitrogen hypoxia” is a “made-up two-word expression” that is not a medical term and recommends “nitrogen gas execution” instead. Dana G. Smith, *New Execution Method Touted as More ‘Humane,’ but Evidence is Lacking*, SCI. AM. (Sept. 23, 2022), <https://www.scientificamerican.com/article/new-execution-method-touted-as-more-humane-but-evidence-is-lacking/> [<https://perma.cc/5KXD-AZ9T>]. The death penalty is already riddled with medical error and legal fictions; accordingly this Article does not use “nitrogen hypoxia” unless directly quoting another source.

tation and resources, the judiciary's disinterest in responding to serious constitutional issues, and state errors in conducting executions.

A. *Matthew Reeves*

Matthew Reeves was sentenced to death for the murder and robbery of Willie Johnson, committed in 1996 when Reeves was eighteen years-old.²⁶ Reeves's case is troubling for four reasons. First, Reeves was diagnosed with intellectual disabilities, but his lawyers did not present enough evidence about it at trial.²⁷ Second, his disabilities affected his ability to understand his statutory right to elect nitrogen gas.²⁸ Third, the Supreme Court allowed Reeves's execution to go forward even when he received relief from lower courts.²⁹ Finally, like the other men this Article discusses, Reeves did not receive a unanimous jury verdict in favor of death; the jury recommended that Reeves should be sentenced to death by a ten to two vote.³⁰

Reeves was initially appointed two attorneys who petitioned the trial court for funds to hire a clinical neuropsychologist to evaluate Reeves for intellectual disability as part of their mitigation case.³¹ Even though Reeves's lawyers obtained funding and accessed his medical records, they did not contact the neuropsychologist they wanted to hire, nor did they hire any other expert to evaluate and testify about Reeves's intellectual disability.³²

Instead, Reeves's lawyers called a clinical psychologist who had been appointed by the court to determine whether Reeves was competent to stand trial and his mental state during the offense.³³ This psychologist had performed limited testing and had not administered a full IQ test or assessed Reeves's "adaptive skills."³⁴ Reeves's lawyers only called two other witnesses during the mitigation phase: a police officer "who described the poor condition of Reeves' childhood home" and Reeves's mother, who "testified about various struggles in Reeves' childhood."³⁵

²⁶ *Reeves v. Comm'r, Ala. Dep't of Corr.*, 836 F. App'x 733, 735 (11th Cir. 2020), *cert. granted & vacated by Dunn v. Reeves*, 141 S. Ct. 2405 (2021).

²⁷ *Reeves*, 836 F. App'x at 748–49.

²⁸ *See id.* at 737.

²⁹ *See Hamm v. Reeves*, 142 S. Ct. 743, 743–44 (2022) (Kagan, J., dissenting); *see also Dunn v. Reeves*, 141 S. Ct. 2405, 2420–21 (2021) (Sotomayor, J., dissenting); *Reeves v. Alabama*, 138 S. Ct. 22, 29 (2017) (Sotomayor, J., dissenting from denial of certiorari).

³⁰ *Reeves*, 836 F. App'x at 735.

³¹ *Id.*

³² *Id.* at 736.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Unsurprisingly, state postconviction proceedings pursuant to Reeves's Rule 32 petition³⁶ revealed a stronger mitigation case than Reeves's attorneys presented at trial.³⁷ The neuropsychologist that Reeves's counsel had failed to retain testified that Reeves was intellectually disabled and had "significant deficits in multiple areas of adaptive functioning."³⁸ The neuropsychologist also testified that, had he been asked to evaluate and testify about Reeves at the time of his trial, he would have "performed similar evaluations and reached the same conclusions."³⁹ Reeves did not call his trial attorneys to testify during this hearing.⁴⁰

The state's expert agreed that Reeves "was 'in the borderline range of intellectual ability'" and estimated that his IQ was sixty-eight.⁴¹ Nonetheless, the state's expert insisted Reeves's functionality was higher than the IQ test reflected and even though Reeves had low scores in adaptive functioning, "other evidence indicated that he did not have substantial deficiencies in these areas."⁴²

The circuit court denied Reeves's petition in 2009, but Reeves and his attorneys did not receive notice of the ruling until 2013.⁴³ Three years later, the Alabama Court of Criminal Appeals affirmed the circuit court's decision.⁴⁴ It concluded that the circuit court did not abuse its discretion in denying Reeves's claims of intellectual disability.⁴⁵ The Alabama Court of Criminal Appeals also rejected Reeves's claims of ineffective assistance of counsel.⁴⁶ It explained that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel."⁴⁷ Most of the decisions Reeves identified as ineffective, the court explained, were "typically considered strategic decisions," and because he did not call his lawyers to testify, the "record is silent" about the reasons why his lawyers did not act.⁴⁸ Reeves also challenged his attorney's failure to conduct an adequate mitigation investigation, but the Alabama Court of Criminal Appeals concluded

³⁶ Alabama Rule of Criminal Procedure 32 sets out a process by which a person convicted of a criminal offense in Alabama may seek relief. *See* ALA. RULE CRIM. P. 32.1 (describing the grounds for relief under a Rule 32 Petition).

³⁷ *See Reeves*, 836 F. App'x at 737.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 738.

⁴⁴ *Reeves v. State*, 226 So. 3d 711, 718 (Ala. Crim. App. 2016).

⁴⁵ *Id.* at 741.

⁴⁶ *Id.* at 746.

⁴⁷ *Id.* at 749.

⁴⁸ *Id.* at 750–51. Reeves identified a significant number of errors by trial counsel other than failing to hire the neuropsychologist they fought so hard to receive funding for. *Id.* at 749. These included failing to object to improper remarks by the prosecutor and improper instruction by the trial judge. *Id.* at 751.

that it had to presume the investigation was reasonable, despite expert testimony about how to conduct a mitigation investigation, because Reeves did not present evidence about the mitigation investigation his trial attorneys did conduct, presumably because they did not testify.⁴⁹

The Supreme Court denied certiorari, but three Justices dissented on the ground that the Alabama Court of Criminal Appeals did not properly apply *Strickland v. Washington's* deficient performance prong.⁵⁰ Although an attorney's performance is presumed reasonable, a defendant may overcome that presumption by presenting evidence of counsel's deficient performance.⁵¹ Courts should perform an objective review of an attorney's performance and assess the entire record to determine whether an attorney's assistance was constitutionally inadequate.⁵² This is so regardless of whether an attorney testifies.⁵³ The Alabama Court of Criminal Appeals erred by resting its decision on the absence of testimony from Reeves's trial counsel without assessing if all of the other evidence he presented could overcome the presumption of reasonableness.⁵⁴ In fact, the Alabama Court of Criminal Appeals had *quoted* precedent that expressly required someone seeking to show ineffective assistance of counsel to call trial counsel to meet their burden.⁵⁵

Reeves's claim of intellectual disability did not fare any better in federal postconviction proceedings. The Eleventh Circuit decided that Alabama did not unreasonably apply Supreme Court precedent or make an unreasonable determination of the facts when it concluded that Reeves was not ineligible for the death penalty under *Atkins v. Virginia*.⁵⁶ Although Supreme Court precedent prohibits courts from weighing a person's adaptive strengths against deficits in intellectual disability assessments,⁵⁷ the Eleventh Circuit concluded that this did not happen in Reeves's case.⁵⁸ It echoed the Alabama

⁴⁹ *Id.* at 752.

⁵⁰ *Reeves v. Alabama*, 138 S. Ct. 22, 26, 28 (2017) (Sotomayor, J., dissenting from denial of certiorari).

⁵¹ *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

⁵² *Wiggins v. Smith*, 539 U.S. 510, 511, 523 (2003).

⁵³ *Reeves*, 138 S. Ct. at 26–27 (Sotomayor, J., dissenting from denial of certiorari).

⁵⁴ *Id.* at 28.

⁵⁵ *Id.*; *Reeves v. State*, 226 So. 3d 711, 747–48 (Ala. Crim. App. 2016) (“Thus, to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.” (quoting *Stallworth v. State*, 171 So. 3d 53, 92 (Ala. Crim App. 2013))).

⁵⁶ *Reeves v. Comm’r, Ala. Dep’t of Corr.*, 836 F. App’x 733, 740–41 (11th Cir. 2020). *See generally* *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executing people with intellectual disabilities violates the Eighth Amendment).

⁵⁷ *See Moore v. Texas*, 581 U.S. 1, 15–16 (2017); *see also* *Smith v. Comm’r, Ala. Dep’t of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019) (“After *Moore*, states cannot ‘weigh’ an individual’s adaptive strengths against his adaptive deficits.”).

⁵⁸ *Reeves*, 836 F. App’x at 742 (“[T]he Court of Criminal Appeals did not treat Mr. Reeves’ adaptive strengths as overriding his adaptive deficits; instead, it weighed con-

Court of Criminal Appeals' assessment that, although Reeves did have low test scores in areas associated with adaptive deficits, those were attributable to the fact that he had been incarcerated shortly after turning eighteen and had not been able to build strength in those areas.⁵⁹

Reeves's ineffective assistance of counsel claim was, however, successful in the Eleventh Circuit.⁶⁰ Tracking the reasoning in Justice Sotomayor's dissent from denial of certiorari, the court concluded that the Alabama Court of Criminal Appeals had "unreasonably applied *Strickland*" when it relied on a "*per se* rule that trial counsel's failure to testify was fatal to Mr. Reeves' ineffective assistance of counsel claims" and "refus[ed] to consider or discuss the evidence in the record . . . establishing counsel's deficient performance."⁶¹ The Eleventh Circuit concluded that Reeves had provided ample evidence demonstrating his trial counsel's deficient performance: a neuropsychologist was essential to Reeves's mitigation case,⁶² Reeves's counsel unreasonably failed to follow up,⁶³ and critically, the psychologist who did testify at Reeves's sentencing phase had warned trial counsel that her evaluations were not the type an expert would conduct for capital sentencing mitigation.⁶⁴

The Supreme Court granted certiorari, vacated, and remanded without oral argument in a summary per curiam opinion.⁶⁵ The Court faulted the Eleventh Circuit for being insufficiently deferential to Reeves's trial counsel and the Alabama Court of Criminal Appeals.⁶⁶ The Court's response tracked an alarming pattern of judicial haste in capital cases, although Reeves at least received a short opinion explaining *why* the Court vacated the Eleventh Circuit's judgment.⁶⁷ The Supreme Court insisted that the Eleventh Circuit improperly "excised a single statement from a lengthy block quote" to support its conclusion that the Alabama Court of Criminal Appeals unreasonably applied *Strickland* by requiring trial counsel testimony in postconviction

flicting evidence and concluded . . . that Mr. Reeves' adaptive deficits were not significant, despite his low test scores in certain areas.").

⁵⁹ *Id.* at 743.

⁶⁰ *Id.* at 734.

⁶¹ *Id.* at 747.

⁶² *Id.* at 748.

⁶³ *Id.* at 749 (concluding that based on everything counsel knew at the time, "there can be no valid strategic reason" for failing to even contact the neuropsychologist).

⁶⁴ *See* *Reeves v. Alabama*, 138 S. Ct. 22, 25 (2017) (Sotomayor, J., dissenting from denial of certiorari).

⁶⁵ *See* *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (per curiam); *see also* Amy Howe, *Justices Add One Religious-Rights Case to Docket but Turn Down Another*, SCOTUSBLOG (July 2, 2021, 11:04 AM), <https://www.scotusblog.com/2021/07/justices-add-one-religious-rights-case-to-docket-but-turn-down-another/> [<https://perma.cc/8PSU-9BY>].

⁶⁶ *Dunn*, 141 S. Ct. at 2410.

⁶⁷ *See id.* at 2420–21 (2021) (Sotomayor, J., dissenting) (identifying cases "in which this Court strains to reverse summarily any grants of relief to those facing execution").

ineffective assistance of counsel claims.⁶⁸ The Court bent over backwards to explain away the Alabama court's insistence on counsel's testimony in ineffective assistance of counsel claims.⁶⁹

Justice Sotomayor's dissent critiqued the Court's "linguistic contortion[s]" to "rescue[] the state court's decision."⁷⁰ "The lengths to which this Court goes to ensure that Reeves remains on death row are extraordinary," she wrote.⁷¹ Her dissent presented a far more accurate characterization of the Alabama Court of Criminal Appeals' decision and identified multiple instances where the Supreme Court's majority opinion provided a highly selective reading of that decision.⁷² She concluded that the "utterly implausible reading" transformed "'deference' . . . into a rule that federal habeas relief is never available to those facing execution."⁷³

Reeves's next claims to reach the Eleventh Circuit addressed the method of execution by which Alabama proposed to execute him.⁷⁴ These claims, like many others, arose from actions that ADOC took following Alabama's 2018 decision to adopt nitrogen gas as a method of execution.⁷⁵

Alabama law afforded any person sentenced to death one opportunity to elect nitrogen gas.⁷⁶ Reeves and others who were sentenced to death before the statute was amended had thirty days to select nitrogen gas in writing as their preferred method of execution.⁷⁷ Someone in that position who did not elect nitrogen gas by June 30, 2018 would permanently waive their opportunity to elect that method.⁷⁸ Federal public defenders went to Alabama's death row to discuss the change with their clients and provided a form their clients could use to elect the method.⁷⁹

With a few days left before the deadline, ADOC decided, although it is unclear how or why that decision was reached, to distribute the form to

⁶⁸ *Id.* at 2410 (majority opinion).

⁶⁹ *See id.* at 2412 ("In particular, the court twice said that it would consider 'all the circumstances' of the case, and it qualified its supposedly categorical rule by explaining that 'counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective.'" (quoting *Reeves v. State*, 226 So. 3d 711, 744, 747 (Ala. Crim. App. 2016))).

⁷⁰ *See id.* at 2414 (Sotomayor, J., dissenting).

⁷¹ *Id.*

⁷² *See id.* at 2418–19 (critiquing the majority opinion's analysis of the Alabama Court of Criminal Appeals opinion in Reeves's case).

⁷³ *Id.* at 2421.

⁷⁴ *Reeves v. Comm'r, Ala. Dep't of Corr.*, 23 F.4th 1308, 1314 (11th Cir. 2022), *application to vacate injunction granted by Hamm v. Reeves*, 142 S. Ct. 743 (2022).

⁷⁵ *Id.* at 1313.

⁷⁶ ALA. CODE § 15-18-82.1(b)(1) (Westlaw through 2023 First Spec., Reg. and Second Spec. Sess.).

⁷⁷ *Reeves*, 23 F.4th at 1324.

⁷⁸ *Id.* at 1313–14.

⁷⁹ *See Miller v. Hamm*, No. 2:22-CV-506-RAH, 2022 WL 4348724, at *3 (M.D. Ala. Sept. 19, 2022).

every person on Holman Prison’s death row, including Reeves.⁸⁰ Corrections staff apparently collected completed forms the same day they were distributed.⁸¹ Reeves did not turn in the form electing nitrogen gas.⁸²

In January 2020, almost two years *before* Alabama set his execution date, Reeves sued ADOC, alleging that he was denied a reasonable accommodation under the Americans with Disabilities Act (“ADA”) because, based on his cognitive deficits, low IQ, and limited literacy, he was unable to read and understand the election form without assistance.⁸³ The timing of Reeves’s suit is critical because a frequent critique of method-of-execution litigation is that it is dilatory, rather than substantive.⁸⁴ The problem with this assertion is that many method-of-execution claims are “intrinsically delayed.”⁸⁵ These sort of challenges cannot be litigated until a person facing execution learns about the protocol or discovers potential constitutional or statutory violations, none of which may be apparent during trial or other postconviction proceedings.⁸⁶ This is true of Reeves’s case—his ADA claim did not exist until Alabama distributed the forms.⁸⁷ That Reeves sued well before he even knew his execution date lends substantial support to the argument that he sought timely redress for the denial of his ADA rights instead of delay.⁸⁸

A speech pathologist testified that Reeves “could read at a 4th grade level but could only comprehend at a 1st grade level”—testimony that the state did not contradict,⁸⁹ and indeed could not, because ADOC was aware that Reeves regularly required assistance reading and understanding various documents.⁹⁰ The district court concluded that Reeves was a “qualified individual with a disability” under the ADA, who did not receive the benefits

⁸⁰ See *Reeves*, 23 F.4th at 1314 (“At some point between June 26, 2018, and the statutory deadline of June 30, 2018, Cynthia Stewart—who was then the Warden at Holman—obtained an election form created by the Federal Defenders for the Middle District of Alabama and had it distributed by Captain Jeff Emberton to every Holman death row inmate. She did so at the ‘direction of someone above her at the ADOC.’”) (quoting *Reeves v. Dunn*, 580 F. Supp. 3d 1060, 1066 (M.D. Ala. 2022)).

⁸¹ See *id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1320–21 (2020).

⁸⁵ *Id.* at 1362.

⁸⁶ *Id.* at 1368; STEPHEN VLADECK, *THE SHADOW DOCKET* 108 (2023).

⁸⁷ See *Reeves v. Dunn*, 580 F. Supp. 3d 1060, 1066 (M.D. Ala. 2022), *vacated by* *Hamm v. Reeves*, 142 S. Ct. 743, 743 (2022).

⁸⁸ See *Reeves v. Comm’r, Ala. Dep’t of Corr.*, 23 F.4th 1308, 1314 (11th Cir. 2022).

⁸⁹ *Id.* at 1315.

⁹⁰ *Id.* at 1316 (“Numerous other documents revealed that prison staff at Holman knew of Mr. Reeves’ disability, specifically his low reading level and comprehension abilities. ‘[M]ost informative,’ explained the court, was a 2015 inmate request slip from Mr. Reeves asking that some documents be read to him because he did not understand what they were.”) (quoting *Reeves v. Dunn*, 580 F. Supp. 3d 1060, 1076 (M.D. Ala. 2022)).

associated with the method-of-execution election form because ADOC did not provide him with a reasonable accommodation.⁹¹ It issued an injunction prohibiting Alabama from “executing Mr. Reeves by any method other than nitrogen hypoxia.”⁹²

The Eleventh Circuit unanimously affirmed the district court.⁹³ There was ample evidence that supported the district court’s factual finding that ADOC was aware that Reeves needed assistance reviewing documents, including medical consent forms.⁹⁴ ADOC asserted that, because the amended method-of-execution statute did not require any particular format to elect nitrogen gas, other than that the election must be made in writing, Reeves was unable to show that ADOC’s “failure to accommodate him prevented him from receiving the benefit of making the election.”⁹⁵ It also asserted that, as Reeves had counsel, “nothing prevented him from understanding that he should discuss the election decision with his attorneys.”⁹⁶ But, the Eleventh Circuit reasoned, because ADOC decided to distribute the forms, they were required to comply with their ADA obligations, and ADOC was unable to offer “any persuasive argument” why the district court erred in reaching that conclusion.⁹⁷

In concluding that the district court did not abuse its discretion when it assessed the equities before issuing a preliminary injunction, the Eleventh Circuit noted that ADOC had “represented” that it would be ready to execute with nitrogen gas “within ‘the first three or four months of [2022].’”⁹⁸ The irreparable harm that Reeves faced—execution by lethal injection—outweighed any delay.⁹⁹ The Eleventh Circuit observed that ADOC could not blame people on death row for those delays because Alabama had adopted the method nearly four years earlier and still could not execute with nitrogen: “[a]ny delay, then, in executing Mr. Reeves and any other death row inmate who elected nitrogen hypoxia is at this point attributable to Alabama.”¹⁰⁰

The Supreme Court vacated the injunction at 7:25 p.m. on January 27, 2022, the day of Reeves’s execution.¹⁰¹ The Court did not explain why.¹⁰²

⁹¹ *Id.* at 1314 (quoting *Reeves v. Dunn*, 580 F. Supp. 3d 1060, 1069 (M.D. Ala. 2022)).

⁹² *Id.*

⁹³ *Id.* at 1325.

⁹⁴ *See id.* at 1322–23.

⁹⁵ *Id.* at 1324.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1325.

¹⁰¹ Tandra Smith, *Alabama Executes Matthew Reeves; No Final Words Before Lethal Injection*, AL.COM, <https://www.al.com/news/2022/01/matthew-reeves-execution-tonights-execution-on-hold-while-us-supreme-court-decides-fate.html> [https://perma.cc/789L-YDTQ] (Jan. 27, 2022, 10:50 PM); *see also* Ellena Erskine, *Court Green-Lights Alabama*

Justice Barrett would have denied Alabama's request to vacate the injunction, but did not join Justice Kagan's dissent from the decision.¹⁰³ Justice Kagan's dissent emphasized the substantial factual record compiled in the district court and the Eleventh Circuit's unanimity after "full briefing and argument."¹⁰⁴ She concluded that the Court "should have left the matter there, rather than enable Reeves's execution by lethal injection to go forward. The Court has no warrant to reweigh the evidence offered below. And it has no other basis for reversing the detailed findings the District Court made to support the injunction."¹⁰⁵

Matthew Reeves was executed that evening.¹⁰⁶ He did not speak any last words.¹⁰⁷ Media reports indicated that the execution proceeded quickly.¹⁰⁸ His execution would be the last one in Alabama in 2022 that appeared to proceed typically.

B. *Joe James, Jr.*

Joe James, Jr., was first sentenced to death in 1996 for the murder of his former girlfriend, Faith Hall.¹⁰⁹ James's case has similarities with Reeves's case. James's lawyers presented limited mitigation evidence at trial.¹¹⁰ One of James's death sentences was imposed after a nonunanimous verdict; the jury in his first trial split ten to two in favor of death.¹¹¹ He received a unanimous recommendation at the conclusion of his second trial.¹¹² James also challenged ADOC's distribution of method-of-execution election forms, although he had weaker claims than Reeves.¹¹³ Unlike Reeves, however, ADOC botched James's execution.

Execution in 5-4 Ruling That Reverses Two Lower Courts, SCOTUSBLOG (Jan. 27, 2022, 11:29 PM), <https://www.scotusblog.com/2022/01/court-green-lights-alabama-execution-in-5-4-ruling-that-reverses-two-lower-courts/> [<https://perma.cc/W4HM-SECL>].

¹⁰² See *Hamm v. Reeves*, 142 S. Ct. 743, 743 (2022); see also *Erskine*, *supra* note 101.

¹⁰³ *Hamm*, 142 S. Ct. at 743; *Erskine*, *supra* note 101.

¹⁰⁴ See *Hamm*, 142 S. Ct. at 743–44 (Kagan, J., dissenting) ("In granting a preliminary injunction, the District Court considered a written record of more than 2,000 pages, heard more than seven hours of testimony and oral argument, and detailed its findings in a 37-page decision.").

¹⁰⁵ *Id.* at 744.

¹⁰⁶ *Smith*, *supra* note 101.

¹⁰⁷ *Id.* ("Reeves had no final words, no final meal and no spiritual advisor present for his execution, which took place despite claims that he was intellectually disabled.").

¹⁰⁸ *Id.*

¹⁰⁹ *James v. State*, 723 So. 2d 776, 777–78 (Ala. Crim. App. 1998). James's first conviction was reversed after the trial court incorrectly admitted four police reports that contained hearsay statements without requiring the state show that the statements fell within any hearsay exceptions. *Id.* at 781, 784.

¹¹⁰ See *James v. Warden*, 957 F.3d 1184, 1190 (11th Cir. 2020).

¹¹¹ *James v. State*, 723 So. 2d at 777–78.

¹¹² *James v. State*, 788 So. 2d 185, 188 (Ala. Crim. App. 2000).

¹¹³ See *infra* notes 142–147 and accompanying text.

James had two attorneys appointed during his second trial.¹¹⁴ Only one of his lawyers had experience handling capital cases.¹¹⁵ The inexperienced lawyer was responsible for “develop[ing] the facts surrounding the murder” but “did nothing to prepare for the penalty phase or to investigate possible mitigation evidence . . . although he presented the defense argument during the penalty phase.”¹¹⁶ According to the inexperienced lawyer, the experienced attorney “had primary responsibility for investigating mitigation evidence.”¹¹⁷ The experienced attorney’s mitigation investigation was limited; she met with James and he provided her with his grandmother’s contact information, although he did not give her any other family member contacts.¹¹⁸ The experienced attorney did speak with James’s mother, but “his mother did not want to get involved.”¹¹⁹ This ended the mitigation investigation: James’s experienced attorney did not contact any other family members, former partners, or seek “school, employment, social services, medical, or prison records.”¹²⁰ Nor did she seek funding for psychological evaluations or review any existing evaluations in James’s records because “there was no indication in speaking with him that he had any mental problems.”¹²¹ The experienced attorney asked James “what mitigation evidence she could use for the sentencing proceeding, and he told her none.”¹²²

James initially expressed to his lawyers that he intended to plead guilty and that he did not want his family involved with his case.¹²³ The state was willing to accept his guilty plea in exchange for a life sentence.¹²⁴ On the day of trial, James changed his mind and decided to go to trial.¹²⁵ According to the Eleventh Circuit’s opinion affirming the district court’s denial of habeas, he made that decision because “he had it pretty good on death row.”¹²⁶ James’s second capital murder trial began “immediately.”¹²⁷

¹¹⁴ James v. Warden, 957 F.3d at 1187.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (“To the best of Vinson’s recollection, James would not give her the names or contact information of any family members, except for his grandmother.”).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (“The psychologist’s report stated that James was competent to stand trial, had a Verbal IQ of 102 (average), and did not display any ‘signs or symptoms associated with a major psychiatric disorder such as psychosis, a thought disorder, or a major affective disorder.’”).

¹²² *Id.* at 1188.

¹²³ *Id.* at 1187. It is not unusual for a person facing a death sentence to initially distrust their attorneys. See William M. Bowen, Jr., *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 813 (2008).

¹²⁴ James v. Warden, 957 F.3d at 1187.

¹²⁵ *Id.* at 1187–88.

¹²⁶ *Id.* at 1188. The district court opinion denying habeas adds some additional details; James had allegedly experienced an “attempted sexual assault in the jail on the night pri-

James's mother and sister "surprised" James's attorneys when they attended the second day of trial.¹²⁸ The experienced attorney spoke with James's sister, who asserted that James's father had abused him, but the attorney did not present her testimony because she had also related "stories about violent episodes in James's past"¹²⁹ James's mother did not want to testify during the penalty phase.¹³⁰ James denied that he had been abused.¹³¹ James's denials are unsurprising. Developing mitigation testimony takes time and requires building relationships of trust with a client and possible mitigation witnesses.¹³² James's attorneys did not present any mitigating evidence during the penalty phase.¹³³ Instead, James's inexperienced attorney asserted that James was less culpable because of his youth, "emotional immaturity," and the "influence of strong emotions" at the time he killed Hall.¹³⁴

Like Reeves, James's postconviction proceedings revealed more mitigation evidence than his trial counsel had uncovered during their limited investigation.¹³⁵ Witnesses testified about neglect, family violence, James's mother's alcohol use during her pregnancy, and a family history of mental illness.¹³⁶ Other mitigating evidence included a police report stating that the victim had attacked James several months before the murder and psychological evaluations indicating that James "demonstrated '[s]chizoid characteristics,' and a psychometric test score indicating that James might exhibit a thought disorder."¹³⁷ The Alabama Court of Criminal Appeals had concluded that James had failed to show deficient performance because counsel did some investigation "despite James's lack of cooperation and instructions not

or to the beginning of trial." See *James v. Culliver*, No. CV-10-S-2929-S, 2014 WL 4926178, at *77 (N.D. Ala. Sept. 30, 2014). James's attorneys claimed they were not aware of the nature of the assault, but a bailiff had informed them that James had "been in an 'altercation' or 'fistfight' during the weekend." *Id.* The district court concluded this claim lacked merit because James did not show that anyone told trial counsel about the attempted assault, that the attempt "actually affected his decision to reject a plea bargain or that a continuance would have changed his mind." *Id.* at *78.

¹²⁷ *James v. Warden*, 957 F.3d at 1188.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Bowen, *supra* note 123, at 813–14 (discussing mitigation investigation practices); see also Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 825–26 (2008) ("Enlisting the trust of the defendant and family members alone may take repeated visits. The defendant and family members have the firsthand information needed for an effective defense, but are often not forthcoming because the information is highly personal.").

¹³³ *James v. Warden*, 957 F.3d at 1188.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1188–89.

¹³⁶ *Id.* at 1189; *James v. State*, 61 So. 3d 357, 377–78 (Ala. Crim. App. 2010).

¹³⁷ *James v. Warden*, 957 F.3d at 1189.

to present mitigating evidence.”¹³⁸ It also determined that James had not shown prejudice because he had told counsel not to present mitigation and because the evidence he had introduced at postconviction was “not compelling” and would not have changed the outcome, although the court did not explain *why* that evidence would not be compelling beyond listing the aggravating circumstances.¹³⁹

The Eleventh Circuit did not bother to assess whether the state court reasonably applied the deficient performance prong of *Strickland*, instead it focused on the absence of prejudice.¹⁴⁰ After noting that the mitigation investigation was “charitably described by the state court as ‘limited,’” it reasoned that because there was no evidence that James would have let his attorneys show mitigation evidence, James was unable to show that “that helpful mitigation evidence would have been heard by the jury even if his counsel’s performance had been beyond reproach,” or that the jury might have recommended a life sentence after hearing that evidence.¹⁴¹

James unsuccessfully sought another opportunity to elect nitrogen gas execution.¹⁴² He had received the form and had not selected that method.¹⁴³ James asserted that his equal protection rights were violated because other people on death row who were represented by federal public defenders had entered into an agreement with the Attorney General to end a lawsuit challenging the state’s lethal injection protocol that allowed them to elect nitrogen gas as a method of execution.¹⁴⁴ People who opted for nitrogen gas had not received execution dates because the protocol was not yet complete, even if their cases were older than James’s.¹⁴⁵ But James had counsel at the time the form was distributed, and the Eleventh Circuit reasoned that he could have asked his attorney for an explanation of the form.¹⁴⁶ The Supreme Court denied James’s application for a stay of execution.¹⁴⁷

¹³⁸ *Id.* at 1190; James v. State, 61 So. 3d at 376–77. *But see* Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 519 (2022) (“The Court has taken for granted that friction and mistrust between lawyers and clients are inevitable, and has neglected to consider that these conflicts can be attributed to the political and economic choices that orchestrate abandonment . . .”).

¹³⁹ James v. State, 61 So. 3d at 378.

¹⁴⁰ James v. Warden, 957 F.3d at 1191 (acknowledging that it is “easier” to dispose of an ineffective assistance of counsel claim on the prejudice prong and “declin[ing] James’s invitation to evaluate his counsel’s mitigation investigation”).

¹⁴¹ *Id.* at 1191–93.

¹⁴² James v. Att’y Gen., Nos. 22-12345 & 12346, 2022 WL 2952492, at *3 (11th Cir. July 26, 2022).

¹⁴³ *Id.* at *5.

¹⁴⁴ *Id.* at *2.

¹⁴⁵ *Id.* at *6.

¹⁴⁶ *Id.* at *7.

¹⁴⁷ James v. Alabama, No. 22A74, 2022 WL 2980556 (July 28, 2022).

As James's execution approached, Faith Hall's family asked Governor Ivey for clemency.¹⁴⁸ Hall's family insisted she would not have wanted James to be executed and that they believed the execution would only exacerbate their trauma.¹⁴⁹ They explained why they would not be attending James's execution:

We hoped the state wouldn't take a life simply because a life was taken and we have forgiven Mr. Joe Nathan James Jr. for his atrocities toward our family. We have relied upon our faith to get us through these dark days. Although we knew this day would come, we hoped to have our voices heard through this process. . . . We pray that God allows us to find healing after today and that one day our criminal justice system will listen to the cries of families like ours even if it goes against what the state wishes. Our voices matter and so does the life of Mr. Joe Nathan James, Jr.¹⁵⁰

Alabama executed James anyway on July 28, 2022.¹⁵¹

The execution got off to a strange start. ADOC attempted to block a journalist from attending the execution as a media witness because of the length of her skirt.¹⁵² The execution began three hours late.¹⁵³ Witnesses reported that James "did not open his eyes or show any deliberate movements at any point during the procedure."¹⁵⁴ He did not speak any last words.¹⁵⁵

¹⁴⁸ *Victim's Family Opposes Execution of Joe James*, EQUAL JUST. INITIATIVE, <https://eji.org/news/victims-family-opposes-execution-of-joe-james/> [<https://perma.cc/6WL8-BXHE>] (July 28, 2022).

¹⁴⁹ Lee Hedgepeth, *'We Shouldn't Play God': Murder Victim's Family Opposed to Alabama Execution of Joe Nathan James*, CBS42, <https://www.cbs42.com/alabama-news/we-shouldnt-play-god-murder-victims-family-opposed-to-alabama-execution-of-joe-nathan-james/> [<https://perma.cc/B8X7-4KG>] (July 12, 2022, 9:10 AM).

¹⁵⁰ *Victim's Family Opposes Execution of Joe James*, *supra* note 148.

¹⁵¹ Elizabeth Bruenig, *Dead to Rights*, ATLANTIC (Aug. 14, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/> [<https://perma.cc/M5YB-RMP4>].

¹⁵² The journalist, Ivana Hrynkiw, reported that she had worn the same skirt to other executions without complaint. Ivana Hrynkiw Shatara (@IvanaSuzette), TWITTER (July 28, 2022, 9:02 PM), <https://twitter.com/IvanaSuzette/status/1552867043984265219> [<https://perma.cc/22EL-DHN6>]; Tim Stelloh, *An Alabama Reporter Said Her Skirt Was Deemed Too Short for Inmate's Execution so She Wore Waders*, TODAY (Aug. 1, 2022, 7:31 PM), <https://www.today.com/news/news/alabama-reporter-said-skirt-was-deemed-short-inmates-execution-wore-wa-rcna41071> [<https://perma.cc/GPP7-A6ZD>]. Hrynkiw ended up wearing a pair of fisherman's waders to the execution. *Id.* ADOC also made her change her shoes. *Id.*

¹⁵³ *See Alabama's Execution of Joe Nathan James, Jr.: What We Know, Don't Know About 3-Hour Delay*, MONTGOMERY ADVERTISER, <https://www.montgomeryadvertiser.com/story/news/local/2022/08/17/joe-nathan-james-jr-alabama-botched-execution-what-we-know/10346456002/> [<https://perma.cc/JV9G-F37J>] (Aug. 19, 2022, 2:50 PM).

¹⁵⁴ Kim Chandler, *Joe Nathan James Jr. Executed Despite Calls from Victim's Family to Spare Him*, MONTGOMERY ADVERTISER, <https://www.montgomeryadvertiser.com/story/news/crime/2022/07/28/joe-nathan-james-jr-executed-alabama-despite-calls-victims-family-spare-him/10181091002/> [<https://perma.cc/LG2F-ZG92>] (July 28, 2022, 11:01 PM).

¹⁵⁵ *Id.*

ADOC officials initially claimed that “‘nothing out of the ordinary’ happened,”¹⁵⁶ but eventually admitted that the execution team had difficulty establishing IV lines.¹⁵⁷

Dr. Joel Zivot, an expert on lethal injection, who arranged for and was present during an independent autopsy for James, concluded that James’s body showed many puncture wounds and lacerations suggesting that ADOC attempted a “cutdown” to access James’s veins.¹⁵⁸ Elizabeth Bruenig, reporting for *The Atlantic*, attended the autopsy and described in some detail the many puncture marks, bruising, and unusual lacerations on James’s arms.¹⁵⁹ A complaint in one of the later cases includes an autopsy photograph of James’s antecubital region. It shows a straight laceration with bruising nearby and several additional thinner cuts.¹⁶⁰ Bruenig consulted with other experts who suggested that the other cuts around the deeper cut may have been caused if James moved while the state attempted to cut into his arm to access a vein.¹⁶¹ The official state autopsy concluded there was no evidence of a cutdown procedure, although it did not count the number of puncture wounds or offer an explanation for the cuts on James’s arm.¹⁶² It is not yet known what happened to James during the three-hour delay, but evidence and the events during Alabama’s attempted executions leads to the conclusion that *something* atypical happened.

In addition to the unusual marks, James’s silence during his execution suggested to witnesses that James was not conscious.¹⁶³ ADOC initially de-

¹⁵⁶ *Alabama’s Execution of Joe Nathan James, Jr.*, *supra* note 153 (“Alabama Department of Corrections Commissioner John Hamm said immediately after the execution that he ‘did not know’ if the execution team had issues finding a vein and that ‘nothing out of the ordinary’ happened.”).

¹⁵⁷ Ramon Antonio Vargas, *Alabama Subjected Prisoner to ‘Three Hours of Pain’ During Execution – Report*, GUARDIAN (Aug. 15, 2022, 9:09 AM), <https://www.theguardian.com/us-news/2022/aug/15/alabama-joe-nathan-james-jr-execution> [<https://perma.cc/9WGJ-QWG2>].

¹⁵⁸ Second Amended Complaint at 17–18, *Smith v. Hamm*, No. 2:22-CV-00497-RAH (M.D. Ala. Dec. 6, 2022) (on file with author and journal); Ivana Hryniw, *What Happened to Joe Nathan James Jr. During Alabama Execution? Doctors at Autopsy Disagree*, AL.COM, <https://www.al.com/news/2022/10/what-happened-to-joe-nathan-james-jr-during-alabama-execution-doctors-at-autopsy-disagree.html> [<https://perma.cc/S6GD-9RES>] (Oct. 27, 2022, 7:50 PM).

¹⁵⁹ Bruenig, *supra* note 151.

¹⁶⁰ *See* Second Amended Complaint, *supra* note 158, at 19.

¹⁶¹ Bruenig, *supra* note 151.

¹⁶² *See* Ivana Hryniw, *Alabama’s Autopsy of Joe Nathan James Jr. Finds No Signs of Abuse, Cutting Into Arms for Vein*, AL.COM, <https://www.al.com/news/2022/11/alabamas-autopsy-of-joe-nathan-james-jr-finds-no-signs-of-abuse-cutting-of-veins.html> [<https://perma.cc/ENB2-2R7X>] (Nov. 7, 2022, 4:23 PM); *see also* Complaint at 14–15, *James v. Ivey*, No. 2:23-CV-00293-ECM-SMD (M.D. Ala. May 3, 2023).

¹⁶³ *See* Bruenig, *supra* note 151 (interviewing James’s last attorney, who expressed concern that his client had not offered final words because it was out of character); *see also* Complaint, *supra* note 162 at 12–13.

nied that James had been sedated, but later “said they could not confirm that James was fully conscious when he was executed.”¹⁶⁴ Dr. Zivot asserted that James had additional puncture marks that were not in a location consistent with attempts to achieve venous access.¹⁶⁵ The uncertain circumstances of James’s execution raised grave concerns for the two other men Alabama intended to execute in 2022, and both of them sought stays based in part on what may have happened to James.

C. Alan Miller

Alan Miller was convicted of capital murder in 2000 for the murders of Lee Michael Holdbrooks, Christopher Yancy, and Terry Lee Jarvis.¹⁶⁶ Like Reeves and James, Miller brought ineffective assistance of counsel claims and received a ten to two jury recommendation for death.¹⁶⁷ Miller’s litigation over nitrogen gas provided a more revealing picture of how ADOC distributed and collected the forms. And, like James, Alabama botched Miller’s execution, although Miller survived.¹⁶⁸

Miller was appointed counsel who had some experience in capital defense,¹⁶⁹ and he initially pleaded not guilty by reason of insanity.¹⁷⁰ His counsel applied for, and received funds to hire mental health experts to assess Miller.¹⁷¹ Miller withdrew his insanity plea after the forensic psychiatrist his attorneys retained determined that, although he was suffering from mental illness, he did not meet Alabama’s definition of insanity at the time he committed the murders.¹⁷² Miller’s attorney decided to focus on the penalty phase of the case because the “the State’s evidence of Miller’s guilt ‘was too overwhelming to seriously contest.’”¹⁷³

Miller’s lawyer focused on a “diminished-capacity defense” in the penalty phase and argued that the state had not proven any aggravating circumstances.¹⁷⁴ The sole aggravating factor the state proved was that the homi-

¹⁶⁴ Hrynkiw, *supra* note 158.

¹⁶⁵ See Second Amended Complaint, *supra* note 158, at 19.

¹⁶⁶ Miller v. State, 913 So. 2d 1148, 1151 (Ala. Crim. App. 2004).

¹⁶⁷ See *id.*

¹⁶⁸ Tina Burnside & Dakin Andone, *Alabama Halts Execution at Last Minute of Inmate Who Disputed Method After Determining It Could Not Be Completed by Midnight Deadline, Officials Say*, CNN, <https://www.cnn.com/2022/09/23/us/alan-eugene-miller-execution-alabama-friday/index.html> [<https://perma.cc/RLN3-7ELW>] (Sept. 23, 2022, 6:31 AM).

¹⁶⁹ Miller, 913 So. 2d at 1159. One of Miller’s attorneys withdrew before trial and the attorney who replaced him “did not play an active role in the trial.” Miller v. Dunn, No. 2:13-00154-KOB, 2017 WL 1164811, at *6 n.4 (N.D. Ala. Mar. 29, 2017).

¹⁷⁰ Miller v. Dunn, 2017 WL 1164811, at *5.

¹⁷¹ *Id.*

¹⁷² *Id.* at *5–6; Miller v. State, 913 So. 2d at 1158.

¹⁷³ Miller v. State, 913 So. 2d at 1159.

¹⁷⁴ *Id.* at 1160.

cides were “especially heinous, atrocious, or cruel compared to other capital offenses.”¹⁷⁵ It relied primarily on evidence from the guilt phase about the homicides and victim impact testimony.¹⁷⁶ Miller’s only witness during the penalty phase was the forensic psychiatrist.¹⁷⁷ The forensic psychiatrist testified that based on the evidence from the offense, interviews with Miller and his family members, and psychological testing, Miller “suffered from a delusional disorder that substantially impaired his rational ability.”¹⁷⁸ Miller’s lawyer did not call any family members to testify because he believed “the support Miller had from his family members during trial was affecting the jury in a positive way. . . . and he did not want to detract from this sympathy by putting family members on the stand.”¹⁷⁹

The jury recommended a death sentence by a ten to two vote, though the jury form did not indicate how many jurors found the state had proved an aggravating factor beyond reasonable doubt.¹⁸⁰ The trial court did not make factual findings about the aggravating circumstance.¹⁸¹ Miller moved for a new trial based on ineffective assistance of counsel and his mental state at the time of the homicides.¹⁸² The trial court held a hearing, then denied the motion without making any findings of fact or entering a written order, even though Miller had offered new evidence during the hearing.¹⁸³

On direct appeal, the Alabama Court of Criminal Appeals remanded Miller’s case so the trial court could make the necessary factual findings on its denial of Miller’s motion for a new trial and the aggravating circumstance that warranted the imposition of the death penalty.¹⁸⁴ On return from remand, the Alabama Court of Criminal Appeals rejected all of Miller’s arguments about ineffective assistance of counsel, concluding that trial counsel was not ineffective because Miller did not provide additional mitigating evidence his lawyer did not uncover or fail to consider.¹⁸⁵ It decided that the decision to concede guilt was “well-reasoned” because it allowed counsel to prioritize the strategy that had the greatest chance of success in saving Miller’s life.¹⁸⁶ It also affirmed the trial court’s findings about the aggravating circumstance because the victims had experienced both physical and psychological suffering and had been killed “execution style.”¹⁸⁷ A homicide in

¹⁷⁵ Miller v. Dunn, 2017 WL 1164811, at *6 (quoting ALA. STAT. § 13A-5-49(8)).

¹⁷⁶ Miller v. Dunn, 2017 WL 1164811, at *6.

¹⁷⁷ *Id.*

¹⁷⁸ Miller v. State, 913 So. 2d at 1156.

¹⁷⁹ *Id.* at 1160.

¹⁸⁰ Miller v. Dunn, 2017 WL 1164811, at *6.

¹⁸¹ Miller v. State, 913 So. 2d at 1152.

¹⁸² *Id.* at 1151.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1153.

¹⁸⁵ *Id.* at 1163.

¹⁸⁶ *Id.* at 1161.

¹⁸⁷ *Id.* at 1166.

Alabama can be “especially heinous, atrocious, or cruel” when there is time for a person facing death to realize that they are about to die.¹⁸⁸

The district court denied Miller’s habeas petition,¹⁸⁹ and the Eleventh Circuit affirmed.¹⁹⁰ During Miller’s direct appeal,¹⁹¹ the Supreme Court had decided *Ring v. Arizona*, which requires that capital defendants receive “a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”¹⁹² In capital proceedings, this means the jury must find any aggravating factors because such findings are necessary to impose a death sentence.¹⁹³ The Alabama Court of Criminal Appeals had concluded that the jury’s recommendation for death “indicated that it must have found the existence of the aggravating circumstance.”¹⁹⁴ The trial court had told the jury that it could not vote on whether to recommend a death sentence unless it first unanimously found an aggravating circumstance “beyond a reasonable doubt,” so the ten to two recommendation for a death sentence “established that the jury unanimously found” the aggravating circumstance.¹⁹⁵ The jury form did not indicate if the jury actually unanimously found the aggravating factor; the jury sent a note asking if they could “have a sentence if we have the appropriate number of required votes but we have one juror undecided?”¹⁹⁶ This, the Eleventh Circuit decided, was not an unreasonable application of *Ring*.¹⁹⁷ It explained that the jury had to have made the findings based on its sentencing recommendation and the remand was only to satisfy compliance with the requirement of specific factual findings for the “‘especially heinous’” aggravating factor—even though the Alabama Court of Criminal Appeals had remanded the case for the *judge* to make the findings.¹⁹⁸

Miller’s sentence did not violate *Hurst v. Florida*.¹⁹⁹ In *Hurst*, the Supreme Court had concluded that Florida’s capital sentencing scheme violated the Sixth Amendment.²⁰⁰ Like Alabama, Florida’s system required juries to make recommendations, followed by specific fact-finding by the trial

¹⁸⁸ *Id.* at 1166–67; *but see* *Godfrey v. Georgia*, 446 U.S. 420, 431–32 (1980) (discussing “vileness” aggravators).

¹⁸⁹ *Miller v. Dunn*, No. 2:13-00154-KOB, 2017 WL 1164811, at *9 (N.D. Ala. Mar. 29, 2017).

¹⁹⁰ *Miller v. Comm’r, Ala. Dep’t of Corr.*, 826 F. App’x 743, 757 (11th Cir. 2020).

¹⁹¹ *Miller v. State*, 913 So. 2d at 1167.

¹⁹² *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

¹⁹³ *Id.* at 609.

¹⁹⁴ *Miller v. State*, 913 So. 2d at 1168–69.

¹⁹⁵ *Id.* at 1169.

¹⁹⁶ *See Miller v. Dunn*, No. 2:13-00154-KOB, 2017 WL 1164811, at *73 (N.D. Ala. Mar. 29, 2017).

¹⁹⁷ *See Miller v. Comm’r, Ala. Dep’t of Corr.*, 826 F. App’x 743, 748 (11th Cir. 2020).

¹⁹⁸ *Id.* at 748–49 (quoting *Miller v. State*, 913 So. 2d at 1152).

¹⁹⁹ *See id.* at 749; *Hurst v. Florida*, 577 U.S. 92, 92 (2016).

²⁰⁰ *Hurst*, 577 U.S. at 94.

judge who imposed the death sentence.²⁰¹ The Eleventh Circuit rejected Miller's arguments because years before *Hurst*, the Supreme Court had upheld the constitutionality of Alabama's capital sentencing scheme in *Harris v. Alabama*,²⁰² even though *Hurst* overruled the decisions that *Harris* relied on.²⁰³ Further, *Hurst* was not retroactive on collateral review—meaning that it could not apply to Miller.²⁰⁴

The Eleventh Circuit also rejected Miller's ineffective assistance of counsel claims about his mental health at the time of the murders because it concluded that the decision not to pursue an insanity defense was a strategic choice.²⁰⁵ An expert Miller retained for postconviction proceedings had testified that Miller "had experienced a dissociative episode during the shootings that 'impaired his ability to appreciate the nature and quality or wrongfulness of his acts,'" but did not conclude that Miller satisfied the legal threshold for insanity.²⁰⁶ Although Miller's trial attorney had failed to provide the expert with all of Miller's psychological evaluation materials, the Eleventh Circuit decided that was not sufficient to show prejudice because the trial expert did not say his opinion had changed after reviewing the materials he had not seen before trial.²⁰⁷

Miller had identified significant mitigation evidence during habeas proceedings that he said his trial counsel should have presented: poverty, abuse, neglect, a family history of drug abuse and severe mental illness, evidence that he had behaved "strangely" before the shootings, and that he had positive traits including close and caring relationships with his siblings.²⁰⁸ Miller's sole witness during the penalty phase—the forensic psychiatrist—testified to some of this information.²⁰⁹ The Eleventh Circuit decided that the Alabama Court of Criminal Appeals "reasonably held that Mr. Miller failed to show prejudice from his trial counsel's failure to present additional mitigating evidence and his appellate counsel's failure to investigate and preserve the issue of trial counsel's alleged ineffectiveness."²¹⁰ This, the Eleventh Circuit explained, was because of the "three murders he committed and the way in which he carried them out."²¹¹ And yet, even after hear-

²⁰¹ *Id.* at 95–96.

²⁰² *See Harris v. Alabama*, 513 U.S. 504, 504 (1995).

²⁰³ *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 F. App'x at 749.

²⁰⁴ *Id.* at 749–50; *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020).

²⁰⁵ *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 F. App'x at 751.

²⁰⁶ *Id.* at 753 (quoting *Miller v. State*, 99 So. 3d 349, 384 (Ala. Crim. App. 2011)).

²⁰⁷ *Id.* at 751–53. The materials included information that suggested that Miller had some loss of memory surrounding the homicides. *Id.* at 751.

²⁰⁸ *Id.* at 754–56 (discussing Miller's mitigation evidence).

²⁰⁹ *Id.* at 755 n.5.

²¹⁰ *Id.* at 756.

²¹¹ *Id.*

ing that evidence, two jurors did not recommend a death sentence and it was unclear what the *jury* found.²¹²

As his execution approached, Miller filed suit seeking to be executed by nitrogen gas instead of lethal injection.²¹³ Miller claimed he had received the nitrogen gas election form, completed it, and returned it when the prison staff collected the forms.²¹⁴ The state insisted they had no record of receiving Miller's form.²¹⁵ Miller asserted that ADOC's haphazard form distribution and collection procedures deprived him of procedural due process and the equal protection of the laws; and that the choice to execute Miller by lethal injection was "arbitrary and capricious in violation of the Eighth Amendment," though he did not challenge the constitutionality of lethal injection or nitrogen gas.²¹⁶

The evidentiary hearing revealed more detail about ADOC's distribution and collection.²¹⁷ Warden Cynthia Stewart testified that she received an order to distribute forms, but could not recall who told her to do it.²¹⁸ The officer who distributed the forms testified that the warden told him "not to write anything down, not to write anyone's name down, and not to keep track of who submitted a form."²¹⁹ Nobody could recall what day the forms were distributed or even when they were collected and turned in.²²⁰ The warden's administrative assistant scanned the forms ADOC received.²²¹ There did not appear to be a process to track who submitted forms or when ADOC received forms, either by mail from federal public defenders or corrections officers.²²²

The corrections officer testified that he handed out forms in the morning and tried to explain the purpose of the form to each individual, unless someone was asleep, in which case he tried to wake them and left the form in their cell.²²³ Warden Stewart testified that the people on death row could return forms by "giv[ing] their completed forms to a staff member, giv[ing] the forms to her when she made rounds through the facility, or they could place their forms in a locked collection box, which was emptied daily and

²¹² *Id.* at 745.

²¹³ *Miller v. Hamm*, No. 2:22-CV-506-RAH, 2022 WL 4348724, at *1 (M.D. Ala. Sept. 19, 2022), *vacated* *Hamm v. Miller*, 143 S. Ct. 50 (2022).

²¹⁴ *Id.* at *3.

²¹⁵ *Id.*

²¹⁶ *Id.* at *3–4 (describing Miller's constitutional claims).

²¹⁷ Some of the evidence was deposition testimony from another case challenging ADOC's form distribution procedure. *See id.* at *5.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See Id.*

²²¹ *Id.* at *6.

²²² *Id.*

²²³ *Id.* at *5.

given to the warden's secretary."²²⁴ The people held on death row in Alabama are locked in their cells for twenty-three hours a day.²²⁵

Miller testified that ADOC staff had difficulty finding veins to draw blood in the past and that he did not like needles.²²⁶ He described receiving the form and considering his options and, although "he did not want to die at all," he signed the form and placed "it in a slot between the bars" where ADOC staff usually collected completed documents.²²⁷

In granting Miller's request for a preliminary injunction on September 19, 2022, the district court observed that the motion was "fully briefed" and it had reviewed "hundreds of pages of evidence" and heard testimony from Miller.²²⁸ The district court concluded that Miller was "substantially credible" and that his testimony was consistent with the testimony from the ADOC officer who distributed the forms.²²⁹ The district court observed that Alabama did not refute Miller's testimony about submitting a form; it "simply argue[d] that Miller did not do what he now claims he did because the State does not have a copy of Miller's completed form . . ."²³⁰ While the state offered some circumstantial evidence that "potentially indirectly" undermined Miller's claims, the absence of any organized policy or process for distributing, collecting, and logging the forms undercut the weight of that evidence.²³¹ Other people on death row had also reported difficulty having their forms collected and tracked.²³² The district court acknowledged it was possible that Miller had brought this claim to delay his execution, but concluded it was "substantially likely" that Miller did pick nitrogen gas, which was sufficient to carry Miller's burden of proof for a preliminary injunction.²³³

Like Reeves's case, the delay Miller sought would be minimal; the court acknowledged that Alabama could not execute Miller by nitrogen gas on his scheduled date, but ADOC "just recently appears to be ready to announce its plan to begin conducting executions by nitrogen hypoxia."²³⁴ Any delay in executions was "attributable to the State, not Miller" because Alabama had

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at *6. Miller testified that it had once taken 30 minutes to draw blood from him, and that the experience had been painful and left a large bruise. *Id.*

²²⁷ *Id.* at *7.

²²⁸ *Id.* at *1.

²²⁹ *Id.* at *9.

²³⁰ *Id.* at *10.

²³¹ *Id.* at *10, *15.

²³² *See id.* at *15.

²³³ *Id.* The district court concluded that Miller was likely to succeed on the merits of his equal protection and procedural due process claims but did not reach his Eighth Amendment arguments. *See id.* at *16–21.

²³⁴ *Id.* at *21–22.

authorized the method in 2018.²³⁵ The district court also concluded that Miller did not unreasonably delay his lawsuit in federal court—he had first learned that ADOC intended to execute him by lethal injection in May 2022 and had exhausted available state remedies before filing suit in federal court.²³⁶

The Eleventh Circuit denied Alabama’s motion to stay the preliminary injunction the day of Miller’s scheduled execution.²³⁷ The district court had made detailed factual findings that Alabama did not “challenge as clearly erroneous.”²³⁸ It agreed substantially with the district court’s reasoning, emphasizing that ADOC “chose not to keep a log or list of those inmates who submitted an election form choosing nitrogen hypoxia” and had lost other forms.²³⁹ Peculiarly, Alabama had not argued that it suffered, or would suffer any irreparable harm from delaying the execution.²⁴⁰ Any delay would, the Eleventh Circuit observed, be minimal because ADOC repeatedly asserted that it would be ready to carry out nitrogen gas executions soon.²⁴¹

As in Reeves’s case, the Supreme Court rejected the lower courts’ determinations without explanation.²⁴² It vacated the district court’s preliminary injunction just after 9:00 p.m. over the disagreements of Justices Sotomayor, Kagan, Barrett, and Jackson.²⁴³ The execution began less than an hour later.²⁴⁴ The witnesses for Miller’s execution were present, but then were told without explanation that the execution had been called off and sent away.²⁴⁵ Alabama sought a new execution date for Miller, who sued, asserting among other claims, that “a second attempt to execute him by lethal injection would violate the Eighth and Fourteenth Amendments.”²⁴⁶

²³⁵ *Id.* at *21.

²³⁶ *See id.* at *23.

²³⁷ *See* Miller v. Comm’r, Ala. Dep’t of Corr., No. 22-13136, slip op. at 20 (11th Cir. Sept. 22, 2022), available at <https://ejl.org/wp-content/uploads/2005/11/09-22-22-alan-miller-11th-cir-order.pdf> [<https://perma.cc/8X68-UJUG>], vacated, 143 S. Ct. 50 (2022).

²³⁸ *Id.* at 9 (“Although the State tries at different points to cast doubt on the strength of Mr. Miller’s evidence, it never argues that the district court’s factual findings are unsupported by the record.”).

²³⁹ *Id.* at 20.

²⁴⁰ *Id.* at 19.

²⁴¹ *Id.* at 17 n.5.

²⁴² *See* Hamm v. Miller, 143 S. Ct. 50 (2022); Associated Press, *Supreme Court Says Alabama Can Carry Out Execution*, POLITICO (Sept. 22, 2022, 10:46 PM), <https://www.politico.com/news/2022/09/22/supreme-court-says-alabama-can-carry-out-execution-00058513> [<https://perma.cc/8D5S-ZCWG>].

²⁴³ *See* Elizabeth Bruenig, *Dead Man Living*, ATLANTIC (Oct. 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/alabama-inmate-execution-alan-miller/671620/> [<https://perma.cc/5K7G-EJ5Q>].

²⁴⁴ *See* Miller v. Hamm, No. 2:22-CV-506-RAH, 2022 WL 16720193, at *2 (M.D. Ala. Nov. 4, 2022).

²⁴⁵ *See* Bruenig, *supra* note 243.

²⁴⁶ Miller v. Hamm, 2022 WL 16720193, at *1.

Miller was brought to the death chamber shortly before 10:00 p.m.²⁴⁷ He asserted that his arms were strapped into a “stress position above his head” because he is “apparently shorter than the height the gurney was designed for,” causing “pain in his chest, neck, and arms.”²⁴⁸ Two men, dressed in medical scrubs, entered and spent approximately ninety minutes attempting to find a vein.²⁴⁹ They first tried Miller’s antecubital areas, slapping the area for “long periods” and making repeated punctures.²⁵⁰ They did not respond when Miller told them it was painful.²⁵¹

The IV team next tried and failed to obtain venous access in Miller’s right hand and punctured his skin several times.²⁵² The men also tried to access a vein in Miller’s right foot, and “inserted a needle . . . which caused Miller sudden and severe pain.”²⁵³ Miller asserted that he thought “the men in scrubs hit a nerve.”²⁵⁴ The two men kept working. They stuck Miller’s right foot more times with the needle, then simultaneously tried to puncture both of his arms.²⁵⁵

A third man entered and began feeling Miller’s neck.²⁵⁶ Nobody responded when Miller asked if they were going to put a needle in his neck.²⁵⁷ Then, after a knock, the IV team stopped working, and Miller was left alone, bleeding, hanging from the gurney that a guard had raised to a vertical position.²⁵⁸ An ADOC employee entered the death chamber and told Miller that his execution had been postponed without further explanation.²⁵⁹

Miller was finally removed from the death chamber and taken to the medical unit to be cleaned up, although he did not receive any medical assistance for the physical pain he was experiencing.²⁶⁰ Guards took Miller back to “the execution holding cell, where he curled into a fetal position on the cot in the cell for many hours.”²⁶¹

The district court decided that Miller had brought a viable Eighth Amendment claim.²⁶² Although the Constitution does not require a painless execution, Miller had plausibly alleged that being subjected to another le-

²⁴⁷ *Id.* at *2.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at *3.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *4.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *See id.* at *14.

thal injection execution would be cruel and unusual punishment.²⁶³ The district court also concluded that because ADOC had not attempted to determine what had gone wrong, it was “plausible to infer that a second attempt to execute [him] by lethal injection will likely expose him, for a second time, to the same extreme pain and suffering over the same period, if not longer.”²⁶⁴

Alabama and Miller settled after Alabama agreed not to attempt to execute him by lethal injection again.²⁶⁵ If Alabama attempts to execute Miller, then it will do so by nitrogen gas.²⁶⁶

Alabama had one more execution scheduled in 2022.²⁶⁷ After what happened to Miller, Kenneth Smith’s warrant litigation took on greater urgency.

D. *Kenneth Smith*

Kenneth Smith was first convicted of capital murder in 1989 for the murder of Elizabeth Sennett in a murder-for-hire case.²⁶⁸ Smith’s case displays similar patterns to the other cases discussed above. Smith brought ineffective assistance of counsel claims and he had a nonunanimous jury recommendations.²⁶⁹ Smith did litigate about nitrogen gas, but his method-of-execution litigation drew substantially on what had happened during

²⁶³ *Id.* at *13–14. (“Miller does not claim that the use of needles or venous access per se is cruel and unusual punishment. Rather, [t]he cruel and unusual punishment is Defendants subjecting Mr. Miller to the same traumatic and painful experience for a second time.”).

²⁶⁴ *Id.* at *13.

²⁶⁵ *Alabama Won’t Try Lethal Injection Again on “Execution Survivor” Alan Eugene Miller, but It May Try New Method*, CBS NEWS (Nov. 30, 2022, 4:09 AM), <https://www.cbsnews.com/news/alan-eugene-miller-alabama-execution-death-penalty-lethal-injection-nitrogen-hypoxia> [<https://perma.cc/VP4C-ZNS7>].

²⁶⁶ *Id.*

²⁶⁷ *See Alabama Governor Halts Executions After Latest in Series of Execution Failures*, DEATH PENALTY INFO. CTR. (Nov. 23, 2022), <https://deathpenaltyinfo.org/news/alabama-governor-halts-executions-after-latest-in-series-of-execution-failures> [<https://perma.cc/5BDQ-UGH5>].

²⁶⁸ *See Smith v. Dunn*, No. 2:15-CV-0384-AKK, 2019 WL 4338349, at *1 (N.D. Ala. Sept. 12, 2019). Elizabeth Sennett’s husband recruited Smith and two other men to kill his wife, though Smith maintained that he had not been the one to kill Mrs. Sennett. *Id.* at *3, *4. The Alabama Court of Criminal Appeals vacated Smith’s conviction for violations of *Batson v. Kentucky*, 479 U.S. 79 (1986). *Id.* at *1; *see Smith v. State*, 588 So. 2d 561, 565 (Ala. Crim. App. 1991), *on return to remand*, 620 So. 2d 727 (Ala. Crim. App. 1992), *on return to second remand*, 620 So. 2d 732, 733–34 (Ala. Crim. App. 1992).

²⁶⁹ *See Austin Sarat, Alabama’s Plan to Execute Kenneth Smith May Be Legal, But It Is Not Just*, VERDICT (Oct. 17, 2022), <https://verdict.justia.com/2022/10/17/alabamas-plan-to-execute-kenneth-smith-may-be-legal-but-it-is-not-just> [<https://perma.cc/4AUK-44S5>].

James's and Miller's executions—like Miller, Smith survived his execution because the IV team was unable to achieve venous access.²⁷⁰

In Smith's first trial, the jury recommended a death sentence in a ten to two vote.²⁷¹ At the conclusion of Smith's second trial in 1996, the jury recommended a sentence of life without parole in an eleven-to-one vote.²⁷² At the time, however, Alabama permitted judges to override jury recommendations.²⁷³ The judge overrode the jury's recommendation and sentenced Smith to death.²⁷⁴ The judge described the jury's recommendation as a "mitigating factor," but observed that they were "allowed to hear an emotional appeal from the defendant's mother."²⁷⁵ The sole aggravating factor the trial judge found was that Smith committed the murder for "pecuniary gain."²⁷⁶ The trial judge found multiple other mitigating factors.²⁷⁷

In federal postconviction proceedings, Smith's ineffective assistance of counsel claims focused primarily on his attorney's errors during the guilt phase of his second trial rather than a failure to investigate and build a mitigation case.²⁷⁸ Smith did argue that his lawyer provided ineffective assistance during the penalty phase due to a conflict of interest.²⁷⁹ Smith had reported a possible plot to harm a guard to that guard, who later found weapons in a cell shared by two other prisoners.²⁸⁰ Smith's lawyer called the guard to testify, and an expert on "correctional issues" who expressed that Smith could be safely incarcerated in a "maximum security prison rather than death row."²⁸¹ Smith's lawyer, however, represented "one of the co-conspirators in the alleged plot against the guard."²⁸² Smith argued that his lawyer did not "push back" against the prosecution's aggressive cross-examination because to do so would have been harmful to the interests of his other client.²⁸³ The district court concluded that Smith had not established a conflict of interest because he did not identify sufficient facts to

²⁷⁰ See *infra* notes 298–302 (discussing Smith's method-of-execution litigation); see also Smith v. Hamm, No. 2:22-CV-497-RAH, 2023 WL 4353143, at *3–5 (M.D. Ala. July 5, 2023).

²⁷¹ Smith v. Dunn, 2019 WL 4338349, at *1.

²⁷² *Id.*

²⁷³ Sarat, *supra* note 269; see also *id.* ("[T]he trial court overrode the jury's recommendation and sentenced Smith to death.").

²⁷⁴ Smith v. Dunn, 2019 WL 4338349, at *1.

²⁷⁵ *Id.* at *18.

²⁷⁶ *Id.* at *5.

²⁷⁷ *Id.* at *6 (identifying mitigating factors).

²⁷⁸ See *id.* at *25–40 (discussing Smith's arguments about ineffective assistance of counsel during the guilt phase).

²⁷⁹ *Id.* at *40.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

suggest that counsel had not elicited additional details about the plot, and the guard who testified could not provide additional details because the plot “never materialized.”²⁸⁴

Smith also challenged the constitutionality of the judge’s decision to override the jury’s recommendation.²⁸⁵ He argued the court improperly focused exclusively on the aggravating factor and failed to give him the individualized consideration that the Eighth and Fourteenth Amendments require because the court found multiple mitigating factors and only one aggravating factor.²⁸⁶ Smith asserted that the trial court failed to accord sufficient weight to the jury’s recommendation for life because it dismissed the jury’s decision as the product of an “emotional appeal” from Smith’s mother.²⁸⁷ Smith also argued that permitting judges to override jury recommendations interfered with individualized determinations because the pressure to be reelected makes judges more likely to impose death sentences.²⁸⁸

The federal district court decided that Smith’s arguments about his mother’s testimony and judicial political pressure were procedurally barred because he did not present those argument in state court.²⁸⁹ It concluded that Smith had failed to demonstrate that the Alabama Court of Criminal Appeals unreasonably applied Supreme Court precedent or made unreasonable determinations of the facts when it decided the trial court had properly evaluated the aggravating and mitigating circumstances.²⁹⁰

Smith’s *Ring* claim was more compelling; a jury, rather than a judge, is required to find any fact that increases a defendant’s maximum punishment; therefore his jury should have made the appropriate findings and weighed the mitigating evidence.²⁹¹ The Alabama Court of Criminal Appeals had concluded that convicting Smith of murder for pecuniary gain was sufficient to make the determination of the fact that could increase Smith’s punishment to death.²⁹² Even though this happened during the guilt phase, this decision satisfied *Ring* because the overlap between the conviction and the aggravating circumstance made Smith death-eligible.²⁹³

The Eleventh Circuit granted Smith a certificate of appealability only on the issue of whether he was prejudiced by his trial attorney’s failure to chal-

²⁸⁴ *Id.* at *42.

²⁸⁵ *Id.* at *21.

²⁸⁶ *Id.* at *18.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at *21.

²⁸⁹ *Id.* at *18 (rejecting the “emotional appeal” argument); *id.* at *21 (rejecting the “political pressure” argument).

²⁹⁰ *Id.* at *19.

²⁹¹ *See id.* at *22.

²⁹² *See id.* at *24.

²⁹³ *See id.* at *24 (“Thus, every fact that made Smith death-eligible was found by the jury, beyond a reasonable doubt, at the guilt phase of the trial. This is what *Ring* requires.”); *see also* Lee v. Comm’r, Ala. Dep’t of Corr., 726 F.3d 1172, 1198 (11th Cir. 2013).

lenge the validity of a search warrant.²⁹⁴ The panel disposed of Smith's claim swiftly, deciding Smith could not show prejudice because the warrant was facially valid under Alabama law.²⁹⁵ The Supreme Court denied certiorari in February 2022,²⁹⁶ and in September, the Alabama Supreme Court set Smith's execution date for November 17, 2022.²⁹⁷

Smith's method-of-execution litigation relied on similar arguments to other challenges in the 2022 executions.²⁹⁸ Smith had not picked nitrogen gas during the 30-day election period.²⁹⁹ He asserted that at the time, he did not know that ADOC did not have a nitrogen gas execution protocol, the lack of which led to "indefinite" execution delays, and if he had known that his choice was between a delayed execution or a risky lethal injection protocol, he would have picked nitrogen gas.³⁰⁰ Smith argued that this violated his due process rights because he was not sufficiently informed to knowingly and voluntarily waive his right to be executed by nitrogen.³⁰¹ The district court concluded that this argument could not overcome the statute of limitations for bringing a method-of-execution challenge.³⁰²

Smith also challenged the constitutionality of Alabama's lethal injection protocol.³⁰³ The district court determined that the statute of limitations had expired on this claim, either because Alabama had adopted lethal injection in 2002, or because Alabama had probably last modified its execution protocol in 2019.³⁰⁴ Smith argued that the unusual length of James's execution, as well as the suspected cut-down and intramuscular sedation showed alterations to the protocol, meaning his suit was not time-barred.³⁰⁵ The district court disagreed, in part because Smith had challenged the entire protocol,

²⁹⁴ Smith v. Comm'r, Ala. Dep't of Corr., 850 F. App'x 726, 728 (11th Cir. 2021).

²⁹⁵ *Id.* at 730.

²⁹⁶ Smith v. Hamm, 142 S. Ct. 1108 (2022).

²⁹⁷ Ivana Hrynkiw, *Alabama Sets Execution in Murder-For-Hire of Pastor's Wife, Despite Jury's Recommendation*, AL.COM., <https://www.al.com/news/birmingham/2022/09/alabama-sets-execution-date-for-man-convicted-in-murder-for-hire-of-pastors-wife.html> [https://perma.cc/2XMS-RVLW] (Sept. 30, 2022, 4:26 PM).

²⁹⁸ Smith had challenged the constitutionality of Alabama's method of execution in his federal habeas petition, asserting that it inflicted unconstitutional pain in violation of the Eighth Amendment. Smith v. Dunn, No. 2:15-CV-0384-AKK, 2019 WL 4338349, at *51 (N.D. Ala. Sept. 12, 2019). The district court denied the claim because it was more properly brought as an action under 42 U.S.C. § 1983. *Id.*

²⁹⁹ Smith v. Hamm, No. 2:22-CV-497-RAH, 2022 WL 10198154, at *2 (M.D. Ala. Oct. 16, 2022). Smith had argued that he did not actually receive an election form, but the district court concluded that this claim expired in 2020, two years after the period for picking nitrogen gas ended. *Id.* at *6 n.9.

³⁰⁰ *Id.* at *2.

³⁰¹ *Id.*

³⁰² *Id.* at *6.

³⁰³ *Id.* at *2 ("Smith alleges that Alabama's three-drug lethal injection protocol violates his right to be free from cruel and unusual punishment under the Eighth Amendment.").

³⁰⁴ *Id.* at *3.

³⁰⁵ *Id.* at *4.

rather than specific deviations by ADOC.³⁰⁶ ADOC denied using either a cut-down or intramuscular sedation during James's execution and assured the district court that they would not use those procedures in Smith's or any other execution.³⁰⁷ The district court dismissed Smith's Eighth Amendment claim, but directed ADOC to strictly comply with its execution protocols.³⁰⁸ "Sanctions will be swift and serious," the court warned, "if counsel and the Commissioner do not honor or abide by their representations and stipulations."³⁰⁹

Smith sought leave to amend his complaint, which the district court denied on November 9, 2022.³¹⁰ Smith's proposed amended complaint relied on the events during James's execution and Miller's attempted execution to allege that he faced a substantial risk of severe pain during his own execution.³¹¹ The district court rejected these arguments because it concluded there was insufficient information about the "severity or duration of pain" that James might have experienced and whether ADOC's alleged deviations from its protocols lasted the entire time "James was hidden from the public eye."³¹² The district court also rejected Smith's arguments about the risk of pulmonary edema from lethal injection execution because it concluded there was not enough information about whether Smith had a sufficient risk of pulmonary edema from lethal injection and the likely pain from that condition.³¹³ Because the Eighth Amendment does not prohibit *all* pain in executions, Smith had not presented sufficient information to show a risk of severe and unnecessary pain.³¹⁴ The district court concluded that its order directing ADOC to adhere to the execution protocol reduced the risk of pain.³¹⁵ The district court also reasoned that Miller's failed execution was not sufficient to show that Smith faced the same risk without more specific evidence.³¹⁶

The Eleventh Circuit reversed in a *per curiam* opinion issued on the afternoon of Smith's scheduled execution.³¹⁷ The Eleventh Circuit concluded

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at *5; *see also* Second Amended Complaint, *supra* note 158, at 15.

³⁰⁹ Smith v. Hamm, 2022 WL 10198154, at *5.

³¹⁰ Smith v. Hamm, No. 2:22-CV-497-RAH, 2022 WL 16842050, at *8 (M.D. Ala. Nov. 9, 2022).

³¹¹ *Id.* at *5–6.

³¹² *Id.* at *5.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at *6–7.

³¹⁷ *See* Smith v. Comm'r, Ala. Dep't of Corr., No. 22-13781, 2022 WL 17069492, at *1 (11th Cir. Nov. 17, 2022); *see also* Evan Mealins, *Timeline in Alabama's Failed Attempt to Execute Kenneth Smith*, MONTGOMERY ADVERTISER <https://www.montgomeryadvertiser.com/story/news/2022/11/17/alabama-attempt-to-execute-kenneth-smith/7000000001>

that the district court should have granted Smith leave to amend his complaint because Smith had plausibly pleaded that Alabama's protocol, which did not specify how long the IV team could take to access a vein, presented an intolerable risk of pain based in part on James's and Miller's executions and in part on Smith's physical condition.³¹⁸ This, it reasoned, presented a plausible allegation that ADOC would have "extreme difficulty" in accessing Smith's veins, leading to "superadded pain as the execution team attempts to gain IV access."³¹⁹ The Eleventh Circuit decided that Smith's complaint was not time-barred because "[i]t is the emergence of ADOC's pattern of superadding pain through protracted efforts to establish IV access in the two previous execution attempts that caused Smith's claim to accrue."³²⁰

In dissent, Judge Grant argued that Smith should have been aware of the possibility of IV delays, repeated needle sticks, and error since 2018, when Alabama tried and failed to execute Doyle Hamm.³²¹ Judge Grant agreed that Smith's concerns were "understandable," but as they were "nothing new" he should not have been allowed to amend his complaint.³²²

Smith's execution had been scheduled for 6 p.m. on November 17.³²³ He sought a stay of execution from the district court, which denied the stay because he had "inexcusably delayed" filing his motion even though he had filed it almost immediately after the Eleventh Circuit decided he did have a valid Eighth Amendment claim.³²⁴ The Eleventh Circuit granted a stay just before 8:00 p.m.³²⁵ The Supreme Court granted Alabama's application to vacate Smith's stay without explanation shortly after 10:00 p.m.³²⁶ Justices Sotomayor, Kagan, and Jackson would have denied Alabama's application.³²⁷ At approximately 11:20 p.m., Alabama called off Smith's execution.³²⁸

Smith's second amended complaint,³²⁹ and an interview with Elizabeth Bruenig,³³⁰ described what happened when ADOC attempted to execute

tiser.com/story/news/2022/11/17/live-updates-kenneth-smith-execution-alabama-prisons/69654501007/ [https://perma.cc/3N6X-VZNP] (Nov. 18, 2022, 3:49 AM).

³¹⁸ Smith v. Comm'r, Ala. Dep't of Corr., 2022 WL 17069492, at *4–5.

³¹⁹ *Id.* at *5.

³²⁰ *Id.*

³²¹ *Id.* at *7 (Grant, J., dissenting).

³²² *Id.*

³²³ Second Amended Complaint, *supra* note 158, at 27 (observing that the district court refused to grant Smith a stay at "approximately 5:55 p.m., minutes before the execution was scheduled to begin."); Mealins, *supra* note 317.

³²⁴ See Smith v. Hamm, No. 2:22-CV-497-RAH, 2022 WL 17067498, at *3 (M.D. Ala. Nov. 17, 2022); see also Second Amended Complaint, *supra* note 158, at 27.

³²⁵ Second Amended Complaint, *supra* note 158, at 28.

³²⁶ Hamm v. Smith, 143 S. Ct. 440 (2022); Second Amended Complaint, *supra* note 158, at 28.

³²⁷ Hamm v. Smith, 143 S. Ct. at 440–41.

³²⁸ See Mealins, *supra* note 317.

³²⁹ The district court gave Smith leave to amend his complaint after he survived the execution and ordered ADOC to preserve all evidence of the execution. Smith v. Hamm,

him. Just before 8:00 p.m., while the Eleventh Circuit was considering whether to grant Smith's stay, ADOC officers made Smith get off the phone with his wife, shackled him, and took him to the death chamber.³³¹ The Eleventh Circuit stayed the execution and Smith's lawyers emailed the Attorney General's office, but Smith remained in the execution chamber, strapped to the gurney.³³² Nobody informed Smith that his execution had been stayed and he was not able to speak with his lawyers.³³³

Smith's complaint asserts that the IV team entered around 10:00 p.m.³³⁴ There were other observers at his execution as well; Smith's complaint describes "two men and a woman who were formally dressed" and who appeared to be taking notes and documenting the proceedings.³³⁵ The IV team was made up of three men, two of whom began attempting to gain IV access, repeatedly sticking needles into his arms and hands.³³⁶ Smith complained about pain from the needle sticks and the IV team ignored him.³³⁷ After several failed attempts, the IV team and the observers left and then came back to attempt a central line.³³⁸

Smith reported receiving "multiple needle jabs in his neck or collarbone region" from "a clear syringe with a needle" after the IV team came back.³³⁹ The deputy warden "torqued" Smith's head to the side, "saying, 'Kenny, this is for your own good.'"³⁴⁰ One of the IV team members began inserting a "large gauge needle" into the region near Smith's collarbone, which Smith described as extremely painful.³⁴¹ When Smith expressed his pain to one of the IV team members, he was told, "[y]ou can't feel that."³⁴² Smith's complaint asserts that the attempt to start a central line went on for some time,

2022 WL 17475761, at *1; Ivana Hrynkiw, *Judge Orders Alabama to Preserve All Evidence From Failed Execution Attempt of Kenneth Smith*, AL.COM, <https://www.al.com/news/2022/11/judge-orders-alabama-to-preserve-all-evidence-from-failed-execution-attempt-of-kenneth-smith.html> [<https://perma.cc/FBR5-K4NU>] (Nov. 18, 2022, 2:49 PM).

³³⁰ See Elizabeth Bruenig, *A History of Violence*, ATLANTIC (Nov. 22 2022), <https://www.theatlantic.com/ideas/archive/2022/11/alabama-deathpenaltykennethsmith-execution/672220/> [<https://perma.cc/ZQ57-9SRE>].

³³¹ Second Amended Complaint, *supra* note 158, at 31.

³³² *Id.* at 31–33.

³³³ *Id.* at 4.

³³⁴ *Id.* at 5. Smith's Second Amended Complaint asserts that there is not clear information about the time the IV team entered and began working in relation to the Supreme Court's decision. *Id.* at 5 n.2.

³³⁵ *Id.* at 32, 37.

³³⁶ See *id.* at 36–37; see also Bruenig, *supra* note 330.

³³⁷ Second Amended Complaint, *supra* note 158, at 36, 38–39.

³³⁸ *Id.* at 37, 39.

³³⁹ *Id.* at 38.

³⁴⁰ *Id.* at 39; Bruenig, *A History of Violence*, *supra* note 329.

³⁴¹ Second Amended Complaint, *supra* note 158, at 39–40.

³⁴² *Id.* at 39; Bruenig, *supra* note 330.

though it does not indicate how long before the IV team gave up the attempt and left.³⁴³

Smith's witnesses were not contacted to be brought to Holman.³⁴⁴ Smith's lawyer emailed Alabama officials to ask for confirmation that the execution had been cancelled and to learn where his client was and whether he was okay, but he did not receive a response.³⁴⁵ Smith had difficulty getting off the gurney and required assistance from corrections officers to leave the death chamber.³⁴⁶ Smith experienced physical pain both from the repeated needle sticks and lengthy time spent strapped to the gurney and serious emotional distress—corrections officers actually took Smith for medical treatment and observation because they were concerned for his well-being two days after the attempted execution.³⁴⁷

Alabama Governor Kay Ivey blamed the failure on “last minute legal attempts to delay or cancel the execution.”³⁴⁸ A few days later, she asked the Attorney General to withdraw his motions seeking execution dates and asked ADOC to begin a full review of execution procedures.³⁴⁹ Alabama would not attempt any additional executions in 2022.

II. PREDICTABLE CONSEQUENCES

The events in Alabama in 2022 are consistent with well-known flaws in the U.S. system of capital punishment. States often complain about delays in implementing capital punishment but are unwilling to recognize that litigation about capital sentencing is a predictable consequence of their own legal systems, limited postconviction review, or flawed execution procedures. This Part focuses on common issues in the four cases described in Part I: non-unanimous jury recommendations for death and judicial overrides, legal representation and resources during capital proceedings, the Supreme Court's response to these issues, and the state's errors in conducting executions.

³⁴³ Second Amended Complaint, *supra* note 158, at 40.

³⁴⁴ *Id.*; Bruenig, *supra* note 330.

³⁴⁵ Second Amended Complaint, *supra* note 158, at 41.

³⁴⁶ *Id.* at 42.

³⁴⁷ *Id.* at 43–44.

³⁴⁸ Bill Britt, *Execution of Kenneth Eugene Smith Halted After Failed Attempt to Find Vein*, ALA. POL. RPTR. (Nov. 18, 2022, 7:48 AM), <https://www.alreporter.com/2022/11/18/execution-of-kenneth-eugene-smith-halted-after-failed-attempt-to-find-vein/> [<https://perma.cc/2EX6-M2EF>].

³⁴⁹ Associated Press, *Alabama Is Pausing Executions After a 3rd Failed Lethal Injection*, NPR (Nov. 21, 2022, 2:36 PM), <https://www.npr.org/2022/11/21/1138357929/alabama-executions-pause-lethal-injection> [<https://perma.cc/67PG-EZQK>].

A. Judges and Juries

There were two overlapping issues that related to the role of the judge and the jury in these four cases. First, every single one of the four men discussed in this Article received a non-unanimous jury recommendation for the death penalty at one point during their capital trials.³⁵⁰ Second, until relatively recently, Alabama compounded this error by permitting judges to override jurors' verdicts. These practices undermine the function of juries and facilitate bias in jury and judicial decision-making. This Section addresses each of these issues in turn.

Most jurisdictions that use capital punishment require juror unanimity in the penalty phase before imposing a sentence of death.³⁵¹ If a jury cannot agree on the sentence, the defendant will automatically receive a life sentence.³⁵² Nineteen of the twenty-seven states that retain the death penalty and the federal government impose an automatic life sentence if a jury cannot unanimously decide to impose the death penalty.³⁵³ Arizona, California, and Kentucky permit either one or multiple retrials of the penalty phase if the jury is not unanimous.³⁵⁴ Nevada permits the judge to either impose life or empanel a new jury for a retrial of the penalty phase.³⁵⁵ Montana and Nebraska use judicial sentencing, but require the jury to find the aggravating factors, which theoretically keeps them in compliance with Supreme Court precedent that requires a jury to find aggravating factors that justify the im-

³⁵⁰ James was re-tried and received a unanimous verdict during his second trial. *See* James v. State, 788 So. 2d 185, 188 (Ala. Crim. App. 2000).

³⁵¹ *See* Richa Bijlani, Note, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. REV. 1499, 1511–12 (2022).

³⁵² *Id.* at 1528 (“In most death penalty jurisdictions, if the jury is unable to reach a verdict during the sentencing phase, the court is required by law to impose a sentence of life without parole.”).

³⁵³ *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings*, DEATH PENALTY INFO. CENT. (Jan. 17, 2018), <https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings> [<https://perma.cc/E9Y6-JHQM>]. The Supreme Court of Florida had held that the Eighth Amendment required “juror unanimity in any recommended verdict resulting in a death sentence.” *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016), *overruled by State v. Poole*, 297 So. 3d 487 (Fla. 2020). Four years later, it reversed. *Poole*, 297 So. 3d at 504. The Supreme Court of Florida’s composition had changed significantly during that time. *See Florida Supreme Court Retracts Jury Unanimity Requirement, Reinstates Non-Unanimous Death Sentence*, DEATH PENALTY INFO. CTR. (Jan. 24, 2020), <https://deathpenaltyinfo.org/news/florida-supreme-court-retracts-jury-unanimity-requirement-reinstates-non-unanimous-death-sentence> [<https://perma.cc/W9X3-RLMV>]. At that time Florida had amended its laws to require jury unanimity to recommend a sentence of death. FLA. STAT. § 921.141(2)(b) (West 2023); *Poole*, 297 So. 3d at 507 (“We acknowledge that the Legislature has changed our state’s capital sentencing law in response to *Hurst v. State*.”).

³⁵⁴ *Life Verdict or Hung Jury?*, *supra* note 353; *Walton v. Arizona*, 497 U.S. 639, 649 (1990); CAL. PEN. CODE, § 190.4(b) (Westlaw current through Ch. 890 2023 Reg. Sess.).

³⁵⁵ *See* NEV. REV. STAT. § 175.556 (2003).

position of a death sentence.³⁵⁶ In Indiana and Missouri, if a jury cannot agree on the punishment, then the judge may choose between life imprisonment or death.³⁵⁷

Alabama, however, expressly permits a capital sentence based on a non-unanimous verdict.³⁵⁸ Until recent changes to Florida's capital punishment scheme, Alabama was the only jurisdiction that allowed the imposition of death sentences based on a nonunanimous jury verdict.³⁵⁹ In Alabama, a recommendation for a life sentence requires a "majority of the jurors."³⁶⁰ A recommendation for death "must be based on a vote of at least 10 jurors."³⁶¹ Reeves, James, Miller, and Smith were all, at one point, sentenced to death based on a ten-to-two jury vote recommending a death sentence.³⁶² In most other capital punishment jurisdictions, three of the four men would not have received a death sentence. In fact, in other states, *most* people sentenced to death in Alabama would not have received the death penalty; the Equal Justice Initiative ("EJI") has determined that "[e]ighty percent of all death sentences in Alabama were nonunanimous."³⁶³

The question of whether imposing a death sentence based on a non-unanimous jury sentencing verdict is one that deserves significant consideration, particularly in light of the Court's embrace of juror unanimity in *Ra-*

³⁵⁶ See Maria T. Kolar, "*Finding*" a Way to Complete the Ring of Capital Jury Sentencing, 95 DENV. L. REV. 671, 700 (2018). Nebraska has a panel of judges determine the sentence; if the panel does not unanimously agree on the sentence, then the defendant receives an automatic life sentence. NEB. REV. STAT. § 29-2522 (Westlaw through 108th Leg. Sess.).

³⁵⁷ MO. REV. STAT. § 565.030(4) (2016); IND. CODE ANN. § 35-50-2-9(f) (Westlaw through July 2023).

³⁵⁸ ALA. CODE 1975 § 13A-5-46(f) (Westlaw through Act 2023-3 of the 2023 First Spec. Sess.; Acts 2023-4 through 2023-491, and 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.); *Supreme Court Holds Jury Verdicts Must be Unanimous in Criminal Cases*, EQUAL JUST. INITIATIVE (Apr. 20, 2020), <https://eji.org/news/supreme-court-holds-jury-verdicts-must-be-unanimous-in-criminal-cases/> [<https://perma.cc/U4T5-KEQY>].

³⁵⁹ In 2023, Florida amended its laws to permit death sentences based on a vote of eight jurors. See Brendan O'Brien, *Florida to Allow Death Penalty With 8-4 Jury Vote Instead of Unanimously*, REUTERS (Apr. 14, 2023, 11:27 AM), <https://www.reuters.com/world/us/florida-allow-death-penalty-with-8-4-jury-vote-instead-unanimously-2023-04-14/> [<https://perma.cc/6EDK-2YV4>].

³⁶⁰ ALA. CODE 1975 § 13A-5-46(f) (Westlaw through Act 2023-3 of the 2023 First Spec. Sess.; Acts 2023-4 through 2023-491, and 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.).

³⁶¹ *Id.*

³⁶² See *Reeves v. Comm'r, Ala. Dep't of Corr.*, 836 F. App'x 733, 735 (11th Cir. 2020), *cert. granted & vacated by* *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (Reeves); *James v. State*, 723 So. 2d 776, 785 (Ala. Crim. App. 1998) (James), *Miller v. Dunn*, No. 2:13-00154-KOB, 2017 WL 1164811, at *6 (N.D. Ala. Mar. 29, 2017) (Miller); *Smith v. Dunn*, No. 2:15-CV-0384-AKK, 2019 WL 4338349, at *1 (N.D. Ala. Sept. 12, 2019) (Smith); *supra* Sections I.A–D.

³⁶³ See *Supreme Court Holds Jury Verdicts Must be Unanimous in Criminal Cases*, *supra* note 358.

mos v. Louisiana and Florida's decision to permit death sentences on an eight-to-four vote.³⁶⁴ While an in-depth discussion of this issue is beyond the scope of this Article, I offer a few observations. First, permitting non-unanimous jury sentencing seems to provide a workaround to Supreme Court precedent like *Witherspoon v. Illinois*, which prohibits the imposition of a death sentence when states exclude jurors who "voice[] general objections to the death penalty or express[] conscientious or religious scruples against its infliction."³⁶⁵ A "*Witherspoon* eligible" may have been swayed by a defendant's mitigating evidence and be unwilling to recommend a death sentence. But nonunanimous jury sentencing means that a state need not worry about whether admitting *Witherspoon*-eligible jurors risks obtaining a death sentence.

Second, permitting nonunanimous jury verdicts is inconsistent with the jury's role in capital sentencing. In *Gregg v. Georgia*, the Supreme Court observed that "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"³⁶⁶ If the imposition of capital punishment "is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death,"³⁶⁷ then nonunanimous verdicts suggest that the representative slice of the community is *not* united in its conclusion that death is the just response to a particular crime.³⁶⁸

Third, nonunanimous capital sentencing cannot be isolated from the racist history of nonunanimous jury verdicts.³⁶⁹ As *Ramos* observed, the states that retained nonunanimous jury verdicts "frankly acknowledged that race was a motivating factor in the adoption of their States' respective non-unanimity rules."³⁷⁰ Louisiana, for example, "sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-

³⁶⁴ See *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). For excellent Student Notes addressing this topic, see generally Bijlani, *supra* note 351; Jennifer Eisenberg, Note, *Ramos, Race, and Juror Unanimity in Capital Sentencing*, 55 LOY. L.A. L. REV. 1085 (2022).

³⁶⁵ *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

³⁶⁶ *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

³⁶⁷ *Gregg*, 428 U.S. at 184.

³⁶⁸ See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 244–45 (2012).

³⁶⁹ See Eisenberg, *supra* note 364 at 1094–95 (discussing the relationship between race and jury qualifications).

³⁷⁰ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020); see also Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1613–20 (2018) (discussing the adoption of non-unanimous jury verdicts).

American juror service would be meaningless.’”³⁷¹ Professor Thomas Frampton has demonstrated that nonunanimous juries are more likely to convict Black defendants than white defendants.³⁷² Race plays a significant role in capital punishment, particularly when the defendant is accused and convicted of killing a white victim.³⁷³ Permitting nonunanimous verdicts in the sentencing phase invites racial bias into jury deliberations with the risk of similar outcomes.³⁷⁴

Alabama currently has 164 people on death row.³⁷⁵ Seventy-eight—approximately 47%—of the people on Alabama’s death row are Black.³⁷⁶ Eighty-four of them are white.³⁷⁷ In reviewing the available data,³⁷⁸ Alabama has executed 225 people since 1927.³⁷⁹ Of that number, 158 of the

³⁷¹ See *Ramos*, 140 S. Ct. at 1394 (quoting *State v. Maxie*, No. 13-CR-72522, at *56–57 (La. 11th Jud. Dist. Oct. 11, 2018)).

³⁷² See Frampton, *supra* note 370, at 1639 (“When a conviction is obtained against a black defendant, there is a 43% chance that the verdict was nonunanimous (or, conversely, a 57% chance the verdict was unanimous). When the convicted defendant is white, there is only a 33% chance the verdict was nonunanimous (and thus a 67% chance the verdict was unanimous).”).

³⁷³ See Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 992–95 (2020) (collecting studies); see also Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 714–15 (2021). See generally Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573 (2012); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119 (2011); David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & SOC. REV. 437 (1984); Hemant Sharma et al., *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee After Gregg v. Georgia*, 2 TENN. J. RACE, GENDER, & SOC. JUST. 1 (2013); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 J. CONST. L. 171 (2001).

³⁷⁴ See Paul Butler, *Mississippi Goddamn: Flowers v. Mississippi’s Cheap Racial Justice*, 2019 SUP. CT. REV. 73, 100 (2019); see also Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698–99 (1985).

³⁷⁵ See *Alabama Inmates Currently on Death Row*, ALA. DEP’T CORR., <http://www.doc.state.al.us/deathrow> [<https://perma.cc/QV2P-MHBV>] (Sept. 22, 2023).

³⁷⁶ *Id.* (77 black males, 1 black female).

³⁷⁷ *Id.* (80 white males, 4 white females.) Alabama also has two men on death row listed as “other,” without identifying their races. *Id.*

³⁷⁸ I have relied primarily on the Death Penalty Information Center’s Execution Database and ADOC’s data, which is why the data I focus on starts with 1927. Available data suggests that Alabama executed 708 people between 1608 and 1972. M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608–2002: THE ESPY FILE (ICPSR 8451), THE UNIV. MICH. INST. FOR SOC. RSCH. 133, <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/8451> [<https://perma.cc/MDL5-BG37>].

³⁷⁹ See *Executions*, ALA. DEP’T CORR., <https://doc.alabama.gov/Executions> [<https://perma.cc/MDL5-BG37>].

people Alabama executed were Black.³⁸⁰ Sixty-seven of the people executed were white.³⁸¹ Over half of the executions of white people took place *after* 1983, when Alabama resumed executions after *Gregg*.³⁸² Alabama has also disproportionately executed Black people for non-homicide offenses. Of the 225 executions since 1927, only *two* white people were executed for a non-homicide offense (rape).³⁸³ By contrast, Alabama executed twenty-nine Black people for non-homicide offences (mostly sexual offenses) since 1927.³⁸⁴

Alabama also displays evidence of another common pattern that illustrates racial disparities in capital punishment: punishing Black defendants more severely for killing white defendants.³⁸⁵ Of the post-1983 executions, only *one* white person was executed for killing a Black person.³⁸⁶ In the same date range, twenty out of the thirty-two executions of Black people were for killing at least one white person.³⁸⁷ Alabama may have executed more white people in recent years, but it and other states with capital punishment cannot escape the racist legacy of the death penalty. The racialized nature of Alabama's capital punishment scheme coupled with the limited approach to judicial investigation of racism in the jury room³⁸⁸ and the ab-

cc/9GMQ-B2U9] (These numbers have not been subjected to a statistical analysis or controlled for other factors.).

³⁸⁰ *See id.*

³⁸¹ *See id.*

³⁸² *Execution Database*, DEATH PENALTY INFO. CTR. <https://deathpenaltyinfo.org/executions/execution-database?state=Alabama&defendant-race=White&federal=No> [<https://perma.cc/LC3G-BW7W>]. The Death Penalty Information Center identifies 39 white people executed in Alabama since 1983. *Id.*

³⁸³ *See Executions*, *supra* note 379. The two white men who were executed for rape, Daniel Reedy and Joseph Hockenberry, escaped from a mental hospital in Washington, D.C., traveled across several states while engaging in many criminal offenses, and attacked a woman and left her for dead. *See Reedy v. State*, 20 So. 2d 528, 529–30, 533 (Ala. 1945); *Hockenberry v. State*, 20 So. 2d 533 (Ala. 1945).

³⁸⁴ *See Executions*, *supra* note 379. (23 for rape, 1 for carnal knowledge, 4 for robbery, and 1 for burglary); *see also* Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 701–702 (1997) (reviewing ERIC. W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT* (1995)).

³⁸⁵ *See* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1415–17 & n.7 (2004) (discussing racial disparity among people executed in the South).

³⁸⁶ *See Execution Database*, *supra* note 382. Henry Hays was a member of the Ku Klux Klan and was executed for the lynching of a nineteen-year-old Black man, Michael Donald. *See* Associated Press, *Klan Member Put to Death in Race Death*, N.Y. TIMES (June 6, 1997), <https://www.nytimes.com/1997/06/06/us/klan-member-put-to-death-in-race-death.html> [<https://perma.cc/AHP9-PRPQ>]. Before executing Hays, Alabama had not executed a white defendant for killing a Black person since 1913. *Id.*

³⁸⁷ *Execution Database*, *supra* note 382.

³⁸⁸ *See* Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CAL. L. REV. 2121, 2122–24 (2021).

sence of unanimity makes it substantially more difficult to address whether racism played a role in a particular death sentence.

Other aspects of Alabama's capital sentencing process invite bias as well. Until 2017, Alabama permitted judges to override jury determinations in capital sentencing.³⁸⁹ Unlike in other jurisdictions, Alabama's judges used judicial overrides to *impose* death sentences.³⁹⁰ The EJI has concluded that, although "African Americans in Alabama constitute 26% of the total population, . . . more than half of the overrides in Alabama have imposed the death penalty on African-American defendants."³⁹¹ The data also reflects that the race of a victim may be relevant in judicial overrides. As the EJI explained,

Each year in Alabama, less than 35% of all murders involve white victims, yet 75% (73) of the cases where judges overrode jury life verdicts to impose death involved white victims. While just 6% of all murders in Alabama involve black defendants and white victims, in 31% of Alabama override cases, the trial judge condemned a person of color to death for killing someone white.³⁹²

Judicial overrides invited arbitrary decision-making. In one case, an Alabama judge imposed a death sentence on a nineteen-year-old defendant because, as he said, "[i]f I had not imposed the death sentence . . . I would have sentenced three black people to death and no white people."³⁹³

Smith was sentenced to death by judicial override: on retrial, his jury voted eleven-to-one in favor of life.³⁹⁴ The state was unable to persuade eleven out of twelve people that Smith deserved to die. A judicial override in a case like Smith's, when only one juror would have sentenced him to death is, like Alabama's nonunanimous verdicts, inconsistent with the jury's role as a representative of community values.³⁹⁵

³⁸⁹ See *Alabama Abolished Judge Override, but Still Seeks to Execute People Who Received Life Verdicts*, EQUAL JUST. INITIATIVE (Nov. 4, 2022), <https://eji.org/news/alabama-abolished-judge-override-but-still-seeks-to-execute-people-who-received-life-verdicts/> [<https://perma.cc/Z4RX-5KUC>].

³⁹⁰ EQUAL JUST. INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 4* (2011); see also *Woodward v. Alabama*, 571 U.S. 1045, 1046 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("In the last decade, Alabama has been the only State in which judges have imposed the death penalty in the face of contrary jury verdicts."); Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255, 1287 (2019).

³⁹¹ JUDGE OVERRIDE, *supra* note 390, at 18.

³⁹² *Id.*

³⁹³ *Id.* at 20 (quoting Sentencing Hearing Transcript, *State v. Waldrop*, No. 98-162 (Randolph Cnty. Cir. Ct. July 25, 2000)).

³⁹⁴ See Sarat, *supra* note 269 and accompanying text.

³⁹⁵ See *Woodward*, 571 U.S. at 1051 (Sotomayor, J., dissenting from denial of certiorari) ("By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes. For example, Alabama judges frequently override jury life-without-parole verdicts even in cases where the jury was unanimous in that verdict. In

Under current Alabama law, Smith would not have received a death sentence.³⁹⁶ When Alabama abolished judicial overrides, the legislature had considered a version of the bill that would permit judges to determine how the statute would apply to people sentenced to death under the old law, but that provision was removed from the bill.³⁹⁷ Retroactivity, however, nearly scrapped the efforts to eliminate judicial overrides.³⁹⁸ While the decision to eliminate judicial overrides corrects one form of injustice going forward, refusing to apply the law retroactively is a manifest injustice.³⁹⁹ But that sort of injustice is endemic to Alabama's capital punishment scheme. Out of the 164 people on Alabama's death row, 144 were sentenced to death by a non-unanimous jury or judicial override.⁴⁰⁰

Nonunanimous juries and judicial overrides provide additional complexity for capital punishment appeals in Alabama. But Alabama's capital punishment system is fueled by other forms of injustice. As the next Section illustrates, Alabama also makes it harder for people facing death sentences to receive adequate representation during trial, appeals, and postconviction proceedings.

B. Legal Representation and Adequate Resources

A consistent problem in capital cases, and one that was present in each of the four cases, is effective legal representation and access to resources.⁴⁰¹ Access to counsel in state capital cases varies significantly by state. This Ar-

many cases, judges have done so without offering a meaningful explanation for the decision to disregard the jury's verdict.”).

³⁹⁶ See Sarat, *supra* note 269.

³⁹⁷ See Britt, *supra* note 348.

³⁹⁸ *Id.* (“That portion of the bill was removed after a filibuster threatened to derail the entire legislation.”).

³⁹⁹ *Cf.* Watkins v. Ackley, 523 P.3d 86, 109 (Or. 2022) (Baldwin, J., concurring) (asserting that nonunanimous jury verdicts in Oregon “undermined the integrity of our judicial system and reduced public confidence in our laws and our system of justice” and the appropriate remedy is to apply *Ramos v. Louisiana* retroactively).

⁴⁰⁰ See Robert Bentley & Don Siegelman, *We Oversaw Executions as Governor. We Regret It*, WASH. POST (May 23, 2023, 6:00 AM), <https://www.washingtonpost.com/opinions/2023/05/23/alabama-governors-death-penalty-regret/> [<https://perma.cc/HP4B-LR98>]. These numbers have been adjusted to reflect the executions of James Barber and Casey McWhorter, both of whom were sentenced to death by nonunanimous juries. See Barber v. Comm’r, Ala. Dep’t of Corr., 861 F. App’x 328, 329 (11th Cir. 2021); see also *Ex Parte McWhorter*, 781 So.2d 330, 332 (Ala. 2000).

⁴⁰¹ See BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 107–08 (2017); see also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836–37 (1994); Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1496 (2021); Corinna Barrett Lain & Douglas A. Ramsey, *Disrupting Death: How Specialized Capital Defenders Ground Virginia’s Machinery of Death to a Halt*, 56 U. RICH. L. REV. 183, 238 (2021); R. Rosie Gorn, Note, *Adequate Representation: The Difference Between Life and Death*, 55 AM. CRIM. L. REV. 463, 464 (2018).

ticle does not argue that the attorneys in Alabama who handle indigent defense or capital cases are unskilled or lack expertise, although Part I illustrates that there are flaws and courts are remarkably willing to excuse those flaws.⁴⁰² Rather, Alabama, like many states, has serious deficits in its system of indigent defense and those deficits are magnified in capital cases.⁴⁰³ “Death penalty representation,” as Professor Lee Kovarsky has observed, “is largely indigent representation, so almost every death-sentenced prisoner will receive legal services from pro bono counsel, an institutional defender, or a court-appointed lawyer.”⁴⁰⁴ Inadequate indigent defense can severely impact capital cases, which are more complex and require special training.

Alabama does not have a state public defender system, although it does have an Office of Indigent Defense Services.⁴⁰⁵ Each judicial circuit in Alabama has an “Indigent Defense Advisory Board” that “determine[s] the method of delivering indigent defense services to be used in its respective circuit.”⁴⁰⁶ These boards can decide whether to use “appointed counsel, contract counsel, or public defenders or a combination of any of these.”⁴⁰⁷ Some boards have chosen to create public defender offices—but not all.⁴⁰⁸ Alabama relies substantially on appointed counsel to represent indigent defend-

⁴⁰² See Alexis Hoag-Fordjour, *White is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 827, 829–30 (2023) (“The ineffective assistance of counsel standard prioritized and preserved defense counsel’s professional reputation at the expense of the defendant’s constitutional right to effective representation.”).

⁴⁰³ See GARRETT, *supra* note 401, at 130; see also John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. UNIV. L. REV. 253, 254 (2017); Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 334 (2012); Erica J. Hashimoto, *Assessing the Indigent Defense System*, AM. CONST. SOC’Y, 1–2 (2010), <https://www.acslaw.org/wp-content/uploads/2010/09/Hashimoto-Indigent-Defense.pdf> [<https://perma.cc/A2RX-NHZM>]; Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 429 (2009); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 339, 343 (2006); Avery Livingston, *Ignoring Those Who Cannot Pay: Addressing Inadequate Defense for Indigent Defendants*, AL.COM (June 12, 2017, 3:52 PM), https://www.al.com/opinion/2017/06/ignoring_those_who_cannot_pay.html [<https://perma.cc/TG8W-CVAQ>]; Norman Lefstein, *A Broken Indigent Defense System: Observations and Recommendations of a New National Report*, ABA (Apr. 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/a_broken_indigent_system_observations_and_recommendations_of_a_new_national_report/ [<https://perma.cc/XV62-FJHQ>].

⁴⁰⁴ Kovarsky, *Delay*, *supra* note 84, at 1372–73.

⁴⁰⁵ See Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama’s Capital Defense Problems: It’s a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 3 (1992); see also ALA. ADMIN. CODE § 355-9-1-.01 (2015); Livingston, *supra* note 403.

⁴⁰⁶ ALA. ADMIN. CODE § 355-9-1.08(1) (2016).

⁴⁰⁷ *Id.*; ALA. CODE § 15-12-40 (Westlaw through end of 2023 First Spec., Reg., and Second Spec. Sess.) (“The indigent defense advisory board may establish a public defender office as a method to provide indigent defense services within a circuit or any part thereof.”).

⁴⁰⁸ See Livingston, *supra* note 403.

ants.⁴⁰⁹ Alabama has capped fees for appointed counsel in most indigent defense matters, ranging from \$4,000 in Class A felony cases to \$1,500 in “all other cases.”⁴¹⁰ Attorneys must seek advance approval for fees and expenses of any experts or investigators from the trial court.⁴¹¹

Some states have centralized capital defense offices.⁴¹² Alabama does not.⁴¹³ The Office of Indigent Defense Services has set standards for attorneys who handle capital cases, regardless of whether they are appointed or public defenders.⁴¹⁴ To act as lead counsel in a capital case in Alabama, an attorney must have five years of “criminal litigation experience,” familiarity with state rules of professional conduct, criminal practice and procedure in Alabama, and be “familiar with capital jurisprudence established by the U.S. Supreme Court and the Supreme Court of Alabama.”⁴¹⁵ Attorneys must also have either “litigated a capital case to verdict, hung jury, or plea as associate counsel, or have litigated four (4) homicide cases to verdict, hung jury, or plea;” have “substantial familiarity with, and experience in the use of, expert witnesses and scientific and medical evidence in litigation;” and complete “at least ten (10) hours of capital defense related continuing legal education every two (2) years.”⁴¹⁶ Associate counsel for Alabama capital cases need only three years of “criminal litigation experience;” must have “participated as trial counsel in at least four (4) jury trials to verdict or hung jury;” must have “substantial familiarity with, and experience in the use of, scientific and medical evidence in litigation;” and must “complete a capital murder seminar every two (2) years.”⁴¹⁷

Access to vital legal experts and investigators requires approval from a trial judge before experts or investigators can provide services.⁴¹⁸ Appointed counsel’s fee is \$70 per hour.⁴¹⁹ Alabama does not cap the total fee for appointed counsel in cases “where the original charge is a capital offense or a

⁴⁰⁹ *See id.*

⁴¹⁰ ALA. CODE § 15-12-21(d) (2023).

⁴¹¹ *Id.*

⁴¹² Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 720–21 (2017) (discussing the creation of North Carolina’s Office of the Capital Defender).

⁴¹³ *See Alabama’s Death Penalty*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/alabama-death-penalty/> [https://perma.cc/LNU9-6XH6]; *see also* Desai & Garrett, *supra* note 390, at 1267 (“[L]eading death penalty states, like Alabama and Florida, still do not have any trial resources at the state level for capital defense . . .”).

⁴¹⁴ *See* ALA. ADMIN. CODE § 355-9-1-.08(b)–(c) (2023).

⁴¹⁵ ALA. ADMIN. CODE § 355-9-1-.08 (b)(1)–(2) (2023).

⁴¹⁶ ALA. ADMIN. CODE § 355-9-1-.08 (b)(3)–(5) (2023).

⁴¹⁷ ALA. ADMIN. CODE § 355-9-1-.08 (c)(1)–(5) (2023).

⁴¹⁸ ALA. ADMIN. CODE § 355-9-1-.07 (2015).

⁴¹⁹ ALA. CODE § 15-12-21(d) (Westlaw current through end of 2023 First Spec., Reg., and Second Spec. Sess.) (“The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of seventy dollars (\$70) per hour for time reasonably expended on the case.”).

charge which carries a possible sentence of life without parole.”⁴²⁰ This, however, is a relatively new development—Alabama used to pay capital defense attorneys “only twenty dollars per hour for any work done out of court and forty dollars per hour for in-court activity,” and capped out-of-court fees at \$1,000.⁴²¹ Alabama eliminated the caps in 1999,⁴²² but the EJI has determined that “[n]early half of the people currently on Alabama’s death row were convicted under this compensation cap.”⁴²³ Although there are resources to assist attorneys such as EJI’s capital defense manual,⁴²⁴ capital trials are complex, time-consuming, and require specialized knowledge and expertise.⁴²⁵

Three of the men discussed in this Article—Reeves, James, and Smith—were sentenced to death before or in 1999 and were represented by appointed counsel.⁴²⁶ All four of the men asserted that they received ineffective assistance of counsel for various reasons, including the failure to properly investigate and present mitigating evidence. In Reeves’s case, the failure to investigate and present mitigating evidence of his intellectual disability was devastating, something the Eleventh Circuit recognized before the Supreme Court summarily reversed.⁴²⁷ James’s attorneys also failed to conduct a thorough mitigation investigation that might have helped their client.⁴²⁸ During federal habeas, James challenged the constitutionality of compensation caps as interfering with his right to effective assistance of counsel, due process, and equal protection because funding caps limited his attorneys’ ability to investigate mitigation evidence and retain experts.⁴²⁹ Alabama courts, as the district court observed, had consistently concluded that the \$1,000 cap for out-of-court work was constitutional because lawyers are supposed to work

⁴²⁰ ALA. STAT. § 15-12-21(d)(1) (2023).

⁴²¹ Friedman & Stevenson, *supra* note 405, at 4–5, n.20.

⁴²² H. B. 53, Reg. Sess. 1999 (Ala. 1999); *see also* *Maples v. Thomas*, 565 U.S. 266, 272 n.2 (2012).

⁴²³ *Alabama’s Death Penalty*, *supra* note 413.

⁴²⁴ *See New Alabama Capital Defense Trial Manual Now Available*, EQUAL JUST. INITIATIVE (Sept. 28, 2017), <https://eji.org/news/trial-manual/> [<https://perma.cc/K6HD-9E-VH>].

⁴²⁵ *See* Gary Davis, *Death Penalty Mitigation: Humanizing the Hatred*, PUB. DEFS. (Mar. 14, 2017 12:59 PM), https://www.publicdefenders.us/blog_home.asp?display=520 [<https://perma.cc/EM8A-M29X>].

⁴²⁶ *Smith v. State*, 588 So. 2d 561, 580 (Ala. Crim. App. 1991) (appointed counsel); *Reeves v. Comm’r, Ala. Dep’t of Corr.*, 836 F. App’x 733, 735 (11th Cir. 2020) (appointed counsel); *James v. Warden*, 957 F.3d 1184, 1187 (11th Cir. 2020) (appointed counsel). Miller was sentenced to death in 2000, but was represented by appointed counsel, who presumably would have been impacted by the state’s fee caps for part of the representation. *See Miller v. State*, 99 So. 3d 349, 364 (Ala. Crim. App. 2011).

⁴²⁷ *See Reeves v. Comm’r, Ala. Dep’t of Corr.*, 836 F. App’x 733, 751–52 (11th Cir. 2020).

⁴²⁸ *See Hoag*, *supra* note 401, at 1541–42.

⁴²⁹ *James v. Culliver*, No. CV-10-S-2929-S, 2014 WL 4926178, at *145 (N.D. Ala. Sept. 30, 2014).

hard for their clients even if they do not receive adequate compensation.⁴³⁰ This may be true, but it ignored substantial evidence that appointment caps and low fees have been frequently linked to inadequate representation.⁴³¹ The district court also pointed out that on June 10, 1999, Alabama's legislature had passed a law removing the cap—but James was convicted of capital murder on June 16, 1999.⁴³² James's penalty hearing began *the next day*.⁴³³ This weak analysis also ignored the fact that legislation typically has a different *effective* date than the date it is passed; in this case, the legislation went into effect on October 1, 2000.⁴³⁴ This error is unsurprising—Alabama courts *also* noted this change when denying relief without explaining how increased fees in the future could resolve a defendant's current claims.⁴³⁵ The district court also pointed out that James had not specifically shown a link between inadequate funding and his attorneys' failure to investigate mitigation.⁴³⁶ Even though courts signaled their disapproval of the scope of James's attorneys' mitigation investigation, they focused on prejudice, rather than evaluating whether that performance was deficient.⁴³⁷

While a defendant may receive better representation during direct appeals and postconviction proceedings, it is also possible to receive ineffective assistance of counsel during that process, which puts a defendant at a severe disadvantage during subsequent habeas proceedings.⁴³⁸ There is no constitutional right to counsel during state postconviction proceedings.⁴³⁹ Most states do provide lawyers during initial postconviction proceedings, but not Alabama.⁴⁴⁰ Alabama judges may appoint a lawyer for postconviction pro-

⁴³⁰ See *id.* at *146 (citing *Ex parte Grayson*, 479 So. 2d 76, 78–80 (Ala. 1985)).

⁴³¹ Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 377 (1993); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1454–55 (1999); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & CONTEMP. PROBS. 31, 48 (1995); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 194–97 (2012).

⁴³² See *James*, 2014 WL 4926178, at *2, *147.

⁴³³ *Id.* at *2.

⁴³⁴ H. B. 53, 1999 Leg., Reg. Sess. (Ala. 1999); *McWhorter v. State*, 781 So. 2d 257, 306–07 (Ala. Crim. App. 1999) (identifying October 1, 2000, as the effective date for fee changes for appointed counsel).

⁴³⁵ See *McWhorter*, 781 So. 2d at 306–07.

⁴³⁶ *James*, 2014 WL 4926178, at *147.

⁴³⁷ See *James v. Warden*, 957 F.3d 1184, 1191 (11th Cir. 2020).

⁴³⁸ *Martinez v. Ryan*, 566 U.S. 1, 10–11 (2012) (“When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. And if counsel’s errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner’s claims.”).

⁴³⁹ *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

⁴⁴⁰ *Kovarsky*, *supra* note 84, at 1375, n.360.

ceedings if it “appears to the court that the indigent defendant is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the indigent defendant.”⁴⁴¹ The complexity of postconviction proceedings means that effective counsel is essential to protect these defendants’ rights. These appointed attorneys are compensated, but their compensation is also capped.⁴⁴² While people on state death rows will receive new attorneys when federal habeas proceedings start, that may not make up for the deficiency in earlier representation.⁴⁴³ This, in turn, makes postconviction litigation more complex, leading to more delays.

Access to counsel was also important in selecting a method of execution after Alabama changed its law in 2018. During the period in which people on death row could pick nitrogen gas, federal public defenders went to Holman on June 26, met with their clients, and discussed the change in the law.⁴⁴⁴ They supplied their clients with a form they could use to elect nitrogen gas as a method of execution.⁴⁴⁵ Most of the people who selected nitrogen gas were represented by the federal defenders, though not all were.⁴⁴⁶ The Attorney General agreed not to seek execution dates for people who picked nitrogen gas as a method of execution.⁴⁴⁷ Other people on death row may not have had attorneys, although even if they had been represented, there may not have been time to consult with their lawyers because ADOC distributed and collected the forms the same day and kept the residents of death row locked up for twenty-three hours per day.⁴⁴⁸ In a dissent from the Supreme Court’s decision to vacate a stay of execution in Christopher Price’s case, Justice Breyer pointed out that “it appears no inmate received a copy of the election form . . . until June 26” leading to the conclusion that, although the law provided the people on death row a month to decide, Price (and

⁴⁴¹ ALA. CODE § 15-12-23 (Westlaw current through Act 2023-3 of 2023 First Spec. Sess.; Acts 2023-4 through 2023-491, and 2023-493 through 2023-561 of 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of 2023 Second Spec. Sess.).

⁴⁴² *See id.*

⁴⁴³ Kovarsky, *Delay*, *supra* note 84, at 1376–77; Shinn v. Ramirez, 142 S. Ct. 1718, 1727 (2022) (“A federal habeas court generally may consider a state prisoner’s federal claim only if he has first presented that claim to the state court in accordance with state procedures.”).

⁴⁴⁴ *See* Miller v. Hamm, No. 2:22-cv-506-RAH, 2022 WL 4348724, at *2 (M.D. Ala. Sept. 19, 2022).

⁴⁴⁵ *See id.* at *3. This was the form that Holman’s warden copied and had distributed to all prisoners. *Id.*

⁴⁴⁶ *See* Price v. Comm’r, Dep’t. Corr., 920 F.3d 1317, 1324 (11th Cir. 2019).

⁴⁴⁷ *See* James v. Att’y Gen., No. 22-12345 & 12346, 2022 WL 2952492, at *4 (11th Cir. 2022).

⁴⁴⁸ *See* Miller, 2022 WL 4348724, at *5.

presumably others) received “no more than 72 hours to decide how he wanted to die.”⁴⁴⁹

In James’s case and others, the Eleventh Circuit glossed over the arbitrariness of ADOC’s form delivery, because James had counsel and could have asked for an explanation.⁴⁵⁰ Access to counsel and an opportunity to consult helped at least one person on death row navigate ADOC’s disorganized distribution and collection of the form. ADOC was unable to find Jarrod Taylor’s election form, but Taylor’s lawyer provided documents supporting Taylor’s assertion that he had elected nitrogen gas—leading the Attorney General to withdraw his motion for an execution date.⁴⁵¹ The fact that most of the people who opted for nitrogen gas were represented by counsel who visited and consulted with them suggests that they were better able to understand their options and the potential costs or benefits of selecting a different method of execution than lethal injection.

Access to counsel is critical in every stage of a capital case—even during executions.⁴⁵² Research shows that improving the quality of capital defense resources leads to a decline in the death penalty.⁴⁵³ Before Virginia abolished the death penalty, it had established Capital Defender Offices that proved remarkably adept at avoiding the death penalty for their clients through skilled, zealous advocacy.⁴⁵⁴ Professor Brandon Garrett has concluded that statewide capital defense offices staffed by specialists help explain why capital punishment has declined more steeply in jurisdictions that have such offices than those that do not.⁴⁵⁵

The inadequate funding and support in turn may increase the number of claims that arise during postconviction, complicating judicial review of capital cases—or making it harder to bring those claims. Alabama’s shameful history of inadequate funding and support for capital defendants, and its outlier status in providing postconviction legal assistance makes it more likely that the people Alabama has sentenced to death are not “those who commit the worst crimes, but . . . those who have the misfortune to be assigned the worst lawyers.”⁴⁵⁶

⁴⁴⁹ *Dunn v. Price*, 139 S. Ct. 1312, 1315 (2019) (Breyer, J., dissenting from grant of application to vacate stay).

⁴⁵⁰ *James*, 2022 WL 2952492, at *7.

⁴⁵¹ *See Miller*, 2022 WL 4348724, at *3.

⁴⁵² *See Bright*, *supra* note 401, at 1882; *see also infra* notes 595–605 (discussing counsel’s presence during executions).

⁴⁵³ GARRETT, *supra* note 401, at 111–13.

⁴⁵⁴ *See Lain & Ramseur*, *supra* note 401, at 251–97 (discussing capital defender practices in Virginia).

⁴⁵⁵ *See Garrett*, *The Decline of the Virginia (and American) Death Penalty*, *supra* note 412, at 669.

⁴⁵⁶ *Bright*, *supra* note 401, at 1883.

C. *Judicial Abdication*

The Supreme Court's response to the warrant litigation in these cases should also raise alarms. Professor Kovarsky's analysis of the 2020 and 2021 federal executions concluded that the consequences of the Supreme Court's decisions are likely to have significant impact on end-stage state capital litigation.⁴⁵⁷ As he explains, "the Supreme Court continued to raise the bar for challenges to lethal injection protocols, and its decisions projected a spiking hostility to end-stage litigation of all kinds—even when the prisoner is largely blameless for the eleventh-hour activity."⁴⁵⁸ The events in Alabama in 2022 have borne out Professor Kovarsky's analysis and signal that the Court may be willing to go even farther even when lower courts grant relief. The method-of-execution litigation in these cases involved claims that either could not have been brought earlier or did not come into being until Alabama's own execution errors caused claims to accrue.

Three of the four men—Reeves, Miller, and Smith—received stays of execution from lower courts. Reeves's case demonstrates the Court's hostility towards capital sentence litigation at multiple stages. First, the Supreme Court summarily issued an opinion rejecting Reeves's ineffective assistance of counsel claims without oral argument and minimal briefing.⁴⁵⁹ Then the Court lifted the Eleventh Circuit's injunction and allowed Reeves's execution to proceed even though Reeves brought his ADA claim well before his execution date and the district court had made ample findings supporting Reeves's claim.⁴⁶⁰

Similarly, Miller provided uncontested testimony that a district court found credible.⁴⁶¹ The Eleventh Circuit was *again* convinced and properly deferred to the district court's findings of fact that ADOC did not challenge.⁴⁶² After James's execution, Miller's concerns about IV errors carried greater urgency. But the Supreme Court vacated Miller's stay without explanation, leading to a botched execution attempt and putting Miller through an ordeal that he need not have experienced.⁴⁶³

Smith could not have brought his method-of-execution claims until shortly before his execution date because his claims arose from ADOC's ongoing errors. In his concurrence in *Louisiana ex rel. Francis v. Resweber*, Justice Felix Frankfurter posited that repeated execution errors might rise to

⁴⁵⁷ See Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 674 (2022).

⁴⁵⁸ *Id.*

⁴⁵⁹ See *supra* notes 65–69 and accompanying text.

⁴⁶⁰ See *supra* notes 92–97, 101–05 and accompanying text.

⁴⁶¹ See *supra* note 229 and accompanying text.

⁴⁶² See *supra* notes 237–39 and accompanying text.

⁴⁶³ See *supra* notes 242–51 and accompanying text.

the level of an Eighth Amendment violation.⁴⁶⁴ The Supreme Court has held that to make out a viable Eighth Amendment method-of-execution claim, a person must show a severe risk of pain and suffering associated with the method such that corrections officials are on notice and to act otherwise would be deliberately indifferent, and an alternative method that would alleviate the anticipated pain and suffering.⁴⁶⁵ *Baze v. Rees* specifically contemplated that a series of “abortive” execution attempts would “demonstrate an ‘objectively intolerable risk of harm’ that officials may not ignore.”⁴⁶⁶ By the time the Supreme Court received Alabama’s request to lift the stay, ADOC had *two* recent botched executions with evidence of severe pain and suffering, and an alternative method—nitrogen gas—that would minimize the risk that Smith would experience prolonged and repetitive needle sticks.⁴⁶⁷ And yet, again without explanation, the Supreme Court gave Alabama the go-ahead to execute Smith.⁴⁶⁸

The Court’s silence does not explain why a majority of the Justices thought the executions, especially Smith’s, should go forward.⁴⁶⁹ One possible explanation is that the Court, like Judge Grant, concluded that Smith’s claims were time-barred. But Judge Grant’s position is illogical. Courts will typically not stay an execution based on one prior error.⁴⁷⁰ Smith’s argu-

⁴⁶⁴ See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) (“The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions.”).

⁴⁶⁵ See *Baze v. Rees*, 553 U.S. 35, 49–50 (2008) (plurality); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

⁴⁶⁶ *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 (1994)).

⁴⁶⁷ See *Smith v. Comm’r, Ala. Dep’t of Corr.*, No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022).

⁴⁶⁸ See *supra* notes 323–27 and accompanying text.

⁴⁶⁹ See Kovarsky, *The Trump Executions*, *supra* note 457, at 673 (“The Supreme Court’s insistence on using shadow-docket orders vacating preliminary relief means that, for most issues, one cannot know whether the rulings were based on the merits, a harm assessment, an evolving presumption against end-stage relief, or something else.”); see also *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 10 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. Tex. Sch. L.), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [<https://perma.cc/Y8J7-L263>] (emphasizing that shadow docket rulings “are causing significant uncertainty both in lower courts and among those government officers, lawyers, and court-watchers left to parse what, exactly, these rulings portend both for the specific policies at issue and for the broader contours of the relevant legal doctrines”); Will Baude, *Death and the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), <https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket/> [<https://perma.cc/BP92-CHZ6>] (observing that because two death penalty cases involving access to spiritual advisor claims were dealt with on the “shadow docket,” there is limited information about why the Court or certain justices reached particular conclusions).

⁴⁷⁰ See *Glossip v. Gross*, 576 U.S. 863, 892–93 (2015) (rejecting arguments that botched midazolam executions were probative of the risk of pain in executions using midazolam);

ments for a severe risk of pain arose from ADOC's conduct during James's execution and Miller's attempted execution. ADOC's attempted execution of Doyle Hamm could not have put *anyone* on notice as he suffered from serious medical conditions that Smith and the other men ADOC attempted to kill in 2022 did not.⁴⁷¹ To argue that one failed execution nearly four years earlier could put someone on notice of a botch when courts would certainly not find that execution to show the risk was substantial seems to foreclose virtually any challenge like Smith's. Courts reject evidence of a single, unique botch as probative of risks of pain.⁴⁷² While a single botched execution may not rise to the level of an Eighth Amendment violation due to an absence of intent to cause suffering,⁴⁷³ in Smith's case ADOC had to have known that there was a risk of a botch.⁴⁷⁴

The Supreme Court's response to these cases has been an abdication of the judiciary's responsibility to protect constitutional rights. Although the Court has left the Eleventh Circuit decision that concluded that Smith had a viable Eighth Amendment claim in place, a majority of the justices were still willing to let his execution go forward.⁴⁷⁵

Vacating stays without explanation is inconsistent with the Court's "established practice."⁴⁷⁶ The Court's willingness to defer to a state's interest in conducting executions means that it is willing to ignore violations of individual rights in favor of state sovereignty.⁴⁷⁷ This is part of an alarming trend in which the Court prioritizes state sovereign interests at the expense of fundamental rights protections—and ignores state sovereign interests that conflict with the Court's policy preferences,⁴⁷⁸ or at the least, appears indif-

see also Smith v. Hamm, No. 22-CV-497-RAH, 2022 WL 16842050, at *6 (M.D. Ala. Nov. 9, 2022).

⁴⁷¹ See Liliana Segura, *Another Failed Execution: The Torture of Doyle Lee Hamm*, INTERCEPT (Mar. 3, 2018, 9:58 AM), <https://theintercept.com/2018/03/03/doyle-hamm-alabama-execution-lethal-injection/> [<https://perma.cc/J2CZ-FBPB>] (discussing Doyle Hamm's complicated medical history, which included cancer and a history of drug use that affected venous access); *see also* Second Amended Complaint, *supra* note 158, at 45–46 (Smith's second amended complaint discussing Alabama's attempt to execute Doyle Hamm).

⁴⁷² *See Glossip*, 576 U.S. at 893.

⁴⁷³ *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *see also* Estate of Lockett v. Fallin, 841 F.3d 1098, 1110 (10th Cir. 2016).

⁴⁷⁴ *See supra* notes 335–43 and accompanying text (discussing the observers that Smith described in his second amended complaint).

⁴⁷⁵ *See Hamm v. Smith*, 143 S. Ct. 1188, 1189 (2023) (Thomas, J., dissenting from denial of certiorari).

⁴⁷⁶ Kovarsky, *The Trump Executions*, *supra* note 457, at 660–63 (discussing the Court's break from longstanding procedure during the federal execution spree in 2020 and 2021).

⁴⁷⁷ *See* Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 994–95 (2016).

⁴⁷⁸ *See* Al Kauffman, *Commentary: With Recent Rulings, an 'Activist Court' Sets Other Liberties in its Sights*, SAN ANTONIO EXPRESS-NEWS, <https://www.expressnews.com/opinion/commentary/article/rulings-activist-supreme-court-17279404.php> [<https://perma.cc/>

ferent to the risk that its actions appear to be driven by policy preferences.⁴⁷⁹

While the lower federal courts in all of these cases were willing to grant relief, the Supreme Court has made it clear that it is unwilling to allow that relief to stand. Therefore, even if courts are reluctant to apply the “context-free presumption against all end-stage claims,” the Supreme Court will do it for them.⁴⁸⁰ It seems that Justice Sotomayor was correct when she predicted that relief will *never* be available to those facing execution.⁴⁸¹ The increasing frequency of botched executions should raise even more alarms about the Court’s disinterest in vindicating constitutional rights and the future of the Eighth Amendment.

D. Incompetent Execution

Alabama’s execution challenges in 2022 were the most visible because it botched three out of its four executions. But Alabama was not the only state that had difficulty conducting executions. Texas’s executioners had problems accessing Stephen Barbee’s veins due to severe joint deterioration that made it difficult for him to straighten his arms, leading to an unusually long execution and an IV in his neck.⁴⁸² Arizona, which had not executed anyone since 2014, when it botched Joseph Wood’s execution, also struggled with IV access in all three of the executions it carried out this year.⁴⁸³ States are carrying out fewer executions than ever, and botching more executions.⁴⁸⁴

VVA7-ZT2A] (July 1, 2022, 12:39 PM) (discussing the October 2021 Supreme Court term and observing, “[t]he court deferred to state control when the states want to do what the court apparently wants. The court gave no deference to the states when the states want to do something the court seemingly does not want”).

⁴⁷⁹ See VLADECK, *supra* note 86, at 20–21, 127–28 (discussing the impact of shadow-docket rulings on public perception of the Supreme Court’s legitimacy).

⁴⁸⁰ Kovarsky, *The Trump Executions*, *supra* note 457, at 678.

⁴⁸¹ See *Dunn v. Reeves*, 141 S. Ct. 2405, 2421 (2021) (Sotomayor, J., dissenting); see also Kovarsky, *The Trump Executions*, *supra* note 457, at 677–78 (discussing the “spillover” effects from the Supreme Court’s shadow-docket practices).

⁴⁸² Jolie McCullough, *Texas’ Execution of Stephen Barbee was Prolonged While Officials Searched for a Vein*, TEX. TRIB., <https://www.texastribune.org/2022/11/16/texas-execution-Stephen-Barbee-tarrant-county/> [<https://perma.cc/T3XV-UH7X>] (Nov. 16, 2022, 8:00 P.M.).

⁴⁸³ See Andi Babineau & Elizabeth Wolfe, *Arizona Prisoner Clarence Dixon Executed Nearly 8 Years After the State’s Last Execution was Botched*, CNN <https://www.cnn.com/2022/05/11/us/arizona-clarence-dixon-execution/index.html> [<https://perma.cc/WYK4-SR9Q>] (May 11, 2022, 11:11 PM); see also *supra* notes 11–12 and accompanying text.

⁴⁸⁴ See *The Death Penalty in 2022*, *supra* note 1, at 2 (“Seven of the 20 execution attempts were visibly problematic—an astonishing 35%—as a result of executioner incompetence, failures to follow protocols, or defects in the protocols themselves.”). Professor Austin Sarat calculated that states have botched approximately 7.12% of lethal injections from the time they started using it until 2010. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 177–78 (2014); see Berger, *Gross Error*, *supra* note 477, at 985 (suggesting that “Professor Sarat’s calculation may be on the

Alabama's challenges are not unique—rather they demonstrate the widespread problems associated with executions.

There is no one answer for why states botch lethal injection executions. People being executed are older and typically have more health conditions that may make it difficult to access veins.⁴⁸⁵ States have not conducted as many executions in recent years and may be out of practice.⁴⁸⁶ Execution teams may be inexperienced or lack adequate training, and many states lack experienced medical personnel on execution teams.⁴⁸⁷ Executioners may not follow the state's protocol; in Tennessee, execution team members did not comply with the protocol's requirement to test execution drugs for contaminants that could trigger a painful execution.⁴⁸⁸ States may not have adequate protocols, or rely on protocols that carry heightened risks of error.⁴⁸⁹ The answer is probably a combination of these factors, but the secrecy surrounding executions complicates matters.

Intravenous access was a significant problem in botched executions nationally in 2022.⁴⁹⁰ Alabama's protocol calls for the execution team to insert a central line if it is unable to achieve IV access, but the execution team did

low side, given that most lethal injection executions include a paralytic that conceals the inmate's pain”).

⁴⁸⁵ See *One Execution, One Reprieve: Scheduled Executions of Oldest Death-Row Prisoners in Texas and Tennessee Illustrate Aging of Death Row*, DEATH PENALTY INFO. CTR., (Apr. 22, 2022), <https://deathpenaltyinfo.org/news/one-execution-one-reprieve-schedule-d-executions-of-oldest-death-row-prisoners-in-texas-and-tennessee-illustrate-aging-of-death-row> [https://perma.cc/6V2L-AKUD]; see also Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should be Deemed Too Old to Execute*, 77 BROOK. L. REV. 1089, 1093–94 (2012) (discussing the elderly population on death rows). Professor Austin Sarat points out that the claims about past drug use and vein access “shifts blame for the botch from the state to the condemned.” SARAT, *supra* note 484, at 171.

⁴⁸⁶ See Maurice Chamah & Keri Blakinger, *How Coronavirus is Disrupting the Death Penalty*, MARSHALL PROJECT. (Mar. 23, 2020, 8:35 PM), <https://www.themarshallproject.org/2020/03/23/how-coronavirus-is-disrupting-the-death-penalty> [https://perma.cc/V846-SVCB]; see also Jeff Amy, *Georgia Court: State Must Honor Pledge to Delay Executions*, AP (Dec. 20, 2022, 3:32 PM), <https://apnews.com/article/georgia-covid-ae3dc1efba0000de47926d6b8eeea99a> [https://perma.cc/Y8S8-JAYW]; Jordan S. Rubin, *Executions Hit Three-Decade Low as Biden Pushes Federal Pause*, BLOOMBERG L. (Dec. 15, 2021, 9:02 PM), <https://news.bloomberglaw.com/us-law-week/executions-hit-three-decade-low-as-biden-pushes-federal-pause> [https://perma.cc/4NVM-PQ7R].

⁴⁸⁷ Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2039–40 (2011); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 117–18 (2007).

⁴⁸⁸ Yang, *supra* note 16.

⁴⁸⁹ See Berger, *Gross Error*, *supra* note 477, at 985; see also Eric Berger, *Evolving Standards of Lethal Injection*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 234–35, 237–39 (Meghan J. Ryan & William W. Berry III eds., 2020).

⁴⁹⁰ See Jimmy Jenkins, *States Under Scrutiny for Recent Lethal Injection Failures*, AZCENTRAL, <https://www.azcentral.com/story/news/local/arizona/2022/11/22/arizona-and-others-under-scrutiny-for-recent-lethal-injection-failures/69667483007/> [https://perma.cc/L9JR-6DJQ] (Nov. 23, 2022, 7:57 AM).

not attempt a central line in any of the executions except Smith's.⁴⁹¹ Arizona executioners spent forty minutes attempting to insert an IV in Clarence Dixon, eventually inserting a catheter into his femoral vein.⁴⁹² Arizona had to use the same procedure on Murray Hooper.⁴⁹³ Unlike Alabama, Arizona has minimum qualifications for its IV team; the 2017 Arizona Execution Protocol requires them to be "currently certified or licensed within the United States to place IV lines."⁴⁹⁴ Journalists in Arizona reported, however, that there does not appear to be any certification or license to specifically insert IVs or femoral central lines.⁴⁹⁵ There was no publicly available information about the training or qualification of any member of Alabama's IV team that participated in Alabama's three botched executions, including the team member who attempted to put a central line in Smith's chest.

Execution teams train and practice, although trainings do not always replicate the high-stress environment of an execution and training varies widely across jurisdictions. Arizona, for example, provides that "IV team members shall only be required to participate in the training sessions scheduled for one day prior to the actual execution."⁴⁹⁶ A retired member of Arizona's execution team reported to journalists that he learned to administer IVs on a "prosthetic arm" and other corrections officers.⁴⁹⁷ Alabama's execution protocol indicates that execution teams "walk through the steps of the execution" during the week leading up to the execution.⁴⁹⁸ While Alabama's protocol requires twice-monthly testing of the electric chair, the protocol

⁴⁹¹ See EXECUTION PROCEDURES: CONFIDENTIAL 15 (2019), <https://files.deathpenaltyinfo.org/documents/AL-Execution-Protocol-April-2019.pdf> [<https://perma.cc/4TXL-YA6A>] [hereinafter ALABAMA EXECUTION PROCEDURES]; see also ASSOCIATED PRESS, *Alabama Says Delay in Execution Caused By IV Line Issue*, NEWS4 (July 30, 2022, 2:47 PM), <https://www.wtvv.com/2022/07/30/alabama-says-delay-execution-caused-by-iv-line-issue/> [<https://perma.cc/V3HR-BHU7>]; *supra* notes 247–266 and accompanying text (discussing ADOC's attempt to execute Alan Miller). A central line is a tube that is typically inserted into a vein in a person's chest that is commonly used when a person needs regular treatment with intravenous medications for long periods of time. See *Central Venous Access Port Placement or Removal*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/imaging/exams-and-procedures/interventional-radiology-procedures> [<https://perma.cc/E5QX-MCLG>].

⁴⁹² Jenkins, *supra* note 490.

⁴⁹³ *Id.*

⁴⁹⁴ ARIZ. DEP'T OF CORR., DEPARTMENT ORDER MANUAL: EXECUTION PROCEDURES 6 (2017) <https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/ArizonaProtocol01.11.2017.pdf> [<https://perma.cc/RP8K-428U>] [hereinafter ARIZONA EXECUTION PROCEDURES]. Arizona's IV team must "consist of any two or more of the following: physician(s), physician assistant(s), nurse(s), emergency medical technician(s) (EMT's), paramedic(s), military corpsman or other certified or licensed personnel including those trained in the United States Military." *Id.*

⁴⁹⁵ Jenkins, *supra* note 490.

⁴⁹⁶ ARIZONA EXECUTION PROCEDURES, *supra* note 494, at 6.

⁴⁹⁷ Jenkins, *supra* note 490.

⁴⁹⁸ ALABAMA EXECUTION PROCEDURES, *supra* note 491, at 3.

does not provide any information about IV team training and practice.⁴⁹⁹ By contrast, Tennessee’s execution teams train monthly, their executioner received training from qualified medical personnel (although the executioner lacks formal medical training), and the IV team “practices pushing three syringes of saline.”⁵⁰⁰ Understanding the IV team’s qualifications, experience, and training—or lack thereof—may illuminate some of Alabama’s errors.⁵⁰¹

Alabama’s method-of-execution problems go beyond IV errors. Alabama’s legislature adopted nitrogen gas in 2018, but ADOC did not unveil its protocol until 2023 and has yet to attempt such an execution.⁵⁰² Alabama informed a federal court in September 2022 that it might be ready to execute by nitrogen gas, only to have the Commissioner of the Department of Corrections file an affidavit explaining that ADOC was not yet ready to carry out such executions.⁵⁰³ This untested method has proved difficult for other states to implement. Oklahoma adopted it, but struggled with developing a protocol and finally resumed lethal injection executions.⁵⁰⁴ It is not clear, at the time of this writing, whether Alabama will be successful.⁵⁰⁵ Using an untested method of execution like nitrogen gas risks its own set of constitu-

⁴⁹⁹ See *id.* at 12, 15–17 (describing lethal injection procedures, but not identifying a training schedule).

⁵⁰⁰ TENNESSEE LETHAL INJECTION PROTOCOL INVESTIGATION, *supra* note 16, at 15.

⁵⁰¹ See *id.* at 35–38 (discussing findings including failure to comply with the protocol, limited expertise among execution team members, and inadequate checks and balances to ensure compliance with protocol). ADOC executed James Barber in July 2023, using a new IV team that includes paramedics, an EMT, and a registered nurse. See Elizabeth Bruenig, *Alabama Wants to Kill Jimi Barber*, ATLANTIC (July 17, 2023), <https://www.theatlantic.com/ideas/archive/2023/07/alabama-execution-jimi-barber/674708/> [<https://perma.cc/6U8W-6VGF>].

⁵⁰² Mike Cason, *Here is How Alabama Plans to Carry Out First Nitrogen Hypoxia Executions in the Nation*, AL.COM (Aug. 28, 2023, 10:28 AM), <https://www.al.com/news/2023/08/here-is-how-alabama-plans-to-carry-out-first-nitrogen-hypoxia-executions-in-the-nation.html> [<https://perma.cc/8E7U-3L2U>].

⁵⁰³ Evan Mealins, *Alabama Says it Won’t Be Ready to Use Nitrogen Hypoxia Method at Sept. 22 Execution*, USA TODAY (Sept. 15, 2022, 4:13 PM), <https://www.usatoday.com/story/news/nation/2022/09/15/alabama-nitrogen-hypoxia-wont-ready-sept-22execution/10390506002/> [<https://perma.cc/W7L5-QJUR>]; Associated Press, *Alabama Wants Executions by Nitrogen Hypoxia: What is it?*, U.S. NEWS (Sept. 13, 2022), <https://www.usnews.com/news/us/articles/2022-09-13/alabama-wants-executions-by-nitrogen-hypoxia-what-is-it> [<https://perma.cc/8SYJ-7W44>].

⁵⁰⁴ See Jonathan Allen, *Oklahoma to Resume Lethal Injections After Plan to Use Gas for Executions Stalls*, REUTERS, (Feb. 13, 2020, 9:55 AM), <https://www.reuters.com/article/us-usa-executions-oklahoma/oklahoma-to-resume-lethal-injections-after-plan-to-use-gas-for-executions-stalls-idUSKBN2072J0> [<https://perma.cc/FB33-HZ9B>]; see also Eli Hager, *Why Oklahoma Plans to Execute People With Nitrogen*, MARSHALL PROJECT (Mar. 15, 2018), <https://www.themarshallproject.org/2018/03/15/why-oklahoma-plans-to-execute-people-with-nitrogen> [<https://perma.cc/4LRQ-9KXX>].

⁵⁰⁵ See Elizabeth Bruenig, *Alabama Makes Plans to Gas Its Prisoners*, ATLANTIC (Dec. 31, 2022), <https://www.theatlantic.com/ideas/archive/2022/12/alabama-botched-executions-2022-gas/672607/> [<https://perma.cc/GUA9-LG82>] (elaborating on some of Alabama’s difficulties in developing a nitrogen hypoxia protocol).

tional challenges. Alabama's struggles with a method of execution it has used since the early 2000s do not bode well for its success in implementing a novel method.

Secrecy adds additional layers of complication to executions. State obsession with secrecy in capital punishment has cast significant uncertainty on the events surrounding James's execution. But because Miller and Smith survived to describe their ordeals, it is not unreasonable to conclude that James may have gone through a similar experience during the three-hour delay before his execution. Secrecy works against Alabama. If Alabama had been willing to act transparently, officials' insistence that ADOC was not at fault would be more convincing.⁵⁰⁶ The lawsuits Miller and Smith brought had, and still have, the potential to shed some light on the state's processes. A federal district court judge ruled that the state must disclose the identities of the execution team that botched Miller's execution to the attorneys only.⁵⁰⁷ James's estate has filed suit as well, alleging that James's execution violated his federal and state constitutional rights to be free from cruel and unusual punishment.⁵⁰⁸ That lawsuit—as well as the litigation that is likely to be brought by other people facing execution in Alabama—may provide critical information about Alabama's practices.

Professor Austin Sarat writes, “[t]he power of botched executions to expose the brutality of capital punishment, and therefore their impact on its continuing legitimation, depends on how they are received, constructed, and construed in popular culture.”⁵⁰⁹ The pattern of botched executions in 2022 reflects the brutality associated with capital punishment—states are willing to go to significant lengths to kill a human. Alabama's execution problems spurred the state to take action because if it continued to botch executions the same way it did in 2022, Alabama may have presented a con-

⁵⁰⁶ See Jon Paepcke, *Alabama Attorney General Says There is No Execution Moratorium*, WVTM 13, <https://www.wvtm13.com/article/alabama-attorney-general-execution-review-procedures/42159559> [https://perma.cc/5N6B-RPHU] (Dec. 5, 2022, 6:17 PM) (asserting that Alabama was not at fault for execution errors).

⁵⁰⁷ Mike Cason, *Judge Orders Alabama to Disclose Execution Team Members' Names for 'Attorneys' Eyes Only'*, AL.COM, <https://www.al.com/news/2022/11/judge-orders-alabama-to-disclose-execution-team-members-names-for-attorneys-eyes-only.html> [https://perma.cc/27HD-43BU], (Nov. 16, 2022, 10:19 AM). Miller's case has since settled with a federal judge's approval. *Alabama Won't Try Lethal Injection Again on 'Execution Survivor' Alan Eugene Miller, but it May Try New Method*, CBS NEWS (Nov. 30, 2022, 4:09 AM), <https://www.cbsnews.com/news/alan-eugene-miller-alabama-execution-death-penalty-lethal-injection-nitrogen-hypoxia/> [https://perma.cc/G6NB-BXRV].

⁵⁰⁸ Complaint & Demand for a Jury Trial at 1–2, *Estate of James v. Ivey*, No. 2:23-cv-00293 (M.D. Ala. May 3, 2023); Ivana Hrynkiw, *Family of Alabama Inmate Sues State, Claims Joe Nathan James Jr. Unconscious Before Execution*, AL.COM, <https://www.al.com/news/birmingham/2023/05/family-of-alabama-inmate-sues-state-claims-joe-nathan-james-jr-unconscious-before-execution.html> [https://perma.cc/385A-GHF3] (May 4, 2023, 10:12 AM).

⁵⁰⁹ SARAT, *supra* note 484, at 148–49.

stitutional problem too severe for even the Supreme Court to ignore⁵¹⁰—unless the Court decides that errors like Alabama’s do not amount to unconstitutional pain.

III. WHAT COMES NEXT

What is known about capital punishment in Alabama is alarming, but the unknowns are probably more alarming. The pattern from the 2022 executions suggests that even if lower federal courts are willing to impose stays, the Supreme Court will not leave them in place regardless of the risk of pain. Although the Governor of Alabama emphasized the impact of cancelled executions on victims, the state’s decision to halt executions was more likely about sustaining the state’s usage of capital punishment. This Part explores how Alabama’s actions are intended to preserve capital punishment in the state. It offers some thoughts about the likely future of capital punishment in Alabama and recommendations for the state’s future execution protocol.

A. *Halting Executions Preserves Capital Punishment*

Governor Ivey’s statement requesting a halt in seeking execution dates focused on victims. She wrote, “I simply cannot, in good conscience, bring another victim’s family to Holman looking for justice and closure, until I am confident that we can carry out the legal sentence.”⁵¹¹ The Governor also denied that anything was wrong with Alabama’s procedures: “I don’t buy for a second the narrative being pushed by activists that these issues are the fault of the folks at Corrections or anyone in law enforcement, for that matter. I believe that legal tactics and criminals hijacking the system are at play here.”⁵¹² Governor Ivey’s statement emphasizes the state’s interests in protecting the families of victims. And yet, when Faith Hall’s family sought clemency for James, the Governor refused to recognize and honor their wishes.⁵¹³ Victims’ interests carry significant weight, it seems, only when they converge with the state’s interests.⁵¹⁴

Similarly, it defies reason that ADOC bears no fault in the botched executions. Instead, Alabama’s officials picked the same convenient scapegoat that members of the Supreme Court have focused on: the people on death

⁵¹⁰ See, e.g., *Hamm v. Smith*, 143 S. Ct. 1188, 1188–89 (2023) (denying certiorari and leaving the Eleventh Circuit’s judgment that Smith had a plausible Eighth Amendment claim in place).

⁵¹¹ Press Release, Governor Kay Ivey, Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims’ Sake (Nov. 21, 2022).

⁵¹² *Id.*

⁵¹³ See *supra* notes 148–151 and accompanying text.

⁵¹⁴ See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense* 49 ARIZ. L. REV. 911, 916 (2007).

row challenging their sentences, their lawyers, and activists who oppose the death penalty.⁵¹⁵ None of those people were in the room with James, Miller, or Smith. It is true that executions may have gotten started later than planned because of litigation—but most of the claims could not have been litigated any earlier, making accusations of dilatory litigation unjustified. This is especially true in Smith’s case because his claims arose out of errors in other executions.

Litigation leading up until an execution, particularly over methods of execution, is *not* a new strategy, especially because some types of claims cannot be litigated until closer in time to execution dates.⁵¹⁶ The problem is also significantly overstated.⁵¹⁷ As Professor Kovarsky has observed, other people on death row may not be able to bring claims as quickly as courts would prefer “because they lack sufficient access to legal services” due to limited resources.⁵¹⁸ And while courts complain about delay, postconviction litigation is stacked heavily against late-stage litigation.⁵¹⁹ Lawyers who represent people on death row are supposed to zealously advocate for their clients’ interests, which include requiring the state to respect their basic constitutional rights.⁵²⁰ Those clients *also* have an interest in having their rights protected, especially when a state has a recent history of botched executions and may subject them to unconstitutional pain and suffering. If the IV team is unable to secure IV access within 90 minutes, litigation is not to blame. To suggest that the defendants’ lawyers are to blame obfuscates responsibility for the state’s own failures.

The Alabama Supreme Court recently took action that is likely intended to minimize delays and may result in barring review of constitutional and procedural violations in capital cases. In 2023 the court amended Alabama

⁵¹⁵ See Paepcke, *supra* note 506 (quoting Alabama’s Attorney General that, “[i]f you’re a defense lawyer representing an inmate you simply know that you have to push the clock back as far as possible. I think we saw that in the last two executions at no fault to the State of Alabama”); see also Kovarsky, *Delay*, *supra* note 84, at 1331–33, 1339–40 (discussing perceptions that people on death row are to blame for the delays in their executions due to “dilatory warrant litigation” and asserting that courts “single out” lawyers as the cause of execution delays and threaten their professional standing).

⁵¹⁶ Kovarsky, *Delay*, *supra* note 84, at 1362 (identifying competence challenges, method of execution challenges, and challenges to delays between sentencing and execution, and some actual innocence claims as claims that frequently cannot be litigated until after postconviction litigation).

⁵¹⁷ See *id.* at 1341 (asserting that the “strategic delay account” incorrectly assumes that litigation delays are better for condemned prisoners when the opposite is actually true).

⁵¹⁸ *Id.* at 1373, 1378–79 (discussing the “under-coverage” of legal representation at crucial litigation stages).

⁵¹⁹ See *id.* at 1331–32, 1352–53.

⁵²⁰ See generally *Capital Defender Standards Library*, ABA GUIDELINES, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/guidelines/ [https://perma.cc/TYM3-XRCL] (enunciating standards of representation for those who represent inmates on death row).

Rule of Appellate Procedure 45A.⁵²¹ The rule used to require the Alabama Court of Criminal Appeals to conduct plain error review of all capital defendants' trials, but now that review is discretionary.⁵²² One Justice explained that such errors that the defendants' lawyers failed to raise can be addressed during postconviction proceedings.⁵²³ Moving more claims to postconviction review seems odd if Alabama were concerned about delays, but the real result is that the complexities of postconviction review will make it harder to litigate such claims.⁵²⁴

Alabama's suspension of executions was also extremely short, lasting only from November 2022 to February 2023.⁵²⁵ Alabama's Attorney General insisted that the review would be "expedited."⁵²⁶ These sorts of reviews, however, rarely lead to significant reforms. Oklahoma and Arizona suspended executions after serious botches, but eventually resumed executions,⁵²⁷ assisted by Supreme Court decisions that make it more difficult to challenge methods of executions or receive stays.⁵²⁸ Tennessee's recent review of its execution process was intended to allow the state to figure out why its Department of Corrections was not in compliance with execution protocols.⁵²⁹ Rather than recognizing that the serious flaws in its implementation of capital punishment signaled to a much larger, ongoing problem with the death penalty, Tennessee will probably be able to rely on this review to convince courts that its execution practices do not create a risk of

⁵²¹ See *Alabama Court Removes Key Appeal Protection for Death Sentenced Defendants*, DEATH PENALTY INFO. CTR. (Jan. 25, 2023), <https://deathpenaltyinfo.org/news/alabama-court-removes-key-appeal-protection-for-death-sentenced-defendants> [<https://perma.cc/T7HB-LLSW>].

⁵²² See ORDER AMENDING R. 45A, ALA. R. APP. P. (Ala. Jan. 12, 2023).

⁵²³ *Id.* at 2 (Mitchell, J., concurring specially).

⁵²⁴ See *id.* at 11 (Shaw, J., dissenting).

⁵²⁵ Hadley Hitson, *Why Alabama Plans to Execute James Barber and Changes in the Process After Ivey's Review*, MONTGOMERY ADVERTISER, <https://www.montgomeryadvertiser.com/story/news/2023/05/15/state-sets-execution-time-frame-for-huntsville-man-convicted-of-murder/70213178007/> [<https://perma.cc/783Y-RJ94>] (May 31, 2023, 7:06 PM).

⁵²⁶ Mike Cason, *Alabama AG Steve Marshall Says Review of Execution Procedures Should be 'Expedited Quickly'*, AL.COM (Dec. 5, 2022, 5:12 PM), <https://www.al.com/news/2022/12/alabama-ag-steve-marshall-says-review-of-execution-procedures-should-be-expedited-quickly.html> [<https://perma.cc/4PPB-N366>].

⁵²⁷ See Andone, *supra* note 17 and accompanying text; see also Jacques Billeaud, *Arizona Governor Won't Proceed With Execution Set by Court*, AP NEWS (Mar. 3, 2023, 2:39 PM), <https://apnews.com/article/execution-arizona-katie-hobbs-f0c799c2a269994474119bd38d5996a1> [<https://perma.cc/82ZD-9APQ>].

⁵²⁸ See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019); see also *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006).

⁵²⁹ See Mattise, *supra* note 9; see also TENNESSEE LETHAL INJECTION PROTOCOL INVESTIGATION, *supra* note 16, at 40–41.

unconstitutional pain and suffering.⁵³⁰ Alabama's limited and vague review was enough to convince courts.⁵³¹ States' periodic reassessments are, like legislative alterations to methods of execution, frequently intended to preserve capital punishment.⁵³²

Although the Supreme Court's recent policy seems to be to authorize executions regardless of the status or merits of pending litigation, even the Court has its limits. For example, after the Court's highly criticized⁵³³ decision in *Dunn v. Ray*, the Court did, as Professor Leah Litman observed, go to some lengths in "defending and distinguishing *Ray*" in later opinions.⁵³⁴ In 2020, the Court granted an application for a stay so that a district court could "promptly determine" if there would be any security concerns if Texas allowed a "prisoner facing execution" to "choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution."⁵³⁵ The next year, there were four votes to deny Alabama's application to vacate a stay in Willie Smith's case, which centered on Smith's desire to have his

⁵³⁰ The Tennessee Attorney General's Office admitted in a May 2022 court filing "that there may be 'factual inaccuracies or misstatements' in its previous filings." Mattise, *supra* note 9.

⁵³¹ *Barber v. Governor of Alabama*, 73 F.4th 1306, 1321–23 (11th Cir. 2023).

⁵³² See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 389–90 (1997) (discussing how changes to method of execution are intended to maintain the death penalty). On the other hand, Ohio's Attorney General's 2022 Annual Report on Capital Crimes described Ohio's capital punishment system as "broken," and asserted that Ohio should either "overhaul the capital punishment system to make it effective, or end it." OFF. OF THE ATT'Y GEN., 2022 CAPITAL CRIMES: STATE AND FEDERAL CASES, 3–4 (2022).

⁵³³ See Leah Litman, *Relitigating Dunn v. Ray*, TAKE CARE BLOG (Apr. 17, 2019), <https://takecareblog.com/blog/relitigating-dunn-v-ray> [<https://perma.cc/8EL3-SKYS>]; see also Ian Millhiser, *The Supreme Court Just Backed Away From One of its Cruellest Death Penalty Decisions*, VOX (Feb. 12, 2021, 3:40 PM), <https://www.vox.com/22279878/supreme-court-death-penalty-religious-liberty-dunn-ray-smith-elena-kagan-amy-coney-barr-ett> [<https://perma.cc/H9PC-MLZF>]; Anusha Merchant, *Religious Freedom for All? Determining What is Left of First Amendment Protections for America's Incarcerated*, COLUM. UNDERGRADUATE L. REV. (Oct. 4, 2022), <https://www.culawreview.org/journal/religious-freedom-for-all-determining-what-is-left-of-first-amendment-protections-for-america-incarcerated> [<https://perma.cc/UAH5-8W9G>]; S.M., *Why Did the Supreme Court Deny a Muslim's Plea for an Imam at his Execution?*, ECONOMIST (Feb. 12, 2019), <https://www.economist.com/democracy-in-america/2019/02/12/why-did-the-supreme-court-deny-a-muslims-plea-for-an-imam-at-his-execution> [<https://perma.cc/U5WK-64KU>]; Ilya Somin, *The Supreme Court's Recent Religious Liberty/Death Penalty Decision is Bad—But Not Quite as Bad as Many Think*, VOLOKH CONSPIRACY (Feb. 9, 2019, 5:34 PM), <https://reason.com/volokh/2019/02/09/the-supreme-courts-recent-religious-libe/> [<https://perma.cc/T7Q5-SZQN>]; Dahlia Lithwick, *An Execution Without an Imam*, SLATE (Feb. 8, 2019, 2:56 PM), <https://slate.com/news-and-politics/2019/02/domineque-ray-alabama-execution-imam-first-amendment-sctus.html> [<https://perma.cc/9DSW-JWJ7>].

⁵³⁴ See Litman, *supra* note 533.

⁵³⁵ *Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020).

pastor with him during his execution.⁵³⁶ In 2022, the Court ruled in favor of John Ramirez, who sought to have his spiritual advisor with him during his execution in Texas,⁵³⁷ although the Court advised lower courts that the “proper remedy” in capital cases with these sorts of claims was “an injunction ordering the accommodation, not a stay of execution.”⁵³⁸ While some of the Supreme Court’s response to the spiritual advisor cases is at least partially attributable to the fact that these cases converge with the Court’s interest in expanding religious liberty jurisprudence, the Court’s uneven response in the spiritual advisor cases, especially after critiques of religious bias, raised questions about its neutrality and legitimacy.⁵³⁹

The majority of the Court is, however, consistently hostile to method-of-execution claims.⁵⁴⁰ It seems that at least some Justices think that claims about unconstitutional pain in executions are meritless. Many method-of-execution claims focus on the type of drugs or state protocols that may risk severe pain.⁵⁴¹ Supreme Court precedent cautions federal courts against interfering with state execution protocols based only on showing “slightly or marginally safer alternative[s],” insisting that states should receive some deference in their execution practices.⁵⁴² Smith’s arguments fit within this framework: he identified evidence that ADOC might be deviating from its own protocol and the serious risk of pain and suffering if the IV team was unable to access his veins.⁵⁴³ Although IV errors are a risk in any execution, Smith’s arguments have greater strength because ADOC’s recent errors in execution lent significant weight to his arguments.⁵⁴⁴ Although the Court allowed Smith’s execution to go forward, letting the Eleventh Circuit decision about the plausibility of Smith’s Eighth Amendment claims stand seems consistent with the Court’s response to the spiritual advisor controversy.⁵⁴⁵ Of course it also could mean that the Court is willing to let executions go forward even if the person facing execution has a plausible claim about the potential unconstitutionality of the execution.

⁵³⁶ *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring in denial of application to vacate injunction).

⁵³⁷ *Ramirez v. Collier*, 142 S. Ct. 1264, 1281–82 (2022).

⁵³⁸ *Id.* at 1283.

⁵³⁹ See *Religious Land Use and Institutionalized Persons Act—Religious Liberty—Death Penalty—Ramirez v. Collier*, 136 HARV. L. REV. 470, 478 (2022) (“The Court’s recent Establishment Clause cases reveal the dangers of making history a central inquiry in RLUIPA cases. Here, history has played a central, if not outcome-determinative, role.”); see also VLADECK, *supra* note 86, at 117–18.

⁵⁴⁰ See Kovarsky, *The Trump Executions*, *supra* note 457, at 674.

⁵⁴¹ See, e.g., Kovarsky, *Delay*, *supra* note 84, at 1366–68.

⁵⁴² *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion).

⁵⁴³ *Smith v. Comm’r, Ala. Dep’t of Corr.*, No. 22-13781, 2022 WL 17069492, at *2 (11th Cir. Nov. 17, 2022).

⁵⁴⁴ *Id.* at *4–5.

⁵⁴⁵ See *Hamm v. Smith*, 143 S. Ct. 440 (2022).

If Alabama had continued trying to execute people after it failed to kill Miller and Smith, it could have put itself at risk of judicial intervention—admittedly a minimal risk based on the Court’s responses in method-of-execution litigation.⁵⁴⁶ Although *Bucklew v. Precythe* made it clear that, while “the Eighth Amendment does not guarantee a prisoner a painless death,” it *does* forbid forms of execution that “superadd terror, pain, or disgrace.”⁵⁴⁷ One isolated incident is not enough for the Supreme Court to conclude that a method of execution has crossed the constitutional threshold,⁵⁴⁸ but ADOC had *three* executions in a row with this sort of failure. In Miller’s case, for example, the district court pointed out that ADOC’s inaction on assessing what had gone wrong was directly relevant to the risk of pain Miller faced if ADOC tried to execute him by lethal injection again.⁵⁴⁹ Absent the “review,” the next person challenging ADOC’s deviations from protocol would have had even more evidence suggesting that ADOC’s errors were causing unnecessary pain and suffering and could avoid it.

Alabama’s litigation strategy seems to be trying to further minimize constitutional checks on executions. Alabama moved to dismiss Smith’s complaint because an attempted execution does not violate the Constitution.⁵⁵⁰ It asserted that what happened to Smith was an isolated error, which does not show the cruelty required to reach an Eighth Amendment violation.⁵⁵¹ While this statement is plausibly consistent with existing law, Alabama seems to be drawing the error line too narrowly. Alabama attempted to execute Smith once, but his execution after two other botched executions suggested that Alabama was aware that it might inflict pain and suffering.

Alabama also insisted that “[a]llegations of pain related to difficulty achieving intravenous access do not amount to cruel and unusual punishment.”⁵⁵² It relied on a recent Eleventh Circuit case that affirmed a district court’s conclusion that repeatedly pricking a person being executed with a needle did not plausibly allege an Eighth Amendment violation.⁵⁵³ Executions do not have to be painless, but they cannot “superadd” pain, terror, or

⁵⁴⁶ See *Miller v. Hamm*, No. 2:22-cv-506-RAH, 2022 WL 4348724, at *22, 23 (M.D. Ala. Sept. 19, 2022).

⁵⁴⁷ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

⁵⁴⁸ See *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion) (“[A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a ‘substantial risk of serious harm.’” (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994))).

⁵⁴⁹ *Miller v. Hamm*, No. 2:22-cv-506-RAH, 2022 WL 16720193, at *14 (M.D. Ala. Nov. 4, 2022).

⁵⁵⁰ Defendants’ Motion to Dismiss at 16–17, *Smith v. Hamm*, No. 2:22-cv-00497-RAH (M.D. Ala. Feb. 6, 2023).

⁵⁵¹ See *id.* (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) and *Baze v. Rees*, 553 U.S. 35, 49 (2008)).

⁵⁵² *Id.* at 23.

⁵⁵³ *Nance v. Comm’r, Ga. Dep’t of Corr.*, 59 F.4th 1149, 1157 (11th Cir. 2023).

disgrace.⁵⁵⁴ The district court in *Nance* applied the presumption from *Resweber* that state officials would carry out an execution carefully and humanely.⁵⁵⁵ *Nance* also asserted, without explanation, that pain from unsuccessful attempts to achieve IV access “would be *de minimis* as it would be no worse than that encountered when visiting a physician or donating blood.”⁵⁵⁶ This is a more troubling argument. If IV access is necessary to execute, then a court may be willing to conclude that it is not *unnecessary* pain and is therefore constitutional.⁵⁵⁷ But unlike *Nance*, *Smith* *had* experienced repeated needle sticks by the IV team, which increases the plausibility of his allegations. James Barber raised these arguments in challenging Alabama’s execution practices in July 2023, but the Eleventh Circuit rejected them, asserting that *Nance* forecloses Eighth Amendment challenges based on assertions that repetitive, futile needle sticks pose a substantial risk of severe pain.⁵⁵⁸ As for James, if the litigation brought by his estate can show that the unusual abrasions on his arm were a cutdown to gain IV access, courts may still find that conduct violated the Eighth Amendment because it inflicted unnecessary pain.⁵⁵⁹

Alabama’s review process likely was intended to figure out what went wrong and how to successfully execute in the future. Suspending executions was necessary because continuing to botch them might risk creating worse precedent on execution practices, even with a Supreme Court that is at best indifferent and at worst hostile to method of execution challenges. But Alabama’s review was not a meaningful response to the errors in Alabama’s executions.⁵⁶⁰

B. *The Future of Executions in Alabama*

At the time Alabama began its review, Governor Ivey claimed that there was “no secrecy involved in the review process” and that Alabama was “looking into new medical personnel.”⁵⁶¹ Public efforts by Alabama executive officials, however, initially seemed to be aimed at extending execution

⁵⁵⁴ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

⁵⁵⁵ *See Nance v. Ward*, No. 1:20-cv-0107-JPB, 2020 WL 13614924, at *5 (N.D. Ga. Mar. 13, 2020).

⁵⁵⁶ *Id.*

⁵⁵⁷ *See Lopez v. Brewer*, 680 F.3d 1068, 1074 (9th Cir. 2012).

⁵⁵⁸ *Barber v. Governor of Alabama*, 73 F.4th 1306, 1320–21, n.20 (11th Cir. 2023).

⁵⁵⁹ Complaint with Jury Demand at 14–15, *Estate of James v. Governor Ivey*, No. 2:23-cv-00293-ECM-SMD (M.D. Ala. May 3, 2023); *Nelson v. Campbell*, 541 U.S. 637, 645–46 (2004) (discussing claims about cutdown procedures as unnecessary and gratuitous).

⁵⁶⁰ *See Barber*, 73 F.4th at 1336–37 (Pryor, J., dissenting).

⁵⁶¹ Erin Davis, *Expert Questions Gov. Ivey’s Call for More Time to Carry Out State Executions*, WFSB 12 NEWS (Dec. 13, 2022, 4:37 PM), <https://www.wfsa.com/2022/12/14/expert-questions-gov-iveys-call-more-time-carry-out-state-executions/> [<https://perma.cc/E533-AJ22>].

times. According to a letter Governor Ivey sent to the Supreme Court of Alabama, the Commissioner of the Department of Corrections was “evaluating options” to alter Alabama’s execution protocols to change the time executions begin.⁵⁶²

Governor Ivey observed that the “most significant aspect of this problem” was an Alabama Rule of Appellate Procedure that limited execution warrants to a specific twenty-four-hour period.⁵⁶³ This rule, she explained, was what “requires Department of Corrections officials to stop all execution attempts at midnight on the scheduled execution day.”⁵⁶⁴ Governor Ivey asked that the court amend the rule to either extend the period of time an execution warrant was valid or to modify the rule to “allow[] the period to be extended in the event of a court-imposed stay [for an] execution.”⁵⁶⁵ The change she requested would amend Alabama Rule of Appellate Procedure 8(d)(1) by adding the following sentence: “[i]f the date designated in the execution warrant passes by reason of a stay of execution, or due to a delay in the execution process caused by a stay of execution . . . then a new date shall be designated promptly by the Commissioner of Corrections.”⁵⁶⁶ But this proposed change ignored that state practices and the nature of capital punishment litigation are the cause of end-stage litigation, especially in Alabama’s most recent executions.

In January 2023, the Alabama Supreme Court amended Rule 8(d)(1). Instead of adopting the language that Governor Ivey proposed, the revised rule is more expansive.⁵⁶⁷ The original rule had required the Supreme Court to set a date of execution.⁵⁶⁸ As amended, Rule of Alabama Appellate Procedure 8(d)(1) now provides that:

The [S]upreme [C]ourt shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate’s sentence of death within a time frame set by the governor, which time frame shall not begin less than 30 days from the date of the order, and it may make other appropriate orders upon disposition of the appeal or other review. The [S]upreme [C]ourt’s order authorizing the Commissioner of the Department of Corrections to carry out the inmate’s sentence of death shall constitute the execution warrant.⁵⁶⁹

⁵⁶² Letter from Kay Ivey, Governor of Alabama, to Chief Justice Tom Parker and the Associate Justices of the Alabama Supreme Court, at 1 (Dec. 12, 2022) (on file with author).

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.* at 2.

⁵⁶⁶ *Id.* at 3.

⁵⁶⁷ See ORDER AMENDING ALA. R. APP. P. § 8(d)(1), 2, (Ala. Jan. 12, 2023).

⁵⁶⁸ Letter from Kay Ivey, *supra* note 562, at 3.

⁵⁶⁹ ORDER AMENDING ALA. R. APP. P. § 8(d)(1), *supra* note 567.

This rule appears to give the governor unlimited discretion over how long ADOC has to carry out executions.⁵⁷⁰

It is true that Alabama had to stop Miller's and Smith's executions because their execution warrants were about to expire. The midnight deadline limited the amount of time that ADOC officials could jab the men with needles, searching for a vein. Had the amended rule been in effect when Alabama attempted to execute Smith, the execution team could conceivably have continued attempting IV access indefinitely—or until someone at ADOC finally decided it was futile.⁵⁷¹

This is not an unlikely scenario: James's execution was delayed for three unexplained hours.⁵⁷² Alabama, unlike other jurisdictions, does not have any information in its execution protocol about when it should stop executions if IV access attempts fail.⁵⁷³ Without some check on the governor's discretion, the only stopping points would be the time the governor chose; the IV team calling it quits because they simply cannot do more; or a condemned person's attorney obtaining a court order, a challenging proposition, especially if their attorney is not able to communicate with them during that time.⁵⁷⁴

Alabama completed its review in February 2023.⁵⁷⁵ Unlike Tennessee, which sought an independent review after far less serious errors, ADOC conducted its own review.⁵⁷⁶ Further, Alabama's review did not include a report and publication of the relevant findings and recommendations.⁵⁷⁷ According to a letter sent by John Hamm, Commissioner of the ADOC, to Governor Ivey, the ADOC conducted an "in-depth review" that "included

⁵⁷⁰ See Ivana Hryniw, *After State Twice Runs Out of Time, Alabama Supreme Court Ends Midnight Deadline for Executions*, AL.COM (Jan. 13, 2023, 10:58 AM), <https://www.al.com/news/2023/01/after-state-twice-runs-out-of-time-alabama-supreme-court-ends-midnight-deadline-for-executions.html> [<https://perma.cc/39MQ-B4TU>].

⁵⁷¹ See Austin Sarat, *Alabama Supreme Court Clears the Way for More Cruelty in Execution*, SALON (Jan. 23, 2023, 5:31 AM), <https://www.salon.com/2023/01/23/alabama-clears-the-way-for-more-cruelty-in-execution/> [<https://perma.cc/5632-ZWFFZ>]; see also *Alabama Supreme Court Issues New Execution Rule That is Unprecedented in the U.S.*, EQUAL JUST. INITIATIVE (Jan. 17, 2023), <https://ej.org/news/alabama-supreme-court-issues-new-execution-rule-that-is-unprecedented-in-the-us/> [<https://perma.cc/VZ3U-5VRC>].

⁵⁷² See Second Amended Complaint, *supra* note 158, at 17 (describing James's execution).

⁵⁷³ Complaint with Jury Demand at 10, *James v. Ivey*, No. 2:23-cv-00293-ECM-SMD (M.D. Ala. May 3, 2023), (noting that Louisiana and Oklahoma both have execution protocols that end executions after an hour of failed IV access attempts).

⁵⁷⁴ See Second Amended Complaint, *supra* note 158, at 41 (describing Smith's attorney's efforts to determine where his client was on the night of his attempted execution; Smith's witnesses were never summoned to Holman prison).

⁵⁷⁵ See *supra* note 525 and accompanying text.

⁵⁷⁶ See *Compared to Neighboring Tennessee, Alabama's Execution Review Falls Short*, EQUAL JUST. INITIATIVE (Mar. 1, 2023), <https://ej.org/news/compared-to-neighboring-tennessee-alabamas-execution-review-falls-short/> [<https://perma.cc/T6K7-G79E>].

⁵⁷⁷ *Id.*

evaluating: the Department’s legal strategy in capital litigation matters, training procedures for Department staff and medical personnel involved in executions,” adding additional medical personnel to assist in executions, and obtaining new equipment.⁵⁷⁸ The letter does not identify what the new equipment is, the qualifications for medical personnel, or their proposed role in executions. ADOC also “communicated with corrections personnel responsible for conducting executions in several other states” and undertook “thorough reviews of execution procedures from multiple states to ensure that our process aligns with best practices in other jurisdictions.”⁵⁷⁹ The letter also touted the procedural change that gives the Governor the authority to set the time for executions, which will “make it harder for inmates to ‘run out the clock’ with last-minute appeals and requests for stays of executions.”⁵⁸⁰ Perhaps the most significant development was that ADOC “conducted multiple rehearsals of our execution process . . . to ensure that our staff members are well-trained and prepared to perform their duties during the execution process.”⁵⁸¹ The letter stated that ADOC would “update our rehearsal and training procedure,” but ADOC’s latest protocol does not appear to include changes to training and practice.⁵⁸² Nor does it explain what “best practices” for executions are—a significant question when a record number of states botched their executions in 2022.

The most concerning omission of the ADOC review is that it does not identify *why* the IV team was unable to secure IV access repeatedly or what went wrong during three of the four executions in 2022. It is possible that ADOC did investigate these problems, but this information was not made public. Litigation may be the best way to uncover this information. Instead, both the letter summarizing the review and the Governor’s letter requesting that the Attorney General seek execution dates blamed people facing execution.⁵⁸³

Longer executions and greater flexibility for execution teams without more concrete reforms and a thorough understanding of the problems is likely to create a greater risk of execution errors. If Alabama is determined

⁵⁷⁸ Letter from John Q. Hamm, Comm’r, Ala. Dep’t of Corr., to Gov. Kay Ivey at 1, 2 (Feb. 24, 2023) (on file with author).

⁵⁷⁹ *Id.* at 1.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 2.

⁵⁸² *Id.*; see also ALABAMA DEP’T OF CORR., EXECUTION PROCEDURES: LETHAL INJECTION, NITROGEN HYPOXIA, ELECTROCUTION 5–6 (Aug. 2023) (on file with author).

⁵⁸³ Letter from John Q. Hamm, *supra* note 578, at 1 (asserting that ADOC is prepared to “carry[] out executions consistent with the mandates of the Constitution . . . in spite of the fact that death row inmates will continue seeking to evade their lawfully imposed sentences”); Letter from Kay Ivey, Gov. of Ala., to Steve Marshall, Atty. Gen. of Ala. (Feb. 24, 2023) (on file with author) (explaining that Commissioner Hamm had notified her that ADOC was ready to execute “even knowing that death-row inmates will continue doing everything within their power to evade justice”).

to retain the death penalty, giving the state even more leeway in conducting executions will not solve the state's problems.⁵⁸⁴ While the easiest solution for Alabama to resolve the mess it finds itself in is to abolish capital punishment, that is highly unlikely at present. This Article does not offer exhaustive proposals. Instead, it identifies some improved practices that would provide greater protections for people facing executions in Alabama.

Alabama's legislature should consider amending the state's method-of-execution statute to permit another opt-in period for nitrogen gas with clearer directions on implementing that process. ADOC should provide forms earlier in the opt-in period, log who received a form, and who turned forms back in. The people on death row should receive adequate time to consult with counsel if they are represented and obtain counsel if they are unrepresented. Repeating the opt-in may mean additional delays, but because ADOC has finally developed a nitrogen gas execution protocol, people now have a more meaningful choice among alternative methods of execution. An opportunity to consult with counsel is especially important because nitrogen gas is a wholly untested method.

Alabama should set minimum qualifications for its IV teams and provide information about its execution team's qualifications, even if it does not disclose their identities.⁵⁸⁵ Alabama's execution protocol does not appear to set qualifications for the IV team⁵⁸⁶ and Alabama law does not include any standards.⁵⁸⁷ The Eleventh Circuit pointed out in Smith's case that, while ADOC's team is unidentified, "the court has no way of knowing the medical training of the individuals who are setting up IV access."⁵⁸⁸ Other states have set minimum qualifications for the members of the execution team who do similar tasks.⁵⁸⁹ If Alabama has certain employment qualifications for those individuals, then it should make those details public, and provide more information about the training their IV team has. This may be a cosmetic fix; after all, other jurisdictions have established qualifications and

⁵⁸⁴ See Davis, *supra* note 561 (quoting the director of the Death Penalty Information Center's observation that "[t]he amount of time that is allotted to carry out an execution has got nothing to do with the competence of the team that carries it out").

⁵⁸⁵ See Kim Chandler, *Alabama Calls Off Execution After Difficulties Inserting IV*, WBHM, (Nov. 18, 2022), <https://wbhm.org/2022/alabama-calls-off-execution-after-difficulties-inserting-iv/> [<https://perma.cc/WGA7-2C5F>] ("In ongoing litigation, lawyers for inmates are seeking information about the qualifications of the execution team members responsible for connecting the lines.").

⁵⁸⁶ See ALABAMA EXECUTION PROCEDURES, *supra* note 491; see also Second Amended Complaint, *supra* note 158, at 45 ("ADOC conceals who is responsible for establishing an intravenous line in the condemned person and does not provide information to ensure that those [who are] responsible are qualified for the task.").

⁵⁸⁷ See ALA. CODE. §§ 15-18-82-82.1 (2022); see also Smith v. Comm'r, Ala. Dep't of Corr., No. 22-13781, 2022 WL 17069492, at *5 n.11 (11th Cir. Nov. 17, 2022).

⁵⁸⁸ Smith, 2022 WL 17069492, at *5 n.11.

⁵⁸⁹ *Id.*

still struggle with executions.⁵⁹⁰ But it will, at a minimum, provide an additional data point for courts assessing the constitutionality of Alabama's execution practices.

Alabama should also film all of its executions, including the preparatory stages, such as IV insertion in lethal injection. The uncertainty surrounding James's execution raises serious concerns about whether he experienced unconstitutional pain and suffering. Such a step is not without precedent; a federal district court in California ordered the state to film Robert Harris's execution as part of a lawsuit challenging the constitutionality of cyanide gas executions.⁵⁹¹ Filming nitrogen gas executions would be useful to courts and experts in challenges to the constitutionality of nitrogen gas executions. Filming the preparatory stages of a lethal injection execution would provide better evidence of whether a person experienced pain and suffering. It would also confirm that the state complied with its protocol.⁵⁹²

Observing execution teams and setting IVs would facilitate judicial determination of the constitutionality of execution practices. If the state is not willing to film execution teams, permitting designated observers to witness all stages of the execution process may be a reasonable alternative. Observers should include the lawyer for the person being executed and a neutral medical professional, both of whom should be familiar with, and have access to, the state's execution protocols. Medical expertise would be essential to determine whether state process has deviated substantially from protocol or risks unconstitutional pain.⁵⁹³ Neutral, expert observers may serve to combat judicial assumptions that reports of pain or error are biased towards the person being executed.⁵⁹⁴

Courts have not concluded that executions are a critical stage in which a person should have access to counsel.⁵⁹⁵ Addressing that question in detail is beyond the scope of this Article, but access to counsel during executions is critical if a state has repeatedly botched prior executions, especially if those

⁵⁹⁰ See *supra* notes 485–500 and accompanying text.

⁵⁹¹ Associated Press, *Videotape of a California Execution is Destroyed*, N.Y. TIMES (Feb. 13, 1994), <https://www.nytimes.com/1994/02/13/us/videotape-of-a-california-execution-is-destroyed.html> [<https://perma.cc/GQ8M-HMGL>] (reporting that the tape was destroyed two years after Harris's execution).

⁵⁹² Compare Second Amended Complaint, *supra* note 158, at 50–51 (claiming that Smith received an intramuscular injection in violation of a court order), with Defendants' Motion to Dismiss, *supra* note 550, at 21–22.

⁵⁹³ Cf. TENNESSEE LETHAL INJECTION PROTOCOL REPORT, *supra* note 16, at 40–41 (recommending TDOC hire staff members with medical and pharmaceutical expertise to provide guidance and training to execution teams).

⁵⁹⁴ See *In re Ohio Execution Protocol*, 860 F.3d 881, 888 (6th Cir. 2017); see also *Hunt v. Smith*, 856 F. Supp. 251, 260 (D. Md. 1994).

⁵⁹⁵ *Coddington v. Crow*, Nos. 22-6100 & 22-6112, 2022 WL 10860283, at *7 (10th Cir. Oct. 19, 2022).

botches amount to torture.⁵⁹⁶ ADOC and courts should expand access to counsel for a person being executed during the process of preparing a person for execution, including IV insertion. Failure to do so may provide a constitutional claim. Access to counsel is important and vindicates a condemned person's constitutional right to access courts and seek judicial intervention to prevent violations of their fundamental constitutional rights.⁵⁹⁷ A person being executed should have access to his attorney during the process—including setting IVs—so that the attorney can quickly seek judicial intervention to vindicate their client's Eighth Amendment rights if necessary.⁵⁹⁸ James, Miller, and Smith did not have access to their lawyers during the extended time ADOC spent attempting to get IV access.⁵⁹⁹ The only reason the IV team stopped jabbing Miller and Smith with needles was because time had run out.⁶⁰⁰ If amended Rule 8(d)(1) permits extended executions, as it seems to do, then access to counsel during this process could be critical to preventing other constitutional violations.⁶⁰¹

Claims about access to counsel during executions have a mixed success rate.⁶⁰² The Tenth Circuit recently rejected claims that Oklahoma's protocol

⁵⁹⁶ See Second Amended Complaint, *supra* note 158, at 16 (explaining that, if ADOC makes errors “there are no witnesses to what occurred other than ADOC personnel. And ADOC is not forthcoming about that process.”).

⁵⁹⁷ See *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (“The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.”); see also *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (observing that the right to access courts has been grounded in the Due Process Clauses, and in the First Amendment and the Privileges and Immunities Clause of Article IV, § 2); *Lewis v. Casey*, 518 U.S. 343, 351 (1996). The Sixth Amendment right to counsel is necessary to enforce the right to access courts for incarcerated persons. See *Mann v. Reynolds*, 46 F.3d 1055, 1059 (10th Cir. 1995).

⁵⁹⁸ For example, during Arizona's botched execution of Joseph Wood in 2014, Wood's lawyers were able to seek a telephonic hearing during the execution, although this was due in part to the unusual length of the execution. Tom Dart, *Arizona Inmate Joseph Wood was Injected 15 Times with Execution Drugs*, *GUARDIAN* (Aug. 2, 2014, 10:40 AM), <https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood> [<https://perma.cc/L5ME-CKSR>].

⁵⁹⁹ See Second Amended Complaint, *supra* note 158, at 41 (describing the attempts that Smith's counsel made to contact Alabama officials after Smith's execution failed); see also Elizabeth Bruenig, *A History of Violence*, *supra* note 330 (describing how ADOC did not contact Smith's attorney or witnesses to be taken to Holman).

⁶⁰⁰ See Chandler, *supra* note 585.

⁶⁰¹ See *supra* notes 567–570 and accompanying text.

⁶⁰² See *Grayson v. Warden*, 672 F. App'x 956, 966–67 (11th Cir. 2016) (denying a claim that Alabama's policy of prohibiting witnesses from having phone access during executions based on standing because it was based on the “possibility that something might go wrong during his execution”); see also *McGehee v. Hutchinson*, 463 F. Supp. 3d 870, 932–33 (E.D. Ark. 2020), *aff'd on other grounds sub nom Johnson v. Hutchinson*, 44 F.4th 1116 (8th Cir. 2022) (granting judgment to defendants to permit their attorneys to “see and hear the full execution, including the insertion of intravenous lines and information about when each drug in the Arkansas Midazolam Protocol is pushed”); *Coe v.*

violates people facing execution's constitutional rights by limiting access to counsel during and before executions.⁶⁰³ The court concluded that people facing execution did not have standing in part because "plaintiffs point us to nothing in the record showing that Oklahoma has regularly experienced issues with the IV, much less issues causing severe pain."⁶⁰⁴ It also rejected the claim that pain and suffering associated with the exposure to a risk of a botched execution would grant standing, in part because the claim was not raised in the district court and in part because this fear was not "reasonably founded" because the plaintiffs had not shown that "something is likely to go wrong, and cause conscious, severe pain during their respective executions."⁶⁰⁵

Setting aside whether the Tenth Circuit correctly concluded there was insufficient evidence that Oklahoma was likely to have problems in its executions, challengers in Alabama would have a much stronger argument for increased access to counsel. After the 2022 executions, there is a well-founded concern that ADOC might make errors that cause them severe pain, particularly because Alabama now permits its governors to decide how long executions can take without safeguards in its execution protocol about the time for IV access.⁶⁰⁶

Alabama's protocol should, like other jurisdictions, identify a defined time when, if IV access is unsuccessful, it would end an execution attempt.⁶⁰⁷ Amended Rule 8(d)(1) could lead to an unnecessarily prolonged execution attempt, or repetitive execution attempts, a practice that could violate the Eighth Amendment.⁶⁰⁸ The interest in returning to the status

Bell, 89 F. Supp. 2d 962, 967 (M.D. Tenn. 2000), *vacated as moot* by 230 F.3d 1357 (6th Cir. 2000) (requiring access to counsel during the hour before an execution, permitting counsel to observe the execution and have access to "a telephone with an unimpeded outside line at the time that he or she witnesses the execution").

⁶⁰³ See *Coddington v. Crow*, Nos. 22-6100 & 22-6112, 2022 WL 10860283, at *7 (10th Cir. Oct. 19, 2022) ("[P]laintiffs here cannot invoke their access-to-courts right to reform the execution protocol in anticipation of claims they might want to file if something goes wrong during an execution."). The Oklahoma protocol limits counsel's access to telephones during executions; ends access to counsel two hours before an execution or earlier; does not provide attorneys with information about the execution, including IV access; and permits prison officials to close curtains between the execution chamber and the witness room at any time. *Id.* at *5-6.

⁶⁰⁴ *Id.* at *8.

⁶⁰⁵ *Id.* at *9.

⁶⁰⁶ *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *5-6 (11th Cir. Nov. 17, 2022).

⁶⁰⁷ See ALABAMA EXECUTION PROCEDURES, *supra* note 491 (protocol does not set a time to end attempts to set an IV).

⁶⁰⁸ See *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality) (acknowledging that repeat attempts at execution may "demonstrate an 'objectively intolerable risk of harm' that officials may not ignore" (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, n.9 (1994))); see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) (observing that a series of "abortive" execution attempts might "raise different

quo—executions—has led to a precarious situation in which ADOC risks repeating its mistakes from 2022 and amplifying litigation over methods of execution. All of this illustrates the pointless cruelty of capital punishment.

CONCLUSION

What happened in Alabama in 2022 is both shocking and an entirely predictable consequence of capital punishment in the United States. Alabama was able to execute a defendant whose intellectual disabilities probably should have barred him from execution under *Atkins*. Alabama tortured three of the four people it attempted to execute. The only surprising part is that two of those people are still alive and that ADOC recognized that *something* was wrong, even if it will not be able to diagnose the real problem: the death penalty itself.

At the time this Article was written, there were 164 people who are waiting for Alabama to kill them. Each of them can probably point to flaws in the procedures used to convict and sentence them to death and the scarcity of resources available during their trials and postconviction proceedings.⁶⁰⁹ The law surrounding postconviction proceedings means that courts can probably come up with reasons not to reverse their death sentences, even in the face of glaring error. When lower courts recognized meritorious claims, the Supreme Court was willing to let executions go forward, most commonly without an explanation as to why the Court reached that conclusion or why it determined that multiple lower court judges must have erred.

While it is unlikely that the Supreme Court will alter its current pattern, Alabama's decision to suspend executions was intended to preserve capital punishment. Alabama's governor focused on victim interests and blamed the people on death row for litigating, rather than acknowledging that the execution team appeared to have made serious errors. That litigation is a predictable consequence of Alabama's capital punishment scheme and execution procedures, and Alabama's response has been to provide additional discretion to executive officials, limit judicial review of capital cases, and argue for lower constitutional thresholds in executions. It is unknown what sort of changes Alabama has made to its execution protocol and whether those will meaningfully address the execution errors of 2022. The statements describing Alabama's readiness to resume executions asserted that the people on death row were evading justice by bringing last-minute

questions" about the constitutionality of executions); Sumner Harrell, *Inmate Has Post-Traumatic Stress After Failed 90-Minute Execution Attempt, Lawyers Say*, WWMT (Oct. 7, 2022, 2:26 PM), <https://wwmt.com/news/nation-world/inmate-has-post-traumatic-stress-after-failed-90-minute-execution-attempt-lawyers-say-psychological-physical-symptoms-alan-eugene-miller-death-row-lethal-injection-death-by-nitrogen-hypoxia-alabama-department-of-corrections> [<https://perma.cc/EV65-C65L>].

⁶⁰⁹ See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, COLUM. L. SCH., PUB. L. RSCH., Paper No. 15, iii, 15-16, 97 (2000).

challenges. But Alabama's capital punishment and execution system, which insulates claims from judicial review, reduces constitutional standards, and fails to remedy injustice in capital sentencing procedures, does not provide justice. These practices do not make a more just system of capital punishment, only a broken one.