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

IN RE: ALABAMA LETHAL INJECTION PROTOCOL LITIGATION	)	CIVIL ACTION NO. 2:12-CV-316-WKW

MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF MOTIONS TO QUASH WITNESS SUBPOENAS TO KIM CHANDLER, KENT FAULK, AND CONNOR SHEETS

The Reporters Committee for Freedom of the Press ("Reporters Committee") hereby respectfully moves this Court for leave to submit the attached *amicus curiae* brief (Exhibit A) in support of the motions to quash filed by non-parties Kim Chandler, AL.com, Kent Faulk, and Connor Sheets. (ECF Nos. 372, 374). A proposed order is attached as Exhibit B. The Reporters Committee has informed counsel for the Office of the Attorney General, the Office of the Federal Defender, Movant Kim Chandler, and Movants AL.com, Kent Faulk, and Connor Sheets of its intent to submit the attached *amicus* brief. Kim Chandler, AL.com, Kent Faulk, and Connor Sheets consent to its filing. The Office of the Attorney General and the Office of the Federal Defender do not object to its filing.

The Reporters Committee is an unincorporated nonprofit association. It was founded by leading journalists and media lawyers in 1970 when the nation's news

media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, the Reporters Committee's attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

A federal district court has inherent authority to consider submissions from *amicus curiae* in connection with pending proceedings. *See Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006); *Mason v. City of Huntsville, Alabama*, No. CV-10-S-2794-NE, 2012 WL 12903100, at *4 (N.D. Ala. May 7, 2012) ("[T]he district courts have inherent authority to appoint *amicus curiae*, or to grant leave to appear as an *amicus curiae*, at the discretion of the court."). Moreover, "*amicus* briefs are typically allowed 'when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Mobile Cty. Water, Sewer & Fire Prot. Auth., Inc. v. Mobile Area Water & Sewer Sys., Inc.*, 567 F. Supp. 2d 1342, 1344 n.1 (S.D. Ala. 2008), *aff'd*, 564 F.3d 1290 (11th Cir. 2009) (quoting *Jin v. Ministry of State Security*, 557 F.Supp.2d 131, 136 (D.D.C. 2008).

The attached *amicus* brief will aid the Court in determining the applicability of the qualified reporters privilege under the First Amendment to observations made by reporters who witness executions in their capacity as journalists, to report the news to the public. Although the Reporters Committee was formed in response

to numerous subpoenas for journalists' confidential sources, no less troubling are subpoenas for journalists' unpublished, non-confidential information, including information about their observations made in the course of gathering the news. If permitted, such subpoenas will chill sources' willingness to speak to reporters and news organization's inclination and ability to report on controversial matters of serious public concern. The *amicus* brief also provides the Reporters Committee's unique perspective on the broad impact the Court's ruling could have on reporters and the public in the state of Alabama and in the Eleventh Circuit, beyond just the reporters at the Associated Press and AL.com and their readers. The Reporters Committee therefore respectfully requests leave to file the attached *amicus* brief.

Dated: May 10, 2018

Respectfully submitted,

/s/ James P. Pewitt
James P. Pewitt
Alabama Bar No. ASB-7642-P62J
JAMES P. PEWITT, LLC
Two North Twentieth
2 20th Street North, Suite 925
Birmingham, AL 35203
205-874-6686
attorneypewitt@gmail.com
Counsel of Record for Amicus Curiae

Bruce D. Brown
Caitlin V. Vogus
Michael W. Shapiro
Reporters Committee for
Freedom of the Press

1156 15th St. NW, Suite 1250
Washington, D.C. 20005
202-795-9300
Of counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to the following:

Thomas R. Govan, Jr., Alabama Deputy Attorney General
James Roy Houts, Office of the Attorney General
Stephen M. Frisby, Alabama Assistant Attorney General
Lauren A. Simpson, Alabama Assistant Attorney General
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
334-242-7300 (office)
334-353-3637 (facsimile)
tgovan@ago.state.al.us
jhouts@ago.state.al.us
sfrisby@ago.state.al.us
lsimpson@ago.state.al.us

John Anthony Palombi
Spencer Jay Hahn
William Marcus Ermine
Federal Defenders
817 South Court St.
Montgomery, AL 36104
john_palombi@fd.org
spencer_hahn@fd.org
w_ermine@fd.org

Archana Nath
Mark S. Olson
Fox Rothschild LLP
222 S. Ninth St., Suite 2000
Minneapolis, MN 55402
anath@foxrothschild.com
molson@foxrothschild.com

Dennis R. Bailey
Rushton Stakely Johnston & Garrett PC
PO Box 270
Montgomery, AL 36101-0270
drb@rushtonstakely.com

John G. Thompson
J. Banks Sewell, III
Jonathan Little
LIGHTFOOT, FRANKLIN & WHITE, L.L.C.
The Clark Building
400 North 20th St.
Birmingham, AL 35203-3200
205-581-0700
205-581-0799 (facsimile)
jthompson@lightfootlaw.com
bsewell@lightfootlaw.com
jlittle@lightfootlaw.com

And I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participant:

Gregory Hunt (Pro Se)
AIS Z-521
ADOC HOLMAN
Holman Correctional Facility
Holman 3700
Atmore, AL 36503-3700

Respectfully submitted,

Dated: May 10, 2018

By: /s/ James P. Pewitt
James P. Pewitt
Counsel for Amicus Curiae

EXHIBIT A

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

IN RE: ALABAMA LETHAL INJECTION PROTOCOL LITIGATION	)	CIVIL ACTION NO. 2:12-CV-316-WKW

[PROPOSED] BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF MOTIONS TO QUASH WITNESS SUBPOENAS TO KIM CHANDLER, KENT FAULK, AND CONNOR SHEETS

James P. Pewitt
Alabama Bar No. ASB-7642-P62J
JAMES P. PEWITT, LLC
Two North Twentieth
2 20th Street North, Suite 925
Birmingham, AL 35203
205-874-6686
attorneypewitt@gmail.com
Counsel of Record for Amicus Curiae

Bruce D. Brown
Caitlin V. Vogus
Michael W. Shapiro
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
202-795-9300
Of Counsel

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Reporters Committee for Freedom of the Press (the "Reporters Committee"), an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of news media. As an organization that advocates on behalf of journalists, the Reporters Committee has a significant interest in ensuring that the qualified First Amendment reporter's privilege recognized in this Circuit is properly applied to shield journalists' observations and impressions from compelled disclosure. The qualified privilege for non-confidential information obtained by reporters while they are engaged in the newsgathering process is essential to journalists' ability to report effectively on matters of public concern. Compelling journalists Kim Chandler, Kent Faulk, and Connor Sheets to testify about the observations they made when acting in a newsgathering capacity would undermine their and their news organizations' ability to gather and disseminate news to the public.

The Reporters Committee urges this Court to quash the subpoenas issued to Ms. Chandler, Mr. Faulk, and Mr. Sheets for the reasons set forth in their briefing to this Court, and submits this *amicus* brief to highlight the negative practical effects of a ruling that would limit the journalistic activities protected by the qualified reporter's privilege for non-confidential information.

INTRODUCTION

Nonparties the Associated Press, AL.com, and three journalists employed by these media organizations, Kim Chandler, Kent Faulk, and Connor Sheets, (collectively, "Movants"), ask this Court to quash subpoenas issued by the Office of Attorney General (the "OAG") to depose Ms. Chandler, Mr. Faulk, and Mr. Sheets regarding the observations they made while witnessing, for purposes of their reporting, the executions of Ronald Berth Smith, Jr. and Torrey Twane McNabb. Movants also ask the Court to enter a protective order precluding the OAG and the Office of the Federal Defender from calling any of the three journalists as witnesses at trial.[1]

The First Amendment qualified reporter's privilege, as recognized by the Eleventh Circuit, shields from discovery a reporter's observations and impressions when she or he is acting in a newsgathering capacity. The Reporters Committee agrees with Movants that this Court should find that the privilege applies here, and

[1] OAG has conceded that the three journalists were acting in their professional capacities when they observed the executions, and that it cannot show that the testimony it is seeking from the journalists is not otherwise unavailable from other potential witnesses to the executions. Defs.' Mot. to Reconsider Holding an Evidentiary Hr'g on Nonparties Mot. to Quash (Doc. 406) p. 2, May 4, 2018. Plaintiffs state they can overcome the qualified First Amendment reporter's privilege but have asked the Court to postpone a hearing on that question until it has decided whether the privilege applies. Pls.' Resp. (Doc. 408) p. 2, May 4, 2018. Accordingly, OAG's argument that the privilege cannot apply to a reporter's observations—even those made during the course of newsgathering—is the dispositive issue before this Court.

that it precludes the OAG from deposing the three journalists and any party from calling them as witnesses at trial. To find otherwise would undermine journalists' ability to gather the news, to the detriment of the public.

ARGUMENT

I. The First Amendment reporter's privilege applies to non-confidential, unpublished information.

A. The First Amendment reporter's privilege for non-confidential information protects the public's access to information about newsworthy events.

This Court has recognized that compelling journalists to testify risks impeding the "free flow of information to the public." *Pinkard v. Johnson*, 118, F.R.D. 517, 520 (M.D. Ala. 1987) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)). "If newspaper reporters are invariably required to reveal the sources of their stories and the processes of their newsgathering whenever such information is sought by litigants, their ability to develop information to report to the public would be severely hampered." *Id.* This is true whenever a reporter is compelled to testify, regardless of whether the sought-after testimony concerns confidential sources or non-confidential, unpublished information.

As federal appellate courts have explained, compelled testimony of journalists has four detrimental effects on newsgathering—effects that application of the qualified reporter's privilege is designed to prevent: (i) "the threat of administrative and judicial intrusion into the newsgathering and editorial process;"

(ii) "the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party;" (iii) "the disincentive to compile and preserve nonbroadcast [or nonpublished] material;" and (iv) "the burden on journalists' time and resources in responding to subpoenas." *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *see also Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999). Each of these detrimental effects is implicated by the testimony sought by the OAG in the instant case.

i. Threat of administrative and judicial intrusion.

The threat of intrusion into the newsgathering process is well illustrated by the OAG's arguments at the April 6, 2018, hearing on Movants' motions to quash. The OAG stated that it intends to question Ms. Chandler, Mr. Faulk, and Mr. Sheets about language used in their news articles, including descriptive words like "grimaced," which the OAG argued is "subjective" and "needs to be defined." Mot. Hr'g Tr. 9:25–10, Apr. 6, 2018. Examination by the state into why news reporters and editors chose certain words over others is precisely the sort of intrusion into the editorial and newsgathering process that the reporter's privilege is designed to protect against.

ii. Investigative arm of the courts or research tool of the state.

Sources are less willing to speak to reporters when they perceive them to be agents of the government or a private party, rather than independent actors. The most prominent ethical guidelines used by members of the media require, among other things, that reporters "[a]ct [i]ndependently" by avoiding "conflicts of interest, real or perceived." Code of Ethics, Society of Professional Journalists (revised Sept. 6, 2014), https://perma.cc/Z2VZ-NB6Y. Testifying creates a risk that a journalist's audience and sources will perceive her or him as aligned with a party in a lawsuit, and sources will be less willing to speak to a reporter who they perceive as biased in favor of one party or another. Moreover, sources will be discouraged from speaking to a reporter if they know that she or he could be compelled to testify against them in litigation.

Journalistic independence is compromised not just when a reporter is compelled to reveal a confidential source, but any time a journalist is forced to testify on behalf of the state or a party to a lawsuit. For example, in this case, if Ms. Chandler, Mr. Faulk, or Mr. Sheets are forced to testify about their observations and impressions of executions they reported on, the independence of their reporting could be called into question by supporters or opponents of the death penalty. Further, if compelled to testify, the reporters in this case may also find that a death-row inmate or criminal defense attorney will be reluctant to speak

with them in the future, for fear that unguarded statements could be used in a legal proceeding.

iii. Incentive to destroy notes documenting important events or avoid reporting on controversial stories entirely.

Compelling journalists to testify about their observations and impressions will create a perverse incentive for them to destroy their notes and other materials memorializing their observations as soon as a story is published or aired, or to avoid reporting on stories about events that are likely to result in litigation altogether. *Gonzales*, 194 F.3d at 35 ("Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas.") When reporters destroy their notes or other materials out of fear of a future subpoena, information gleaned from past newsgathering that could enrich future reporting is lost. It is the public, ultimately, that suffers when reporters cannot consult their old notes for information that might be relevant to a story weeks, months, or years after an initial event.

Faced with the prospect of being compelled to testify, reporters and news organizations may also report less extensively on controversial topics that are likely to result in litigation in order to protect their reporters from legal process. For example, if Movants' motions to quash are denied, journalists and editors—especially those without larger news organizations to back them up—may be

chilled from attending executions as neutral witnesses. This would be to the detriment of the citizens of Alabama, who depend on news reports based on reporters' observations to assess the manner in which executions are carried out in their state.

Discouraging experienced reporters from witnessing executions is particularly detrimental to the public. Journalists who witness multiple executions develop expertise that allows them to provide greater insight to the public. Movant Kim Chandler is an example of this, having witnessed many executions. (Doc. 377, n. 1); Kim Chandler, *Alabama Man, 83, Executed for Judge's 1989 Mail-Bomb Slaying*, Associated Press, Apr. 19, 2018, https://bit.ly/2HVhzPY; *see also* Dave Alsup, *Texas Reporter's Seen Unrivaled Number of U.S. Executions*, CNN, July 20, 2009, https://perma.cc/BA22-PWU9 (describing an Associated Press reporter who had watched at least 315 executions as of 2009). When reporters attend multiple executions, their audience directly benefits through a more nuanced and knowledgeable accounting of the execution process, including descriptions of how an execution may differ from another, or how the execution process may change over time.

News reports already suggest that local papers are less likely to send a reporter to cover an execution than in years past. *See* Richard Perez-Pena, *One Reporter's Lonely Beat, Witnessing Executions*, N.Y. Times, Oct. 20, 2009,

https://nyti.ms/2HDdX1G. If those reporters who *do* attend executions are forced to testify about their observations and impressions of that execution in litigation, it could exacerbate this trend, further limiting the public's opportunity to read a news article or watch a TV news segment from a reporter who witnessed an execution.

iv. Burden of being compelled to testify.

Finally, reporters and news organizations can face significant burdens when journalists are subpoenaed to testify. There is a non-negligible cost to a media outlet when one of its reporters is compelled to provide testimony when he or she would otherwise be gathering news and producing news stories. Even when just one reporter must travel to court to testify, the disruption to the newsroom could be considerable, since newsrooms have shrunken in size over the last decade. *Newspapers Fact Sheet*, Pew Research Center on Journalism & Media, June 1, 2017, https://perma.cc/H23F-628M (stating that "in 2015 (the last year available) 41,400 worked as reporters or editors in the newspaper industry [in the U.S.], down 4% from 2014 and 37% from 2004").

Federal courts also have broad discretion to sequester witnesses to prevent them from being influenced by earlier testimony in a case, another potential impediment for a subpoenaed reporter tasked with covering a trial. *See, e.g.*, *Holder v. United States*, 150 U.S. 91, 92 (1893); *Braswell v. Wainwright*, 330 F. Supp. 281, 283 (S.D. Fla. 1971), *modified*, 463 F.2d 1148 (5th Cir. 1972). And

even if a reporter is not excluded from the courtroom during a trial, she or he would be ethically prohibited from a covering a trial where she has given testimony that could affect the outcome. Code of Ethics, Society of Professional Journalists (revised Sept. 6, 2014), https://perma.cc/Z2VZ-NB6Y.

At smaller news outlets, the burden may be most pronounced, since it is more likely that when a reporter is subpoenaed to testify at a newsworthy trial that there will be fewer or no reporters to step in and cover the proceeding.

B. This Court should reject the OAG's crabbed interpretation of the reporter's privilege as protecting only confidential sources.

This Circuit has long recognized that the First Amendment requires a qualified reporter's privilege that shields journalists from compelled testimony regarding their confidential sources. *See United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (citing *Miller v. Transamerican Press Inc.*, 621 F.2d 721 (5th Cir. 1980)).[2] Though the Eleventh Circuit has not specifically addressed the applicability of the First Amendment reporter's privilege to non-confidential, unpublished information, its decision in *Caporale* indicates that the privilege indeed protects such information.

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.

In *Caporale*, the Eleventh Circuit articulated the standard for when the First Amendment qualified privilege may be overcome. The Court stated that "*information* may only be compelled from a reporter claiming privilege if the party requesting *the information* can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources." *Id.* (emphasis added). The Court used broad language concerning the substance of compelled testimony, making clear that it shields "information" from journalists, not merely the identities of confidential sources.

Every district court in this Circuit that has addressed the issue has held that the reporter's privilege applies to non-confidential information under either the First Amendment or federal common law. The U.S. District Court for the Middle District of Alabama, specifically, has interpreted the privilege to apply broadly to confidential *and* non-confidential materials gathered by reporters. In *Pinkard*, a non-party reporter moved to quash a defendant's subpoena seeking to depose the reporter and force disclosure of a large number of records of his employer, the *Montgomery Advertiser*. 118 F.R.D. at 519. Although the defendant did not specify whether he sought confidential or non-confidential materials, the Court described the defendant's subpoena as a request for "carte blanche to discover the records, notes, and mental processes of the *Montgomery Advertiser* and its reporters." *Id.* And, in determining whether to quash the subpoena, the Court did

not limit the reporter's privilege only to information concerning confidential sources; rather, the Court stated that to invoke the reporter's privilege, the journalist "must show that he received the information in dispute while engaged in a newsgathering capacity." *Id.* at 521 (citing *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987)). Finding that the reporter had made the "requisite showing of newsgathering activity," the Court held that the First Amendment reporter's privilege applied and quashed the defendant's subpoena. *Id.* at 522, 523.[3]

The U.S. District Court for the Southern District of Florida has expressly held that the qualified reporter's privilege recognized by the Eleventh Circuit applies to non-confidential information. For example, in *United States v. Blanton*, the district court quashed a subpoena seeking a reporter's testimony to verify the accuracy of published quotations and other statements of the defendant. 534 F. Supp. 295, 297 (S.D. Fla. 1982) (stating that "[a]lthough no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the press and public") *aff'd on other grounds*, 730 F.2d 1425 (11th Cir.1984); *see also*

[3] The Court in *Pinkard* declined to deny the reporter's motion to quash a separate, narrower subpoena from the plaintiff seeking to depose the reporter "only on the substance of [an] affidavit he previously gave to" the plaintiff's attorney that described a prior conversation with the defendant, holding that the reporter had waived the privilege with respect to the substance of that affidavit. *Id*. at 519, 523.

Kidwell v. McCutcheon, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996) ("In this federal circuit the law is clear that even where no confidential source is involved, the government is not entitled to subpoena a reporter to testify regarding the product of a newsgathering activity."); *Gregory v. Miami-Dade Cty.*, No. 13-21350-CIV, 2015 WL 3442008, at *3 (S.D. Fla. May 28, 2015) ("[I]n the Eleventh Circuit, the test for overcoming the privilege remains the same even if the information was not obtained from a confidential source.")

II. The First Amendment qualified reporter's privilege for non-confidential information shields reporters' on-the-job observations.

A. Observations of events is a core feature of newsgathering.

Because the act of making observations is central to the job of journalists, failing to apply the First Amendment reporter's privilege to this category of information could have significant, detrimental effects on reporters' ability to gather the news. Witnessing events is a core component of most journalists' jobs—from the city hall reporter who attends zoning board meetings, to the sports reporter in the press box, to the White House correspondent at the daily briefing. Observation-based reporting is a vital skill within the industry, and is necessary to effectively cover matters ranging from natural disasters, Jason Dearen & Michael Biesecker, *Toxic Waste Sites Flooded in Houston Area*, Associated Press, Sept. 3, 2017, https://perma.cc/6L4L-KSC6 (directly observing seven Superfund sites in the Houston area after a period of intense flooding to test government claims that

there was no significant environmental damage at the sites), to arts and culture. Gene Weingarten, *Pearls Before Breakfast*, Wash. Post Magazine, Apr. 8, 2007, https://wapo.st/2qZKEjn (Pulitzer-Prize winning coverage of a violin virtuoso who busked anonymously at Washington, D.C., Metro stations).

For news photographers and videographers, in particular, personal observation is a core function. For example, as photographer Ryan Kelly said of his Pulitzer-prize-winning photograph of the moment a white supremacist drove a car into a group of protesters at the 2017 "Unite the Right" in Charlottesville, Virginia: "I wish it didn't happen. But if it did, I'm glad the photo exists. That's journalism, unfortunately. It's being there to witness things that are happening." Zach Schoenfeld, *Pulitzer Prize's Ryan Kelly Left Journalism the Day After Taking His Winning Photo of Charlottesville*, Newsweek, Apr. 18, 2018, https://perma.cc/4EAA-M3AP.

Finally, technological advances have made personal observation a more prominent and significant aspect of many reporters' jobs. David Carr, *At Front Lines, Bearing Witness in Real Time*, N.Y. Times, July 27, 2014, https://nyti.ms/2Fk8NFB. "Bearing witness is the oldest and perhaps most valuable tool in the journalist's arsenal, but it becomes something different delivered in the crucible of real time . . . ." *Id.* (comparing Matthew Brady's publishing photographs of the Battle of Antietam weeks after the fact to reporters

today who can publish what they see nearly instantaneously on social media platforms).

B. Numerous courts have rejected a "personal observation" exception to the reporter's privilege.

The OAG argues that the First Amendment qualified reporter's privilege does not apply to reporters' personal observations. (Doc. 377, pp. 6–11; Doc. 378, pp. 7–11.). In support of this argument, the OAG relies heavily the Court's statement in *Pinkard* that "[f]ederal courts have held generally that the qualified privilege does not apply when the reporter is being questioned about an incident to which he or she may be *a witness like any other member of the public*." 118 F.R.D. 517, 519 (emphasis added). However, this *dicta* reflects, at most, only the unremarkable proposition that while reporters enjoy a qualified privilege with regard to their newsgathering activities—which includes their observations and impressions in connection with matters they are covering—they are not shielded from testifying as to observations made in their capacities as ordinary citizens.

Indeed, several courts have specifically rejected a "personal observation exception" to the reporter's privilege, whether derived from the First Amendment or federal common law. *See Lozman v. City of Riviera Beach*, 2014 WL 12360697, at *3 (S.D. Fla. Oct. 8, 2014) (noting that "neither the United States Supreme Court nor the Eleventh Circuit has recognized any such 'personal observation exception' to the journalist's privilege and . . . other courts have

specifically rejected the application of it"). For example, the U.S. District Court for the Southern District of New York has repeatedly applied the reporter's privilege to journalists' observations. *See, e.g.*, *Lebowitz v. City of New York*, 948 F. Supp. 2d 392, 394 (S.D.N.Y. 2013); *United States v. Treacy*, 603 F.Supp.2d 670, 672 (S.D.N.Y.2009), *aff'd in relevant part*, 639 F.3d 32, 36 (2d Cir. 2011); *Carter v. City of New York*, No. 02 Civ. 8755(RJH), 2004 WL 193142, at *1 (S.D.N.Y. Feb. 2, 2004).

Similarly, in Florida, where the state reporter's shield law tracks the federal privilege recognized by the Eleventh Circuit, courts have applied the state statute to block the compelled testimony of reporters regarding their observations of executions. *Muhammad v. State*, 132 So.3d 176, 190 (Fla. 2013).

C. Reporters who witness executions or other newsworthy events in connection with their reporting are not "in the same position as any ordinary citizen that witnesses an event."

Other federal courts that have considered whether the reporter's privilege shields a journalist from testifying about her or his observations have drawn a line to separate the journalist acting as a reporter, who may evoke the reporter's privilege, and the journalist who observes an event as an ordinary citizen. *See, e.g.*, *United States v. Blanton*, 534 F.Supp. 295, 296–97 (S.D. Fla. 1982), *aff'd*, 730 F.2d 1425 (11th Cir. 1984) (information sought was *"gathered, developed or received* by [reporter] in his professional *newsgathering* capacity" and "[a]lthough

no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the press and public") (emphasis added) (citing *United States v. Cuthburtson*, 630 F.2d 139, 147 (3d Cir. 1980)).

This Court should reject the OAG's plainly incorrect argument that reporters who attend and witness executions as media witnesses in order to report on those executions are "in the same position as any ordinary citizen that witnesses an event." (Doc. 377, p. 10.) For two reasons, it is easy to distinguish reporters from other witnesses of executions: (i) reporters attend executions as expressly authorized by statutes or regulations *because* of their role in creating a public record; and (ii) reporters publish and/or broadcast what they observe for the public record.

State and federal laws and regulations grant reporters access to attend executions in their capacities as journalists, not as ordinary citizen-witnesses. *See, e.g.*, 28 C.F.R. § 26.4(c)(4)(ii) (setting the maximum number of journalist-witnesses at federal executions at 10); Ala. Code § 15-18-83 (1975); Ala. Dep't of Corrs. Admin. Reg. No. 005(V)(g)(1). These statutory and regulatory rights of access for reporters guarantee that when a person is executed, a neutral observer will be there to report on what occurs for the benefit of the broader public.

Most importantly, unlike other witnesses to executions, journalists publish or broadcast what they observe, and these observations become part of the public record. *Witnessing Death: AP Reporters Describe Problem Executions*, Associated Press, Apr. 29, 2017, https://perma.cc/N289-8PHS (compiling the observations of AP reporters in Alabama, Arizona, Arkansas, Ohio, and Oklahoma of executions where inmates were sedated with the drug midazolam). Reporters who witness executions in their capacity as journalists have a clear "intent to use the material—sought, gathered or received—to disseminate information to the public." *Von Bulow*, 811 F.2d at 144.

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully urges this Court to grant Movants' motion to quash the OAG's subpoena and for a protective order prohibiting any party from compelling their testimony at trial.

Respectfully submitted on this the Tenth day of May, 2018.

Bruce D. Brown
Caitlin V. Vogus
Michael W. Shapiro
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
202-795-9300
bbrown@rcfp.org
Of Counsel

/s/ James P. Pewitt
James P. Pewitt
Alabama Bar No. ASB-7642-P62J
JAMES P. PEWITT, LLC
Two North Twentieth
2 20th St. North, Suite 925
Birmingham, AL 35203
205-874-6686
attorneypewitt@gmail.com
Counsel of Record for Amicus Curiae

EXHIBIT B

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

IN RE: ALABAMA LETHAL INJECTION PROTOCOL LITIGATION	)	CIVIL ACTION NO. 2:12-CV-316-WKW

[PROPOSED] ORDER GRANTING MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF MOTIONS TO QUASH WITNESS SUBPOENAS TO KIM CHANDLER, KENT FAULK, AND CONNOR SHEETS

THIS MATTER comes before the Court on the motion ("Motion") of the Reporters Committee for Freedom of the Press ("Reporters Committee") for leave to file an *amicus curiae* brief in support of Motions to Quash Witness Subpoenas to Kim Chandler, Kent Faulk, and Connor Sheets.

THE COURT, having considered the Motion, hereby ORDERS that the Motion is GRANTED, and the *amicus curiae* brief submitted by the Reporters Committee is DEEMED FILED.

DATED this ____ day of _____, 2017.

_____
The Honorable Charles S. Coody

Presented by:

JAMES P. PEWITT LLC
Counsel for Amicus Curiae
Reporters Committee for Freedom of the Press

By: */s/ James P. Pewitt*
James P. Pewitt
Alabama Bar No. ASB-7642-P62J
JAMES P. PEWITT, LLC
Two North Twentieth
2 20th Street North, Suite 925
Birmingham, AL 35203
205-874-6686
attorneypewitt@gmail.com
Counsel of Record for Amicus Curiae

Bruce D. Brown
Caitlin V. Vogus
Michael W. Shapiro
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
202-795-9300
Of counsel