No.

IN THE

Supreme Court of the United States

NATHANIEL WOODS,

Applicant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, HOLMAN CORRECTIONAL FACILITY, ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE: EXECUTION SCHEDULED FOR MARCH 5, 2020

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

On **Thursday, March 5, 2020**, the State of Alabama is scheduled to execute Nathaniel Woods. Mr. Woods moves this Court for a stay of execution.

ARGUMENT

Before July 1, 2018, the Alabama Attorney General carried out executions in chronological fashion based on when the inmate had exhausted his or her federal habeas proceedings. Whatever discretion the Alabama Attorney General exercised was never challenged. That's because the process—grounded in a "first-out-of-habeas, first-up" policy—was predicated upon objective criteria. But what if the Attorney General changed the criteria? In place of objective indicia, he began scheduling execution dates based on the race of the inmate's victim? The Eighth and Fourteenth Amendments would not tolerate such arbitrary, capricious, and discriminatory treatment. That is what has transpired in the State of Alabama—except with a twist.

In June 2018, Alabama officials told death row inmates to choose between execution via lethal injection or nitrogen gas. *See* Ala. Code § 15-18-82.1(b)(2). Inmates had thirty days to decide. *Id.* With what information they had available, some chose lethal injection, others chose nitrogen gas, and others simply declined to participate in their own execution process and made no choice at all. In the months following that 30-day time period, the State first moved to execute a couple inmates whose federal habeas proceedings had been completed. The State appeared to be focusing its execution efforts on inmates scheduled to die by lethal injection but, with such a

small sample size, there was no way to definitively know. Then came the execution of Jarrod Taylor—i.e., the twist.

In the summer of 2019, the State of Alabama moved to set Mr. Taylor's execution. In so doing, it represented that he had chosen lethal injection. The State was mistaken. Mr. Taylor's counsel apprised the Attorney General's Office as much. The State then scrambled to withdraw Mr. Taylor's requested execution, explaining, "ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia" because it does not have—nor has it ever had—a protocol in place. But what the State could not withdraw was its accidental disclosure that, as a consequence of having no nitrogen-gas-based protocol, it would not be executing inmates that had chosen nitrogen gas and would be proceeding with those scheduled to die by lethal injection. In other words, contrary to past practice, inmates were now being chosen based on whether they unwittingly stumbled into a viable method (or not).

The State's response to all of this has been: we're simply "honoring each inmate's choice two years ago." But that was no choice at all. Mr. Woods was led to believe any decision was relegated to his preferred method of being executed: lethal injection or nitrogen gas. Within those parameters, Mr. Woods declined to choose. But he was never told this (in-)decision would impact the *timing* of his execution. He was never told the State had no nitrogen protocol. And he was never told the State would proceed with lethal injection executions in spite of that. In the absence of this critical information, Mr. Woods refused to participate in a process that required him to play an active role in his own execution. The result: unlike the fourteen death row

inmates at Holman Prison whose federal habeas proceedings were exhausted many months (and in some instances, over a year) ago, Mr. Woods faces imminent execution by Alabama's default method: lethal injection. It's as if the State told Mr. Woods to choose his hair length, he kept it buzzed, the State then revealed it had a policy of prioritizing short-haired executions, and then justified proceeding with Mr. Woods' execution by citing his "choice." Had Mr. Woods known the State would weaponize his abstinence from the execution process against him, he would have proceeded differently.

At its core, the Eighth Amendment prohibits such arbitrary and capricious administration of the death penalty. *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (recognizing death sentences should not be "administered arbitrarily or discriminatorily"); *see also Caldwell v. Mississippi*, 472 U.S. 320, 343 (1983) (death penalty should not be deployed in "circumstances under which" it will be "meted out arbitrarily or capriciously or through whim or mistake") (O'Connor, J., concurring in part and concurring in the judgment). The Eleventh Circuit concluded otherwise, holding that "[t]he district court correctly rejected Woods's attempt to equate his situation—the *carrying out* of his death sentence—with the *imposition* of a death sentence." *Woods v. Comm'r, Ala. Dep't of Corr.*, No. 20-10843 (11th Cir. Mar. 3, 2020), at 13-14 (slip op.) (emphasis in original). But, contrary to the Eleventh Circuit's determination, this prohibition applies *both* to how the State imposes the death penalty *and* how it carries it out. *See*, *e.g.*, *Bucklew v. Precythe*, 139 S.Ct. 1112, 1122 (2019) ("While the Eighth Amendment doesn't forbid capital punishment, it does speak to

how States may *carry out* that punishment, prohibiting methods that are 'cruel and unusual.'") (emphasis added); *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (noting that "*carrying out* a sentence of death upon a prisoner who is insane" violates the Eighth Amendment, even though the prisoner was earlier determined to be competent to stand trial) (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) ("[T]his Court is compelled to conclude that the Eighth Amendment prohibits a State from *carrying out* a sentence of death upon a prisoner who is insane.") (emphasis added). Were it otherwise, prosecutors would have unfettered discretion. They could, for instance, single out for execution any disfavored inmate, while effectuating a de facto mortarium for those he might prefer. Or, as occurred, here, withhold information and prioritize executions for inmates who did not accidentally stumble onto a more-favored outcome. This is the height of arbitrariness. The Eighth Amendment is not so brittle as to tolerate such state-sponsored shell games.

Nor does the Fourteenth Amendment permit the State to withhold such vital information when asking individuals to make life-altering decisions. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Death row inmates maintain a life interest. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281 (1998); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986). They are thus entitled to a constitutional right to notice, "at a meaningful time and in a meaningful manner." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citation and internal quotations omitted); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) ("Perhaps the

most basic of due process's customary protections is the demand for fair notice.") (citations omitted). Mr. Woods was deprived of that notice when the State asked him to choose between lethal injection and nitrogen gas but neglected to mention (1) it had no execution protocol for nitrogen gas and (2) it would nonetheless proceed with executions for lethal injection. The State has little, if any, interest in creating a process that asks inmates to make a choice but shields from them vital information bearing upon that decision.

Finally, the State's disparate treatment of inmates violates the Equal Protection Clause. Mr. Woods is similarly situated in all meaningful respects to the fourteen (14) other death-row inmates who are eligible to be executed due to the completion of their federal habeas proceedings. However, Mr. Woods' execution will proceed because he is scheduled to die by lethal injection. As this Court has recognized, "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942). It is one thing if Mr. Woods had, in fact, made a knowing choice, but to distinguish him from others based on his inability to divine the State had no execution protocol is improper.

This Court is empowered to grant petitioner a stay of execution in order to adjudicate these meritorious constitutional claims. As this Court held in *Barefoot v. Estelle*,463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c),

a stay may be granted when there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; . . a significant possibility of reversal of the lower court's decision; and . . . a likelihood that irreparable harm will result if that decision is not stayed." *Id.* at 895. Further, a stay should be granted when necessary to "give non-frivolous claims on constitutional error the careful attention that they deserve" and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits." *Id.* at 888-89.

Here, Mr. Woods advances meritorious claims—claims whose existence were not known until a few months ago (when the State mistakenly moved for Jarrod Taylor's execution) and only became ripe when the State moved to set an execution date (maintaining its practice of targeting for execution inmates scheduled to die by lethal injection). Mr. Woods' expeditious pursuit of these claims allowed the district court to address them on the merits, thereby undercutting any contention that this litigation is simply about delay. In the absence of a stay, Mr. Woods will be irreparably harmed: he will be executed—as a consequence of the State's duplicity, which gets to the very heart of his claims.

CONCLUSION

For these reasons, this Court should stay Mr. Woods' execution and grant his certiorari petition to address whether the State's practice of targeting inmates for

execution from whom it withheld vital—indeed, life-altering information—violates the Eighth and Fourteenth Amendments.

Respectfully submitted,

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