No. _____

In the Supreme Court of the United States

JEFFERSON DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
APPLICANTS,

v.

WILLIE B. SMITH III,
RESPONDENT.

EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

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

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February 11, 2021

EXECUTION SCHEDULED THURSDAY, FEBRUARY 11, 6:00 P.M. CST.

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Plaintiff-Appellant Willie B. Smith III, an Alabama inmate, is scheduled to be executed today—February 11, 2021.[1] He has known this date since December 1, 2020. Yet he waited sixty-five days—until just a week ago—to file an emergency motion for a stay with the district court. Smith gave no good reason for his delay; rather, when pressed by the district court, his attorney admitted that the late-breaking stay motion was a "last resort." The district court refused to reward this gamesmanship, denying the stay motion both on its merits and due to Smith's unexplained delay.

But yet again, the Eleventh Circuit has tossed aside this Court's teachings by granting an emergency stay on the eve of a long-scheduled execution. Thus, as in *Dunn v. Ray*[2] and *Dunn v. Price*,[3] this Court should again vacate the Eleventh Circuit's last-minute grant of a last-minute stay motion. Indeed, the case for vacatur is even stronger here, where the Eleventh Circuit appears to have granted Smith's stay motion precisely because Smith's delays left the court with insufficient time to review his motion. The Eleventh Circuit's decision thus not only excuses delay, but rewards it, getting this Court's teachings exactly backward. The Court should promptly vacate that unexplained and inexplicable decision.

* * *

1. Order, *Ex parte Smith*, No. 1011228 (Ala. Dec. 1, 2020).
2. 139 S. Ct. 661 (2019).
3. 139 S. Ct. 1312 (2019).

On November 25, 2019, Smith initiated the present 42 U.S.C. § 1983 action in the Middle District of Alabama.[4] Therein, he raised two claims: (1) a method of execution claim concerning Alabama's three-drug lethal injection protocol, which was filed years beyond the statute of limitations, and (2) an Americans with Disabilities Act of 1990[5] (ADA) claim that he was too intellectually disabled to make the hypoxia election without reasonable accommodation. Defendants' motion to dismiss was still pending on October 27, 2020, when the State of Alabama moved for Smith's execution to be set. Smith had full knowledge that this motion had been filed. Nor was it kept secret from Smith when, on December 1, 2020, the Alabama Supreme Court set his execution date.

And yet, Smith waited until the evening of Thursday, February 4, 2021, ***sixty-five days*** after the announcement of his execution date and one week from the date itself, to move the district court for an emergency stay of execution.[6] This emergency was one of Smith's own making, and the district court did what it could to fairly consider the motion: inviting Smith to make an evidentiary submission the next day, taking up the motion during the scheduled hearing on February 8, and inviting the parties to make a second evidentiary submission that night.

The court found that Smith had unduly delayed in moving for a stay of execution. In addition, based upon the evidence brought before the court in the limited time available, the court concluded that Smith had not shown a substantial likelihood of

4. Doc. 1. "Doc." numbers refer to the ECF filings in the district court.
5. 42 U.S.C. § 12101 *et seq*.
6. Doc. 42.

success on the merits of his ADA claim. The district court's decision was well within its discretion and supported by the evidence before the court.

Smith then filed an emergency motion for a stay of execution in the Eleventh Circuit. Rather than rule on the motion, that Court punted, and, at 8:11 p.m. EST, granted Smith's motion for stay of execution until Tuesday, February 16, 2021, at 5:00 p.m. EST "to allow the court time to review the merits of the claim"—effectively granting Smith an indefinite stay of execution because Alabama's execution warrant is only valid for twenty-four hours, until 11:59 p.m. CST tonight.[7] The fact that the Eleventh Circuit had to grant a temporary stay just to have enough time to consider Smith's stay motion shows that Smith filed his initial stay motion in the district court far too late. This Court has repeatedly held that litigants should not be rewarded for dilatory tactics, but the Eleventh Circuit granted Smith a stay at least in part *because* he delayed. That is reason enough for this Court to vacate the Eleventh Circuit's stay. Otherwise, the State's and victims' "important interest in the timely enforcement of a sentence" will be further "frustrated in this case."[8]

STATEMENT

A. Smith's crime, trial, and appeals

A full recitation of the facts is not necessary for this Court to vacate the Eleventh Circuit's unexplained stay of execution. In brief, Smith is scheduled to be executed for the 1991 murder of twenty-two-year-old Sharma Ruth Johnson, who made

7. Order, *Ex parte Smith*, No. 1011228 (Ala. Dec. 1, 2020).
8. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019).

the fatal error of stopping at an ATM. Smith kidnapped Johnson, coerced her into giving him the PIN for her debit card, and shot her in the head in the trunk of her own car as she swore not to tell anyone about his crimes.[9] Smith's conventional appeals concluded on July 2, 2020, when this Court denied certiorari.[10]

B. Alabama introduces nitrogen hypoxia as a method of execution

On March 22, 2018, Governor Kay Ivey signed Alabama Laws Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama. Pursuant to section 15-18-82.1(b)(2) of the Code of Alabama, as modified by the act, an inmate whose conviction was final prior to June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia. Inmates sentenced after the enactment of the law would have a thirty-day election period from the date that their death sentence became final.

The law did not include any provision requiring that any individual be given special notice of its enactment, nor did it specify how an inmate should make an election beyond "personally," "in writing," and "delivered to the warden of the correctional facility" within thirty days of the triggering date.[11] As the ADOC's only duty under the statute was to receive notices of election from inmates who wished to elect hypoxia, the ADOC created no program or policy concerning the election.

9. *Smith v. State*, 838 So. 2d 413 (Ala. Crim. App. 2002).
10. *Smith v. Dunn*, 141 S. Ct. 188 (2020) (mem.).
11. ALA. CODE § 15-18-82.1(b)(2).

On June 22, 2018, an attorney with the Federal Defenders for the Middle District of Alabama drafted an election form, which was given to death row inmates represented by that organization, allegedly on June 26.[12] Cynthia Stewart, then the Warden of Holman Correctional Facility, obtained this form. As a courtesy to the inmates at Holman, she directed Captain Jeff Emberton, an ADOC correctional officer, to give every death row inmate a copy of the form and an envelope in which he could return it to the warden, should he decide to elect.[13] Captain Emberton did as instructed before the end of June. The form stated:

> ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA
>
> Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.
>
> This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

The form also included a line for the date of signing that read: "Done this ___ day of June, 2018."[14]

Smith did not elect. Nor does Smith allege that he asked anyone a question about this form. And at no time did Smith request an accommodation under the ADA. In fact, the Facility ADA Coordinator for Holman Correctional Facility reports no ADA request for accommodation from Smith in the facility files.[15]

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12. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), Doc. 29-3.
13. Doc. 44-6.
14. Doc. 44-9.
15. Doc. 47-38.

C. Smith brings this ADA claim

Smith initiated the present action on November 25, 2019.[16] Relevant to the present matter, Smith alleged that he was a qualified individual with an intellectual disability under the ADA, and so he was unable to make a timely election of nitrogen hypoxia during the June 2018 election period without a reasonable accommodation from the ADOC.[17] Defendants filed a motion to dismiss the complaint.

On December 1, 2020, the Alabama Supreme Court set Smith's execution for February 11, 2021.[18] After a hearing on Defendants' motion to dismiss,[19] the district court granted Defendants' motion on December 14, 2020.[20]

Though Smith knew for two weeks before the hearing and dismissal that his execution was scheduled, he did not ask the district court for a stay. Smith could have moved the district court for a stay at many points over the next seven weeks, while he was pursuing Rule 59 relief. Instead, not until the evening of February 4, 2021—sixty-five days after the Alabama Supreme Court set his execution date—did Smith finally move for a stay.[21]

The following day, the district court issued an order permitting Smith to submit evidence in support of his motion, with Defendants permitted to file a written response and submit evidence by February 6.[22] Dissatisfied with the amount of

16. Doc. 1.
17. *Id.* ¶¶ 53–55.
18. Doc. 17-1.
19. Doc. 24.
20. Doc. 25.
21. Doc. 42.
22. Doc. 43.

evidence presented before the February 8 hearing, the court invited the parties to submit additional evidence by 9 p.m. that evening.[23] Defendants produced to the district court Smith's inmate and health records, slightly more than sixteen hundred pages of information, plus two affidavits.[24]

On February 9, the district court denied Smith's stay motion in a twenty-seven-page order.[25] Turning first to the question of Smith's substantial likelihood of success on the merits, the court ruled in Smith's favor as to the issues of whether he had "some degree of intellectual disability,"[26] whether he was a qualified individual with a disability,[27] and whether he had been excluded from a public benefit.[28] However, as to the question of whether Smith was excluded or denied access to a public benefit on account of his disability, the court found that the evidence "weighs heavily against Smith on the merits of this prong."[29]

Here, the court explained that to succeed on his ADA claim, "Smith must show either that he requested an accommodation or the need for one was obvious, and the public entity failed to provide a reasonable accommodation."[30] Smith made no request for an accommodation until December 14, 2020.[31] As to the question of obvious need,

23. *See* Docs. 47, 48.
24. *See* Doc. 49 at 22 n.5.
25. Doc. 49.
26. *Id.* at 13.
27. *Id.* at 14.
28. *Id.* at 17.
29. *Id.*
30. *Id.* at 18.
31. Doc. 45-6.

the court noted that "it is not just the disability that must be obvious; the Plaintiff must also show that his 'need' resulting from the disability—the necessary reasonable accommodation—is also obvious."[32]

Smith's evidence as to this point consisted of two statements in his 1992 prison intake form and testing conducted during his state postconviction proceedings.[33] The district court was unimpressed by the intake forms, which, while noting that Smith seemed confused as to the purpose of the interview, also noted that he should be allowed to pursue his GED.[34] As for the postconviction testing, the district court concluded, "[E]ven if the State's knowledge of the Plaintiff's IQ scores are properly imputed to the ADOC, that knowledge alone does not establish that the ADOC should have known that Smith needed an accommodation."[35]

Instead, the district court focused on the records available to the ADOC, Smith's inmate file, and his health file:

> [T]he hundreds of pages of Smith's inmate and health records do not reveal any evidence to demonstrate that his need for an accommodation was known or obvious to the [] ADOC. In fact, Smith's inmate and health file provide the strongest evidence that it was not obvious the prison needed to accommodate him. First, the Court has scoured the Plaintiff's medical and psychological records and can find no comments or notations that indicate the staff was even aware of his intellectual disability. (See, e.g., docs. 47-1 at 22, 31–37, 41–53, 76–79, 83–84; 47-3 at 17–50; 47-4 at 1–16, 42). For example, on June 18, 2009, a form for the "Identification of Special Needs" did not have "yes" checked for "Developmentally Disabled" or "Special Mental Health Needs." (Doc. 46-1 at 92). As recently as 2016, prison officials screened Smith for prison victimization risk factors, and checked "no" in response to the question, "[h]ave you

32. *Id.*
33. *Id.*; *see* Docs. 44-1, 44-2, 44-3, 44-4, 44-5, 48 at 2 (noting documents in record).
34. Doc. 49 at 20–21.
35. *Id.* at 21.

> ever been told you have a mental disorder, learning disability . . . or developmental disability," and they indicated that he had no difficulty verbalizing. (Doc. 47-4 at 40).
>
> More importantly, none of the documents produced show that Smith was accommodated for an intellectual disability. His inmate and prison files are replete with forms signed by Smith with no indication the ADOC accommodated him in any way. Smith signed forms selecting next of kin, (doc. 47-25 at 6, 16), agreeing not to work in the kitchen while sick, (*id.* at 8; doc. 47-29 at 35, 41), attesting to a Tuberculosis notice form, (doc 47-25 at 26), consenting to medical treatment, (*id.* at 34; doc. 47-30 at 34, 35; 47-37 at 45-47), refusing medical treatment, (doc. 47-29 at 14, doc. 47-33 at 39, 40, 42, 44, 46, 48; doc. 47-37 at 50), and consenting to speak to the news media, (doc. 47-2 at 14). Many of these forms included the signature line below a statement agreeing that the signing party had read and understood the form. Some of the forms show annotations that appear to be made by Smith himself. For example, Smith wrote on a medical services release of responsibility form on April 13, 2009, "[a]ll I wanted was to see the dentist. I'm not sick." (Doc. 47-25 at 52). He signed beneath the note. (*Id.*). None of these forms suggest that Smith had the contents of any form read aloud to him, that he did not understand any form, or—crucially—that it appeared obvious that he needed an accommodation. Smith's record also includes handwritten letters by him to the Warden in 2002. (Doc. 47-2 at 10–12). And, in a notarized affidavit, the Holman ADA coordinator stated that he "would be made aware of any request for accommodation made by an inmate," and that after reviewing all of Holman's ADA files, none "contained any request for accommodation made by inmate Willie B. Smith." (Doc. 47-38 at 2).[36]

In light of the "voluminous records," the district court concluded that Smith failed to show a substantial likelihood of success because he failed to present evidence showing that his alleged need for such an accommodation was obvious.[37]

Turning then to the remaining equitable factors in the stay calculus, the district court paid heed to this Court's "explicit[] direct[ion] . . . to 'police carefully'

36. *Id.* at 22–24 (footnotes omitted).

37. *Id.* at 24.

against efforts to use last-minute motions to say an execution 'as tools to interpose unjustified delay.'"[38] The district court noted that "Smith could have filed his motion as early as December 1, 2020, when the Alabama Supreme Court set his execution date," but he "did not file his emergency motion for a stay until February 4, 2021, one week before his scheduled execution."[39] Worse still, Smith "offer[ed] no reasonable explanation as to why a motion to stay was not filed" in December, and "[w]hen asked at oral argument why the motion to stay was not filed earlier, counsel for Smith acknowledged that the motion was one of last resort."[40] The district court thus found that Smith's "unexplained delay in seeking a stay of execution also weighs against equitable relief."[41] Because "'last-minute stays should be the *extreme exception*, not the norm,' and the 'last-minute nature of an application that could have been brought earlier . . . may be grounds for denial of a stay,'" the district court concluded that "a stay of execution is not warranted."[42]

The district court also found that "the State's strong interest in enforcing its criminal judgments and the public interest in seeing capital sentences completed both weigh heavily against Smith in this case."[43]

Smith filed a notice of appeal on the evening of February 9 and an emergency motion for stay of execution with the Eleventh Circuit yesterday afternoon, February

38. *Id.* at 25 (quoting *Bucklew*, 139 S. Ct. at 1134).
39. *Id.*
40. *Id.* at 25–26.
41. *Id.* (quoting *Bucklew*, 139 S. Ct. at 1134).
42. *Id.* at 25 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)).
43. *Id.* at 26.

10, at 12:31 p.m. EST. The State filed a response by 5 p.m., and Smith filed a reply at 8:02 p.m.

Nine minutes later, at 8:11 p.m., the Eleventh Circuit issued a one-line order staying Smith's execution "until Tuesday, February 16, 2021 at 5:00 p.m. EST to allow the court time to review the merits of the claim."

REASONS FOR GRANTING THE APPLICATION

I. Smith's Late-Breaking "Last Resort" Stay Motion Should Have Been Denied As Untimely.

This Court has made clear again,[44] and again,[45] and again,[46] that "federal courts 'can and should' protect settled state judgments from 'undue interference' by invoking their 'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion[.]"[47] The district court below received the message. The court noted that "Smith could have filed his motion to stay as early as December 1, 2020," but instead waited "until February 4, 2021, one week before his scheduled execution."[48] He had "no reasonable explanation" for this delay and, under questioning from the court, had to admit "that the motion was one of last resort."[49] In the words of the *Bucklew* Court, it was a "last-minute . . . application that could have been brought

44. *Bucklew*, 139 S. Ct. at 1134.
45. *Dunn v. Ray*, 139 S. Ct. 661 (2019).
46. *Dunn v. Price*, 139 S. Ct. 1312 (2019).
47. *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006)).
48. Doc. 49 at 25.
49. *Id.* at 25–26.

earlier," which is sufficient "grounds for denial of a stay."[50] The district court so held, and that decision should have been affirmed.

After all, Smith waited ***sixty-five days*** after the announcement of his execution date to file his emergency motion for a stay of an execution that was scheduled a mere seven days later.[51] If there was any emergency here, it was one of Smith's own making, and he should not be rewarded for creating it. Even so, the district court did what it could to fairly consider the untimely motion: inviting Smith to make an evidentiary submission the next day, taking up the motion during the scheduled hearing on Monday, February 8—three days before the execution date—and inviting the parties to make a second evidentiary submission that night. After briefing and a period of factual development that was necessarily abbreviated by Smith's sixty-five-day delay in filing his motion, the district court denied Smith's motion at 9:22 p.m. EST on February 9. The district court relied on this Court's decision in *Bucklew* and took this Court's lessons to heart, recalling this Court's "explicit[] direct[ion] . . . to 'police carefully' against efforts to use last-minute motions to say an execution 'as tools to interpose unjustified delay.'"[52]

Smith filed his notice of appeal at 8:30 a.m. on February 10, but did not file his Emergency Motion to Stay in the Eleventh Circuit until four hours later, at 12:31 p.m. This delay left the Eleventh Circuit with precious little time to evaluate Smith's motion, so the court didn't. Rather, less than eight hours after Smith's filed his

50. *Bucklew*, 139 S. Ct. at 1134.
51. Doc. 42.
52. Doc. 49 at 25 (quoting *Bucklew*, 139 S. Ct. at 1134).

motion, less than ten minutes after he filed his reply brief, and less than an hour after the same panel had issued an opinion reversing the district court and granting Smith a preliminary injunction in a different appeal regarding a different execution claim,[53] the Eleventh Circuit granted the stay "to allow the court time to review the merits of the claim."[54] Thus, Smith's sixty-five day delay created a situation in which the Eleventh Circuit did precisely what this Court warned against in *Bucklew*, rewarding a dilatory inmate with a stay of execution. Rather than treating Smith's delay as "grounds for denial of a stay,"[55] the appellate court deemed it grounds for ***granting*** a stay. If that backwards approach is not rejected here, it will be copied again and again, perhaps even in another of Mr. Smith's many cases. "The people of [Alabama], the surviving victims of Mr. [Smith's] crimes, and others like them deserve better."[56]

Moreover, the delay in this case is even more egregious than the delay at issue in *Dunn v. Ray*,[57] which this Court cited in *Bucklew* as emblematic of the type of abusive delay that would create a "strong equitable presumption" that the stay was not warranted and justified vacating a stay "where a claim could have been brought

53. *See Smith v. Comm'r, Ala. Dep't Corrs.*, No. 21-10348 (11th Cir. Feb. 10, 2021). In a separate filing with this Court, the State is requesting that the Court vacate that preliminary injunction.

54. By acknowledging that the court did not have sufficient time to even "review" the merits of Smith's claim, the Eleventh Circuit necessarily could offer no opinion as to whether the district court abused its discretion in finding that Smith failed to show a "substantial likelihood of success on the merits." Doc. 49 at 26.

55. *Bucklew*, 139 S. Ct. at 1134.

56. *Id.*

57. 139 S. Ct. 661 (2019).

at such a time as to allow consideration of the merits without requiring entry of a stay."[58] In *Dunn v. Ray*, Ray's delay meant that the merits of his claims weren't placed before the court until "just 10 days before his scheduled execution."[59] Smith's delay in seeking a stay of execution resulted in the district court having only five days to consider the merits of his arguments—and resulted in the Eleventh Circuit having effectively no time at all.

Smith has consistently laid the blame for his delay at everyone's feet but his own. He blamed Defendants for filing a non-frivolous motion to dismiss his amended complaint in January 2020 instead of answering it.[60] He blamed the district court for not ruling on Defendants' initial motion to dismiss until December 2020.[61] But the question here is not about when Smith filed his complaint, rather it is when he chose to ask for a stay of execution. Smith knew on December 1, 2020, that his execution date was set and that he already faced a tight timeline for a fact-intensive claim. As the district court found, Smith could have sought a stay at that time, but he did not.[62] Instead, holding the motion back as a "last resort,"[63] Smith waited until the night of February 4, 2021—less than one week before his execution—to ask the district court for a stay, forcing both the parties and the court into emergency litigation. Through

58. *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill*, 547 U.S. at 584).
59. *Id.*
60. Corrected Emergency Motion at 22–23, *Smith v. Comm'r, Ala. Dep't of Corrs.*, No. 21-10413 (11th Cir. Feb. 10, 2021).
61. *Id.*
62. Doc. 49.
63. Doc. 49 at 26.

undue delay, Smith forced the district court and Eleventh Circuit into an emergency of his own making.

And the proper outcome was clear. Smith's unexplained delay should have doomed his motion. Instead, the Eleventh Circuit rewarded Smith, granting him a stay precisely because he had left the court no time to review his stay motion. That turns *Bucklew* on its head. And just like in *Dunn v. Ray* and *Dunn v. Price*, this Court should again step in to remind the Eleventh Circuit that it too "can and should protect settled state judgments from undue interference by invoking [its] equitable powers to dismiss or curtail suits" like this one "that are pursued in a dilatory fashion."[64]

II. Smith Is Unlikely To Succeed On His ADA Claim.

The district court correctly found that Smith failed to show a substantial likelihood of success as to the final prong of his ADA claim. Title II of the ADA "prohibits a 'public entity' from discriminating against 'a qualified individual with a disability' on account of the individual's disability."[65] To sufficiently plead a claim under Title II, an inmate plaintiff:

> generally must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.[66]

64. *Bucklew*, 139 S. Ct. at 1134.
65. *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1081 (11th Cir. 2007).
66. *Id.* at 1083.

The third prong is at issue here. A plaintiff may establish discrimination by showing that a public entity failed to provide him a reasonable accommodation.[67] Usually, a public entity is not obligated to give a reasonable accommodation unless a plaintiff specifically requests one.[68] However, if the plaintiff's need for accommodation is obvious, he does not need to explicitly request one.[69]

In this case, the district court properly concluded that Smith failed to establish a substantial likelihood of success on the merits of this third prong.[70] Smith did not request an accommodation until December 14, 2020. Thus, the question before the district court—and now this Court—is whether Smith's alleged need for an accommodation as to the hypoxia election form should have been obvious to Defendants.

As the district court noted, in the penal setting, courts have found the need for accommodation to be obvious "when the defendants either assessed the plaintiff's disability before failing to accommodate or treated the plaintiff for his disability in the past."[71] For example, the Florida Department of Corrections knew of an inmate's disability (asthma and a glass eye) because it had previously assessed him to determine whether chemical agents could be used against him.[72] The department was also

67. *Rylee v. Chapman*, 316 F. App'x 901, 906 (11th Cir. 2009).
68. *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999).
69. *E.g.*, *Arenas v. Ga. Dep't of Corrs.*, 4:16-cv-00320, 2020 WL 1849362, at *12 (S.D. Ga. Apr. 13, 2020) (citing *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1327 n.33 (N.D. Ga. 2017)).
70. Doc. 49 at 17-25.
71. *Id.* at 18.
72. *Nattiel v. Fla. Dep't of Corrs.*, 1:15-cv-00150, 2017 WL 4143, at *1 (N.D. Fla. Nov. 28, 2017).

held responsible when it housed an inmate in a dormitory where he had a fatal asthma attack, as the department had substantial evidence of the inmate's history of asthma.[73] By contrast, courts have not found the need for accommodation to be obvious where the defendant departments of corrections were not explicitly aware of the alleged disabilities. For instance, the Georgia Department of Corrections was not liable when a bipolar inmate committed suicide in his cell because the guards were unaware of his suicidal ideation.[74]

Smith failed to present evidence that Defendants knew of his supposed disability ***or***—and this is important—his need for accommodation as to the courtesy hypoxia form specifically. Smith directed the district court to two notations on his 1992 intake forms in which the interviewer noted that he appeared not to fully understand the purpose of the interview, but neither form indicated that Smith was disabled.[75] Smith also pointed to his state postconviction proceedings, in which he raised an *Atkins v. Virginia* claim.[76] There, the state court concluded that Smith had not shown intellectual disability—indeed, even Smith's expert had concluded that he was not intellectually disabled, despite his low score on an IQ test.[77]

Even if, arguendo, these scores support a finding of a disability for ADA purposes or knowledge of these scores can be imputed to Defendants, the district court

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73. *Wolfe v. Fla. Dep't of Corrs.*, 5:10-cv-00663, 2012 WL 4052334, at *4 (M.D. Fla. Sept. 14, 2012).
74. *Arenas*, 202 WL 1849362, at *12–13.
75. Doc. 49 at 20–21.
76. 536 U.S. 304 (2002).
77. *Smith v. State*, 112 So. 3d 1108, 1127–28 (Ala. Crim. App. 2012); Doc. 44-3.

correctly found that this knowledge would not establish that Smith ***needed accommodation***.[78] As the district court noted, after "scour[ing]" sixteen hundred pages of Smith's inmate and health—including psychological—records, the court found "no comments or notations that indicate the staff was even aware of his intellectual disability."[79] Several forms that specifically asked whether the inmate had "special mental health needs" or a developmental disability indicated that Smith fit neither category.[80] There is no indication of a request for accommodation in Smith's files.[81] Smith was able to sign forms identifying his next of kin for medical purposes, consent to and refuse medical treatment, and consent to speak to the media, and some of these forms include annotations from Smith.[82] Smith alleged that these annotations are proof of his need for accommodation because he "writes in print, does not use complete sentences, lacks punctuation, misspells words, and converses on an elementary level,"[83] but the fact that he does not write in cursive or exhibits the occasional misspelling is not indicative of a need for accommodation. As the district court noted, "None of these forms suggest that Smith had the contents of any form read aloud to him, that he did not understand any form, or—crucially—that it appeared obvious that he needed an accommodation."[84] Moreover, Smith's file also contained

78. Doc. 49 at 21.
79. *Id.* at 22.
80. *Id.* (citing Doc. 47-1 at 92).
81. Doc. 47-38.
82. Doc. 49 at 22–23.
83. Corrected Emergency Motion at 17.
84. Doc. 49 at 23.

handwritten letters to the deputy warden from 2002, indicating that his comprehension and literacy surpass the bleak picture painted in his Eleventh Circuit emergency motion for stay.[85]

The presence of other mental health records in these files suggests that if the ADOC had knowledge that Smith was intellectually disabled to the point of needing accommodation, there would have been a notation in his records. As the district court pointed out, records indicate Smith was diagnosed with depression in 1994.[86] When he was evaluated in April 2002, the interviewer noted his "history of mental health treatment for depression and vague complaints of hallucinations."[87] Another evaluation that August showed Smith to be "rational" in speech and thought, and the interviewer noted that he "want[ed] to talk about library books usually."[88] But while Smith's mental health is documented, there is no evidence in Smith's file of nearly thirty years that the ADOC ever knew of a need for accommodation due to intellectual disability.[89]

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85. Doc. 47-2 at 10–12.
86. Doc. 49 at 24.
87. Doc. 47-2 at 16.
88. Doc. 49 at 24.
89. Smith alleges that the ADOC's ADA coordinator was not hired until October 2020. Corrected Emergency Motion at 20. That employee, Richard Lewis, reviewed Smith's file and found no indication of a request for accommodation. Moreover, as Smith has been pursuing this matter with his current counsel since November 2019, he could have requested an accommodation if he needed one at any time in the last year. His only "request" to date was the aforementioned December 14, 2020, request, e-mailed to counsel when the district court dismissed his original complaint.

    Smith also makes reference to a 2016 consent decree concerning accommodations provided to inmates with an IQ of 75 or below. *Id.* The provision of that

The district court correctly found that Smith had shown no substantial likelihood of success on the merits as to the third prong of Smith's Title II claim. The Eleventh Circuit's grant of the stay to review the merits of the claim rings empty in light of the clear evidence that the ADOC knew, or should have known, that he needed a reasonable accommodation for the nitrogen hypoxia form. For this reason also, this Court should vacate the Eleventh Circuit's stay of execution.

III. The Remaining Equitable Factors Also Favor Vacating The Stay.

The other factors also demonstrate that the district court was right to deny a stay, and the Eleventh Circuit was wrong to grant one. This Court has held that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence."[90] For this reason, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."[91] As the Court noted in *Bucklew*:

> Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled

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consent decree concerning testing inmates' intelligence excludes death row inmates like Smith, as counsel for death row inmates—including the Federal Defenders, Smith's current counsel—objected to the ADOC testing them. Parties' Joint Stipulation of Dismissal, *Dunn v. Dunn*, 2:14-cv-00601 (M.D. Ala. Oct. 28, 2016), ECF No. 911; *see* Parties' Joint Submission Regarding the Views of the Equal Justice Initiative, *Dunn v. Dunn*, 2:14-cv-00601 (M.D. Ala. Aug. 17, 2016), ECF No. 652.

90. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

91. *Id*.

> precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning.[92]

Here, the rights of the victim of Smith's crime, the State, and the public interest at large heavily outweigh Smith's last-minute request for a stay. Carrying out Smith's lawful sentence pursuant to a state conviction "acquires an added moral dimension" because his postconviction proceedings have run their course.[93] Smith committed his crime in 1991, thirty years ago. He robbed, kidnapped, and murdered a twenty-two-year-old woman who simply happened to be at the wrong ATM at the wrong time. His conviction is valid, and a competent state court with jurisdiction over his case properly set his execution date according to Alabama law. He has not demonstrated a substantial likelihood of success on the merits, and his dilatory "last resort" motion for a stay a week before his execution represents the sort of gamesmanship this Court has repeatedly decried. This Court should strongly consider Alabama's interest in enforcing its criminal judgment and vacate the improvidently granted stay of execution.

CONCLUSION

The Court should vacate the Eleventh Circuit's stay.

92. *Bucklew*, 139 S. Ct. at 1133-34.
93. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Dated: February 11, 2021

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