No. 20A-129

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IN THE SUPREME COURT OF THE UNITED STATES

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JEFFERSON DUNN, Commissioner,
Alabama Department of Corrections, and

TERRY RAYBON, Warden,
Holman Correctional Facility,

*Applicants,*

v.

WILLIE B. SMITH III,

*Respondent.*

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# OPPOSITION TO APPLICATION TO VACATE STAY OF EXECUTION

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*****CAPITAL CASE*****
**EXECUTION SET FOR**
**FEBRUARY 11, 2021 – 6:00 p.m. CST**


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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:

## INTRODUCTION

On February 11 at 6:00 p.m. CST, the State of Alabama is scheduled to carry out the execution of Willie B. Smith III, a man with lifelong intellectual deficits as demonstrated by an IQ of 64 at the low end and 75 at the high end. On February 10, 2021, the U.S. Court of Appeals for the Eleventh Circuit granted a stay of execution. As explained below, equitable factors tip the scales in favor of the stay so this Court should deny the Emergency Application to Vacate Stay of Execution.

On July 17, 1992, in its order sentencing Mr. Smith to death, the trial court found that with an IQ score of 75, Mr. Smith functioned in "the borderline range between mild retardation and low average intelligence." (Dist. Ct. Doc. 48-2 at 32.) Upon being sentenced, Mr. Smith was transferred to the custody of the Alabama Department of Corrections (ADOC) and was interviewed as part of his custody classification. In the report, the ADOC official noted that Mr. Smith "*didn't understand the interview*," so the official "tried to explain what this interview was about and the reason." (Dist. Ct. Doc. 48-2 at 46) (emphasis added). This document was signed by the warden, classification coordinator, and a member of the central review board. Thus, from the time that Mr. Smith was sentenced to death and placed in the custody of the ADOC, the State knew that he was

intellectually impaired and that he had difficulty understanding even basic concepts and questions related to a routine prison intake interview.

Because of his intellectual deficits, Mr. Smith requires reasonable accommodation to participate in certain benefits provided by the ADOC. Reasonable accommodation is required by the Americans with Disabilities Act.[1] But the ADOC deprived him of those benefits when it failed to provide reasonable accommodations to assist him in understanding a highly complex and complicated election form ADOC provided to all condemned prisoners regardless of their disability. As a result, he was denied the opportunity to make a timely election to Alabama's nitrogen hypoxia method of execution. Because of ADOC's denial of his rights, Mr. Smith filed a civil complaint ***more than one year ago*** alleging a violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("ADA"). What followed was a series of events that prevented Mr. Smith from having his claim considered on the merits. Unless this Court upholds the current stay, Mr. Smith will have his longstanding claim mooted by his execution.

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[1] The district court found: (1) that Smith has a substantial likelihood of establishing some degree of intellectual disability that substantially limits one or more major life activities, (2) that the evidence weighs slightly in favor of Smith having a substantial likelihood of establishing himself as a qualified individual with a disability, and (3) the evidence weighs in favor of Smith having a substantial likelihood of establishing he has been excluded from a public benefit and the State has not disputed those findings.

## PROCEDURAL HISTORY

On November 25, 2019, Mr. Smith filed a two-count complaint alleging that the Alabama Department of Corrections (ADOC) violated the Americans with Disabilities Act (ADA) when it denied him reasonable accommodations to assist him in understanding a legal document it provided to all prisoners regarding the prisoner's right to elect an alternate method of execution. The U.S. District Court for the Middle District of Alabama denied ADOC's motion to dismiss the claim on February 8, 2021, *Smith v. Dunn*, 2:19-cv-00927, but subsequently denied Mr. Smith a stay of execution to litigate that same claim February 9, *Smith v. Dunn*, 2:19-cv-00927. Mr. Smith then sought an emergency stay of execution from the Eleventh Circuit, which was granted on February 10, 2021. *Smith v. Dunn*, 11-21-10413.

## LEGAL STANDARD

The standard for granting a stay of execution is well-established. In upholding a stay of execution, the Court should consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims.[2] Here, these factors weigh in favor of staying Respondent's execution. Moreover, because this Court

[2] *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

has ultimate jurisdiction over the issues that could be raised, it has the authority to protect its jurisdiction by staying an execution that would otherwise moot the case—a step the Court took in *Bucklew v. Lombardi*, No. 13A1153.[3]

## MR. SMITH HAS NOT UNNECESSARILY DELAYED IN FILING HIS CLAIM

Because Mr. Smith filed his ADA claim *more than one year* before the execution warrant even issued, he did not unnecessarily delay in bringing his claim. This Court should deny the Applicants' Emergency Application to Vacate Stay of Execution and keep the stay in place so Mr. Smith has an opportunity to obtain relief on his claim.

Perhaps because the Applicants recognize that Mr. Smith has a substantial likelihood of success on the merits of his ADA claim, they spend most of its Emergency Application relying upon other cases in which this Court vacated stays of execution. And although the State attempts to include Mr. Smith in the same category as two other Alabama prisoners who were denied a stay in 2019, the circumstances here are drastically different.

In *Ray v. Dunn*, the prisoner filed a lawsuit only ten days prior to his scheduled execution.[4] In the order vacating the stay of execution, this Court said:

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[3] This Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

[4] *Ray v. Dunn*, No. 2:19-cv-00088, Compl. (M.D. Ala. Jan. 29, 2019), ECF No. 1.

"On November 6, 2018, the State scheduled Domineque Ray's execution date for February 7, 2019. *Because Ray waited until January 28, 2019 to seek relief*, we grant the State's application to vacate the stay."[5]

The State's reliance on *Price v. Dunn*, a case in which a lawsuit was filed four months before an execution, is also inapposite to Mr. Smith's case. There, the state sought an execution warrant on January 11, 2019, and Price waited to file his lawsuit the following month on February 8, 2019.[6] The State answered the complaint on February 26,[7] and on March 1, 2019, the Alabama Supreme Court set Mr. Price's execution for April 11, 2019.[8] *Because the State had answered the Complaint, the parties were able to move forward in the lawsuit, filing substantive motions*.[9] Price, however, still asked the Court to stay his execution and the State argued he delayed because Price initiated "the current § 1983 litigation two weeks after the State moved for a date in 2019."[10]

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[5] *Dunn v. Ray*, 139 S. Ct. 661 (2019) (emphasis added).

[6] *Dunn v. Price*, No. 19-cv-00057, Compl. (S.D. Ala. Feb. 8, 2019), ECF No. 1.

[7] *Dunn v. Price*, No. 19-cv-00057, Answer to Price's Compl. (S.D. Ala. Feb. 26, 2019), ECF No. 12.

[8] *Dunn v. Price*, No. 19-cv-00057, Scheduling Order (S.D. Ala. Mar. 1, 2019), ECF No. 18.

[9] *See generally Dunn v. Price*, No. 19-cv-00057, Defs' Not. Of Execution Date (S.D. Ala. Mar. 1, 2019), ECF No. 16-1.

[10] *Dunn v. Price*, No. 19-cv-00057, Defs' Reply to Price's Opp. To Defs' Mot. for Summary J., Opp. to Price's Cross-Mot. for Summary J., and Opp. to Price's Mot. for Stay of Execution (S.D. Ala. Apr. 2, 2019), ECF No. 31 at 13.

The State of Alabama seems to raise the same argument when objecting to a condemned prisoners' request to for stay: whenever the prisoner may have brought his claim, it will be too late. Ray's case was filed ten days before his execution, and that was too late. Price's case was filed two weeks after the State moved for an execution and four months before the scheduled execution, and that was too late. Here, Mr. Smith filed his lawsuit *before* he even sought review in this Court on his habeas corpus case and *eleven months* before the State asked for an execution date and *over fourteen months* before an execution date was (eventually) set. But the State, once again, argues that Mr. Smith has used delay tactics so this Court should vacate the pending stay. This Court should not signal to litigants that no matter how soon they bring a claim, it will never warrant a stay.

Setting aside the Alabama cases cited by the State, this Court's recent decision in *Bucklew v. Precythe* also does not support the State's argument that Mr. Smith delayed in filing his lawsuit. In that case, decided in 2019, the Missouri prisoner filed his claim "six years after he said he had an as-applied challenge [to the lethal-injection protocol] and *just 12 days before his scheduled execution*."[11] Moreover, Bucklew failed to comply with the " Eighth Circuit's express instruction" in 2015, yet was still eventually permitted "extensive discovery" in his

[11] *Bucklew v. Precythe*, Br. of Respondents, 2018 WL 3969564, at *16 (U.S. 2019) (emphasis added).

case, and lost in 2017 on summary judgment.[12] There, this Court reiterated that "'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay,"[13] and charged courts with "polic[ing]carefully against attempts to use such challenges as *tools to interpose unjustified delay*."[14]

Here, Mr. Smith has not used his pending ADA lawsuit as a tool to interpose unjustified delay or manipulate the system. Mr. Smith brought his claim well in advance of his execution—indeed he filed the instant lawsuit prior to even seeking review in this Court from the Eleventh Circuit's denial of habeas relief.[15] **Mr. Smith's lawsuit was pending for *over one year* before Mr. Smith's execution warrant issued**, and eleven months before the State *even asked* to set an execution date. Indeed, when Mr. Smith brought his claim, he had no need to ask for a stay of execution. These facts alone demonstrate that Mr. Smith did not unnecessarily delay in seeking to litigate his claim and lean strongly in favor of this Court upholding the stay.

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[12] *Bucklew v. Precythe*, 139 S. Ct. 1112, 1121 (2019).

[13] *Bucklew*, 139 S. Ct. at 1134 (citing *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992)). In *Gomez*, the Court found "abusive delay" and vacated a stay for a death-row prisoner who challenged the constitutionality of lethal gas, a claim that could have been brought a decade earlier and in one of the previous ***four*** habeas petitions *Gomez*, 503 U.S. at 653-54.

[14] *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (emphasis added).

[15] Mr. Smith filed his certiorari petition on February 19, 2020. Pet. for Writ of Cert., *Smith v. Dunn*, No. 19-7745 (Feb. 19, 2020), *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-7745.html.

Moreover, had the case proceeded forward when the claim was initially raised, Mr. Smith likely would not have needed a stay of execution to permit merits review.[16] The ADOC's motion to dismiss the lawsuit was fully briefed on March 6, 2020—nearly nine months before the execution warrant issued and eight months before the currently scheduled execution date. Despite the briefing being complete in March, the district court took *no action* on the motion until nearly nine months later, and then only *after* Mr. Smith notified the Court that an execution date had been set on December 1, 2020.

At this posture, Mr. Smith has survived a motion to dismiss his ADA claim, and should be permitted to litigate the issue. But the State of Alabama seeks to execute him today. Mr. Smith's only opportunity to vindicate his rights will be if this Court allows the stay to remain in place, which will provide the district court the opportunity to decide the merits of his claim.

## MR. SMITH WILL SUFFER IRREPARABLE HARM IF THE STAY IS VACATED

In balancing the harms that will occur if the current stay is – or is not – upheld, the scales of equity tip in favor of Mr. Smith. The only reason that Mr. Smith is scheduled to be executed today via lethal injection is that he is a cognitively disabled

[16] A stay of execution is improper where a prisoner's claim could have been "brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

person to whom ADOC denied reasonable accommodations. As a result, he was deprived of the benefit of the Election Form and thus understanding that he had the option to select nitrogen hypoxia as his method of execution.

Mr. Smith recognizes that the State has an interest in carrying out its sentences, and he is not asking this Court to uphold a stay that would prevent the State of Alabama from ever carrying out his punishment. To the contrary. He seeks only to be afforded the opportunity to choose nitrogen hypoxia instead of midazolam as the method by which Alabama carries out his sentence. Once ADOC has developed a new execution protocol, the State will be able to carry out its punishment. At this stage, Mr. Smith should receive the benefit that ADOC provided to all other condemned prisoners. It is only because ADOC failed to provide reasonable accommodations to compensate for Mr. Smith's intellectual limitations that he now is facing execution via a midazolam protocol that has continuously been challenged as causing pain and suffering.[17]

At the end of the day, if the stay is upheld, the State of Alabama will suffer little, if any, harm, and Mr. Smith will be permitted to obtain relief on his claim in

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[17] *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015) (Oklahoma prisoners challenging midazolam use in lethal injection); *In re Ohio Execution Protocol Litig.*, 946 F.3d 287 (6th Cir. 2019) (Ohio prisoner challenging midazolam use in lethal injection); *McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. 2017) (Arkansas prisoners challenging midazolam use in lethal injection); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016) (Alabama prisoner challenging midazolam use in lethal injection).

the district court. On the other hand, Mr. Smith will suffer irreparable harm if he is executed after being denied a benefit because his disability prevented him from understanding the Election Form that ADOC distributed. He seeks redress under the ADA, a law that was enacted to protect the rights of individuals, like Mr. Smith, who have an intellectual disability. There is no provision to the ADA that exempts condemned prisoners, and in fact, this Court has held that the statute "unambiguously" applies to prisoners.[18]. Regardless of Mr. Smith's convictions and death sentence, he is entitled to the protections of the ADA. "[T]here have been and there will continue to be instances of discrimination against [intellectually disabled individuals] that are in fact invidious."[19] But this Court can mitigate such discrimination by upholding the existing stay, ensuring that Mr. Smith is not executed in violation of his rights under the ADA.

**MR. SMITH CAN DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS ON HIS PENDING CLAIM**

To state a Title II ADA claim, a 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

[18] *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

[19] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.[20]

The district court denied Mr. Smith's Emergency Motion for Stay of Execution finding that while he showed a substantial likelihood of success on the merits as to the first three prongs of his Title II ADA claim, he failed to show the fourth prong, exclusion or denial based on disability. This finding was an abuse of discretion and the lack of discovery is highly relevant as the only prong of the Title II ADA claim that the district court found Mr. Smith did not satisfy is one where he must show what the Applicants knew or should have known.

The court agreed that Mr. Smith did not need to show that he requested an accommodation if the "the defendant otherwise had knowledge of an individual's disability and needs but took no action." Indeed, the court found that "evidence presented by the Defendants certainly suggests they had constructive notice of Smith's intellectual limitations—or, at the very least, that he was claiming to have an intellectual disability." However, the court required Mr. Smith to show that not only did the prison officials know of Mr. Smith's disabilities but had dealt with those disabilities in the past and were aware of the need for accommodations. The court concluded that "[t]hus, for a needed accommodation to be obvious, the

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[20] *See Shotz v. Cates,* 256 F.3d 1077, 1079 (11th Cir. 2001) (citing 42 U.S.C. § 12132).

Plaintiff must establish that ADOC had more than constructive knowledge of his disability; it must be obvious that an *accommodation* was needed."

Mr. Smith argued that the Applicants had this knowledge as there was a history dating back to his initial intake at Holman Correctional Facility which clearly showed that Mr. Smith had borderline intelligence and struggled with comprehension and required accommodation in the form of assistance in understanding concepts and language. The court acknowledged but rejected this history because "even 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."

The court then turned to the "the 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." This evidence was that the court "can find no comments or notations that indicate the staff was even aware of his intellectual disability." Moreover, the court concluded that Mr. Smith had signed forms while in ADOC custody and none of those forms indicated that he was accommodated "in any way" and some of the forms indicated "that Mr. Smith himself had made annotations." Mr. Smith submits the actual annotation referenced by the court:

the risk(s) involved in refusing. I hereby release and agree to hold harmless Correctional Medical Services, its employees and agents from all responsibility and ill effect, which may result from this action.

All I wanted was to see the dentist. I'm Not Sick

x Willie Smith — Inmate Signature

4-13-09 @ 1630 — Date/Time

Witness

Indeed, the "annotation" and others like this made by Mr. Smith are evidence of his need for a reasonable accommodation when provided with complex information. Mr. Smith writes in print, does not use complete sentences, lacks punctuation, misspells words, and converses on an elementary level.

Property Returned to Inmate

Willie Smith — Inmate Signature

10-5-07 — Date

Officer Signature

Print Name: Willie Smith

ID # 2-5\\1

Date of Request: 10/26/05

Date of Birth: 10/2/69

Location: 8D-5

Nature of problem or request: Broke wrist Hurting bad Tynelwol Not Helping

Willie Smith — Signature

DO NOT WRITE BELOW

Simply, this is not the writing of a person who could, *without any reasonable accommodation*, understand and comprehend this Election Form, a

document distributed to Mr. Smith by the Applicants without any offer of assistance or explanation:

> 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 execution by nitrogen hypoxia.
>
> Dated this _______ day of June, 2018.

Yet, the court determined that Mr. Smith's "need" resulting from his disability – the necessary reasonable accommodation to participate in the service and benefit of the Election Form – was not obvious. This was a clear abuse of discretion.

The Applicants wrongly asserted that "Smith contended that his intellectual disability was obvious, but he failed to present evidence that Defendants-Appellants knew of this supposed disability *or*—and this is important—his need for accommodation as to the courtesy hypoxia form specifically." While Mr. Smith has asserted that it would be difficult to show what the Applicants "knew" about his need for an accommodation as to this singular and very specific form absent discovery where he could depose the persons responsible for its selection and

institutional distribution, a review of the record shows that, in fact, there is ample evidence of the Applicants' knowledge of his need for accommodation as to the form.

To be clear, the undisputed evidence shows that the Applicants "knew" that the form they adopted as their own for distribution to death row inmates was originally used by licensed attorneys equipped with the knowledge and expertise to explain the 2018 change in Alabama law and its legal implication and ramifications. The Applicants "knew" that because they arranged for those same inmates to be present and available for a legal visit with their counsel on June 26, 2018, that this form required additional discussion and explanation. The Applicants then took the same form used in this attorney-client consultation and distributed it to a person (Mr. Smith) with a known IQ of 72. The Applicants "knew" Mr. Smith had a 72 IQ and functions in the "borderline to low average range of intellectual ability"[21] because the expert retained by the Applicants in 2007 told them so. To argue that Mr. Smith failed to present evidence that an accommodation was necessary is simply without belief.

Moreover, the law cited by the court for the proposition that "where the evidence did not demonstrate that defendants were explicitly aware of the prisoner's disabilities and resultant needs, courts have found the plaintiffs'

[21] *Id.* at 2.

disabilities and need for accommodations were not obvious" are cases in which courts determined the need for accommodation was not "open, obvious, and apparent" involving depression and the need for accommodation in the form of a suicide-proof cell where the prisoner was asked about and explicitly denied currently having suicidal thoughts."[22] Depression resulting in suicidal tendencies is not a permanent condition (so evidence that it existed prior to incarceration does not demonstrate prison staff had current knowledge) whereas cognitive deficiencies are permanent, and two of his IQ tests were conducted during his incarceration while he was in the custody and control of the Applicants. None of the evidence presented by the Applicants shows that Mr. Smith was asked if he had cognitive or learning disabilities and denied it. Relying on this entire line of cases was also an abuse of discretion.

Finally, it was known and the Applicants conceded in a 2016 consent decree entered in the Middle District of Alabama that the ADOC was not adequately (if at all) offering Title II ADA accommodations to prisoners on death row, in particular, ADOC was not providing accommodations to those with learning disabilities or intellectual disabilities. So, there would not be a record of an assessment of Mr.

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[22] *Arenas v. Georgia Dep't of Corr.*, No. CV416-320, 2020 WL 1849362, at *13 (S.D. Ga. Apr. 13, 2020),*Gonzales v. Bexar County, Texas,* 2014 WL 12513177, at *5 (W.D. Tex. Mar. 20, 2014), aff'd, sub nom. *Gonzales v. Bexar County,* 584 F. App'x 232 (5th Cir. 2014); *Zaragoza v. Dallas County*, 2009 WL 2030436, at *1 (N.D. Tex. July 13, 2009)).

Smith's needs for an accommodation nor would there be formal documentation of an ADA request since none existed. Further, since the ADOC was subject to the Consent Decree, they have not consistently had an ADA Facility Coordinator or accommodations person or, really, a true working system in place to submit requests. The affidavit provided by the Applicants from the ADA Coordinator, Richard Lewis, shows that he was not employed in that position until October 16, 2020, more than two years after the election period. Yet, the Applicants acknowledged in the 2016 Consent Decree that accommodations should be provided to inmates with a 75 or below. All of this information shows that Mr. Smith has a substantial likelihood of success on the merits by establishing that the Applicants knew, not only of his disability, but of his need for an accommodation.

Finally, the district court relying solely on the records of the Applicants is particularly problematic given that the Alabama Department of Corrections has long been recognized for its failures to provide prison conditions which comport with the Eighth Amendment. The following summary of Commissioner Dunn's testimony (and that of his subordinate) in long-running Eighth Amendment prison conditions litigation in the Middle District of Alabama makes this clear:

> The plaintiffs' case then proceeded with testimony from Commissioner Dunn, who aptly described the prison system as wrestling with a "two-headed monster": overcrowding and understaffing. Dunn Testimony at 26. The court also heard from Associate Commissioner Naglich and MHM's program director

> Houser, for whom overcrowding and understaffing (both as to correctional staff, as noted by Dunn, and mental-health staff) were a mantra. They, with admirable candor, as with many other fact witnesses and the experts from both sides, essentially agreed that the staffing shortages, combined with persistent and significant overcrowding, contribute to serious systemic deficiencies in the delivery of mental-health care.
>
> The inadequacies in the mental-health care system start at the door, with intake screening for prisoners who need mental-health care.[23]

Relying on Applicants' records is problematic because they were generated and maintained by a system "many fact witnesses and experts from both sides" agreed was seriously and systemically deficient—the result of what Commissioner Dunn described as a long-running battle with a "two-headed monster." These records—provided in a vacuum without opportunity to examine or rebut[24] less than one day before the district court determined the Mr. Smith failed to show a substantial likelihood of success on the merits —are not helpful to the Applicants, and if anything, support Mr. Smith's argument. In finding otherwise, the district court abused its discretion.

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[23] *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1184 (M.D. Ala. 2017).

[24] "Despite twice refusing to provide Mr. Smith with his own ADOC Health Records for over a year, the Applicants managed to produce 803 pages of never-seen before Bates-stamped health records – sorted and distinguished by their perceived significance to the litigation to the court . . . in fewer than 9 hours." Nowhere in their argument regarding delay do Applicants address their failure to provide these records to Mr. Smith, let alone the remarkable speed with which they were able to generate and analyze the records when it was potentially to their benefit.

## CONCLUSION

Because Mr. Smith can demonstrate a likelihood of success on the merits of his ADA claim, and because he attempted to avail himself of the protections afforded to him as a person with a disability more than one year before the State scheduled an execution, this Court should exercise its equitable power and allow the current stay to remain in place.


/s/ Allyson R. du Lac*
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/s/ Spencer J. Hahn
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