No. 20A129

In the Supreme Court of the United States

JEFFERSON DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
APPLICANTS,
v.
WILLIE B. SMITH III,
RESPONDENT.

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

Because of Smith's undue delay in seeking a stay, the Eleventh Circuit threw up its hands and granted Smith's request just minutes after he filed his reply brief. It did so not because Smith had carried his burden of showing that a stay is warranted. The district court had considered the stay factors, concluded from the evidence that Smith was unlikely to prevail on his ADA claim, and found that the equities did not warrant a stay because (among other reasons) Smith had waited sixty-five days after his execution was set to seek a stay. Rather, the Eleventh Circuit halted Smith's execution because it didn't have sufficient time to consider the merits of Smith's claim due to the last-minute nature of the litigation

But the time crunch was of Smith's own making. One might even say it was the point. Yet the Court has long warned against such practices and long instructed courts not to "reward those who interpose delay."[1] And it has admonished lower courts to "police carefully against attempts to use such challenges as tools to interpose unjustified delay" because "[l]ast-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought

1. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019); *see Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992) ("We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission."); *Gomez v. U.S. Dist. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay."[2] The Eleventh Circuit shirked that responsibility.

Smith's response confirms the error of the Eleventh Circuit's ways, for just as when he was before the district court, Smith "offers no reasonable explanation as to why a motion to stay was not filed" until sixty-five days after the Alabama Supreme Court set his execution date.[3] He admitted to the district court that his late-breaking stay motion was filed just a week ago as a "last resort."[4] In this Court, he admits that unnecessary delay is a factor in the stay calculus.[5] And yet, Smith contends that there was no delay here because he filed his underlying claim in November 2019.[6]

The logic proves too much. Under Smith's reasoning, he could wait until just minutes before his execution to lodge a stay application and the Court would accept it as timely so long as it was part of an underlying lawsuit. That cannot be right; all the reasons the Court gave in *Bucklew* (and many other cases) as to why dilatory filings are problematic apply equally to the stay context. In fact, in *Dunn v. Price*, the Court vacated a district court's stay of execution where the lower court had granted a stay based on evidence submitted a few hours before the planned execution, and the Court did so even though the claim itself had been raised a couple of months before.[7] Perhaps that is why the Court has emphasized that the timing of the stay

2. *Bucklew*, 139 S. Ct. at 1134 (cleaned up and citation omitted).
3. Doc. 49 at 25.
4. *Id.* at 26.
5. Opp'n to Appl. to Vacate Stay of Execution at 4 (citing *Hill*, 547 U.S. at 584).
6. *Id.* at 5–9.
7. 139 S. Ct. 1312, 1312 (2019).

application—in addition to the timing of the claim itself—matters: "A court may consider the last-minute nature of an ***application to stay execution*** in deciding whether to grant equitable relief."[8]

Smith attempts to paint Applicants and the State of Alabama more broadly as bad actors for arguing that "whenever the prisoner may have brought his claim, it will be too late."[9] Yes, Domineque Ray's case was filed too late when he waited until ten days before his execution to initiate litigation.[10] Yes, Christopher Price unduly delayed when he initiated one § 1983 action one month after the State moved for his execution date in 2014 and another two weeks after the State moved for a second date in 2019—Price, like many death row inmates, employed meritless federal civil litigation as a stalling tactic.[11] And yes, Smith could have initiated this action months before he did, as he waited nearly seventeen months after the nitrogen hypoxia election period ended to raise his ADA and method-of-execution claims. But the question here is not whether Smith was untimely in initiating this action. Rather, it is whether he unduly delayed in ***moving for a stay of execution***. This is what the Court plainly cautioned against in *Bucklew*. Smith could have moved for a stay as early as

8. *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (emphasis added); *see also Bucklew*, 139 S. Ct. at 1134 (noting that "the last-minute nature of an *application* that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay" (cleaned up, emphasis added, and citation omitted)).

9. Opp'n to Appl. to Vacate Stay of Execution at 7.

10. *Dunn v. Ray*, 139 S. Ct. 661 (2019).

11. *See Price v. Dunn*, 139 S. Ct. 1533, 1534 (2019) (Thomas, J., concurring in denial of certiorari) ("The dissent omitted any discussion of the murder that warranted petitioner's sentence of death and the extensive procedural protections afforded to him before his last-minute, dilatory filings.").

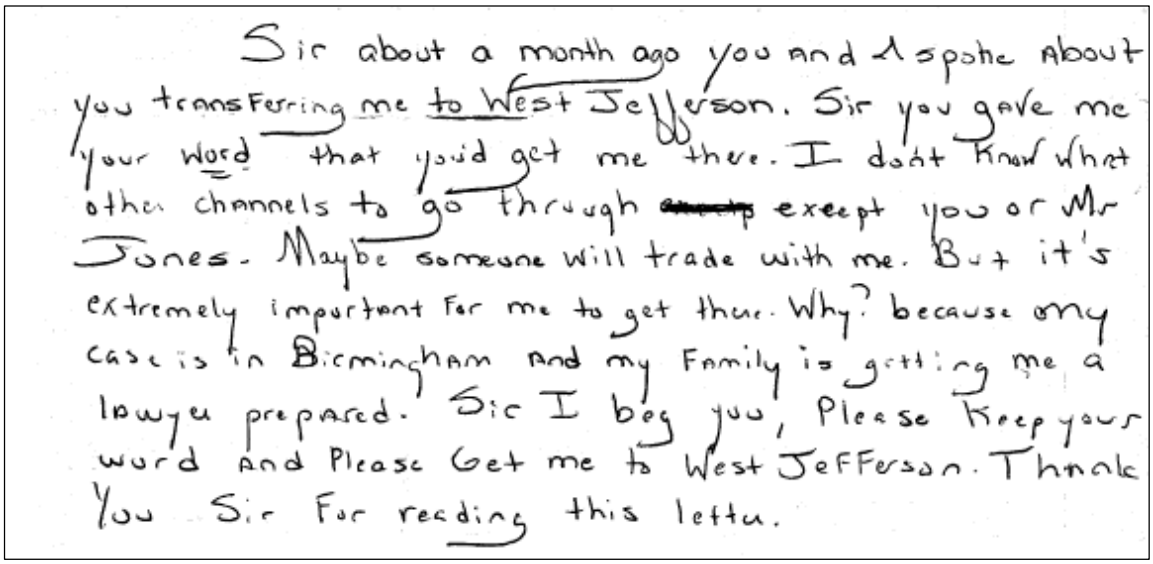
December 1, 2020, and thereby given the district court—and the Eleventh Circuit—time to consider the merits of his claims. Instead, like so many inmates with impending executions, he decided to take a chance and play games with the courts. He lost in the district court, which considered the evidence before it and found no substantial likelihood of success on the third prong of his Title II claim. For the moment, he has won in the Eleventh Circuit by sheer virtue of running out the clock. Smith has no excuse for his dilatory filing, and this Court should remind inmates in Smith's position that civil litigation is not a wrench to throw into the works of justice.

Turning then to Smith's failure on the merits of his ADA claim, if this were a matter in which the district court considered the evidence and found a substantial likelihood of success as to all of Smith's claims, then the tardiness of his filing might be overlooked. But that's not what happened below. By waiting until the last minute to move for a stay of execution, Smith forced the district court into the unenviable position of requesting quick evidentiary submissions in support of and opposition to his motion.[12] When those evidentiary submissions proved insufficient, the court asked for more, giving the parties roughly nine hours to assemble documents.[13] Impressively, in under twenty-hour hours, the court reviewed these voluminous submissions and drafted a twenty-seven-page order. And while the court made certain findings of fact in Smith's favor, the court also concluded that Smith failed to show a substantial likelihood of success as to his burden of showing that the ADOC knew or

12. Docs. 44, 45 (and exhibits).
13. Docs. 47, 48 (and exhibits).

should have known of his need for reasonable accommodation as to the hypoxia election form. The Title II prongs are not optional, and failure to satisfy one is a failure to prove the claim.

Smith contends that the district court erred in its finding that his alleged need for accommodation was not obvious, arguing that he writes in print instead of cursive and that certain notations he made on forms in his record are short or contain misspellings.[14] While Smith offers the Court two clips of forms showing his supposed illiteracy, he failed to include clips of his letters to the deputy warden, such as the following:[15]



Sir about a month ago you and I spoke about you transferring me to West Jefferson. Sir you gave me your word that you'd get me there. I don't know what other channels to go through ~~except~~ except you or Mr Jones. Maybe someone will trade with me. But it's extremely important for me to get there. Why? because my case is in Birmingham and my family is getting me a lawyer prepared. Sir I beg you, Please keep your word and Please Get me to West Jefferson. Thank You Sir For reading this letter.

While Smith may not be a poet, his linguistic ability is not nearly as minimal as he would have this Court believe.

14. Opp'n to Appl. to Vacate Stay of Execution at 14.
15. Doc. 47-2 at 10.

As a final note, Smith points the Court to a consent decree in *Dunn v. Dunn* concerning the ADOC's ADA accommodations.[16] He argues that under the terms of the consent decree, inmates whose IQ scores are 75 or below should be given ADA accommodation. But this brings the matter back to the question of what the ADOC knew or should have known about Smith and his needs. The ADOC has never administered an IQ test to Smith, nor would ADOC under the *Dunn* consent decree, which specifically excludes death row inmates from intelligence testing—a provision that Smith's current counsel championed.[17]

* * *

The inescapable fact is that rather than pursue a stay of execution in a timely fashion and give the district court ample time to consider the merits of his claims, Smith waited until the last moment, offered no real excuse for his behavior, and waited for the district court to blink. That court, however, did its duty, made factual findings, and ruled against him. The Eleventh Circuit, on the other hand, rewarded Smith by granting a stay of execution—on paper, five days, but in practice, potentially weeks or months. Smith is not entitled to a stay of execution, and the Court should vacate the stay the court of appeals improvidently granted.

16. Opp'n to Appl. to Vacate Stay of Execution at 17–18.

17. 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.

CONCLUSION

The Court should vacate the Eleventh Circuit's stay.

Dated: February 11, 2021

Respectfully submitted,

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