No. _____

In The
Supreme Court of the United States

WILLIE B. SMITH III,
Applicant,
v.

JEFFERSON DUNN, COMMISSIONER,
TERRY RAYBON, WARDEN
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE – EXECUTION SCHEDULED FOR THURSDAY, OCTOBER 21, 2021, AT 6:00 P.M. CST

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CAPITAL CASE

QUESTION PRESENTED

What is the threshold of evidence required for a cognitively disabled petitioner to establish that his need for accommodation was obvious under the ADA?

LIST OF PARTIES

The Petitioner is Willie B. Smith III. Respondents are Jefferson Dunn, the Commissioner of the Alabama Department of Corrections and Terry Raybon, the Warden of Holman Correctional Facility. Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Willie B. Smith III respectfully requests that this Court grant a writ of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals' opinion in this case affirming the district court's denial of a motion for preliminary injunction is attached at Pet. App.1a. The district court for the Middle District of Alabama's memorandum opinion and order denying Mr. Smith's motion for a preliminary injunction is attached at Pet.App. XXa.

JURISDICTION

The district court had jurisdiction under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202, and 42 U.S.C. § 12133. The district court's denial of preliminary injunction on the merits was issued on remand after the Eleventh Circuit vacated the district court's *sua sponte* dismissal for lack of Article III standing. The court of appeals had jurisdiction over Mr. Smith's appeal from the district court's order denying a preliminary injunction on the merits under 28 U.S.C. § 1292(a) and exercised its pendant jurisdiction as to his appeal of the district court's order denying partial summary judgment. The court of appeals issued its order denying Petitioner's emergency motion for stay of execution pending appeal on October 21, 2021. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12101 *et seq.* is reproduced at Pet.App. XXa

INTRODUCTION

According to the Bureau of Justice Statistics ("BJS"), over 1.4 million Americans were incarcerated at the end of 2019.[1] The BJS also has found that cognitive disabilities are the most common disabilities among prisoners.[2] Departments of Corrections are required to accommodate those prisoners with obvious need for accommodation under the Americans With Disabilities Act. (Cite) The District Court's decision in this case, as affirmed by the Court of Appeals, holds a cognitively disabled prisoner to a level of proof contrary to the purposes of the ADA. *Certiorari* is necessary to clarify these important matters for our large and rapidly aging prison population.

STATEMENT OF THE CASE

On March 22, 2018, Governor Kay Ivey signed Senate Bill 272, amending Alabama Code § 15-18-82.1 to authorize the use of nitrogen hypoxia as a method of execution. Under the amended statute, "unless the person elects to be executed by . . . nitrogen hypoxia," a sentence of death "shall be executed by lethal injection." ALA. CODE § 15-18-82.1(a). A person

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[1] https://bjs.ojp.gov/content/pub/pdf/p19.pdf.

[2] Bureau of Justice Statistics, *Disabilities Among Prison and Jail Inmates, 2011-12* (2015), available at https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf.

who wishes to be executed by nitrogen hypoxia "shall have one opportunity to elect . . . nitrogen hypoxia." ALA. CODE § 15-18-82.1(b). The election "is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility . . . within 30 days of" the effective date of Senate Bill 272. ALA. CODE § 15-18-82.1(b)(2). Senate Bill 272 became effective on June 1, 2018.

On June 26, 2018, the Federal Defenders met with their clients at Holman Correctional Facility ("Holman"); Mr. Smith was not yet their client. (Doc. 36 at 4). At some point—after the June 26, 2018, meeting, but before the statutory opt-in deadline—the ADOC adopted, for its own use and distribution, an election form created by the Federal Defenders. Cynthia Stewart, then Holman's Warden, and acting under the "direction of someone above her at the ADOC," ordered corrections staff to distribute the election forms, along with an envelope, to all death row prisoners. If a prisoner wished to be executed by nitrogen hypoxia, he was to sign and date the form and put it in the envelope for delivery to the Warden. Mr. Smith, who has significant cognitive deficiencies and required an accommodation to enjoy the benefit of the statute and the election form, did not elect nitrogen hypoxia within the opt-in period.

In November 2019, Mr. Smith, now represented by the Federal Defenders' Office, filed a complaint alleging, *inter alia*, a violation of his rights under the ADA with respect to the enforcement and implementation of

Alabama Code § 15-18-82.1(b). Mr. Smith was litigating a stay in this suit when the February 11, 2021 death warrant expired after this Court declined to vacate a preliminary injunction guaranteeing Mr. Smith's right to have his pastor present in the execution chamber ("religious freedom suit"). *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.).

Shortly thereafter, the district court issued a scheduling order (Doc. 62) and discovery commenced.[3] (Doc. 148 at 14). On July 6, 2021—following resolution of the religious freedom suit—the State again moved for an execution date. (Doc. 148 at 10). On July 14, 2021, Mr. Smith moved for a preliminary injunction, seeking to prevent, prior to the conclusion of this litigation, his execution by any method other than nitrogen hypoxia.

Following an evidentiary hearing on the PI Motion, "the district court heard the parties' arguments and made a determination—despite Defendants' concessions on the point—finding that Smith failed to establish all three elements of Article III standing" and dismissed. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 21-13298-P (11th Cir. Oct. 15, 2021) at *4-*5. Ultimately, this Court vacated and remanded for the district court to rule on the merits of the PI Motion. *Id.* at *12.

On the evening of October 17, 2021, the district court denied both motions. The district court's opinion was based, in part, on a finding that Mr.

[3] Discovery remains unfinished due to the district court's dismissal followed by its ruling denying a preliminary injunction.

Smith's need for accommodation for his cognitive disability was not obvious— despite his 72 and 64 IQ scores— because he had signed other forms in the past, wanted to discuss library books, and had magazines and other written material in his cell. Mr. Smith filed a notice of appeal (Doc. 171), and on October 18, 2021, the Eleventh Circuit *sua sponte* issued an order expediting merits briefing and stay litigation, with the matter to be fully briefed by 6 p.m. Eastern on October 20, 2021.

On the morning of October 21, 2021, the Eleventh Circuit issued an opinion affirming the District Court's decision on both motions, finding that the District Court's opinion was not clearly erroneous. Pet. App. 1a. While concurring with the opinion on the law, Judge Jill Pryor noted that the Department of Corrections, "which took on the responsibility to inform prisoners about their right to elect death by nitrogen hypoxia within 30 days, did so in [] a feckless way." Pet.App. 12a. Mr. Smith is scheduled for execution by lethal injection at 6 p.m. Central on October 21, 2021.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case because the District Court's proof threshold effectively eviscerates the ADA for cognitively disabled prisoners who are unable or unwilling to request accommodations.

The Americans with Disabilities Act is supposed to be interpreted broadly in a manner to provide relief for disabled individuals. "As a remedial statute, the ADA must be broadly construed to effectual its purpose' of provide ' a clear and comprehensive national mandate for the elimination of

discrimination against individuals with disabilities." *Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 68 (2d Cir. 2012) (quoting *Innovative Health Sys., Inc. v. City of White Plains,* 931 F. Sup. 222, 232 (S.D.N.Y. 1996). Further complicating this case is that Mr. Smith is a man with cognitive difficulties, not physical. Indeed, the example of an obvious need for accommodation Defendants cited in Mr. Smith's case involved "an inmate [who] had both legs amputated below the knee."

Where, as here, a plaintiff alleges discrimination based on a public entity's refusal to provide a reasonable accommodation, the plaintiff must also establish that the plaintiff requested an accommodation (or the need for one was obvious) and that the public entity failed to provide a reasonable accommodation. *See, e.g.*, *McCullum v. Orlando Reg'l Healthcare*, 2013 WL 1212860, at *4 (M.D. Fla. Mar. 25, 2013). The Court of Appeals did not analyze in depth the District Court's opinion, merely concluding that its opinion was not clearly erroneous. Pet. App. 10a. However, the District Court's opinion interprets the ADA in such a way to render its provisions nearly non-existent for cognitively disabled prisoners.

Courts have routinely found that "mental disabilities are discreet and uniquely within the knowledge of the disabled person and their healthcare provider." *Pena Arita v. Cty. of Starr, Texas*, No. 7:19-CV-00288, 2020 WL 5505929, at *8 n.116 (S.D. Tex. Sept. 11, 2020) (citing Taylor v. Principal Fin. Grp., Inc., 93 F.3d 155, 165 (5th Cir. 1996)). *See also, Taylor v. Principal Fin. Grp.,*

Inc., 93 F.3d 155, 165 (5th Cir. 1996) ("When dealing in the amorphous world of mental disability, we conclude that health-care providers are best positioned to diagnose an employee's disabilities, limitations, and possible accommodations.). In carceral settings, the departments of corrections are responsible for the healthcare of their prisoners. At intake, prisoners are assessed for their cognitive and physical impairments, and prison employees are responsible for continuing to assess prisoners throughout the duration of their incarceration. In Mr. Smith's case, intake records clearly noted Mr. Smith did not understand what was going on, though it was explained to him, and prison officials had constructive knowledge of his IQ scores of 64 and 72.

Here, the district court concluded its "substantial likelihood of success on the merits" injunction analysis by finding that Mr. Smith "does not adequately" demonstrate that his need for an accommodation was obvious. (Pet.App. 30a-31a). The district court's opinion was legally incorrect, and the Eleventh Circuit's opinion affirming that standard is therefore also legally incorrect.

Because the Eleventh Circuit did not analyze the District Court's opinion beyond holding that it used the correct legal standard and was not clearly erroneous, the appropriate opinion for this Court to examine is the District Court's opinion. To begin, the district court's citations to the applicable legal standard vacillate between the well-known standard of a Title II ADA claim where the claimant did not make a request for

accommodation and inapplicable Title II or Title VII cases containing entirely irrelevant standards that should not be imposed on Mr. Smith. (citing *Arenas,* 2020 WL 1849362, at *11 (Title II – failure to accommodate); *Gaston v. Bellingrath Gardens & Home, Inc.,* 167 F.3d 1361, 1363 (11th Cir. 1999) (Title II - employment); *Randolph v. Rodgers,* 170 F.3d 850, 858 (8th Cir. 1999)[4] (Title II – failure to accommodate); *Hedberg v. Ind. Bell Tel. Co.,* 47 F.3d 928, 934 (7th Cir. 1995) (Title VII - religious discrimination).

At certain points, the district court imposes a requirement that Mr. Smith must have made a "specific demand" to the ADOC and that he had to "explain what it is he requires" to the ADOC to prevail on this final prong of his ADA claim. (Pet. App. 30a). At other points, the district court acknowledges that because Mr. Smith did not make any such request of the ADOC, he can only succeed if his need for accommodation was "open, obvious, and apparent." (*Id.*). The "ADA does not require clairvoyance" (Pet.App. 30a), yet the District Court required Mr. Smith to be clairvoyant to guess which legal standard the district court applied to his claims. The District Court's

[4] The district court quoted *Randolph* in supporting the principle that "[t]he claimant himself must explain what it is he requires—public entities are not required to '*guess at what accommodation they should provide.*'" (Pet.App. 30a) (citing *Randolph*, 170 F.3d at 858) (emphasis added). The quote from *Randolph*, in its entirety, reads: "While it is true that public entities are not required to guess at what accommodations they should provide, the requirement does not narrow the ADA or RA so much that the Department of Corrections may claim Randolph failed to request an accommodation when it declined to discuss the issue with him." *Id*. at 858-59.

legal confusion was exacerbated by its factual inaccuracies on the question of whether Mr. Smith's disability was obvious.

At the outset, the district court started its analysis with the observation that "the record *abounds* with evidence that Smith spent his time reading, writing, or in the prison [law] library." (Pet. App. 31a) (emphasis added). The Holman prison law library, as evidenced by the photographs provided to the district court, has no books. The prison law library consists of a stand-alone toilet, several steel tables with checkerboards painted on them, two homemade basketball hoops taped to the wall, and a single computer terminal—shared among all death row inmates "at different intervals, different times." Thus, the fact that the record shows Mr. Smith "wants to talk about library books," a fact the district court relied on to show that Mr. Smith used the law library, actually demonstrates the opposite. Nothing else in the record suggests that Mr. Smith used the prison library.

Second, to support a finding that Mr. Smith "spent his time" writing, the district court cited two annotations made by Mr. Smith[5] on two forms and

[5] Pet.App. 33a ("writing on a release of responsibility form that 'all [he] wanted was to see the dentist'") (brackets in original); (*id.*) (writing on an inmate property sheet that he wished someone would "get the TV [he] donated to Van Felt," as it was "the last day")). "Van Felt" is likely a misspelling of Kim Van Pelt, a death row prisoner. *See, e.g.*, *Van Pelt v. Alabama*, 132 S. Ct. 1003 (2012) (mem.) (denying cert in *Van Pelt v. State*, 74 So. 3d 32 (Ala. Crim. App. 2009)).

three handwritten letters[6] in his inmate file. (Pet.App. 42a). While these writings are noteworthy, it is not for the reason given by the district court. Rather, it is because in Mr. Smith's 29 years at Holman, the district court could only point to five documents in his entire medical and institutional file to establish that his need for an accommodation was not obvious because he "spent his time" writing.

The district court derived its finding that he "could read and understand written materials," (Pet.App. 41a) from the fact that Mr. Smith had "magazines, mail, and the like in [his] cell," (Pet.App. 40a), and signed forms stating "I have read this form and certify that I understand its contents." But mere possession or signing of written material demonstrate an ability to read any more than owning a car demonstrates an ability to drive. Allowing courts to make such inferences erodes any protection the ADA offers prisoners with cognitive disabilities, who often do not know how or want to ask for help. Indeed, experts have found that people with cognitive disabilities—including Mr. Smith— "try to mask or hide their intellectual

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[6] The district court noted that these three letters were "complete with excellent spelling and penmanship." Pet.App 41a. Focusing on spelling and penmanship is a stereotypical ablist way that lay persons differentiate between the cognitively disabled and those who are not. *See also Moore v. Texas,* 139 S. Ct. 666, 671 (2019)("the appeals court emphasized Moore's capacity to communicate, read, and write based in part on pro se papers Moore filed in court. That evidence is relevant, but it lacks convincing strength without a determination about whether Moore wrote the papers on his own, a finding that the court of appeals declined to make.)

disability. . . [are] embarrassed / offended by [their impairments, and are]. . . at risk for exaggerating [their] skills and abilities because [they] do[] not have insight and [do] not want to look deficient." *Smith v. Dunn*, No. CV 05-00474-CG, 2021 WL 3666808, at *7 (S.D. Ala. Aug. 17, 2021).

The district court next determined that that record "reveals that for years, the ADOC personnel evaluated Smith's mental functioning, memory, speech, and concentration as 'normal,' and his demeanor and behavior as 'rational.'" (Pet.App. 40a). The District Court ignored documents produced by Mr. Smith that showed ADOC staff who considered him as "slow," or worse, 30-day segregation review forms that the author photocopied and used month after month to "document" the same clinical observations of Mr. Smith repeatedly.

The district court then turned its focus to the testimony of ADOC employees. (Pet.App.40a). The district court found significant the perceptions of three ADOC staff persons, Warden Stewart, Captain Emberton and Defendant Raybon. These staff members were not only wholly untrained in recognizing cognitive difficulties but did not know Mr. Smith and never watched him read. As this Court has held, "lay perceptions of intellectual disability . . . should spark skeptism" *Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017)

The district court next extrapolated that because in the 29 years Mr. Smith has been in the custody and control of the ADOC, he "filled out dozens

of forms." Pet.App.41a). It found compelling that the institutional forms executed by Mr. Smith—as required by the ADOC—did not "indicate[] that he ever requested help reading or understanding the forms." (*Id.*). This observation largely ignores that the records are only as good as the record keepers. Moreover, it presumes that Mr. Smith has the same freedom as a person who is not incarcerated in declining to sign forms or execute contracts, hoping for better terms. Mr. Smith has two choices: execute the document given to him by the ADOC—whether he understood it or not—or forego the service requested.

These are just some of the examples of the way that the District Court held Mr. Smith to a burden of proof nearly impossible for a cognitively disabled prisoner to meet in the prison setting, particularly in a prison system like Alabama's, which has a history of difficulties in providing appropriate services to inmates with mental challenges. *See e.g. Braggs v. Dunn*, 257 F.Supp. 3d 1171 (2017). As illustrated above, the District Court's reasoning, which was affirmed by the Eleventh Circuit with no analysis and with an improperly deferential review (*see United States v. Kayser-Roth Corp.*, 272 F.3d 89, 101 & fn. 12 (1st Cir. 2001) (collecting cases from various circuits); McCreary Cty., Ky. v. Am. C.L. Union of Ky., 545 U.S. 844, 867 (2005)) held Mr. Smith to an impossibly high burden, which is exactly the opposite result required by the ADA.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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