

No. 21A__

**In The
Supreme Court of the United States**

WILLIE B. SMITH III,
Petitioner,

v.

JEFFERSON DUNN, COMMISSIONER,
TERRY RAYBON, WARDEN
Respondents.

APPLICATION FOR STAY OF EXECUTION PENDING APPEAL

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

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

John Palombi*
Allyson duLac
Spencer J. Hahn
Assistant Federal Defenders
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099
John_Palombi@fd.org
Allyson_duLac@fd.org
Spencer_Hahn@fd.org

* *Counsel of Record*

Mr. Smith respectfully requests that this Court enjoin his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for a writ of *certiorari*. See *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) (“Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.”); see also *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (Court may stay execution if needed to resolve issues raised in initial petition).

The standard for granting a stay of execution pending *certiorari* is well-established. In upholding a stay of execution, the Court should consider the prisoner’s likelihood of having four justices on this Court vote to grant *certiorari*, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. See *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Here, these factors weigh in favor of staying Mr. Smith’s execution. Moreover, because this Court 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. 13A1153.¹

First, Mr. Smith’s petition for writ of *certiorari* raises issues that are of national importance inside and outside of the death penalty context. Specifically, it raises issues concerning the scope of Title II of the Americans With Disabilities Act,

¹ This Court “may issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

(42 U.S.C. § 12101), what an inmate challenging a prison's failure to provide an accommodation under the ADA must prove, and issues of civil procedure related to preliminary injunctions. With nearly 1.5 million people incarcerated in the United States,² the scope of the ADA as it applies to prisoners is of wide-reaching and critical significance. This is particularly true for prisoners sentenced to death—an estimated 20 percent of whom are cognitively impaired—further heightening the relevance of Title II's application in the prison context.

Second, the relative harm to the State is negligible. Mr. Smith is not seeking to avoid execution. Rather, he is requesting the option that he would have received if Respondents had provided him the accommodation he is entitled to under the ADA. Over 50 prisoners on Alabama's death row have opted to be executed by nitrogen hypoxia. Executing Mr. Smith by nitrogen hypoxia would be consistent with ADOC policy for those individuals and represent minimal additional burden. Moreover, because trial in Mr. Smith's case is scheduled for June 2022, litigation in this case will conclude in less than a year, at which point—regardless of the outcome—the State may proceed with executing Mr. Smith. In contrast to the state, absent a stay Mr. Smith will lose the opportunity to vindicate his rights under the ADA and be subject to a substantially painful execution by lethal injection at 6 PM tonight.

As for delay, there can be no question that Mr. Smith avoided delay. This suit was filed nearly three years ago, before his habeas petition was completely litigated. The State moved to dismiss the suit and the district court did nothing with the case

² <https://bjs.ojp.gov/data/key-statistics#citation--1>

for 11 months, waiting until after the State moved for an execution date before ruling on the motion to dismiss. In February 2021, this Court enjoined Mr. Smith's previously scheduled execution, and discovery on the present suit began. On July 6, 2021—in the midst of ongoing litigation—the state moved to reset Mr. Smith's execution. They did so despite the fact that discovery was incomplete and trial scheduled for June 2022. Eight days later, Mr. Smith filed for preliminary injunction. Mr. Smith is not responsible for any delay in this action.

For the reasons stated above, this Court should grant Mr. Smith a stay of execution, or, in the alternative, enjoin the defendants from executing him until a trial in this case can be held or by any method other than nitrogen hypoxia.

Dated: October 21, 2021

Respectfully submitted,

John Palombi*
Allyson duLac
Spencer J. Hahn
Assistant Federal Defenders
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099
John_Palombi@fd.org
Allyson_duLac@fd.org
Spencer_Hahn@fd.org

* *Counsel of Record*

CERTIFICATE OF SERVICE

I, John A. Palombi, a Member of the Bar of this Court, do hereby certify that on October 21, 2021, as required by Rule 29.4(a) of the Rules of the Supreme Court of the United States, I served the enclosed Motion to Proceed in Forma Pauperis and Petition for a Writ of Certiorari to Counsel for Respondents by sending them via e-mail to:

Lauren.Simpson@AlabamaAG.gov
Edmund.LaCour@AlabamaAG.gov

Respectfully submitted,
/s/ John A. Palombi
FEDERAL DEFENDERS
FOR THE MIDDLE DISTRICT OF
ALABAMA
817 S. Court Street
Montgomery, Alabama 36104
(334) 834-2099
John_Palombi@fd.org