No. 22A423
CAPITAL CASE

In the
Supreme Court of the United States

KENNETH EUGENE SMITH,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Supreme Court

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Alabama Solicitor General

Richard D. Anderson*
Assistant Attorney General

OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36104
(334) 242-7300
richard.anderson@AlabamaAG.gov
*Counsel of Record
Counsel for State of Alabama

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

Kenneth Eugene Smith asks this Court to stay his lawful execution based upon the claims brought in his contemporaneously-filed petition for writ of certiorari to the Alabama Supreme Court (hereinafter "ASC"). (Smith Stay Application, No. 22A423.) As shown in the State's Brief in Opposition, the manner in which Smith presented those claims to the ASC failed to comply with the requirements of Alabama law. Moreover, Smith's claims are dilatory, and meritless.

First, Smith claims that the stay is necessary to consider the "weighty" issues in his petition, relying on *Lonchar v. Thomas*, 517 U.S. 314, (1996). But Smith's reliance on *Lonchar* is misplaced. In *Lonchar*, a pre-AEDPA case, this Court addressed the granting of a "stay in a first federal habeas case." *Id.* at 320. Indeed, *Lonchar* carefully distinguishes first habeas petitions from second or successive petitions because "the Habeas rules specifically authorize dismissal of *those* petitions for 'abuse of the writ.'" *Id.* at 330. As Justice Rehnquist observed in his concurrence, this Court has "vacated a stay of execution" on a claim that the petitioner

"had not raised the Eighth Amendment claim in any of the four federal habeas corpus petitions he had filed over 10 years." *Id*. at 338 (Rehnquist, C.J. concurring); *citing Gomez v. United States Dist. Court for Northern Dist. of Cal.,* 503 U.S. 653 (1992). Because Smith is bringing a claim that he failed to bring in his state habeas action, failed to bring in his federal habeas action, and has never attempted to bring in any properly-filed successive action, his situation is *far* closer to that in *Gomez* than to *Lonchar*. And as this Court held in *Gomez*, "Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation." *Gomez*, 503 U.S. at 654. Just so here. Smith's delay in bringing his Eighth Amendment challenge in the Alabama Supreme Court, his failure to comply with Alabama law in doing so, and his decision to bring this current challenge on the eve of execution all weigh *against* granting him the relief he seeks.

Moreover, an inmate plaintiff "is not entitled to a stay of execution 'as a matter of course' [and] the traditional stay factors ... govern a request for a stay pending judicial review." *Nken v. Holder*, 556 U.S. 418, 426 (2009). These are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. 425–26.

Smith falls at the first hurdle, because he is unlikely to prevail on the merits. As explained in the State's Brief in Opposition, Smith presents this Court with a splitless claim that was plainly rejected by the state court below for its obvious state law procedural faults. Moreover, "even if recent procedural changes in Alabama, Florida, and Indiana were indicative of society's views, they reflect a society that values finality over the retroactive application of those changes." (State's Brief in Opposition, pp. 18-19.

Smith likewise fails on the balance of the equities. As this Court has observed, "[c]ourts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). Smith is scheduled to be executed in *two days*, he has known the State was seeking an execution date since June 24h, and he has know the date of his execution since September 30th. He delayed until November 3rd to raise a claim he could have raised

years ago, and did not seek this Court's intervention until after 6 p.m., *last night*. Moreover, Smith is not the only party whose interests are at stake. The State of Alabama has a well-established interest in seeing that executions are carried out in a timely manner. Perhaps more importantly, Liz Sennett, Smith's victim, has two children who have already waited overlong to see justice done. Rewarding Smith's gamesmanship with additional delay at this late hour would work harm to those interests. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.")

Conclusion

The Court should deny Smith's Application for a stay of execution.

Dated November 15, 2022

Respectfully submitted,

Steve Marshall
Alabama Attorney General

Edmund G. LaCour Jr.
Alabama Solicitor General

s/Richard D. Anderson
Richard D. Anderson
Assistant Attorney General