

No. _____

In the Supreme Court of the United States

CASEY MCWHORTER,
Petitioner,
v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Supreme Court

CAPITAL CASE PETITION FOR WRIT OF CERTIORARI

BENJAMIN ROSENBERG <i>Counsel of Record</i>	SAMUEL H. FRANKLIN WESLEY SMITHART LIGHTFOOT, FRANKLIN & WHITE, LLC The Clark Building 400 20th Street North Birmingham, AL 35203
MAY CHIANG JULIA CANZONERI DECHERT LLP Three Bryant Park 1095 Avenue of the Americas New York, NY 10036 (212) 698-3500 benjamin.rosenberg@ dechert.com	SPENCER HAHN JOHN PALOMBI FEDERAL DEFENDERS FOR THE MIDDLE DISTRICT OF ALABAMA 817 South Court Street Montgomery, AL 36104
ROBERT C. NEWMAN THE LEGAL AID SOCIETY 199 Water Street New York, NY 10038	

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

In response to repeated failures of the Alabama Department of Corrections (“ADOC”) to timely execute prisoners, or execute them without torturing them, Governor Kay Ivey ordered a “top to bottom review” of the process. The review concluded that the issue was not the competency of the execution team, but the time allotted to carry out the execution.

Following this review, the Alabama Supreme Court transferred to the Governor the responsibility for setting the actual execution, and allowed the Governor to set a range of days for the execution. However, the Alabama legislature did not change the statute requiring a minimum of 30 days’ notice of an execution date. Here, the Governor gave Mr. McWhorter only 29 days’ notice of his execution. Mr. McWhorter asked the Alabama Supreme Court to vacate the execution date, arguing that he has been treated differently from every inmate before him in the modern era of the death penalty. The court refused. This set of facts leads to the following question presented:

Does a state violate a prisoner’s right to due process and equal protection of the laws when it complies with an execution related statute for some prisoners facing execution, but does not for other prisoners facing execution?

LIST OF PARTIES

The parties involved are listed in the caption.

STATEMENT OF RELATED PROCEEDINGS

McWhorter v. State, No. CC-93-77A (Ala. Cir. Ct.) (issuing sentencing order on May 14, 1993).

McWhorter v. State, No. CR-93-1448 (Ala. Crim. App.) (affirming conviction and sentence on Aug. 27, 1999, as reported at 781 So.2d 257; later denying rehearing in unreported decision on Dec. 3, 1999).

Ex Parte McWhorter, No. 1990427 (Ala.) (affirming conviction and sentence on Aug. 11, 2000, as reported at 781 So.2d 330; later denying rehearing in unreported decision on Oct. 27, 2000).

McWhorter v. Alabama, No. 00-8327 (U.S.) (denying certiorari for the direct appeal of McWhorter's conviction and sentence on April 16, 2001, as reported at 532 U.S. 976).

McWhorter v. State, No. CC-93-77.60 (Ala. Cir. Ct.) (issuing final order denying McWhorter's petition under Alabama Rule of Criminal Procedure Rule 32 in unreported decision on March 29, 2010).

McWhorter v. State, No. CR-09-1129 (Ala. Crim. App.) (affirming denial of Rule 32 petition on Sept. 30, 2011, as reported at 142 So.3d 1195; later denying rehearing in unreported decision on Feb. 10, 2012).

McWhorter v. State, No. 1110609 (Ala.) (denying certiorari regarding denial of Rule 32 petition in unreported decision on Nov. 22, 2013).

McWhorter v. Comm'r, Alabama Dep't of Corr., No. 4:13-cv-2150-RDP (N.D. Ala.) (denying petition for writ of habeas corpus on Jan. 22, 2019, as reported at 2019 WL 277385).

McWhorter v. Comm'r, Alabama Dep't of Corr., No. 19-11535 (11th Cir.) (affirming denial of habeas petition on issues certified for appeal on Aug. 18, 2020, as reported at 824 F. App'x 773; later denying petition for rehearing in unreported decision on Oct. 20, 2020).

McWhorter v. Dunn, 141 S. Ct. 2757 (2021) (denying petition for certiorari).

Ex Parte McWhorter, No. SC-2023-0656 (Ala.) (dismissing petition for writ of habeas corpus on October 13, 2023).

Ex Parte McWhorter, Case No. 1990427 (Ala.) (denying motion to vacate execution date on November 7, 2023).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES	ii
STATEMENT OF RELATED PROCEEDINGS.....	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.....	vi
DECISION BELOW	1
STATEMENT OF JURISDICTION.....	1
RELEVANT CONSTITUTIONAL PROVISIONS.....	1
INTRODUCTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION.....	4
I. Alabama statutes, rules, and custom require at least 30 days' notice of an execution date.....	4
II. The shortened notice violates Mr. McWhorter's rights to due process and equal protection.....	7
III. Mr. McWhorter was injured by the Governor's action because being deprived of one day of required notice and, thereby, one day of life is injurious.	10
CONCLUSION	11
APPENDIX	

Appendix A	Order Denying Motion to Vacate Execution Date in the Supreme Court of Alabama (November 7, 2023).....App. 1
Appendix B	Motion to Vacate Execution Date in the Supreme Court of Alabama (October 25, 2023).....App. 2
	State's Response to Motion to Vacate Execution Date in the Supreme Court of Alabama (October 26, 2023).....App. 18
	Reply to State's Response to Motion to Vacate Execution Date in the Supreme Court of Alabama (October 31, 2023).....App. 24

TABLE OF AUTHORITIES

Cases

<i>A.F. by Fenton v. Kings Park Central School Dist.</i> , 341 F. Supp. 3d 188 (E.D. N.Y. 2018)	10
<i>Gideon v. Alabama State Ethics Comm'n</i> , 379 So. 2d 570 (Ala. 1980)	8, 9
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	6
<i>Hall v. Barr</i> , 830 Fed. App'x 8 (D.C. Cir. 2020)	7
<i>Humphrey v. Cady</i> , 405 U.S. 504 (1972)	10
<i>Jefferson County Burial Soc. v. Scott</i> , 118 So. 644 (Ala. 1928)	10
<i>Koh v. Village of Northbrook</i> , 2020 WL 6681352 (N.D. Ill. Nov. 12, 2020)	11
<i>McWhorter v. Dunn</i> , 141 S. Ct. 2757 (2021)	5
<i>Moody v. Holman</i> , 887 F.3d 1281 (11th Cir. 2018) ..	11
<i>Rinaldi v. Yeager</i> , 384 U.S. 305 (1966)	10
<i>Sunday Lake Iron Co. v. Wakefield Twp.</i> , 247 U.S. 350 (1918)	9
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000) 9	

Statutes

28 U.S.C. § 1257(a)	1
Ala. Code § 15A-18-82(a)	4, 5, 6

Rules

28 C.F.R. § 26.4(a)	7
Ala. R. App. P. 8(d)(1)	5, 6

Rule 8(d)(1), Ala. R. App. P. cmt.	6
Constitutional Provisions	
U.S. Const. amend. XIV	1, 3, 7, 9

DECISION BELOW

On October 25, 2023, Mr. McWhorter moved the Alabama Supreme Court to vacate the gubernatorially set execution date on the ground that it violated Alabama law and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The Alabama Supreme Court denied the motion on November 7, 2023.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Petitioner filed an action in the Alabama Supreme Court moving to vacate the execution date set by Governor Kay Ivey, raising claims under both Alabama law and the Fourteenth Amendment to the United States Constitution. On November 7, 2023, the Alabama Supreme Court issued a summary order denying the action.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment, in relevant part, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Alabama's recent history of implementation of the death penalty should give this court pause before it allows Alabama to deviate from any provision related to execution procedures. In July 2022, it took Alabama over 3 hours to execute Joe Nathan James, Jr., after sticking him with needles repeatedly over that time.

Then followed two failed executions—of Alan Miller and Kenny Smith—in which Alabama could not insert IV lines to conduct an execution, again repeatedly sticking multiple needles before finally giving up. Alabama was warned about potential difficulties with the executions but charged forward anyway, with predictably horrific results.

Despite these failures, Alabama is ignoring its own statutes and giving Mr. McWhorter less notice of his execution date than statutorily required, less notice than the person executed before him, and less notice than the man scheduled to be executed after him. There is no rational basis for this disparate treatment of identically situated prisoners. This Court must step in to require, in this most sensitive area, that the State treat its citizens equally and with provide them with due process of law.

STATEMENT OF THE CASE

On August 9, 2023, the Alabama Attorney General filed a motion with the Alabama Supreme

Court seeking an order authorizing McWhorter's execution.¹

On September 6, 2023, McWhorter filed a motion to strike the Alabama Attorney General's motion and an opposition to the motion. On September 14, 2023, McWhorter filed an original petition for writ of habeas corpus with the Alabama Supreme Court.

On October 13, 2023, the Alabama Supreme Court issued three separate orders. It granted the Alabama Attorney General's motion seeking an order authorizing McWhorter's execution. It denied McWhorter's motion to strike the aforementioned motion. And it dismissed McWhorter's original petition for writ of habeas corpus.

On October 18, 2023, Alabama Governor Kay Ivey sent a letter to Alabama Department of Corrections Commissioner John Q. Hamm, authorizing Mr. McWhorter's execution to take place between 12:00 am on Thursday, November 16, 2023, and 6:00 am Friday, November 17, 2023.

Thursday, November 16, 2023, is 29 days after the order for the execution was entered. Mr. McWhorter filed an action in the Alabama Supreme Court moving to vacate the execution date because it failed to comply with Alabama law and violated the Fourteenth Amendment's Due Process and Equal Protection Clauses. On November 7, 2023, the

¹ Mr. McWhorter recited the facts of his case leading up to August 2023 in his previously tendered petition in No. 23-471 and will not repeat them here.

Alabama Supreme Court denied the motion without opinion.

REASONS FOR GRANTING THE PETITION

Mr. McWhorter's current execution time frame does not comply with Alabama law and violates his right to due process of law. Further, in failing to comply with the law, Alabama is treating Mr. McWhorter differently than any other prisoner executed since Alabama restarted executions in 1983 by giving him fewer than 30 days' notice between the order setting his execution date and the execution date itself. This includes the man executed before him and the man scheduled to be executed after him. This Court should take this case to clarify that statutes and rules surrounding executions must be applied identically to all death-sentenced prisoners, and that treating one death-sentenced prisoner differently than another when it comes to execution-related statutes violates the Equal Protection Clause.

I. Alabama statutes, rules, and custom require at least 30 days' notice of an execution date.

In Alabama, capital defendants are entitled to 30 days' notice of their execution date. This right is derived from Alabama statute, Court rules, and practice.

Section 15A-18-82(a), Alabama Code, in relevant part, provides, “[w]hen the sentence of death is pronounced against a convict, the sentence shall be executed at any hour on the day set for the execution, not less than 30 nor more than 100 days from the date

of sentence as the court may adjudge[.]” The plain language of the statute contemplates a death sentence will be carried out within 30 to 100 days of it being levied against the defendant. If this statute was the only law relevant to setting the date of execution, Alabama could not carry out McWhorter’s execution, as it has obviously been more than 100 days since he was first sentenced to death in 1994, and also more than 100 days after McWhorter exhausted his appeal on his federal habeas petition, *see McWhorter v. Dunn*, 141 S. Ct. 2757 (2021) (declining certiorari on June 24, 2021).

Recognizing that Ala. Code § 15A-18-82(a) sets a deadline that is nearly impossible to meet, the Alabama Supreme Court adopted Rule 8(d)(1). As recently amended, Rule 8(d)(1), Ala. R. App. P., in relevant part, provides:

[t]he supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate’s sentence of death within a time frame set by the governor, which time frame shall not begin less [sic] than 30 days from the date of the order. . . The supreme court’s order authorizing the Commissioner of the Department of Corrections to carry out the inmate’s sentence of death shall constitute the execution warrant.

This rule treats the order authorizing the execution as the execution warrant. It also contemplates that the

defendant will receive at least 30 days' notice of the execution date. The comments to the original version of Rule 8(d)(1), in which the Alabama Supreme Court acknowledged the rule conflicted with Ala. Code § 15A-18-82(a), explain, "the supreme court is in the best position to set *an execution date* and enter any necessary stays." Rule 8(d)(1), Ala. R. App. P. cmt. (emphasis added).

From the time the death penalty was reinstated following *Gregg v. Georgia*, 428 U.S. 153 (1976), until October 18, 2023, each Alabama death-sentenced prisoner have been given at least 30 days' notice of his or her execution date. Even where an execution warrant expired and needed to be reset, as occurred with Christopher Price in 2019, the Alabama Supreme Court provided at least 30 days' notice of an execution date. In Mr. Price's case, the State had asked the Alabama Supreme Court to suspend the 30-day notice requirement for his second execution warrant; instead, it provided 31 days' notice. More recently, the first—and thus far only—execution under the amended version of Rule 8(d)(1), that of James Barber, the Governor provided more than 30 days' notice.² Further, in the case of Kenneth Smith, who is scheduled to be executed *after* Mr. McWhorter, the time between Governor Ivey's order and Mr. Smith's execution date is 79 days.

² The Alabama Supreme Court issued the execution order in Mr. Barber's case on May 3, 2023, and on May 30, 2023, the Governor set Mr. Barber's execution time frame to begin at 12:00 a.m. on July 20, giving Mr. Barber 50 days' notice of his execution date.

II. The shortened notice violates Mr. McWhorter’s rights to due process and equal protection.

The Fourteenth Amendment, in relevant part, provides, “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. The Governor’s failure to provide 30-days’ notice violates both Mr. McWhorter’s rights to due process and equal protection.

Mr. McWhorter has a legal interest in receiving the minimum required legal notice of his execution date. *Cf. Hall v. Barr*, 830 Fed. App’x 8, 9 (D.C. Cir. 2020) (finding no due process violation where Federal Bureau of Prisons reduced execution notice period from 90 to 50 days because it was a non-binding procedural rule and prisoner received the 20 days’ notice required by regulation). In *Hall*, there were two notice periods. The first, an internal, “non-binding procedural rule” that was modified to reduce the notice period from 90 to 50 days was in a protocol that expressly provided it “does not create any legally enforceable rights or obligations.” *Id.* (citations and quotation marks omitted). The second, a duly-enacted federal regulation—28 C.F.R. § 26.4(a)—required a minimum of 20 days’ notice. *Id.* Because the binding regulation was satisfied, Hall had no substantive due process claim. Here, the statute and rule require a minimum of 30 days’ notice, making them more akin to the binding regulation in *Hall*.

While the language of the Alabama statute refers to the “court”—not the Governor—being

required to give 30 days' notice, the statute equally applies to the Governor as it did to the Alabama Supreme Court. The legislature, by statute, gave the authority for setting an execution date to Alabama's judiciary. As supervisor over Alabama's judiciary, the Alabama Supreme Court, by rule, took that responsibility and, for 40 years, has followed the statute. In 2022, by amending the same rule, the Alabama Supreme Court delegated its responsibility to set an execution date to the Governor of Alabama. This delegation does not relieve the Governor, as the designee of the Alabama Supreme Court, from following Alabama law. Therefore, the Governor of Alabama is required to give Mr. McWhorter the same due process protections required by statute.

Governor Ivey has also, without explanation, treated Mr. McWhorter differently from every one of the 71 people the State of Alabama has executed since it resumed executions in 1983. Even under rational basis review, this violates Mr. McWhorter's right to equal protection. *See, e.g., Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570, 574 (Ala. 1980) ("Under the rational basis test the Court asks: (a) Whether the classification furthers a proper governmental purpose, and (b) whether the classification is rationally related to that purpose."). Here, Governor Ivey has essentially classified Mr. McWhorter as a condemned prisoner entitled to fewer than 30 days' notice – but there is no rational basis for doing so because doing so is neither a "proper governmental purpose" nor rationally related to such a purpose.

It is undisputed that Governor Ivey treated Mr. McWhorter differently than those to whom he is

similarly situated (all 71 people executed before him in the modern era, and the one who is scheduled to be executed after him).

This Court has “recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations omitted). Nothing in the plain language of the Equal Protection Clause or case law limits it to some category of actions labeled as substantive. *See, e.g., Gideon*, 379 So. 2d at 573 (“The United States Supreme Court has established two tests to determine whether a statute draws a classification which violates the Equal Protection Clause of the Fourteenth Amendment *or* whether that statute denies a person substantive due process of law . . . Since the instant case involves neither a ‘suspect class’ nor a ‘fundamental right,’ the rational basis test is the proper test to apply to *either* a substantive due process challenge *or* an equal protection challenge.”) (emphases added); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918) (“The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”).

Moreover, an equal protection claim can arise out of the application of procedural rules. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (“This Court has never held that the States are required to

establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”) (citations omitted); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (“The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, *or of other procedural protections*, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other.”) (footnote omitted) (emphasis added).

III. Mr. McWhorter was injured by the Governor’s action because being deprived of one day of required notice and, thereby, one day of life is injurious.

The State argued below that Mr. McWhorter was not injured by the Governor’s actions because the execution date was set with 29 days’ notice instead of 30. Courts, however, have found a one-day deprivation of something less significant than life sufficient to state an injury. *See, A.F. by Fenton v. Kings Park Central School Dist.*, 341 F. Supp. 3d 188, 196 (E.D. N.Y. 2018) (a one-day, out-of-school suspension was sufficient to state a deprivation of students’ property right to education in violation of due process, because it “required exclusion from school premises and the students did not receive instruction for the day”); *Jefferson County Burial Soc. v. Scott*, 118 So. 644, 647 (Ala. 1928) (“If defendant improperly detained the body from Thursday to Friday, we cannot say that only nominal damages should be awarded.”);

Koh v. Village of Northbrook, 2020 WL 6681352 (N.D. Ill. Nov. 12, 2020), at *5 n.3 (discussing “comparators for the \$100,000, each for the Kohs on the Fourth Amendment wrongful detention of around one day,” as including “a plaintiff [who] received \$125,000 for just over 24 hours in jail” and “another [who] received \$100,000 for a six-hour false arrest detention”). Being executed with one day less notice (and one day less to live) constitutes a harm. *Cf. Moody v. Holman*, 887 F.3d 1281, 1286 (11th Cir. 2018) (finding “injury-in-fact” where State’s alleged wrongful conduct in retaining custody would lead “imminently” to “an injury—his scheduled execution”).

These examples all involve governmental deprivation of something less than life that were found to be injurious. Alabama’s argument that the injury here is *de minimis* is unsupported by law or logic.

CONCLUSION

The petition should be granted, the execution date vacated, and the case remanded to the Alabama Supreme Court to require sufficient notice of a future execution date.

Respectfully submitted,

Benjamin Rosenberg
Counsel of Record
May Chiang
Julia Canzoneri
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036

(212) 698-3500
benjamin.rosenberg@dechert.com
may.chiang@dechert.com
julia.canzoneri@dechert.com

Samuel H. Franklin
M. Wesley Smithart
LIGHTFOOT, FRANKLIN & WHITE, LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203
(205) 581-0720
sfranklin@lightfootlaw.com
wsmithart@lightfootlaw.com

Spencer Hahn
John Palombi
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 SOUTH COURT STREET
MONTGOMERY, AL 36104
(334) 834-2099
Spencer_Hahn@fd.org
John_Palombi@fd.org

Robert C. Newman
THE LEGAL AID SOCIETY
199 Water Street
New York, NY 10038

Counsel for Petitioner