Nos. 23-7591 and 23A1065
CAPITAL CASE

In the
Supreme Court of the United States

JAMIE MILLS,
Petitioner,
v.
JOHN HAMM,
Commissioner, Alabama Department of Corrections,
Respondents.

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

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

Steve Marshall
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

Robert M. Overing
Deputy Solicitor General

Dylan Mauldin
Assistant Solicitor General

Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

May 30, 2024

EXECUTION SCHEDULED MAY 30, 2024

CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

Jamie Mills was sentenced to death in 2007 for the brutal execution of an elderly couple with a machete, tire tool, and hammer. He has known he would be subject to lethal injection since 2012, and he should have known since at least 2017 that the Alabama Department of Corrections does not permit counsel for the condemned in the execution chamber, and certainly not with a telephone. On April 26, 2024, thirty-four days before his execution, Mills initiated a 42 U.S.C. § 1983 action alleging that he would be subjected to cruel and unusual punishment by being restrained on the execution gurney for too long and that several of his constitutional rights would be violated if his counsel were not permitted to be with him in the chamber and given access to a phone. The questions presented are:

1. Whether the district court erred in denying a preliminary injunction as to Mills's Eighth Amendment claim when ADOC has taken measures in the last year and a half to speed up the preparatory time immediately before an execution and when the Commissioner has testified that Mills will not be taken to the gurney until all stays are lifted, and that in the unlikely event of a stay being granted while Mills is on the gurney, he will be returned to the holding cell.

2. Whether Mills has a constitutional right to have counsel with him in the execution chamber during a period that is not a critical stage for Sixth Amendment purposes, where there has been no procedural due process violation, and where ADOC has legitimate penological interests in preserving the security of the chamber.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Introduction 1

Statement of the Case 4

A. Mills murders an innocent elderly couple 4

B. Mills is convicted, sentenced to death, and unsuccessful on appeal 6

C. Mills launches a flurry of last-minute filings to stop his execution 7

D. Mills delays on appeal, and the Eleventh Circuit denies relief 10

Standard of Review 12

Reasons Certiorari and a Stay of Execution Should be Denied 12

I. Mills has no chance of success on his Eighth Amendment claim based solely on claims of clear error. 12

A. Mills's claim cannot overcome the district court's factual findings based on an evidentiary hearing. 13

B. Mills's claim fails as a matter of law. 17

II. Mills has no constitutional right to counsel or to access the courts in the execution chamber. 20

III. Mills's delay was "unreasonable, unnecessary, and inexcusable." 26

IV. The remaining equities favor the State. 32

A. A stay would undermine the public interest in justice. 32

B. Mills faces no threat of irreparable harm. 33

V. Mills violated Rule 23 by failing to request a stay in the court below. 35

Conclusion 39

TABLE OF AUTHORITIES

Cases

Angelone v. Bennett,
519 U.S. 959 (1996) 36

Arthur v. Comm'r, Ala. Dep't of Corr.,
680 F. App'x 894 (11th Cir. 2017) 21

Barbour v. Haley,
471 F.3d 1222 (11th Cir. 2006) 22

Barefoot v. Estelle,
463 U.S. 880 (1983) 12

Bateman v. Arizona,
329 U.S. 1302 (1976) 12

Baze v. Rees,
553 U.S. 35 (2008) 16, 19

Benisek v. Lamone,
585 U.S. 155 (2018) 26

Bucklew v. Precythe,
587 U.S. 119 (2019) 18–19, 27, 32

Calderon v. Thompson,
523 U.S. 538 (1998) 33

Chavez v. Fla. SP Warden,
742 F.3d 1267 (11th Cir. 2014) 32

Dolman v. United States,
439 U.S. 1395 (1978) 35

Edwards v. Hope Medical Group for Women,
512 U.S. 1301 (1994) 12

Glossip v. Gross,
576 U.S. 863 (2015) 1, 18–19

Gomez v. U.S. Dist. Court for N. Dist. of Cal.,
503 U.S. 653 (1992) 3, 26

Graves v. Barnes,
405 U.S. 1201 (1972) 12

Hill v. McDonough,
547 U.S. 573 (2006) 26, 32

Hollingsworth v. Perry,
558 U.S. 183 (2010) 12

Hope v. Pelzer,
536 U.S. 730 (2002) 1, 13, 16–18

Jordan v. Comm'r, Miss. Dep't of Corr.,
947 F.3d 1322 (11th Cir. 2020) 29–30

Lewis v. Casey,
518 U.S. 343 (1996) 23

Little v. Reclaim Idaho,
140 S. Ct. 2616 (2020) 36

McNair v. Allen,
515 F.3d 1168 (11th Cir. 2008) 21

Mills v. Hamm,
142 S. Ct. 1680 (2022) 6

Mills v. State,
62 So. 3d 553 (Ala. Crim. App. 2008) 4–6

Milwaukee v. Illinois,
451 U.S. 304 (1981) 36

Missouri v. Frye,
566 U.S. 134 (2012) 22

Nance v. Ward,
597 U.S. 159 (2022) 21

Nelson v. Campbell,
541 U.S. 637 (2004) 32

Ohio Citizens for Responsible Energy, Inc. v. NRC,
479 U.S. 1312 (1986) 12

Pennsylvania v. Finley,
481 U.S. 551 (1987) 11, 23

Pope v. Hightower,
101 F.3d 1382 (11th Cir. 1996) 24

Ramirez v. Collier,
595 U.S. 411 (2022) 25–26, 34

Respect Maine PAC v. McKee,
562 U.S. 996 (2010) 12

Rothgery v. Gillespie Cnty.,
554 U.S. 191 (2008) 11, 23

Siegel v. LePore,
234 F.3d 1163 (11th Cir. 2000) 34

Turner v. Safley,
482 U.S. 78 (1987) 2, 24–25

United States v. Lanier,
520 U.S. 259 (1997) 23

United States v. Sineneng-Smith,
590 U.S. 371 (2020) 38

Wall v. CDC,
588 F. Supp. 3d 1301 (M.D. Fla. 2022) 34

Whitaker v. Collier,
862 F.3d 490 (5th Cir. 2017) 22

Woods v. Comm'r, Ala. Dep't of Corr.,
951 F.3d 1288 (11th Cir. 2020) 26

Wreal, LLC v. Amazon.com, Inc.,
840 F. 3d 1244 (11th Cir. 2016) 26

Statutes and Rules

ALA. CODE § 6-2-38 21

ALA. CODE § 15-18-83 21

SUP. CT. R. 10 ..... 1, 13

SUP. CT. R. 14 36

SUP. CT. R. 15 36

SUP. CT. R. 20 36

SUP. CT. R. 23 35–36

11TH CIR. R. 27 37

11TH CIR. R. 27-1 37–38

INTRODUCTION

Jamie Mills will be executed **today, May 30, 2024**, for the savage murders of Floyd and Vera Hill nearly twenty years ago.

Mills's claims would require this Court to identify clear error in the district court's factual findings and an abuse of discretion in denying relief. This Court does not typically grant review in such cases, SUP. CT. R. 10, so no stay should issue.

I. Mills alleges that the State will violate the Cruel and Unusual Punishments Clause by restraining him on the execution gurney for too long. If his claim is a method challenge, it falls far short of the extremely demanding standard of *Glossip v. Gross*, 576 U.S. 863 (2015). If he meant to allege deliberate indifference, he failed to show the restraint will be an "unnecessary and wanton infliction of pain" "totally without penological justification," *Hope v. Pelzer*, 536 U.S. 730, 737 (2002).

Even if Mills had adequately pleaded an Eighth Amendment violation, he did not prove a likely one. His "claim rests on unsupported premises," App'x A at 6, and the record "strongly indicate[s] that Mills will be restrained for much less time" than he fears, App'x B at 41. Mills spends much of his briefing discussing other executions before the State made important changes, Pet. 4–10, 16–18, the result of which is no "substantial likelihood that *he* would be restrained" for an unconstitutional length of time. App'x B at 41–42.

II. As a prophylactic against Eighth Amendment violations, Mills asserts a one-time-only as-applied constitutional right to have his attorneys in the execution room. This proposal is premised on two unfounded factual predictions that were

rejected below. First, Mills will not need counsel to prevent an Eighth Amendment violation because there is no likelihood of one. Second, Mills speculated that the State would restrain him even after a court ordered a stay of execution, but in sworn testimony, Commissioner Hamm agreed not to do so, App'x A at 6–7, and no court entered a stay. Hamm also testified that the State would treat any pending stay litigation in this Court as an administrative stay of execution until the Court rules, App'x D at 68, so Mills is flat wrong to fear that he "will be restrained…while litigation is ongoing." Pet. 12. Counsel is not needed to avert a non-existent risk.

Even if Mills had a reasonable fear, the State's interests in the safety, security, and solemnity of its executions would still justify excluding the condemned's attorneys from the room. *See Turner v. Safley*, 482 U.S. 78 (1987).

Mills's claims fail for other reasons, too. His Sixth Amendment and due process claims are time barred because he has known since at least 2017 that the condemned's counsel is not allowed in the execution chamber, particularly not with a telephone. Mills also has no Sixth Amendment right to counsel past the first appeal of his criminal conviction. He will not be deprived of life without due process, for his execution is the result of a lawful conviction and sentence imposed after a trial. Finally, Mills has no right to access the courts from the execution gurney because, on this record, he will not have a colorable claim, and it is reasonable for the prison to restrict an inmate's access to the courts during an execution.

III. Mills asks this Court to grant relief on claims he brought just a month ago despite having known their basis in fact for many years. Because his delay was

"unreasonable, unnecessary, and inexcusable," App'x B at 26, his "inequitable conduct" disqualifies him from equitable relief, App'x A at 9–10. The district court found that Mills's delay not only weighed against him but that "his motion [was] due to be denied for this reason alone." App'x B at 31. Among other scathing findings, the court identified twelve earlier times when Mills reasonably could have brought this suit. *Id.* at 25–26. Both courts below noted that Mills moved for injunctive relief only after the district court "prompted him," *id.* at 25; otherwise, he "might have waited [even] longer," App'x A at 9.

Upon receipt of the district court's rebuke, Mills injected further delay. He did not appeal the order for three full days, waiting until last Friday night, May 24, before the three-day weekend to file an opening brief on appeal. He did not move the court of appeals to expedite his appeal, nor did he respond to the State's motion to deny expedited briefing (Doc. 7). He also did not move the court for a stay; in fact, he expressly disclaimed any such motion. *See* Doc. 11 at 11, 24, 26, 62 (Mills "does not need a stay.").

The gravamen of Mills's complaint is that the State will mistreat him if May 30 turns into a "long night" of "ongoing litigation." *E.g.*, Doc. 11 at 35; App'x C ¶ 1. Yet Mills did everything in his power to make that "long night" a reality. The Court may deny equitable relief because the timing of this case reflects "legal manipulation rather than genuine legal advocacy," App'x B at 30; *see Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam).

IV. Other equitable factors favor the State, including the public interest in justice after twenty years. Mills faces no irreparable harm; he does not challenge the State's right to execute him, and his fears of prolonged restraint are speculative.

V. The Court need not entertain the application because Mills failed to seek a stay of execution in the Eleventh Circuit. *See* SUP. CT. R. 23.3.

STATEMENT OF THE CASE

Mills is scheduled to be executed on May 30 for the robbery-murder of Floyd and Vera Hill, a crime the trial court deemed a "horrendous, gutless, and cowardly act." *Mills v. State*, 62 So. 3d 553, 557 (Ala. Crim. App. 2008).

A. Mills murders an innocent elderly couple.

On the afternoon of June 24, 2004, Mills and his common-law wife, JoAnn Mills, visited the Hills at their home in Guin, Alabama. *Id.* at 557. Vera, seventy-two, was in poor health, and her husband Floyd, "a spry gentleman 15 years her senior," took care of her. *Id.* Floyd knew Mills, and the evidence, including JoAnn's testimony, showed that they were able to easily gain access to the home. *Id.* at 557, 560. Floyd took Mills out to a shed holding items for an upcoming yard sale. *Id.* at 560. There, Mills attacked Floyd; when Vera and JoAnn came out to investigate, Floyd hit Vera with a hammer. *Id.* Once the Hills were incapacitated, Mills put a towel over Floyd's face to muffle his gurgling, took the murder weapons—a tire tool, hammer, and machete—and robbed the house. *Id.* The Millses' take included Vera's medication, her purse, Floyd's wallet, a phone, and a police scanner. *Id.* After showering, Mills called Benji Howe, a local drug user, and sold him some of Vera's pain pills. *Id.* Mills

and JoAnn put the bloody evidence in a bag and left to stay with Mills's father overnight. *Id.* at 560-61. When they returned in the morning, they found that dogs had torn open the bag. *Id.* at 561. They hastily packed everything into a duffel bag, along with a cement block, and loaded it into the trunk of their car to dispose of it. *Id.*

The Guin police arrived just as the Millses were driving off. *Id.* JoAnn gave consent to search, and officers found the trunk full of incriminating items, including the murder weapons and a pair of work pants with Mills's name on the inside, stained with Floyd's blood. *Id.* at 559.

Floyd died in his shed, and his wounds were horrific: "blunt force injuries to the right side of the head and face (including near total amputation of the right ear), blunt force injuries to the posterior scalp, incised wounds to the anterior neck, blunt force injury to the anterior neck, horizontal-orientation lacerations to the anterior right shoulder, and blunt force injuries to the lower left arm and left hand." HDE37-1:130.[1] The trial court opined, "One only has to view the gruesome autopsy photos of Mr. Hill's left hand (fingers and hand split by the machete's blows as he obviously tried to ward off the savage beating), his severed ear, his sliced and stabbed throat, to become repulsed and appalled." *Id.* at 136.

Vera was found alive and taken to the hospital, "where she was treated for brain injuries, a depressed skull fracture on the back of the head, fractures around her left eye, fractures to the nasal cavity, broken/fractured neck, and crushed hands." *Mills*, 62 So. 3d at 558. She was transferred to hospice care and died in her daughter's

1. HDE citations refer to the Northern District of Alabama's docket entries in Mills's other case pending before this Court, also captioned *Mills v. Hamm*, Case Nos. 23-7590 and 23A1064.

home on September 12 of complications of blunt head trauma. *Id.* at 558. The trial court described her final days:

> Mrs. Hill no doubt witnessed the brutal attack on her husband prior to having the back of her skull caved into her brain by the defendant's blow with a ball-peen hammer. Although she lived for two and a half months after the incident, it is unclear as to how conscious she was. During the last month of her life, she could not recognize her own daughter.…The only words she spoke while at UAB were to call out the name of her loving husband—"Floyd!"

HDE37-1:136.

B. Mills is convicted, sentenced to death, and unsuccessful on appeal.

Mills was convicted of three counts of capital murder on August 23, 2007. *Id.* at C. 78–80. At the conclusion of the penalty phase the following day, the jury recommended death 11-1. *Id.* at C. 112. The court then held a sentencing hearing on September 14 and accepted the jury's recommendation. HDE37-10:R. 1022–33; *see* HDE37-1:C. 122–37 (sentencing order). The Alabama Court of Criminal Appeals affirmed. *Mills,* 62 So. 3d at 574.

The Equal Justice Initiative (EJI), present counsel for Mills, began representing him on direct appeal in December 2009.[2] His conventional appeals concluded when in April 2022, when this Court denied certiorari in his federal habeas proceedings. *Mills v. Hamm*, 142 S. Ct. 1680 (2022) (mem.).

2. Motion for Permission to Appear, *Ex parte Mills*, No. 1080350 (Ala. Dec. 16, 2009).

C. Mills launches a flurry of last-minute filings to stop his execution.

Mills brought no new actions until the State moved on January 29, 2024, to set his execution. DE14-1. His counsel requested an enlargement of time to answer that motion, and they were granted until March 7 to do so. DE14-3.

On March 4, Mills filed a successive Rule 32 petition in the circuit court based on a claim he had raised in various forms since his motion for new trial: that District Attorney Jack Bostick and JoAnn Mills had lied when they testified that she did not have a pretrial plea bargain for her testimony.[3] He attached an affidavit from JoAnn's trial counsel, J. Tony Glenn, who claimed that there was a bargain and stated that EJI had asked him about it for the first time on February 23, 2024. *Id.* at 41.

Three days later, Mills raised the same allegations in response to the State's motion to authorize his execution in the Alabama Supreme Court, DE14-4. But on March 20, the Alabama Supreme Court rejected Mills's request to postpone the execution and issued a warrant authorizing the Governor of Alabama to set a date. On March 27, the Governor set Mills's execution for May 30.

Following the announcement of Mills's execution date, "a flurry of legal filings blanketed the courts." App'x B at 6. On April 5, a month after initiating his state postconviction proceedings, Mills brought the same perjury allegations to the Northern District of Alabama through a Rule 60 motion, asking the court to reopen his habeas litigation.[4]

3. Petition, *Mills v. State*, 49-CC-2004-000402.61 (Marion Cnty. Cir. Ct. Mar. 4, 2024), Doc. 1.
4. Motion for Relief from Judgment Pursuant to Rule 60, *Mills v. Hamm*, 6:17-cv-00789 (N.D. Ala. Apr. 5, 2024), ECF No. 42.

But Mills found that his "newly discovered" evidence of perjury had no traction in the state circuit court. On April 16, the court denied and dismissed his successive Rule 32 petition, noting its untimeliness and Mills's lack of diligence in waiting nearly seventeen years to talk to JoAnn's trial counsel, Tony Glenn.[5] Mills did not appeal.

Instead, on April 26, Mills filed a 42 U.S.C. § 1983 complaint in the Middle District of Alabama (App'x C), the basis for this case before the Court. This time, he raised an Eighth Amendment claim concerning the execution gurney, contended that the period immediately prior to his execution is a "critical stage" of criminal prosecution, and argued that he was entitled to counsel in the execution chamber pursuant to the Sixth Amendment, the Due Process Clause, and the right of access to the courts. *Id.* at 32–39. The district court ordered Mills to file any motions by noon on May 3, 2024, DE5, and Mills filed motions for preliminary injunction and expedited discovery (DE7; DE8), which Defendants opposed (DE15; DE16).

The Middle District held an evidentiary hearing on May 14. Mills offered documentary exhibits in the public domain, including articles, *see* App'x D at 51–58, while Defendants put on testimony from Alabama Department of Corrections (ADOC) Commissioner Hamm and ADOC Regional Director Cynthia Stewart Riley, *id.* at 61–69, 87–94. As Mills had asked the court to "enjoin the placement of Mr. Mills on the execution gurney while this case or his case pending in the Northern District are still ongoing," *id.* at 5, the court asked counsel whether they had moved the Northern

5. *Mills v. State*, 49-CC-2004-000402.61 (Marion Cnty. Cir. Ct. Apr. 16, 2024), Doc. 17.

District for a stay, *id.* at 7. They had not, explaining, "[W]e don't believe that we are going to need to." *Id.* at 8.

But two days later, nearly six weeks after filing his Rule 60 motion, Mills asked the Northern District for a stay after all.[6] The State objected, and around 2 p.m. on Friday, May 17, the Northern District denied both the Rule 60 motion and the stay motion.[7] The district court held that Mills's Rule 60(b) claims were untimely, that he failed to exercise reasonable diligence in getting his affidavit from Glenn, that the affidavit was mere impeachment evidence, that Glenn's attorney fee declaration—supporting evidence for his affidavit—contained erroneous statements, and that Mills failed to show the "extraordinary circumstances" necessary to reopen a habeas judgment. *Id.* at 13–22. Moreover, Mills's position would imply that "Glenn sat in court on August 22, 2007, and watched both JoAnn and District Attorney Bostick repeatedly perjure themselves, yet said nothing to the Court." *Id.* at 21. The court also found that "Mills offer[ed] no reason why he could not have spoken with Glenn or obtained Glenn's September 2007 fee declaration before February 2024," and that "for Mills to wait until after the State has set his execution to attempt to reopen his habeas litigation based upon information he could have produced years ago is prejudicial to the State's interests." *Id.* at 15, 22.

Mills sought a certificate of appealability from the district court, which it swiftly denied, and from the Eleventh Circuit, which it denied on May 28.

6. Motion for Stay of Execution, *Mills v. Hamm*, 6:17-cv-00789 (N.D. Ala. May 16, 2024), ECF No. 46.
7. Memorandum of Opinion and Order, *Mills v. Hamm*, 6:17-cv-00789 (N.D. Ala. May 17, 2024), ECF No. 48.

Meanwhile in this case, the Middle District of Alabama denied Mills's motions for preliminary injunction and expedited discovery on May 21. *See* App'x B. The district court found that "the balance of the equities militates strongly against granting injunctive relief because Mills inexcusably delayed filing this action," *id.* at 18–19, and even if that were not the case, that Mills "failed to show a substantial likelihood of success on the merits," *id.* at 19.

D. Mills delays on appeal, and the Eleventh Circuit denies relief.

Despite being chastised by the district court for inexcusable delay, Mills took his time on appeal. He waited three days to appeal on Friday, May 24. Filing his opening brief on the Friday night before a three-day weekend, Mills did not ask the Eleventh Circuit to expedite his appeal or to grant an emergency motion.

The Eleventh Circuit reviewed the district court's denial of a preliminary injunction for abuse of discretion. App'x A at 4–5. The court determined that Mills was not likely to succeed on the merits. Mills's Eighth Amendment claim failed because "the district court credited the plausible testimony of the Commissioner that the State would not restrain Mills on the gurney while a stay is in effect and that the State would remove Mills from the gurney if a stay were later issue." *Id.* 6–7. The court found it "more than plausible" that "legitimate penological reasons explain why several inmates have recently been strapped to the gurney for longer durations, including the difficulty of gaining intravenous access and delays in transporting witnesses to the chamber." *Id.* at 7 (cleaned up). "In any event, those delays have dwindled…on account of improvements the State has made to decrease delays." *Id.* Mills's Sixth Amendment claim failed because the right attaches only to certain

"'trial-like confrontations' between the State and the accused," *id.* at 5 (quoting *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 n.16 (2008)), and the right to counsel "does not extend beyond the first appeal," *id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). His due process claim for access to counsel in the execution chamber failed because "Mills has no constitutionally protected interest in having counsel present throughout his execution." *Id.* at 7. Finally, Mills's access to courts claim failed because "Mills is not substantially likely to succeed on the merits of his other claims," so he did not have a separate substantive claim that he would need judicial relief to vindicate. *Id.* at 8.

The Eleventh Circuit also agreed with the district court's ruling on the equities. At best for Mills, he "waited a month" after his execution date was set "to file this action—and then waited another week…to seek injunctive relief or a stay. He might have waited longer had the district court not ordered him to file." *Id.* at 9. Mills's excuse—that he brought this action only after realizing that the night of his execution might be "long" due to his "flurry" of filings—"snaps credulity." *Id.* at 9–10. Mills did not act as a "reasonably diligent plaintiff," and the court saw no error in the district court's finding that he engaged in "inequitable conduct." *Id.* at 10. Finally, the equities weighed against any stay because the "State has an important interest in the timely enforcement of Mills's sentence" and "the public[has an] interest in seeing its moral judgment…carried out promptly." *Id.* at 9–10 (cleaned up).

STANDARD OF REVIEW

For Mills "[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari," he "must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

On this posture, the Court gives "considerable weight" to the decisions below. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983); *see also Respect Maine PAC v. McKee*, 562 U.S. 996 (2010) (Kennedy, J., in chambers) (requiring significant justification for "judicial intervention that has been withheld by lower courts" (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)); *cf. Bateman v. Arizona*, 329 U.S. 1302, 1304 (1976) ("In all cases, the fact weighs heavily 'that the lower court refused to stay its order pending appeal.'") (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)). Because the district court and appellate panel denied injunctive relief, Mills has "an especially heavy burden." *Edwards v. Hope Medical Group for Women*, 512 U.S. 1301 (1994) (Scalia, J., in chambers).

REASONS CERTIORARI AND A STAY OF EXECUTION SHOULD BE DENIED

I. Mills has no chance of success on his Eighth Amendment claim based solely on claims of clear error.

The claim at the heart of Mills's § 1983 complaint was that he would be subjected to cruel and unusual punishment by being restrained on the gurney for too

long. App'x C at 32–34. It is undisputed that *some* "restraint is a necessary part of the execution," App'x B at 34, but even now, Mills refuses to quantify the length of time an inmate may be restrained on what, in fact, *is* "a bed equipped with straps and a pair of padded arm boards, housed in a climate-controlled building," Pet. 15 without crossing the line to torture.[8] His claim has no chance of success.

A. Mills's claim cannot overcome the district court's factual findings based on an evidentiary hearing.

Mills assigns error to the factual findings below, which this Court is highly unlikely to review (SUP. CT. R. 10), and thus does not warrant a stay. On the record before the Court, Mills is wrong: the State will not restrain him for a "torturous" amount of time. Even if Mills's descriptions of past executions in Alabama were accurate (and they are not), the district court correctly found that "Mills has not shown a substantial likelihood that *he* will be restrained to the gurney for hours." App'x B at 39–40. Based on the evidence and the district court's factual findings, there can be no comparison of this case to *Hope v. Pelzer*, 536 U.S. 730 (2002), in which an inmate was left handcuffed to a hitching post for seven hours. App'x C at 33; DE7:9.

First, Mills refuses the district court's factual findings by relying heavily upon allegations about the aborted execution of Kenneth Smith in 2022, Pet. 7–8, in which Smith was restrained for approximately three and a half hours. Just after Smith had been taken to the chamber and restrained, the Eleventh Circuit entered a stay of

8. The district court pressed Mills's counsel during the evidentiary hearing—"Is 30 minutes too long? 60 minutes? How long? And how would that be gauged?"—to no avail. App'x D at 17.

execution, and after this Court lifted the stay, the State's (previous) IV team tried for more than an hour to establish IV access. DE15-4:2–3; *see* App'x C at 11.

Mills cannot overcome the plausible factual findings that he will not face prolonged restraint like Smith did in 2022. ADOC agreed—and Commissioner Hamm confirmed under oath in testimony that both courts below credited—that Mills would not be taken to the execution chamber until any stays are lifted, and should a stay come down while he is in the chamber, he would be returned to the holding cell. App'x D at 61–62. The Commissioner also testified that the State would not proceed to execute Mills while this Court reviews any stay application. The circumstances of Smith's case—a stay entered while the inmate is being prepared for execution on the gurney—are now inapposite. Because the State will not proceed unless and until this Court denies Mills's pending stay applications, there will be "no pending litigation by the [time] of his execution," making his case just like that of McWhorter, Pet. 17, who Mills admits did not endure "unnecessary and prolonged suffering," Pet. 13.

Mills's claim that he "*will be* restrained to the execution-gurney during pending litigation," Pet. 16, is simply wrong.

Second, following an internal review, Alabama made important changes to its execution procedures that reduced the duration of the inmate's time on the gurney. Critically, the State introduced a new IV team in 2023, and the execution logs from the previous six executions (and aborted executions) reflect a vast improvement over the performance of the personnel who oversaw the longer and failed executions of 2022. *See* DE15-2 through 15-7; DE15:41–44. Cynthia Stewart Riley, a Regional

Director at ADOC and the former warden of Holman Correctional Facility, also provided testimony via affidavit that ADOC had taken steps to speed up the preparatory process by changing the way in which witnesses were transported to the prison. DE15-8:5.

The district court noted the changes ADOC made after Alan Miller's and Smith's aborted 2022 executions. App'x B at 39–40. As a result, James Barber, executed in July 2023, spent only one hour and seventeen minutes on the gurney before his death warrant was read; Casey McWhorter, executed in November 2023, was there for only forty-eight minutes. *Id.*; *see* DE15-5; DE15-6. Mills offered no evidence showing that the new IV team had difficulty with either inmate. App'x B at 37. The court also credited Riley's affidavit testimony and Commissioner Hamm's testimony at the evidentiary hearing, and rightly concluded, "This evidence undermines Mills' contention that he faces an imminent risk of unnecessarily prolonged restraint on the execution gurney." *Id.* at 38. The Eleventh Circuit found no clear error and described the district court's findings as "more than 'plausible.'" App'x A at 7.

Third, Mills also failed "to show that the circumstances of prior executions make it likely that he will be subjected to prolonged, unnecessary restraint." App'x B at 34. As the district court explained, extended restraint had been necessary in other executions due to "difficulty obtaining IV access" for certain inmates as well as factors like an inmate's physical resistance, time with the spiritual advisor, and the time necessary to transport witnesses. *Id.* at 35. Mills has not alleged that he has a

physiology that will make IV access more difficult, and the record reflects that ADOC has eliminated two of the primary causes for extended time on the gurney. If Mills is combative, resulting in longer time on the gurney than theoretically necessary, that risk would be self-imposed, not an Eighth Amendment violation.

Fourth, the district court inferred from the circumstances of other executions that, as a matter of fact subject to clear error review, ADOC had good reasons for each case of allegedly prolonged restraint. In other words, not only did Mills fail to show he is similarly situated to those inmates who had damaged veins, resisted, or were subject to the old procedures for witnesses and religious advisors, but he also failed to rebut that these "explanations" for previous cases "suffice[d] as *legitimate penological reasons* why inmates previously were restrained on the gurney for their respective durations." App'x B at 35–36 (emphasis added). Mills's claim falls apart because he did not show facts to support his conclusion that ADOC's conduct is "gratuitous or wanton." *Id.* at 39. Even cases of "restraint lasting up to three or four hours" were not "'totally without penological justification.'" *Id.* (quoting *Hope*, 536 U.S. at 737). The court correctly concluded that "to the extent Mills relies on periods of restraint during past executions and execution attempts as evidence that his own execution likely will be unconstitutional, his reliance is unavailing." *Id.* at 37. Even if Mills had an example of prolonged restraint for *no reason*, "it would amount to a mere 'isolated mishap,' which 'does not give rise to an Eighth Amendment violation' in the execution context." *Id.* at 36 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

Finally, Mills references spectacular allegations by inmate Alan Miller, whose execution was aborted in 2022, including Miller's false claim that the gurney was tilted so that he was left hanging vertically for twenty minutes. Pet. 5–6; App'x C at 16. As the district court found, "Mills' unsworn allegations concerning the use of stress positions during prior executions are undermined by Riley's sworn testimony that the execution gurney cannot tilt to a 90-degree angle." App'x B at 36; *contra* Pet. 5; Doc. 11 at 5. Mills's fears do not stand up to scrutiny.

B. Mills's claim fails as a matter of law.

Aside from the insurmountable factual obstacles for Mills's claim, it fails as a matter of law for a variety of reasons.

First, as the district court rightly noted, "'[s]ome risk of pain is inherent" in an execution, and "'the Constitution does not demand the avoidance of all risk of pain,'" App'x B at 33 (quoting *Baze*, 553 U.S. at 47). Even if the Court accepts Mills's attempt to frame his claim as a deliberate-indifference claim, Mills offers one authority, *Hope v. Pelzer*, which had facts far afield from this case.

Any pain associated with prolonged restraint in the chamber during an execution "falls well short of the gratuitous infliction of wanton and unnecessary pain addressed in *Hope*." App'x B at 39. In *Hope*, the inmate was stripped to the waist and handcuffed to a metal hitching post, where he stood for seven hours in the summer sun. He suffered from the pain of having his hands chained above his head, from sunburn, and from the additional burns resulting from the heated metal of his restraints. He was given water only once or twice, was offered no bathroom breaks,

and was taunted by guards. 536 U.S. at 734–35 & n.2. By contrast, the gurney is a medical bed equipped with straps and a pair of padded arm boards, housed in a climate-controlled building. *See* DE15-8:3–4; App'x D at 89–90. Even accepting Mills's worst fears as true, which the Court is not required to do on this posture, he has not alleged facts that support a substantial likelihood of an Eighth Amendment violation.

Second, Mills is unlikely to succeed because his claim is properly construed as a method-of-execution claim, and it fails this Court's exacting standard for such claims. Mills should be understood to challenge the method because, as the district court reasoned, restraint on the execution gurney does not "amount[] to punishment." App'x B at 34; *see id.* at 39 ("[T]he mere act of restraining an inmate on the gurney to prepare for an execution is *not* punishment[.]"). Rather, restraint is just "a necessary part of the execution," *id.* at 34, and the execution is the punishment. Consequently, Mills challenges the way the State intends to carry out his punishment (*i.e.*, the method), not the punishment itself (execution).

As a method-of-execution claim, Mills's Eighth Amendment challenge plainly fails. Under this Court's method jurisprudence, the first question is whether the State's method deliberately superadds a substantial risk of severe pain. Mills failed to establish that he is "sure or very likely" to face prolonged restraint and that such restraint would amount to a "substantial risk of serious harm." *Glossip,* 576 U.S. at 877. The reasons that his fears are speculative are discussed above, *supra* § I.A, but even if it were probable that Mills will face prolonged restraint, it would not come close to a constitutional level of pain. In *Bucklew v. Precythe*, the Court found it

"instructive" to examine past methods of execution, such as hanging, which was "evidently painful." 587 U.S. 119, 132 (2019). If hanging often caused death by slow suffocation, and hanging is a constitutional method, then *a fortiori* strapping an inmate to a padded medical bed is constitutional. The *Bucklew* Court went on to sustain Missouri's lethal injection protocol despite the possibility that the inmate would choke on his own blood and experience the "excruciating pain of prolonged suffocation." *Id.* at 157–60 (Breyer, J., dissenting). Mills simply has not alleged harms of sufficient probability, severity, and duration. Thus, he has not shown the kind of severe risk sufficient to state a claim under the Eighth Amendment.

Further, if the claim is properly analyzed as a method-of-execution challenge, Mills would have to plead and prove an alternative. Determining whether pain is superadded requires comparison to "an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 52). Mills's sole proposal "to not be placed on the execution-gurney while litigation is pending," Doc. 11 at 36, is neither feasible nor readily implemented. It would mean that any inmate effectively earns an automatic stay simply by filing a last-minute claim. It would encourage gamesmanship of the worst kind, exacerbating the concerns about Mills's conduct the district court raised. Mills's proposal does not define "litigation" or "pending" and leaves open whether, in his view, the State would need to refrain even if every court to review his claims has denied emergency relief, so long as some legal action is live.

The proposal is unworkable. The Eighth Amendment does not require a de facto stay of execution as a prophylactic to prevent prolonged time in the execution room.

As Mills has no chance of success on his Eighth Amendment claim, the Court should not grant certiorari or a stay of execution on this ground.

II. Mills has no constitutional right to counsel or to access the courts in the execution chamber.

Mills's remaining three claims "center around one common issue: Mills' alleged lack of access to counsel during his entire execution process (or more specifically, in the execution chamber)." App'x B at 47. Specifically, he alleged that various rights would be violated were he denied access to counsel with a telephone in the chamber: his Fifth and Fourteenth Amendment right to due process (Count II), his right of access to courts (Count III), and his Sixth Amendment right to counsel (Count IV). App'x C at 34–39. He contended that that the preparatory period before an execution is a critical stage in which he is entitled to counsel. *Id.* at 35, 37–38. As a point of clarity, Mills will have access to counsel via phone as he waits in the holding cell; only after this Court denies relief and the execution can begin is Mills's access terminated. The courts below correctly denied relief.

First, Mills admits in this Court that his counsel-related claims are limited to this "unique and acute context" where he allegedly cannot "enforce[]" his other constitutional rights "without the presence of counsel." Pet. i. Mills essentially admits that his question presented is not worthy of certiorari review because its resolution would not extend beyond this case. Moreover, his question relies on factual predicates that the courts have resoundingly rejected. *Accord* Pet. 28. And there is no "acute

context" here: Mills does not face a substantial threat of harm, and his constitutional rights are not in jeopardy, so he does not need counsel to "enforce" them. Unless this Court reverses several findings of the district court discussed *supra*, the crucial premise behind Mills's demand—that his *other* rights will be violated without counsel (*e.g.*, Pet. 27)—is a nonstarter on this record.

Second, Mills's due-process and Sixth Amendment claims are barred by the statute of limitations. App'x B at 44. "[A]ll § 1983 suits must be brought within a State's statute of limitations for personal-injury actions," *Nance v. Ward*, 597 U.S. 159, 174 (2022), and in Alabama, "the governing limitations period is two years," *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008); *see* ALA. CODE § 6-2-38. Here, "[t]he parties agree that Counts II and IV are subject to a two-year statute of limitations." App'x B at 46.

Since Mills's direct appeals concluded in 2012, ADOC's execution protocol has not allowed counsel for the condemned to be present in the chamber. And since at least 2017, Mills should have known that counsel were not permitted to have access to a phone in the viewing rooms, much less the chamber itself. App'x B at 44–45; *see Arthur v. Comm'r, Ala. Dep't of Corr.*, 680 F. App'x 894 (11th Cir. 2017). The district court explained:

> In 2017, the Eleventh Circuit decided *Arthur,* in which the court explained that ALA. CODE § 15-18-83, which lists the persons who may be present at an execution, "does not provide an option for the inmate's attorney to be present in his or her capacity as legal counsel." 680 F. App'x at 898. As for access to a phone, the Eleventh Circuit panel stated that Alabama's "long-standing rule against visitors bringing cell phones into prison facilities…was undisputedly in place no later than August 1, 2012." *Id.* at 906 (emphasis in original).

App'x B at 46–47. As Mills waited until April 2024 to bring these claims, they are outside the statute of limitations.

Below, Mills argued that the 2022 execution of Joe James reset the limitations period because the time on the gurney "markedly increased starting with [that] execution." Doc. 11 at 39. The district court rightly rejected this argument. While later events could "elucidate[] the reasons for Mills' desire to have his counsel present in the execution chamber with a phone, it is the State's *policies* which he challenges and which give rise to his claims in Counts II and IV." App'x B at 47. Mills knew years ago that he would be executed without counsel present in the execution chamber; his claims are barred because he could have but did not bring his claims back then.

Third, Mills's counsel-related claims independently fail on the merits. Mills is not substantially likely to succeed on Count IV, his Sixth Amendment claim, because the counsel right "applies only to criminal proceedings," *Barbour v. Haley*, 471 F.3d 1222, 1231 (11th Cir. 2006), and more specifically, only during "critical" stages of criminal proceedings. *Missouri v. Frye*, 566 U.S. 134, 140 (2012). But Mills's execution is not a proceeding in his criminal prosecution for Sixth Amendment purposes, and he never cited "binding authority supporting his contention that the imposition of a death sentence is a proceeding to which the right to counsel extends at every stage." App'x B at 50. The district court explained that Mills was no longer a criminal defendant, but rather a civil litigant, and had no right to counsel. *Id.*; *see also Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (rejecting § 1983 claim in which inmate plaintiffs alleged they had right to counsel "during the events leading up to

and during the execution"). The Eleventh Circuit agreed that Mills was unlikely to succeed on the merits of this claim, noting that the Sixth Amendment applies to "trial-like confrontations," App'x A at 5 (quoting *Rothgery,* 554 U.S. at 212 n.16), and even then not "beyond the first appeal," *id.* (citing *Finley*, 481 U.S. at 555).

Mills is unlikely to succeed on his procedural due process claim,[9] which alleges a right to counsel already "covered by a specific constitutional provision"—*viz.*, the Sixth Amendment. *Cf. United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[T]he claim must be analyzed under the standard appropriate to that specific provision."). Thus, he has no constitutionally protected interest in the presence of counsel in the execution chamber for the same reasons he has no right under the Sixth Amendment. *See supra*; *accord* App'x B at 51. If instead Mills's claim is really about the deprivation of *life* (not the right to counsel), then his claim fails because he had adequate pre-deprivation process: His execution is the result of a lawful conviction and sentence.

Mills's right of access to the courts " is not 'an abstract, freestanding right,'" *id.* at 52 (quoting *Lewis v. Casey*, 518 U.S. 343, 351 (1996)). A right of access claim is an ancillary claim, and Mills needed to plead a substantive claim underlying it. *Id.* Here, he failed to show a substantial likelihood of success as to Count III "because his substantive underlying claim, the Eighth Amendment claim in Count I, is not colorable on this record," and "[w]ithout a colorable Eighth Amendment claim, Mills is not substantially likely to succeed on his right of access claim because he has no

9. Counsel clarified during the evidentiary hearing that the claim concerned procedural due process. App'x D at 51.

substantive claim for which he needs court access to vindicate." *Id.* The Eleventh Circuit concurred. App'x A at 8.

Fourth, even if Mills had shown a likely violation of his constitutional rights, it would be justified in the execution chamber under *Turner v. Safley*, 482 U.S. 78, 87 (1987). *Accord* App'x B at 53. Mills's claims concern an ADOC rule that serves legitimate penological interests, and if that rule infringes on his rights, he has "an actionable constitutional violation only if the regulation is unreasonable." *Id*. When reviewing prison regulations for reasonability, courts consider:

> (1) whether there is a "valid, rational connection" between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an "exaggerated response" to prison concerns.

Id. (quoting *Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996)).

The *Turner* factors favor Defendants. An execution "is a choreographed process which would require significant restructuring of resources to accommodate an attorney—particularly one with a cellphone capable of capturing photos and videos—in the execution chamber." App'x B at 54. The State has a "need for strict confidentiality of the execution team members' identities" because unfortunately, those involved in the execution process in many jurisdictions have faced serious threats. *Id.* Further, an attorney with a phone in the execution chamber "would jeopardize [ADOC's] efforts to keep confidential the execution team members'

identities," *id.*, and raise the risk of "disruptions" that threaten "solemnity and decorum in the execution chamber," *see Ramirez v. Collier*, 595 U.S. 411, 430 (2022).[10]

Mills argues that departments of corrections in other states permit counsel in their execution chambers. Pet. 22–24. This does not invalidate ADOC's legitimate penological concerns or make the presence of counsel a constitutional requirement. App'x B at 54–55 (citing *Turner*, 482 U.S. at 93 n.* ("[T]he Constitution 'does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.'")). Thus, the district court found that "even if Mills had overcome the multiple other hurdles to Count III, he has not overcome the *Turner* factors," particularly the prison's "interests in security, confidentiality, and conserving resources." *Id.*

Mills contends that the district court erred by "fail[ing] to address what security concerns relate to a landline as opposed to a cell phone," Doc. 11 at 45; *see* Pet. 19. But ADOC has legitimate penological interest in limiting the presence of non-ADOC personnel in the highly secure execution chamber even if they cannot record. For example, pleadings following the Miller and Smith aborted executions in 2022 described individuals present in the chamber and their alleged conversations. The result of disclosures like those is that the State of Alabama has lost the assistance of experts, the availability of drugs, and sources for supplies due to activist campaigns. Adding an *adverse* attorney to the chamber and giving him or her the unrestricted

10. Mills claims, "[I]t is possible to maintain Defendants' interests through less restrictive means, as demonstrated by the presence of attorneys for Defendants, with phones, in the execution chamber." Pet. 22. But counsel for ADOC have no interest in jeopardizing the State's ability to carry out execution, exposing the identities of members of the execution and IV teams, or disrupting the process.

ability to observe the IV team and execution team would jeopardize the confidentiality of the process, the safety of the prison, and the State's future ability to carry out judicial executions. It is discomforting that the district court had to remind Mills's counsel ***in this case*** that they are "officers of the court." App'x B at 30. ADOC is not constitutionally required to trust that "a confidentiality agreement" would protect its interests. *See* Pet. 19, 28.

In sum, Mills's claims concerning his supposed right to counsel in the execution chamber are not cert-worthy, nor do they entitle him to a stay of execution.

III. Mills's delay was "unreasonable, unnecessary, and inexcusable."

A. Because "[e]quity strongly disfavors inexcusable delay," *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020), "last-minute claims arising from long-known facts" can justify "denying equitable relief," *Ramirez*, 595 U.S. at 434. That "well-worn principle[] of equity" holds true even "in capital cases," *id.*, and applies equally to preliminary injunctions and stays of executions, *see id.* (preliminary injunction); *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (stay). Undue delay, whether for "a few months," *Wreal, LLC v. Amazon.com*, 840 F. 3d 1244, 1248 (11th Cir. 2016), or "years," *Benisek v. Lamone*, 585 U.S. 155, 160 (2018) (per curiam), is strongly disfavored. The reason is plain: Failure to act with "urgency" suggests that instead of needing an "extraordinary and drastic remedy," *Wreal*, 840 F. 3d at 1247–48, a plaintiff is engaged in "manipulation," *Gomez*, 503 U.S. at 654.

B. The district court found that Mills's last-minute litigation is "inexplicable," "inexcusable," and leaves "little doubt" that his real goal is to "delay…his execution."

App'x B at 30 (quotation omitted). The court lamented:

> The practice of filing lawsuits and requests for stay of execution at the last minute where the facts were known well in advance is ineffective, unworkable, and must stop. The unique circumstances of execution litigation and the attendant deadlines are precisely why such litigation should be filed at the earliest possible opportunity: to ensure that courts at all levels have as much time as possible to review the case and make a reasoned decision. This case seems to follow a continuing trend of lawyers filing last-minute § 1983 lawsuits to create an emergency situation in the hopes that the condensed timeframe will persuade courts to stay the execution to afford themselves more time to consider the matter. But this strategy is untenable given the Supreme Court's instruction that "[c]ourts should police carefully against attempts to use [execution] challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at 150.…The Court acknowledges that lawyers representing death row inmates set to be executed unquestionably owe a duty to their clients. However, these lawyers are also officers of the court. The act of filing a civil action and then a request for injunctive relief after unjustified delay often appears to be legal manipulation rather than genuine legal advocacy.

App'x B at 30. This district court correctly denied relief based on Mills's delay alone, and its frustration was not misplaced.

Mills has known since January 29, 2024, that the State was seeking his execution date. He has or should have known *for years* prior to that point that ADOC does not permit attorneys to be in the execution chamber with telephone access. *See supra* § II (discussing *Arthur v. Comm'r*). The district court itemized a dozen points when Mills might have initiated this litigation prior to April 26, dating back to the time this Court denied certiorari in April 2022. App'x B at 26 & n.15.

Yet Mills waited until April 26, 2024—after filing two other meritless lawsuits—to bring this action, and he waited another week to move for a preliminary injunction. "He might have waited longer had the district court not ordered him to

file any motions by" May 3, the Eleventh Circuit observed. App'x A at 9.

C. Mills's main excuse for delay is the *post hoc* rationalization that he lacked standing "before it became clear that litigation" in his Rule 60 case would be "ongoing on May 30." Pet. 34; Doc. 11 at 24.[11] In his view, the crucial fact "emerged" when he spoke to Tony Glenn, procured the affidavit, and developed the basis for his Rule 60 suit, which made it likely that May 30 would be a "long night," resulting in prolonged restraint on the gurney. *See* Pet. 34; Doc. 11 at 24; Doc. 16-1 at 9–10. This excuse was rejected below and makes no sense.

First, Mills cannot rely on his years-long delay in the Rule 60 case to excuse his years-long delay here. If May 30 is indeed a "long night" of litigation or waiting on the Court, *it will be Mills's fault* for bringing meritless cases at the last minute. Because he could have spoken to Glenn years ago, he could have "discovered" the affidavit that he alleges dragged out litigation to the eleventh hour.

Second, Mills should have known that there would be litigation over the Glenn affidavit—which, on his view, gave him standing here—after speaking to Glenn on February 23 and/or after filing his successive Rule 32 petition on March 4. Yet Mills delayed in bringing this suit until April 26.

Third, Mills demonstrates ample knowledge of the (unfortunately) typical timing in last-minute capital litigation. For instance, both the Miller and Smith executions in 2022 were called off late in the evening because there was insufficient time to establish IV access before the deadline for those executions. *See* DE15-3; 15-4.

[11] Mills attributes this view of standing to the State based on its position in other pending litigation, which involves very different claims concerning the timing and sequence of executions in Alabama.

The death warrant in the Barber execution in 2023 was not read until 1:31 a.m. DE15-5. Thus, the possibility that Mills's execution might be a "long night" did not just become clear to him in March 2024. Indeed, "Mills's assertion that he brought this action when 'it first became apparent to him' that the night of his execution might be 'long' on account of what the district court called his 'flurry' of legal filings snaps credulity." App'x A at 9–10.

Fourth, Mills arguably has claims unrelated to the risk of a "long night" of litigation on May 30, including the assertion that the State would strap him to a gurney "for no reason." *E.g.*, Pet. 18. If there were such a risk, it would have nothing to do with ongoing litigation, and his claim would have accrued long ago.

D. Mills next offers the outrageous excuse that *the State* is to blame for his eleventh-hour stay application. We are here because of the State's "continued litigation and unwillingness to comply," he says, neglecting to address his delay in bringing both cases and his efforts to slow-walk them at every step. Pet. 34. Mills argues that the State could have enforced its sentence without threat of interference if it had "immediately implemented" his personal execution protocol. Pet. 31.

But the State has repeatedly explained why Mills's execution "could not take place as scheduled" in accordance with his demands. Pet. 32. To name just one reason, adding unknown lawyers to the execution chamber at the eleventh hour poses an unacceptable threat of exposing the identities of the members of the IV and execution teams, which are kept confidential to protect their privacy. *See, e.g.*, *Jordan v.*

Comm'r, Miss. Dep't of Corr., 947 F.3d 1322, 1332 (11th Cir. 2020).[12] And given Mills's early bad faith in this litigation, of course ADOC could not commit to keeping him off the gurney while *any and all stay litigation* is pending. *See* Pet. 30. Mills will be able to communicate with his counsel via phone about the status of his litigation while he is in the holding cell, but once he is taken to the execution chamber, that act will inform him that there is not a stay of execution in place. To be clear, if there is any kind of stay in place at 6 p.m. on May 30, Mills will not be executed until it is lifted. If, after Mills is taken to the gurney, a stay is entered, then he will be returned to the holding cell to wait for the stay's resolution. But asking ADOC to stop Mills's execution whenever he flings another eleventh-hour stay motion at the judiciary is unreasonable. If ADOC had agreed to Mills's demand, then what would stop him from moving for a new stay of execution in state or federal court at 5:59 p.m. on May 30? At midnight? Or at any point before the warrant expires on May 31?

The State could not comply with Mills's belated demands, which is precisely why he framed his requested relief in terms of a preliminary injunction, rather than a stay of execution that he *knew* was too late. Consider the following exchange at the evidentiary hearing:

THE COURT: But this litigation can't be resolved in 30 days.

[12] Mills minimizes the State's interest by pointing out that ADOC allows a spiritual advisor in the chamber, App'x B at 17–18; *see* Pet. 20, but the spiritual advisor is present for a limited time after the IV team has done its work. DE15-1:17. And ADOC already has procedures for handling spiritual advisors. Mills implies that for each attorney he wants in the chamber, ADOC could have conducted "a background check," an "interview [of] him and his associates," and "a penalty-backed pledge." Pet. 20. He cannot claim that these are reasonable changes to make at the last minute.

> [COUNSEL]: We believe it can. We believe it can be resolved expeditiously.
>
> THE COURT: You think that a four-count federal lawsuit can, from start to finish, be completed and all appeals completed in 30 days?
>
> [COUNSEL]: We believe that a preliminary injunction can be entered in this case, and the Court can—the defendants can move forward with the execution under the terms of that injunction, yes.

App'x D at 5. Because the terms of Mills's proposed injunction—including prohibiting his execution if any litigation in the § 1983 action *or* in his Northern District Rule 60 action was pending and allowing counsel to be with him in the execution chamber, equipped with a phone, DE7:1–2—were plainly aimed at delay, Mills's late filing and motion were not made in good faith. The district court was right that thirty-four days is "woefully insufficient," and "Mills' assertion that this entire process could 'easily' take place within the thirty-four days between when he filed suit and his execution date defie[d] credulity."[13] App'x B at 28–29.

Mills should not evade the consequences of his delay because he artfully attempted to seek only preliminary relief that the State could not provide. Both courts below caught on to Mills's maneuver and treated his request as one for a stay anyway. App'x A at 9; App'x B at 24 n.14. Accordingly, they did not apply the wrong legal

13. Equally absurd was Mills's motion for expedited discovery, also filed on May 3, 2024. DE8. Attached to the motion was a sixteen-item request for production and a nine-item list of interrogatories; both attachments were overly broad and requested information Defendants would have refused to provide. When the court noted that they were, at that point, only two weeks away from the execution, Mills's counsel suggested that Defendants could complete the discovery "within 48 hours." App'x D at 49. The court rightly found that Mills failed to show good cause for discovery and that "the time constraints are entirely of Mills' creation." App'x B at 57.

standard, *contra* Pet. 32; Doc. 11 at 52.[14] And if anything, the equities should weigh *more heavily* against Mills for cloaking his stay request as a set of impractical demands on the State and for seeking a form of relief in this Court that, according to Mills, he waited until the eve of execution to request for the first time.

* * *

Applying precedent, the district court correctly found that Mills's delay was inexcusable and smacked of gamesmanship, and rejected his "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). "Last-minute stays should be the extreme exception, not the norm," *Bucklew* 587 U.S. at 150, and this case is not exceptional.

IV. The remaining equities favor the State.

A. A stay would undermine the public interest in justice.

A stay or any other injunctive relief that might delay today's execution would undermine the powerful interest—shared by the State, the public, and the victims of Mills's crime—in the timely enforcement of his sentence. *Hill,* 547 U.S. at 584. An unpunished murder is an intrinsic and ongoing harm to those interests and to the rule of law. Twenty years is twenty years too long. While Mills has suggested that the Court could enter bespoke relief that would permit the execution to proceed on time, anything other than an unambiguous denial threatens further delay. "Only with real finality" can we "move forward knowing the moral judgment will be carried out."

[14] The preliminary injunction standard "mirrors" the stay standard, *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1273 (11th Cir. 2014), and, as the district court recognized, Mills's unclean hands weigh heavily against him whether he is seeking an injunction or a stay.

Calderon v. Thompson, 523 U.S. 538, 556 (1998). "To unsettle these expectations," especially at the eleventh hour, "is to inflict a profound injury to…the State and the victims of crime alike." *Id.*

Both the Eleventh Circuit and the district court found these equitable factors to be salient in this case. *See* App'x A at 10 ("Further interference…would be undue.") (cleaned up); App'x B at 31 ("Equity also weighs against granting [relief] because the State and the victims of crime have an important interest in the timely enforcement of [Mills's] sentence.") (cleaned up). Mills argues that these equities do not weigh heavily because he does not seek relief that would "prohibit the execution from moving forward," Pet. 31–33, yet he has now applied for a stay of execution. And the *Turner* analysis above, supported by factual findings, suggests that Mills's demands are not "mere[]…alteration[s]" that could be "immediately implemented." Pet.31.

B. Mills faces no threat of irreparable harm.

The district court did not reach the irreparable-harm factor. Thus, when Mills argued to the Eleventh Circuit that the district court abused its discretion, he did not address irreparable harm on appeal. He filed an ordinary appeal and never moved for emergency relief, such as a stay, so he was not required to show irreparable harm. As a result, granting relief would make this Court the first to rule on irreparable harm, something the Court generally does not do. The Court should deny relief because Mills had the burden to prove irreparability, but he did not ask the courts below to rule on it, so this Court has no basis on which to make the required finding.

If the Court reaches irreparable harm, it should deny relief. Mills's claims in this case do not challenge his eligibility for capital punishment, so the execution itself cannot suffice for irreparability here.

As to Mills's Eighth Amendment claim, not all pains or discomforts are legally irreparable. The Court must evaluate the concrete facts alleged, and on this record, there is very little risk that Mills will face prolonged restraint on the execution gurney. Even if the Court were to identify clear error, Mills has not shown that the risk of restraint rises to the level of irreparability.

Nor are all constitutional violations irreparable. Even if Mills is likely to succeed on one of his Sixth Amendment, due process, or right-of-access claims, he has not automatically satisfied the harm factor. A constitutional violation is not "synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000); *Wall v. CDC*, 588 F. Supp. 3d 1301, 1305 (M.D. Fla. 2022). In *Ramirez v. Collier*, for example, this Court emphasized that the inmate faced a "spiritual" harm, not a "pecuniary" one, so the threatened violation of the inmate's religious rights was irreparable. 595 U.S. at 433. There is no comparable allegation here. Mills does not attempt to argue that the absence of counsel in the execution room is akin to a burden on prayer in one's final moments of life on Earth.

V. Mills violated Rule 23 by failing to request a stay in the court below.

Mills appealed the district court's order denying preliminary injunctive relief but never asked the Eleventh Circuit for the same relief.[15] By then asking this Court for a stay of execution, Mills flagrantly flouts Rule 23, which provides that that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." SUP. CT. R. 23.3; *Dolman v. United States*, 439 U.S. 1395, 1397–98 (1978) (Rehnquist, J., as Circuit Justice) ("[A]pplications for a stay here will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed.").

Mills's application does not acknowledge Rule 23's requirement to seek relief in the court below, much less explain why his last-minute filing presents "most extraordinary circumstances." SUP. CT. R. 23.3. While Mills is facing execution—an extraordinary punishment for an extraordinary crime—that fact alone does not excuse him from compliance with Rule 23.3. There is nothing procedurally unique

---

15. The closest Mills came to requesting a stay in his opening brief in the Eleventh Circuit was a throwaway line in his conclusion: "In the alternative, Mr. Mills moves this Court for a stay of execution in the event injunctive relief is not granted or in the event this litigation remains pending at the time of Mr. Mills' scheduled execution." Doc. 11:52–53. He specifically stated that he did not need a stay. *Id.* at 1. Mills repeated this stance in the conclusion of his reply brief:

> Mr. Mills does not need a stay to obtain the relief he seeks: an injunction prohibiting Defendants from restraining him on the execution-gurney while a court-ordered stay or stay litigation is pending, excluding counsel from the execution chamber, or otherwise limiting Mr. Mills' ability to communicate in person with his counsel while in the execution chamber, and denying legal counsel's access to a phone line to communicate with his legal team and the courts. Mr. Mills seeks a stay only in the event that injunctive relief is not granted or in the event this litigation remains pending at the time of Mr. Mills' scheduled execution.

Doc. 13:29–30. In this Court, he reiterates that he did not formally seek a stay below. *E.g.*, Pet. 32.

about Mills's case that would distinguish it from any other capital case. And while this Court has several special rules governing capital cases, *see, e.g.*, SUP. CT. R. 14.1(a), 15.1, 20.4(b), it did not provide an exception to Rule 23.3 for stay applicants facing capital punishment. *Cf. Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981) (applying text "as written" where the author "kn[ew] how" to write it otherwise).

The high stakes in a capital case present all the more reason to apply the Court's ordinary procedural rules and deny Mills's application. Condemned prisoners facing death and States seeking justice need to know the ground rules, especially in fast-paced eleventh-hour litigation. If the Court were to apply in this case an unannounced and unwritten policy excusing compliance with Rule 23, a future litigant may expect the same treatment and suffer for it.

Rule 23 prevents this Court from acting as a court of first view on a compressed timeline. In capital cases, the Court often has no more than days—sometimes mere hours—to act before the scheduled execution. Rule 23 ensures the Court has "the benefit of the appellate court's full consideration" and, to the extent possible in emergency litigation, helps fulfill "the public's expectation that its highest court will act only after considered deliberation." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2619 (2020) (Sotomayor, J., dissenting); *see also Angelone v. Bennett*, 519 U.S. 959 (1996) (Stevens, J., dissenting) ("I believe we should steadfastly resist the temptation to endorse procedural shortcuts that can only increase the risk of error.").

It would not be unfair to Mills to deny his application for failure to seek the same relief in the Court below. ***First***, Mills has been represented by competent

counsel from the Equal Justice Initiative, a well-heeled nonprofit that has handled capital cases for over thirty years. ***Second***, Mills knew how to ask for a stay—requesting one from the district and appellate courts in his habeas litigation—and intentionally chose not to do so. *See, e.g.*, Pet. 32. ***Third***, Mills should have known to move the court below because the Eleventh Circuit's rules and procedures require it. *See* 11TH CIR. R. 27, I.O.P. 3 ("[A]n appeal may be expedited only by the court upon motion and for good cause shown."); 11TH CIR. R. 27-1(b)(2) (requiring that emergency movants "specifically discuss" four elements).

Mills says that he "did not require stay of execution" when he filed this lawsuit, but he does now "to prevent what could become a long and torturous night." Stay App. 2. This version of events is hard to square with his position that his *standing* to bring this action is premised on the risk of a "long night." There can be no exception to the rules on the ground that Mills's claim somehow evolved between last weekend (when he failed to move for a stay below) and today.

And Mills had every opportunity to move the Eleventh Circuit for a stay. As soon as he noticed his appeal last Friday, the State preemptively moved to deny an expedited appeal and to deny any requested stay. Doc. 7. Mills failed to respond, failed to move for expedition, and failed to request a stay. Instead, he filed an opening brief claiming that he did not need a stay and that the Eleventh Circuit should reverse and remand. After the State responded in no uncertain terms that Mills had no emergency motion and no motion to expedite, Mills still failed to move the Eleventh Circuit to do anything—apparently assuming that he is "entitled to emergency relief" without

asking for it. Doc. 13 at 28–30; *contra, e.g.*, *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) ("[Courts] do not, or should not, sally forth each day looking for wrongs to right."). In reply below, Mills claimed he had "called the Court clerk," *id.*, but circuit rules expressly state that "telephon[ing] the clerk…is not a substitute for the filing required by FRAP 27(a)"—*i.e.*, a motion. 11TH CIR. R. 27-1(b)(4).

In short, Mills knew the rules but played by them selectively, even after the State made explicit its position that the Eleventh Circuit ought not grant emergency relief absent a satisfactory showing. The Court may consider whether Mills's failure to ask specifically for emergency relief and argue all four of the required elements was intentional. Whatever the reason for Mills's failure, it prejudiced the State. Our adversarial system relies on the principle of party presentation—not only so that courts know what claims and issues to address, but also so that parties know how to respond to protect their rights and interests. Because Mills never moved in the Eleventh Circuit, he never disclosed the complete grounds on which he would seek emergency relief. In particular, he failed to address the prospect of irreparable injury, which is critical in this case and the State's response. *See supra* § IV.B. As a result, the State was forced to dedicate a significant portion of its responsive brief to rebutting an imaginary motion. Doc. 12 at 43–53. Mills evaded scrutiny by saving arguments for this Court to review in the first instance. This tactic is one of many that tax the courts and governments in capital litigation; it should not be lightly excused. Strict enforcement of Rule 23 may be part of the solution.

CONCLUSION

Mills would have this Court find that being restrained on a padded gurney for longer than the absolute minimum required to establish IV access constitutes cruel and unusual punishment. He would also have this Court find that the moments immediately prior to a condemned inmate's execution, when every court has denied relief, is a critical stage for Sixth Amendment purposes and that he will be denied due process if his counsel cannot be with him in the execution chamber, equipped with a phone. This Court should not give credence to Mills's meritless claims and should deny his cert petition and stay application. And because of Mills's dilatory tactics, his stay application should be denied on equitable grounds as well.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

Robert M. Overing
Deputy Solicitor General

Dylan Mauldin
Assistant Solicitor General

/s/ Lauren A. Simpson
Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

May 30, 2024