

Nos. 23-7591 and 23A1065

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAMIE MILLS,

Petitioner,

v.

JOHN HAMM,
Commissioner of the
Alabama Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITIONER'S REPLY

***** Mr. Mills' execution is scheduled from 6:00 p.m. CST on May 30, 2024 until 6:00 a.m. CST on May 31, 2024. *****

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I. THE UNIQUE PATTERN OF UNNECESSARY SUFFERING ESTABLISHED IN ALABAMA EXECUTIONS FROM 2022-2024 CREATES AN INTOLERABLE RISK OF TORTURE WITHOUT THE NARROW, FEASIBLE, AND READILY IMPLEMENTED RELIEF MR. MILLS SEEKS.

This action is predicated on a series of disturbing and horrific failed and botched executions that took place between July 2022 and January 2024. The State of Alabama has attempted six executions during this time period and evidence has emerged that in five of these executions condemned prisoners were subjected to unnecessary suffering and cruelty, that Defendants have misrepresented or concealed critical facts about their failure to comply with their own protocols and the suffering of prisoners and that even when federal courts have granted stays of execution, condemned prisoners have been strapped to gurneys with no acknowledgement of these federal court orders.

Defendants contend that the pattern of torturous executions was disrupted in 2023 and that after Defendants made unwritten changes to their execution protocol there was a “vast improvement” in two of the three executions that followed these changes. See Defendants’ Opposition, at 14. But, evidence disclosed by Defendants for the first time in response to this litigation and introduced by Mr. Mills at the evidentiary hearing corroborates many of Mr. Mills’ allegations regarding the continuation of this pattern of tortuous executions. See, e.g., PX-1 - PX-21.

For example, the State’s argument that James Barber’s execution was a vast improvement is contradicted by the record. Mr. Barber was placed on the execution-gurney at 12:14 a.m. but the death warrant was not read until 1:31 a.m.

See DE 15-5. IV access was established in minutes. Id. The record establishes that the only reasons for restraining him for the next hour was a delay caused by transporting witnesses. The district court found that Defendants' interest in transporting witnesses to Holman constitutes a legitimate penological reason. DE 26, at 35-36. Missing from the court's analysis, however, is how restraining the condemned prisoner to the execution-gurney relates to this interest. Defendants cited no evidence that the interest in transporting witnesses could not be accommodated while also accommodating the rights of the condemned to not be unnecessarily restrained. Defendants' prioritization of the witnesses to an execution in fact emphasizes the Defendants' wanton disregard for the suffering of the condemned. It is also contrary to a reasonable and chronological reading of Alabama's execution protocol. See DE 15-1, Ala. Dep't. of Corr. Execution Procedures, at 15, 17 (Aug. 2023).¹

Similarly, as to Mr. Smith's 2024 nitrogen execution, Mr. Smith was never apprised of the U.S. Supreme Court's decision in his case, including a dissent by one of the justices, see DE 1, at ¶¶ 77-79; see also Smith v. Hamm, 144 S. Ct. 414 (2024) (Sotomayor, J., dissenting), and Defendants blatantly misrepresented what occurred

¹ Defendants assert that "ADOC had good reasons for each case of allegedly prolonged restraint." See Defendants' Opposition, at 16. Defendants cite difficulty obtaining IV access, "an inmate's physical resistance," conversations with spiritual advisors, and witness transportation issues. Id. at 15. The period of unnecessary and cruel restraint pointed to by Mr. Mills, however, does not include periods of time in which IV access was being attempted. See, e.g., DE 1, at ¶¶ 28-38, 59-67. As to "physical resistance," Kenneth Smith jerked his head after over an hour of attempts to establish an IV and when Defendants sought to establish a central line in his neck without giving him any information about what they were doing or what he was being injected with. DE 15, at 42-43; see also DE 1, at ¶¶ 44-49.

during Mr. Smith's prolonged death after the execution, DE 1, at ¶¶ 101-06; DE 25, at 56-57. The district court's treatment of Kenneth Smith's nitrogen execution demonstrates a lack of understanding of Mr. Mills' underlying claims, **which are not method-related challenges to lethal injection**, but are related to the unnecessary, prolonged, and cruel restraint to the gurney, which is present in both lethal injection and nitrogen hypoxia executions. See DE 15-1, Ala. Dep't. of Corr. Execution Procedures, at 15-17 (Aug. 2023).

This pattern of wanton disregard for the unnecessary suffering of condemned prisoners established in five of the six executions conducted in 2022 through 2024 creates a likelihood that condemned prisoners in Alabama will be subject to unnecessarily torturous executions in violation of the Eighth Amendment. In order to protect Mr. Mills from this Eighth Amendment violation,² Mr. Mills asked the lower court for an injunction that made three very specific requests:

- (1) prohibit Defendants from placing Mr. Mills on the execution-gurney while stay litigation is pending in this case or in Mills v. Hamm, Case No. 6:17-cv-00789-LSC (N.D. Ala.);
- (2) prohibit Defendants from unnecessarily restraining Mr. Mills on the execution-gurney without legitimate reason;
- (3) prohibit defendants from excluding Mr. Mills' 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.

Doc. 11, at 52.

² Mr. Mills' suit is predicated on this unconstitutional conduct not "a one-time-only as-applied constitutional right to have his attorneys in the execution room." See Defendants' Opposition, at 1.

Mr. Mills did NOT seek a stay of execution because this suit did not contend that the State was constitutionally barred from carrying out an execution by lethal injection but sought minor changes in protocols which Defendants could readily accomplish without cost or delay.

Mr. Mills' need for counsel and access to the courts in the chamber, and inability to rely on Defendants' assurances, is demonstrated by Defendants' continued misrepresentations in their brief before this Court. Defendants assert that Alan Miller's execution, as well as Kenneth Smith's, was "called off late in the evening because there was insufficient time to establish IV access before the deadline for those executions." See Defendants' Opposition, at 28 (citing DE 15-3, 15-4). The Execution Log from Alan Miller's botched execution, however, shows that **IV access was in fact established** prior to the Defendants' decision to call off his execution. See DE 15-3 ("IV installed, Inmate Miller is ready for push" at 11:20 p.m.). Defendants' Execution Log further shows that the IV team began attempts to establish IV access at 9:55 p.m. Id. Defendants had over two hours to establish IV access and did in fact establish IV access before the execution was called off. To blame what happened to Alan Miller on legitimate litigation in his case is false, unethical, and just one example of Defendants' blatant misrepresentations and untrustworthiness.

Additionally, Defendants in their brief before this Court asserted that Defendant Hamm "testified that the State would not proceed to execute Mills while this Court reviews any stay application." See Defendants' Opposition, at 14; see also

id. at 2 (“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). At the evidentiary hearing cited by Defendants, however, Defendant Hamm testified “That is correct”, in response to questioning from Defendants’ counsel in this case, that “If the Supreme Court has entered an administrative stay, whether verbally, by agreement, or in the form of a paper stay order, ADOC will not allow the inmate to be taken to the execution chamber; correct?” DE 25, at 68. Defendant Hamm also testified that while litigation is pending before this Court or others, “we will move him to the execution chamber.” DE 25, at 67; see also id. at 66 (“If there’s no stay in place, we will proceed.”). The assertion that Defendants testified and assured Mr. Mills that they will not place him on the execution-gurney “while this Court reviews any stay application” is false and directly contrary to the record in this case.

II. MR. MILLS’ CLAIMS ARE WITHIN THE STATUTE OF LIMITATIONS.

The extended pattern described above, combined with the ongoing litigation, constitutes a “substantial change” to Alabama’s execution process, causing Mr. Mills’ statute of limitations to accrue from this change. West v. Warden, Comm'r, Ala. Doc, 869 F.3d 1289, 1298 (11th Cir. 2017). Further, the “substantial change” is directly related to Mr. Mills’ claims. Smith v. Dunn, No. 2:19-CV-927-ECM, 2021 WL 433189, at *8 (M.D. Ala. Feb. 8, 2021) (quoting Gissendaner v. Comm'r, Ga. Dep't of Corrs., 779 F.3d 1275, 1280–81 (11th Cir. 2015)) (“[A] claim that accrues by virtue of a substantial change in a state’s execution protocol is *limited to the particular part*

of the protocol that changed.”) (emphasis in original). In Thomas Arthur’s case, the Eleventh Circuit found that his injury was too hypothetical, based on one “allegedly botched execution,” and that therefore he lacked standing to bring the claim. Arthur v. Comm’r, Ala. Dep’t of Corr., 680 F. App’x 894, 909 (11th Cir. 2017). Had Mr. Mills brought these claims at the same time, in 2017, he would have run into these same issues. Instead, Mr. Mills’ claims accrued after the acute pattern described above.

Additionally, the claims Mr. Mills raises are not tied to the visitation or cell phone policy enacted previously and litigated in Arthur. The pattern emerging with Joe James constitutes the “substantial change” in Defendants’ execution process—not the origin of the State’s cell phone and witness policies.³ Mr. Mills had no way of knowing prior to this pattern that counsel and access to the courts would be required to protect his Eighth Amendment rights and to ensure the execution process complies with court orders and the Constitution. Just as the district court in Alan Miller’s case was “surprise[d]” that Defendants did not view placing the condemned on the execution-gurney as part of the execution or that it would violate the Eighth Amendment to do so during a court-ordered-stay, so too was Mr. Mills—this marked departure from past practice is surprising and alarming, and

³ Further, the Eleventh Circuit in Mr. Arthur’s case explicitly held that its decision was very “narrow” explaining that Mr. Arthur made “no claim under the Sixth Amendment” and did not challenge the visitation statute under Ala. Code § 15-18-83. Arthur, 680 F. App’x at 898. Instead, Mr. Arthur’s case was “only about the narrow issue of whether Arthur has a constitutional right to have his friend-witness have a cell phone (or access to a landline) in the viewing room while witnessing his execution.” Id. (emphasis in original). Here, contrary to Arthur, Mr. Mills *does* assert a Sixth Amendment right to counsel, as well as a Due Process right to counsel and right to access the courts, at his execution from the time he enters the execution chamber until the execution ends.

indicates a substantial risk of harm to Mr. Mills. See Motion Hearing, Miller v. Hamm, et al., Case No. 2:22-cv-506, Doc. 118, at 42–46 (M.D. Ala. Nov. 9, 2022) (middle district court finding this issue to be “important. . . very important . . . it surprised me . . . I’ve really got to pin the State down as to where is the line. And the line it sounds to me is different than what I thought the line was. I was under the impression the line was while we’re waiting for the U.S. Supreme Court, the condemned inmate will remain in the cell, and that is where the line is. But at least from what I understand, your position is the line is actually different.”).

Defendants assert that “[i]f 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.” See Defendants’ Opposition, at 28. Alabama’s recent pattern of torturous and prolonged executions, in which Defendants have demonstrated a wanton disregard for the suffering of the condemned creates a legitimate, non-frivolous cause of action. Likewise, Tony Glenn’s affidavit creates a legitimate cause of action. Giglio v. United States, 405 U.S. 150, 152, 154-55 (1972); see also Guzman v. Sec’y, Dep’t of Corr., 663 F.3d 1336, 1349 (11th Cir. 2011). The fact that Mr. Mills is litigating legitimate and meritorious claims does not give Defendants license to torture Mr. Mills on the night of his execution.

III. SUPREME COURT RULE 23 DOES NOT PRECLUDE A STAY OF EXECUTION.

Defendants assert that this Court would be “acting as a court of first view” if the Court granted a stay. See Defendants’ Opposition, at 36. Mr. Mills, however, raised a request for a stay of execution in the alternative before the Eleventh

Circuit, doc. 11, at 52-53, which requires the same standard as a preliminary injunction. Gissendaner v. Comm'r, Ga. Dep't of Corr., 779 F.3d 1275, 1280 (11th Cir. 2015). The Eleventh Circuit then only ruled on Mr. Mills' motion for a stay. Doc. 16-1, at 10 ("We DENY Mills's motion for a stay of execution."); see also id. at 2 (Mr. Mills "moves for a stay of execution pending this appeal."); see also id. at 4 ("We take up Mills's request for a stay pending appeal.").⁴ Additionally, contrary to Defendants' contention, see Defendants' Opposition, at 33, Mr. Mills has addressed irreparable harm on appeal. See, e.g., doc. 11, at 23 ("This fact, [that Defendants will place him on the gurney while litigation is pending and that it will be a long night,] combined with the pattern established from Joe James through the present, forms the basis of Mr. Mills' claim of harm, that he will be subject to an unnecessary and prolonged period of restraint on the execution-gurney while litigation is ongoing and will be unable to communicate with counsel or the courts.").

Although Mr. Mills did not need a stay of execution at that time, he sought one in the alternative if, as Defendants have, Defendants refused to comply with Mr. Mills' limited and reasonable request or if the litigation remained pending at the time of Mr. Mills' execution. This Court has the authority to grant stays in "extraordinary circumstances" and even where members of the court disagree as to the application of Rule 23.3. In re U.S., 583 U.S. 1029 (2017) (granting stay); see also id. (Breyer, J., dissenting) (relief "seems to be barred by this Court's Rule 23.3"). The unique and acute pattern described in Mr. Mills' prior briefs, as well as in this

⁴ Mr. Mills also raised this in the alternative before the district court. DE 7, at 30.

brief, demonstrate the extraordinary circumstances condemned prisoners face during Alabama's torturous and prolonged execution process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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