

No. \*\*\* CAPITAL CASE \*\*\*

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IN THE  
**Supreme Court of the United States**

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CASEY McWHORTER

*Petitioner,*

*v.*

STATE OF ALABAMA,

*Respondent.*

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**On Petition for a Writ of Certiorari to Alabama Supreme Court**

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**APPLICATION FOR A STAY OF EXECUTION TO THE HONORABLE  
CLARENCE THOMAS, CIRCUIT JUSTICE FOR THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**Execution To Take Place Between November 16, 2023, 12:00 am CT and  
November 17, 2023 6:00 am CT**

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**APPLICATION FOR A STAY OF EXECUTION**

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

Applicant Casey McWhorter respectfully requests a stay of his execution by lethal injection pending the Court's disposition of his Petition for Writ of Certiorari seeking review of the decision of the Alabama Supreme Court (November 7, 2023), and any further proceedings in this Court. The execution is scheduled to take place between November 16, 2023, 12:00 am CT and November 17, 2023 6:00 am CT. If this Court is unable to resolve this application by November 16, 2023, it should grant a temporary stay while it considers this application.

**OPINION BELOW**

The judgment for which review is sought is attached as Exhibit A.

**JURISDICTION**

McWhorter has concurrently filed a petition for a writ of certiorari with this Application. This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651, and Supreme Court Rule 23.

**CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS**

U.S. Constitution, Fourteenth Amendment, Section 1:

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.

Alabama Code § 15-18-82(a):

(a) Where 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, by lethal injection unless the convict elects execution by electrocution or nitrogen hypoxia as provided by law.

### **REASONS FOR GRANTING THE STAY**

McWhorter seeks a stay of his execution pending this Court's decision on his petition for certiorari. The Governor of Alabama has authorized McWhorter's execution to take place within a thirty-hour period beginning November 16, 2023 at 12:00 am CT and ending November 17, 2023 at 6:00 am CT. Without a stay, he may be executed while his petition for certiorari remains pending before this Court.

The framework guiding the Court's discretion to grant a stay is as follows:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Thus, a stay should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve” and when a court cannot “resolve the merits [of a claim] before the scheduled date of

execution ... to permit due consideration of the merits.” *Barefoot v. Estelle*, 463 U.S. 880, 888-89 (1983).

Where an applicant seeks a stay pending the Court’s ruling on a petition for certiorari, he or she need show only a “reasonable probability” that this Court will grant certiorari and a “fair prospect” that the decision below will be reversed.

*Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

McWhorter’s pending petition raises substantial violations of his rights under the Fourteenth Amendment and therefore easily surpasses the threshold for a stay. For the reasons set forth below, the Court should grant McWhorter’s application and stay McWhorter’s execution date pending a decision on his petition.

**I. There is a reasonable probability that this Court will grant certiorari and a fair prospect that McWhorter will succeed on the merits**

It is reasonably likely that this Court will grant certiorari on McWhorter’s petition because his petition seeks redress for Alabama’s violation of the Fourteenth Amendment. Specifically, the Governor of Alabama set Mr. McWhorter’s execution date outside of the statutory framework for notice, and in doing so, treated Mr. McWhorter differently than every other prisoner executed in Alabama since 1983, and differently than the men scheduled to be executed before him and after him.

On August 9, 2023, the Alabama Attorney General filed a motion with the Alabama Supreme Court seeking an order authorizing McWhorter’s execution. The Alabama Supreme Court granted that motion on October 13, 2023, and authorized the Governor to set Mr. McWhorter’s execution date. Five days later, Governor Ivey set Mr. McWhorter’s execution for November 16, 2023, 29 days after she issued the

order. Mr. McWhorter challenged the legality of this order in the Alabama Supreme Court as violating state law as well as the Fourteenth Amendment's guarantees of due process and equal protection. The Alabama Supreme Court denied this action without opinion on November 7, 2023.

The issues in Mr. McWhorter's concurrently filed petition for *certiorari* are straightforward with undisputed facts. The questions before this Court are whether a violation of due process exists where a state refuses to follow its own execution-related statutes, and whether Mr. McWhorter was denied equal protection of the law by being treated differently than every other death-sentenced prisoner since Alabama restarted executions in 1983, including the men scheduled for execution immediately before and immediately after him. The answer to both question is yes.

The Court's intervention in this case is important to confirm that the concepts of due process and equal protection apply just as much to death-sentenced prisoners as they do to the rest of society. Because Mr. McWhorter raises important issues related to the death penalty, it is reasonably likely that this Court will grant *certiorari*.

**II. McWhorter will be irreparably injured pending this Court's decision on the petition without a stay of his execution**

McWhorter is scheduled to be executed in less than a week. Without a stay of his execution, this Court will not have an adequate opportunity to consider and rule on his petition for *certiorari*. Absent a stay, McWhorter will be executed and thus irreparably injured. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Mem.)

(Powell, J., concurring) (a prisoner facing execution will suffer irreparable injury if the stay is not granted).

**III. The state will not be substantially injured by the stay, and the public interest favors the stay**

A brief stay of execution pending the Court's consideration of McWhorter's petition serves both the State's and public's interest in ensuring that Alabama comply with constitutional norms when it seeks to execute one of its citizens. Further, given that Alabama did not take immediate action to schedule McWhorter's execution following this Court's denial of review of McWhorter's federal habeas petition (indeed, it waited 21 months), the State cannot credibly argue that it would be substantially injured by a brief stay that allows this Court to rule on McWhorter's petition in the normal course.

**CONCLUSION**

The Court should grant McWhorter's application for a stay of execution pending its consideration of his petition for certiorari.

Respectfully submitted,

Date: November 14, 2023

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# IN THE SUPREME COURT OF ALABAMA

November 7, 2023

1990427

Ex parte Casey A. McWhorter. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS. (In re: Casey A. McWhorter v. State of Alabama). (Marshall Circuit Court: CC-93-77; Criminal Appeals: CR-93-1448).

## ORDER

The “Motion to Vacate Execution Date” filed by Casey A. McWhorter on October 25, 2023, having been fully considered,

IT IS ORDERED that the Motion is DENIED.

Shaw, Bryan, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur.

Wise, J. recuses.

Witness my hand and seal this 7th day of November, 2023.

*Megan B. Rhodeseck*

Clerk of Court,  
Supreme Court of Alabama

**FILED**  
**November 7, 2023**  
**Clerk of Court**  
**Supreme Court of Alabama**