No. 23A429
CAPITAL CASE

In the
Supreme Court of the United States

CASEY A. MCWHORTER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Supreme Court

OPPOSITION TO SECOND APPLICATION FOR A STAY OF EXECUTION PENDING SECOND PETITION FOR WRIT OF CERTIORARI

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EXECUTION SCHEDULED THURSDAY, NOVEMBER 16, 2023

CAPITAL CASE
QUESTION PRESENTED (RESTATED)

Should the Court deny McWhorter's second application for a stay, filed two days before his scheduled execution, because (a) he did not seek a stay of execution in the court below; (b) his certiorari petition rests on a misinterpretation of Alabama law; (c) even if his reading of Alabama law were correct, his Equal Protection Clause "class of one" claim fails; and (d) his alleged injury is merely that he was deprived of one extra day of notice of his execution date?

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INTRODUCTION

On February 18, 1993, Casey McWhorter ambushed Edward Lee Williams in his home and shot the man eleven times, including once directly in the head while Williams lay helpless on the floor. McWhorter was convicted and sentenced to death.

On June 14, 2021, McWhorter finally exhausted his direct appeals and state and federal postconviction procedures when this Court denied his petition for a writ of certiorari. *McWhorter v. Dunn*, 141 S. Ct. 2757 (2021) (mem.).

Now, almost thirty years after his death sentence, McWhorter says he lacked "sufficient notice" of his execution. Having successfully postponed justice for over ten thousand days, McWhorter demands one more. His claim is frivolous, his injury is non-existent, and the public interest lies strongly against a stay and further delay in carrying out this just sentence.

McWhorter's last-minute certiorari petition rests on the fact that on October 18, 2023, the Governor set his execution date for November 16, 2023, which gave McWhorter 29 days' notice of his execution date. McWhorter mistakenly believes he is entitled to 30 days' notice. But the statute provides only that 30 days pass between the *court order* authorizing execution and the execution date. Here, the Alabama Supreme Court authorized execution on October 13, 2023, which was 34 days prior to his execution date. There is no additional notice requirement under Alabama law, and McWhorter's rights were not violated by the timing of his execution.

Respectfully, this Court should swiftly deny this eleventh-hour application based on the merits, the equities, and McWhorter's failure to satisfy the "most extraordinary" burden of Supreme Court Rule 23.3.

STATEMENT OF THE CASE

A. Statement of the Facts

McWhorter, Lee Williams, and two other friends conspired to rob and murder Lee's father, Edward Williams. *Ex parte McWhorter*, 781 So. 2d 330, 333 (Ala. 2000). McWhorter and his co-conspirators spent three weeks planning the murder and, around 3:00 p.m. on February 18, 1993, Lee and one of the other conspirators dropped off McWhorter and the fourth conspirator at Edward Williams's home. *Id.* Knowing that Williams would not be home for several hours, McWhorter and his friend passed the time finding the rifles they would use to kill Williams, creating makeshift silencers for those rifles, test-firing them into a mattress, and pillaging through the house for items to steal. *Id.* When Williams arrived home, McWhorter shot first. He and his co-conspirator shot Williams at least eleven times. *Id*. One of those shots came as Williams was lying helpless on the floor, when McWhorter fired a shot directly into Williams's head "to assure that he was dead." *Id.*

After killing Williams, McWhorter methodically gathered items from the home, including retrieving Williams's wallet from his dead body, before driving away in Williams's pick-up truck. *Id*. The co-conspirators met at a pre-arranged spot in the woods, stripped the truck for parts, and divided the stolen items. *Id.* McWhorter's only concern was that Edward Williams did not have as much money on him as his son had promised.

Once the co-conspirators separated, McWhorter hid his "take" from the robbery. Another co-conspirator almost immediately went to the police and reported the crime. The day after the murder, police found McWhorter; he confessed and was arrested. *Id.*

B. Proceedings and Disposition Below

McWhorter was indicted for capital murder in May 1993.[1] The trial began on March 13, 1994, with voir dire, which lasted four days. R. 58–59. The guilt phase of the trial began on March 17, 1994, and continued for five days. R. 59–61. After a day of deliberations, McWhorter was convicted of capital murder for an intentional killing during a robbery. R. 1758. The penalty phase of trial followed, and the jury recommended a sentence of death by a vote of 10–2. R. 1852. The trial judge subsequently accepted the jury's recommendation and sentenced McWhorter to death. C. 384–95. The judge focused on the premeditated and calculated nature of McWhorter's crime and his lack of remorse. *Id.*

McWhorter appealed his conviction and sentence, and the Alabama Court of Criminal Appeals affirmed, *McWhorter v. State*, 781 So. 2d 257 (Ala. Crim. App. 1999), as did the Alabama Supreme Court, *Ex parte McWhorter*, 781 So. 2d 330 (Ala. 2000). This Court denied certiorari. *McWhorter v. Alabama*, 532 U.S. 976 (2001) (mem.). Thereafter, McWhorter sought collateral relief in state court under Rule 32 of Alabama Rules of Criminal Procedure. After an evidentiary hearing on

1. Record citation are as follows:
   C. Clerk's record on direct appeal
   R. Transcript on direct appeal
   C32. Rule 32 (state postconviction) record

McWhorter's impartial-jury and ineffective-assistance-of-counsel claims, the trial court denied McWhorter's petition and McWhorter appealed to the Alabama Court of Criminal Appeals. *McWhorter v. State*, 142 So. 3d 1195, 1202–03 (Ala. Crim. App. 2011). The Alabama Court of Criminal Appeals affirmed the denial of state postconviction relief. *Id.* at 1264. Although McWhorter sought discretionary certiorari review in the Alabama Supreme Court, his petition was denied. *Id.* at 1195.

McWhorter then sought habeas corpus relief through a petition filed in the United States District Court for the Northern District of Alabama. *McWhorter v. Dunn*, No. 4:13-cv-02150, 2019 WL 277385 (N.D. Ala. Jan. 22, 2019). The district court denied the petition and declined to issue a certificate of appealability, *id.* at *90, but the Eleventh Circuit granted a certificate of appealability on two issues. The Eleventh Circuit ultimately affirmed in an unpublished opinion, *McWhorter v. Comm'r, Ala. Dep't of Corr.*, 824 F. App'x 773 (11th Cir. 2020), and this Court denied certiorari, *McWhorter v. Dunn*, 141 S. Ct. 2757 (June 14, 2021) (mem).

On August 9, 2023, the State sought authorization from the Alabama Supreme Court to execute McWhorter's sentence. On September 6, 2023, McWhorter responded by filing a motion to strike the State's request and an original petition for writ of habeas corpus in the Alabama Supreme Court. On October 13, 2023, the Alabama Supreme Court authorized the State to carry out McWhorter's sentence in accordance with that Court's procedures, denied McWhorter's motion to strike, and dismissed McWhorter's original habeas petition. McWhorter did not seek a stay of any Alabama Supreme Court order.

McWhorter filed his first petition for a writ of certiorari (No. 23-471) and his first stay application (No. 23A402) in this Court on November 1, 2023. McWhorter's first stay application has been fully briefed.

McWhorter filed his second petition for a writ of certiorari and the instant stay application in this Court yesterday, on November 14, 2023.

McWhorter is scheduled to be executed tomorrow, on November 16, 2023.

REASONS FOR DENYING THE STAY

McWhorter's application suffers from a major procedural defect, his certiorari petition has no probability of success, and the equities favor denial. First, McWhorter never requested a stay from the Alabama Supreme Court before seeking that relief here. SUP. CT. R. 23.3. Second, McWhorter misreads Alabama law, which provides a 30-day period between the court issuing the execution warrant and the execution date (indisputably satisfied here), not 30 days' notice of the execution date. Third, McWhorter's alleged injury is that he did not receive one extra day of notice; that is not the kind of irreparable harm that warrants extraordinary equitable relief. The public interest lies in executing McWhorter's lawful sentence. His last-minute application should be denied.

I. McWhorter Did Not Request a Stay in the Court Below.

This Court's Rule 23.3 provides in part: "Except 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 (emphasis added). The Court may deny McWhorter's

application because he did not first seek in the Alabama Supreme Court a stay of execution pending disposition of his certiorari petition.

McWhorter's application does not acknowledge Rule 23's requirement to seek relief in the lower court, much less explain why his last-minute filing presents "most extraordinary circumstances." SUP. CT. R. 23.3. While McWhorter is facing execution—an extraordinary punishment for an extraordinary crime—that fact alone does not excuse him from compliance with Rule 23.3. This Court has several special rules governing capital cases, *see, e.g.*, SUP. CT. R. 14.1(a), 15.1, 20.4(b), yet 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 the text "as written" where its author "knows how" but chose not to write it otherwise).

McWhorter may argue that he sought *similar* relief from the Alabama Supreme Court when he filed a motion to vacate his execution date. First, the plain text of the rule is not so relaxed. McWhorter must have "first sought" below "the relief requested" here, not some other, similar relief. SUP. CT. R. 23.3. Second, the two requests are not equivalent. Here, McWhorter asks for a stay of execution pending the disposition of his certiorari petition. *See* Stay App. at 1. That is a stay pending appeal, which would require the State to wait for a ruling before carrying out McWhorter's sentence. But McWhorter asked the Alabama Supreme Court to "vacate the execution date" and to require "30 days' notice" before any future execution. Pet. App. 10. Mere vacatur would permit the State to set a new date and to carry out the execution. That is not a stay at all. Thus, McWhorter seeks relief from this Court that

he has not sought elsewhere. *See, e.g.*, *Dolman v. United States*, 439 U.S. 1395, 1397–98 (1978) (Rehnquist, J.) (denying stay application due to "uncertainty" about whether stay was sought below).

Rule 23.3 is not a formality. Its enforcement serves important functions in capital cases, which may involve lengthy records and weighty interests on both sides. "Applications for stays of death sentences" require "careful assessment." *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). By first moving in this Court for extraordinary relief without asking any court below, McWhorter does a disservice to both parties and to this Court's judicial resources. His application presses this Court to act as a court of first view on a compressed timeline.

In contrast, Rule 23.3 contemplates that this Court should be a court of review after the stay motion is heard by the appropriate court below. That sequence, the normal sequence, affords "the benefit of the appellate court's full consideration" and serves "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."); *Barefoot*, 463 at 896 ("A stay of execution should first be sought from the Court of Appeals, and this Court generally places considerable weight on the decision [below].").[2]

[2] Alternatively, if any filing below could be construed as a motion for a stay pending disposition of McWhorter's November 14, 2023 petition for a writ of certiorari, then the lower court's denial of such motion "weighs heavily" against the application.

II. McWhorter Has Not Shown a Substantial Likelihood of Success.

This Court ordinarily does not grant a stay unless the applicant "has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "It is not enough that the chance of success on the merits be better than negligible." *Id.* (cleaned up). The applicant must show both "a reasonable probability" that the Court will grant certiorari and "a fair prospect" of reversal. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J.). McWhorter has not shown either, so his application should be denied.

McWhorter's petition challenges his execution date on the ground that it was set by the Governor on October 18, 2023, rather than on October 17, 2023. The alleged defect is insufficient notice: If McWhorter is executed on November 16, he will have known the precise date of his execution for 29 days. Misreading Alabama law, McWhorter argues that he should receive 30 days' notice of the execution date. McWhorter is wrong about Alabama's appellate rules and has not stated a plausible constitutional claim. He is unlikely to succeed.

A. McWhorter misreads the plain text of Alabama law and mistakes an appellate procedural rule for a substantive right.

McWhorter's execution date complies with Rule 8(d)(1) of the Alabama Rules of Appellate Procedure. The controlling rule states in pertinent part:

Bateman v. Arizona, 429 U.S. 1302, 1304 (1976) (Rehnquist, J., in chambers). The "presumption" in favor of a lower court's order "deserves even greater respect in cases where the applicant is asking a Circuit Justice to interfere with the state judicial process." *Id.* This Court's "respect for the principles of comity," *id.*, may be especially strong here because McWhorter's claim implies that the Alabama Supreme Court misread the Alabama Rules of Appellate Procedure.

> The supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death within a time frame set by the governor, which time frame shall not begin less than ***30 days from the date of the order***, and it may make other appropriate orders upon disposition of the appeal or other review.

ALA. R. APP. P. 8(d)(1) (emphasis added).[3] McWhorter does not dispute that on October 13, 2023, the Alabama Supreme Court entered an order authorizing his execution. Pet. App. at 3. By straightforward application of the rule, the Governor could have scheduled McWhorter's execution for as early as November 12, 2023, the thirtieth day "from the date of the order." ALA. R. APP. P. 8(d)(1). There is no other order and no other 30-day period.[4] Because McWhorter's execution is scheduled for November 16, 2023, later than 30 days from the Alabama Supreme Court's order, the timing is proper under state law.

All that Rule 8(d)(1) provides is a 30-day grace period between the execution warrant (the Alabama Supreme Court's order) and the date of execution. The rule governs timing. It does *not* ensure "notice" to the offender of the actual date of his execution; in fact, the rule does not mention "notice" at all. In practice, it may be that offenders often receive notice of the execution date more than 30 days beforehand, but such notice is merely incidental to the State's compliance with the timing rule.

[3] This version of Rule 8, providing for "a time frame set by the governor" rather than the Alabama Supreme Court, became effective on January 12, 2023.

[4] At one point, McWhorter confusingly refers to "Governor Ivey's order," Pet. at 6, but the rule does not contemplate two separate orders—one issued by the court and another issued by the Governor. The Governor is required to "set" a time frame; she does not issue any "order" under the rule.

Here, the effect of the court order was to provide notice that McWhorter could be executed as early as November 12, 2023. McWhorter was not entitled to more.

McWhorter's contrary argument for a "right" to notice of the execution date is premised on several errors. *See* Pet. at 4–6; Pet. App. at 4–7. First, McWhorter points to Section 15-18-82 of the Alabama Code, which governed timing prior to Rule 8(d)(1). The way capital punishment used to work in Alabama was that a court entered the sentence, and the State carried it out 30 to 100 days later. *See* Ala. Acts 1923, No. 587, p. 759, now codified at ALA. CODE § 15-18-82(a). If that century-old provision were the law today, McWhorter would have been executed in 1994 (or the time to execute him would have expired).

But, as McWhorter admits, it would be "nearly impossible" for a death sentence to be meted out so quickly today, and Section 15-18-82 is *not* the operative law. Pet. at 4–5. That provision, adopted over a century ago, has been superseded by Rule 8(d)(1) of the Alabama Rules of Appellate Procedure. *See* ALA. CODE § 15-1-1 (providing that Title 15 governs "only if the procedural subject matter is not governed by rules … adopted by the Supreme Court of Alabama"). Section 15-18-82 is irrelevant to McWhorter's demand for another reason: The provision does not provide or contemplate *notice* of the actual execution date. Like Rule 8(d)(1) today, Section 15-18-82 governed only the timing of executions; there was no provision ensuring notice to the offender.

Second, McWhorter asserts that the State has always "given at least 30 days' notice of [the] execution date." Pet. at 6. Even if true, that fact would not create a

legal right or rule entitling every offender to 30 days' notice. It is unsurprising that in practice, offenders receive such notice because 30 days must pass between the execution warrant and the execution date. The Christopher Price case is inapposite. There, the execution warrant expired after the window for conducting his execution had lapsed; a new warrant meant a new 30-day period, but that has nothing to do with *notice of the actual date* of execution. *Id.* McWhorter mentions that other offenders have had more than 30 days' notice, but he does not explain how that fact could overcome the plain meaning of state law or otherwise obligate the State to give additional notice. *Id.*

Neither the text of the Alabama Rules of Appellate Procedure nor the alleged custom of the State creates a right to 30 days' notice. McWhorter has not shown a likelihood that the Court will grant certiorari to reinterpret a rule of state appellate procedure and then reverse the order below.

B. McWhorter is unlikely to succeed on his constitutional claims, which rest on the same misinterpretation of Alabama law.

McWhorter's certiorari petition is entirely dependent on his misreading of the Alabama appellate rules. He has no serious alternative claim that the Constitution demands 30 days of notice irrespective of state law.[5] Thus, if the State's position is correct, that is enough to dispose of the application. But assuming *arguendo* that

[5] Even if McWhorter had such a claim, he would not be entitled to a stay because a challenge to Rule 8(d)(1) could have been brought much earlier. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (providing that "the last-minute nature of an application" "may be grounds for denial of a stay").

Alabama law provides 30 days' notice from the time the Governor sets the execution date, McWhorter still has no prospect of success on his constitutional claims.

First, even if it could be construed as a "notice" provision, the 30-day period does not establish a substantive due process right. Neither Rule 8(d)(1) nor the Alabama Supreme Court's recent amendment created a substantive right to notice. The Alabama Rules of Appellate Procedure govern appellate practice and procedure; they do not concern primary private conduct and so should not be lightly construed to create or alter any substantive right. In this context, McWhorter's "rights or interests … were all but extinguished when [the] jur[y] convicted and sentenced [him] to death." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 125 (D.C. Cir. 2020) (Katsas, J., concurring) (concurring in order vacating preliminary injunction based on challenge to federal execution protocol).

In *Schoenvogel*, the Alabama Supreme Court outlined several factors for "discriminating between substance and procedure." *See Schoenvogel v. Venator Group Retail, Inc.*, 895 So. 2d 225, 246–53 (Ala. 2004). First, whether the rule was an exercise of judicial "rulemaking authority." *Id.* at 253. Second, whether the rule "affect[s] the prelitigation conduct of a party." *Id.* Third, whether "its predominant and paramount purpose" is to aid the court or to protect rights. *Id.* Here, all three factors suggest a procedural rule, not a substantive right. The Alabama Legislature authorized the Alabama Supreme Court to promulgate appellate rules; Rule 8, concerning stays or injunctions pending appeal, is an exercise of the court's

rulemaking power.[6] The execution-warrant procedure cannot plausibly affect prelitigation conduct. Finally, its primary purpose is evidently to ensure the execution of a final sentence; there is no textual indication that the provision exists to provide any right or benefit to the offender.

Several features of Alabama law support this conclusion. For one, Rule 8(d)(1)'s predecessor statute is located in Title 15, the portion of the code addressing "Criminal Procedure." And it is undisputed that Section 15-18-82 has been displaced by the appellate rule. But that could only be the case if Section 15-18-82 concerned "procedural subject matter … governed by the rules of practice and procedure adopted by the Supreme Court of Alabama." ALA. CODE § 15-1-1. Moreover, McWhorter raised the same argument for a right to notice below, and the Alabama Supreme Court rejected it. That conclusion should receive substantial deference. *See O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State.").

Under Alabama law, the subject matter at issue here is procedural, not substantive. Even if McWhorter's interpretation were correct, he would not be entitled to a stay from this Court on the ground that an appellate procedural rule gives him a substantive due process right to notice or a right against execution without adequate notice.

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[6] "The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party…." ALA. CONST. art. VI, § 6.11.

McWhorter's only authority to support his proposed substantive due process right is *Hall v. Barr*, 830 Fed. App'x 8 (D.C. Cir. 2000), an unpublished decision in which the D.C. Circuit ultimately rejected a due-process challenge premised on inadequate notice. Critically, despite regulations dictating the length of notice, the circuit court analyzed Hall's constitutional claim under the substantive due process test of *Washington v. Glucksberg*, 521 U.S. 702 (1977). Hall could not "make out a violation" because he did not "identif[y] any basis in precedent or otherwise 'deeply rooted in this Nation's history and tradition' for concluding that a particular notice period is 'implicit in the concept of ordered liberty.'" 840 F. App'x at 9. So too McWhorter has failed to show that a particular period of advance notice of the date of execution is a right satisfying *Glucksberg*.[7]

Second, McWhorter plainly had constitutionally adequate notice (even if Alabama law requires more). Due Process requires notice and an opportunity to be heard. McWhorter "had both before the execution date was set." *James v. Att'y Gen.*, 2022 WL 2952492, at *8 (11th Cir. July 26, 2022). For one, the State's motion to the Alabama Supreme Court put McWhorter on notice on August 9, 2023, several months before the date was set. *Id.* He had an opportunity to be heard on the State's motion and afterward on his own motion to vacate the execution date. *See id.* Because McWhorter had an opportunity to be heard—and he does not allege that one more

[7] As McWhorter notes, Pet. at 7, the D.C. Circuit did state that the federal regulations required only 20 days' notice. But that fact was not necessary for its conclusion because the court had already determined that Hall had failed to satisfy *Glucksberg*. 840 F. App'x at 9.

day of notice before the execution date would have made any difference to his ability to be heard—Due Process was satisfied. Additionally, McWhorter "has been on notice of his death sentence since it was first imposed in [1994]." *Hall*, 830 F. App'x at 9.

Third, McWhorter's "class of one" Equal Protection claim fails as well. The premise of such a claim is the recognition that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against *intentional* and *arbitrary* discrimination." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (cleaned up; emphasis added). McWhorter has not shown that he was "intentionally treated differently from others similarly situated *and* that there is no rational basis for the difference in treatment." *Id.* (emphasis added); *see also Madden v. Cmmw. of Kentucky*, 309 U.S. 83, 88 (1940) ("The burden is on the one attacking" a classification "to negative every conceivable basis which might support it.").

Each offender is differently situated, and there are many factors the State may consider when setting an execution date, including the availability of certain prison personnel, facilities, and other resources that go into executing a death sentence. As McWhorter noted, each offender recently set to be executed received a different length of time between the date of announcement and the date of execution. Pet. at 6 & n.2. Inevitably, one offender will have the least amount of time among those sentenced over a given period; McWhorter has no colorable claim that he was singled out or treated differently simply because his execution date was announced 29 days prior, whereas someone else's date was set 50 days prior.

Additionally, this Court has recognized that there "are some forms of state action" that "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 603 (2008). "In such situations," the Court said, "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* Setting an execution date is necessarily an individualized process subject to State discretion and a great variety of contextual factors. There can be no Equal Protection challenge in such circumstances; otherwise, any offender could "conjure up a claim of differential treatment" and "suddenly [have a] basis for a federal constitutional claim." *Id.* at 608.

Further, McWhorter must show that the government applied a wholly different test to him than it applied to others. *See Olech*, 528 U.S. at 565; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-47 (1923). But the State's position in briefing before the Alabama Supreme Court and this Court has been consistent and evenhanded: Rule 8(d)(1) provides a 30-day period between the authorizing order and the date of execution. That policy applies prospectively to all offenders facing death sentences, not just McWhorter.

C. McWhorter failed to show a reasonable probability that this Court will grant his petition for a writ of certiorari.

In addition to being wrong on the merits, McWhorter has not shown a "reasonable probability" that this Court will grant certiorari. *King*, 567 at 1302 (Roberts, C.J.). His petition offers no compelling reason for this Court to exercise its certiorari jurisdiction or reason to think it will. There is no circuit split identified and

no suggestion that the issue has any significance beyond this case. The court below did not provide an opinion explaining its decision, so there is no legal analysis and reasoning for the Court to review. Even if there were an important constitutional question presented, this case would be a poor vehicle for resolving it.

III. The Equities Favor Denial of McWhorter's Stay Application.

A. McWhorter will not be irreparably injured absent a stay.

McWhorter's petition for a writ of certiorari does not challenge the lawfulness of his sentence or the State's power to carry it out. The State does no cognizable harm, let alone irreparable harm, when it imposes a lawful and just sentence. To the contrary, punishing the guilty is the fulfillment of the State's "moral judgment." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Thus, the execution of McWhorter's lawful sentence—on its own—cannot be deemed an irreparable harm. McWhorter's only argument for irreparable harm fails.[8]

McWhorter's sole authority on this element is a single Justice's terse statement that "irreparable harm … is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (mem.) (Powell, J., concurring). That is incorrect. For just one illustration, this Court recently granted a stay of execution to an applicant alleging a violation of RLUIPA. *See Ramirez v. Collier*, 595 U.S. 411 (2022). When discussing the likelihood of irreparable harm, the Court stated:

[8] McWhorter also says that absent a stay, "this Court will not have an adequate opportunity to consider and rule on his petition." Stay App. 4. But he does not seem to suggest that declining to rule on the petition prior to his execution is itself an injury. Rather, McWhorter relies solely on his scheduled execution as the threatened injury.

> Ramirez is likely to suffer irreparable harm in the absence of injunctive relief because he will be unable to engage in protected religious exercise in the final moments of his life. Compensation paid to his estate would not remedy this harm, which is spiritual rather than pecuniary.

Id. at 433. If it were true that irreparable harm is automatic in every capital case, then the Court's analysis would have been superfluous. It was not. It mattered that the offender alleged a "spiritual rather than pecuniary" injury. *Id.* Thus, the prospect that the State will carry out a lawful death sentence is not itself the irreparable injury required for a stay. The applicant must show an injury beyond the fact that the State may do something it is fully legally entitled to do.

In the usual case, a stay applicant alleges harm that is irreparable in the sense it would be avoided or redressed by a favorable decision on the merits, but that decision may come too late. Not so here. If McWhorter were correct about the notice required by Alabama law, the actual injury he would suffer is the wrongful deprivation of one day of notice of the date of his execution. And that is the most relief he could receive upon reversal because his certiorari petition seeks review of only the lower court's November 7 order. That order denied McWhorter's motion, which sought two forms of relief: (1) vacatur of his execution date and (2) an order requiring the Governor to set any future execution date "with at least 30 days' notice from the Governor's office." Pet. App. 10. Even if this Court were to reverse, McWhorter would receive just one more day's notice before his execution. *See, e.g.*, *Tiner v. State*, 122 So. 2d 738, 752 (Ala. 1960) ("[T]he error in setting the day for execution is not error to reverse, and would merely require remanding for proper sentence….").

That is not enough. McWhorter has not alleged why or how that one extra day of notice could be irreparable. Particularly after McWhorter has already lived almost thirty years knowing that he likely would be executed (but not knowing precisely when), it is difficult to see how one more day in that state is the kind of irreparable harm warranting extraordinary equitable relief.

B. The remaining equities favor denial of the application.

A stay is an extraordinary equitable remedy. "When a party seeking equitable relief 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him. These well-worn principles of equity apply in capital cases just as in all others." *Ramirez*, 142 S. Ct. at 1282 (cleaned up).

This is McWhorter's second attempt to secure a stay from this Court. And it is even more frivolous than the last. This second certiorari petition does not challenge his conviction or his sentence—claims long exhausted—but instead asks the Court to review a case arising under Alabama rules of appellate procedure for the purpose of securing an execution date that McWhorter knows about one more day in advance. This is exactly the kind of "'last-minute' claim relied on to forestall an execution" that this Court does "not for a moment countenance." *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022); *Bucklew*, 139 S. Ct. at 1134 ("Last-minute stays should be the extreme exception, not the norm, and … 'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'"); *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006); *Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in

deciding whether to grant equitable relief."). "Courts should police carefully against attempts … to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134.

Any further delay here would be unjustified and extraordinary. After decades of litigation, McWhorter is scheduled to be executed ***tomorrow*** and has endeavored to proliferate eleventh-hour litigation for the purpose of deliberate delay. "The people of [Alabama], the surviving victims of [McWhorter's] crimes, and others like them deserve better." *Id.* Such gamesmanship, which would thwart the State's and society's strong interests in carrying out just and lawful sentences, should not be rewarded.

CONCLUSION

For the foregoing reasons, this Court should deny McWhorter's second application for stay of execution.

Respectfully submitted,

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