

No. 23A429 \*\*\* 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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REPLY IN SUPPORT OF SECOND 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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McWhorter submits this reply in support of his second application for a stay.

**I. McWhorter’s Stay Application Complies With Supreme Court Rule 23**

McWhorter’s stay application is not barred by Rule 23’s requirement to seek a stay from the court below. McWhorter sought relief equivalent to a stay from the Alabama Supreme Court. As the State is aware, on October 25, 2023, McWhorter moved the Alabama Supreme Court for an order vacating his execution date. App. 2 (McWhorter Motion to Vacate). The Alabama Supreme Court denied McWhorter’s motion on November 7, 2023. App. 1 (Order). In light of the Alabama Supreme Court’s denial of the motion to vacate, seeking a stay from that court would have been redundant.<sup>1</sup>

The State argues that McWhorter’s motion to the Alabama Supreme Court was not equivalent to a stay because, had the motion been granted, the Governor could simply have set a new date. But a request for a stay and a request to vacate the execution date result in identical relief: if either request is granted, the State cannot carry out the execution on the planned date.

Given the impending execution date of November 16, had McWhorter sought a further stay from the Alabama Supreme Court before filing his cert petition here, he risked running out of time to seek relief before this Court. The exigency of his

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<sup>1</sup> Thus, here, unlike in *Dolman v. United States*, 439 U.S. 1395 (1978), on which the State relies, there is no uncertainty about whether McWhorter sought relief equivalent to a stay below. Compare *Dolman v. United States*, 439 U.S. at 1398 (“On the basis of the information before me, I cannot say that applicants have requested a stay . . . though I cannot say with certainty that they have not.”) with App. 2 (McWhorter’s October 25, 2023, motion to vacate his execution date).

upcoming execution thus made compliance with Rule 23.3 “virtually impossible and legally futile.” *W. Airlines, Inc. v. Int’l Bhd. of Teamsters*, 480 U.S. 1301, 1305, 107 S. Ct. 1515, 1517, 94 L. Ed. 2d 744 (1987) (concluding that petitioner did not need to seek a stay before the Court of Appeals in advance of applying for a stay before the U.S. Supreme Court).

McWhorter thus properly sought a stay from this Court pending review of his petition for certiorari.

## **II. McWhorter Has Shown That He Has A Substantial Likelihood Of Success On The Merits Of His Case**

The State argues that the rules that McWhorter argues were violated are procedural, not substantive, and that his constitutional claims are without merit. The State is incorrect on both points.

### **A. The Rules At Issue Here are Substantive**

As explained in McWhorter’s underlying petition and opening application for a stay, Alabama statute, court rules, and custom require 30 days’ notice of an execution date. The State argues that the most pertinent rule, Alabama Supreme Court Rule 8(d)(1) is procedural, not substantive, but that argument is contradicted by the Alabama Supreme Court’s orders in this very case.

On August 9, 2023, when the State filed its motion pursuant to Rule 8(d)(1) to set an execution date, the Alabama Supreme Court permitted McWhorter seven days within which to file a response. That order demonstrated that the Alabama Supreme Court deems Rule 8(d)(1) as substantive, not procedural. Alabama Rule of Appellate Procedure 27 distinguishes between motions seeking “procedural orders,”

and those seeking other relief. Rule 27(a), in relevant part, provides: “Any party may file a response in opposition to a motion, *other than one for a procedural order* (for which see subdivision (b)), within 7 days (1 week) after service of the motion; . . .” Ala. R. App. P. 27(a) (emphasis supplied). By contrast, Rule 27(b) which pertains to procedural motions, provides for no response. It states that “motions for procedural orders . . . may be acted upon at any time, without awaiting a response thereto,” and “[a]ny party adversely affected by such action may request reconsideration, vacation or modification of such action.” Ala. R. App. P. 27(b).

That the Alabama Supreme Court followed Rule 27(a), rather than Rule 27(b), shows that it deemed the State’s motion as substantive, not procedural. Rule 8(d)(1)’s terms therefore confer substantive rights on McWhorter.

This fits with the State’s previous interpretation of the rule as requiring more than 30 days’ notice.<sup>2</sup> In Christopher Price’s case, the State asked the Alabama Supreme Court to waive the 30 days’ rule because Price “has already had his execution set and erroneously delayed, he has been given more notice than other inmates in his position and more than enough notice.”<sup>3</sup> So, contrary to their declaration before this Court,<sup>4</sup> the State has believed that the Alabama death sentencing scheme requires 30 days’ notice between the order setting the date<sup>5</sup> and

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<sup>2</sup> See “Alabama wants to get Christopher Lee Price’s new execution date on the books,” Montgomery Advertiser (Apr. 16, 2019).

<sup>3</sup> *Id.*

<sup>4</sup> See *McWhorter v. Alabama*, 23A429, Opp’n to Second Appl. for Stay at 11.

<sup>5</sup> In the Opposition, the State claims that it’s “confusing” that McWhorter refers to the Governor’s Order as an “order.” There is no question that the

the date itself. McWhorter was not given 30 days; therefore, his due process rights have been violated.

**B. McWhorter’s Constitutional Claims Present Important Questions Of Federal Law**

The State argues that McWhorter’s constitutional arguments are based on a “misinterpretation” of Alabama law, and that McWhorter was not denied notice, but had sufficient notice of his execution date.<sup>6</sup>

By definition, McWhorter did not have sufficient notice because he did not get the notice required by statute. The Alabama statute defines sufficient notice. It is 30 days. And it is indisputable that McWhorter did not get the full 30 days’ notice.

The State also argues that McWhorter was not deprived of his right to equal protection because different death-sentenced prisoners would always have different lengths of notice before their executions.<sup>7</sup> But McWhorter is the *only* prisoner in 40 years who got less than 30 days. All of the other prisoners got more – often substantially more. Equal protection requires that McWhorter receive at least the minimum-prescribed period set forth by law – 30 days – which is all that McWhorter’s petition asks for.

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Governor ordered the setting of the execution date. When she said: “I hereby set . . .,” she directed the Commissioner when to conduct this execution. To call that anything other than an order is twisting language to fit their argument.

<sup>6</sup> Opp’n at 14.

<sup>7</sup> *Id.* at 15.

The State also argues that because there is no circuit split, no reasoned decision from the lower court, and no significant legal question, a grant of certiorari is unlikely.<sup>8</sup> These arguments must fail.

This case falls squarely under Rule 10(c) because “a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court.”<sup>9</sup> In fact there are two important questions: First, whether a state’s failure to follow its own statute for setting a prisoner’s execution date violates the prisoner’s right to due process of law. Second, whether unjustifiably treating one prisoner more harshly than every other prisoner who has been executed (or scheduled to be executed) in the last 40 years violates that prisoner’s right to the equal protection of the laws. In these circumstances, the lack of a circuit split is irrelevant. Disparate treatment of death-sentenced prisoners by states presents a federal question that should be resolved by this Court.

Finally, the State falls back on the argument that this case is a poor vehicle for this Court to consider constitutional issues because there was no reasoned opinion below.<sup>10</sup> But there is no requirement in any of this Court’s rules for granting certiorari that there be a reasoned decision below, and the lack of reasoning or explanation on such an important issue should encourage this Court to

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<sup>8</sup> *Id.* at 16-17.

<sup>9</sup> S. Ct. R. 10(c).

<sup>10</sup> Opp’n at 17.

grant certiorari to provide needed guidance and prevent future litigation on this issue.

McWhorter has met the requirements for a stay of execution pending certiorari, and for the reasons stated here and in his previous pleadings, he requests the Court to grant the stay and, ultimately, his petition.

### **III. The Equities Favor a Stay**

The State's opposition asserts that McWhorter will not be irreparably injured absent a stay because the deprivation of "just one more day's notice before his execution" (Opp'n at 18) does not amount to irreparable harm.

But the denial of a single day of life is the quintessential irreparable harm, especially in McWhorter's circumstances. An extra day of life is one more day to say goodbye to friends and loved ones, to put affairs in order, to seek peace of soul and spirit. Alabama's law provides 30 days' notice to allow prisoners to prepare for death in just this way.

That McWhorter has been in prison, facing a sentence of death, for almost 30 years is not an excuse to shorten the time from the announcement of the date of his execution to the execution date itself. Just as the sight of the gallows focuses a man's mind, the setting of the execution date focuses the soul, and each of the 30 days is precious in McWhorter's preparation for death. Delay would not harm the State, nor would it be "unjustified" (Opp'n at 20). It would simply give McWhorter the time that the law and decency prescribe.

The capital sentence levied against McWhorter thirty years ago does not give the State a blank check to carry out the sentence in violation of McWhorter's



constitutional rights. Alabama's failure to give McWhorter the full notice period to which he is entitled deprives him of his due process right to notice. The equities favor a stay.

### **CONCLUSION**

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

Respectfully submitted,

Date: November 15, 2023

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