No. A-

IN THE
Supreme Court of the United States

JAMES EDWARD BARBER,

Applicant,

v.

GOVERNOR OF ALA., ET AL.,

Respondents.

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

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 SCHEDULED FOR JULY 20, 2023**

AT 6:00 P.M. CT/7:00 P.M. ET****

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July 20, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, applicant states as follows:

Petitioner is James Edward Barber. Respondents are Kay Ivey, John Q. Hamm, Terry Raybon, Steve Marshall, and John and Jane Does 1-4. No party to this proceeding is a corporation.

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APPLICATION FOR 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 James Edward Barber 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 United States Court of Appeal for the Eleventh Circuit in Case No. 23-12242 (July 19, 2023), and any further proceedings in this Court. Mr. Barber is scheduled to be executed on July 20, 2023. If this Court is unable to resolve this application by July 20, 2023, it should grant a temporary stay while it considers this application.

OPINION BELOW

The judgment for which review is sought is *Barber v. Ivey*, No. 23-12242 (11th Cir. July 19, 2023), a copy of which is attached as Exhibit A.

JURISDICTION

The U.S. Court of Appeals for the Eleventh Circuit issued its decision denying a preliminary injunction of Mr. Barber's execution on July 19, 2023. Mr. Barber 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

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Alabama's execution statute, Ala. Code § 15-18-82(a), provides, in relevant part, that "[i]f lethal injection is held unconstitutional or otherwise becomes unavailable, the method of execution shall be by nitrogen hypoxia."

REASONS FOR GRANTING THE STAY

Mr. Barber seeks relief from this Court to ensure that Alabama does not needlessly subject him to cruel and unusual punishment in violation of the Eighth Amendment. As detailed more fully in the accompanying petition for certiorari, the three most recent efforts by the State of Alabama to execute inmates by lethal injection have all been plagued by hours-long efforts to establish IV access—establishing a trio of "extraordinary and systemic failures" for which the State of Alabama has refused to provide any explanation. *See* Pet. App. 70a[1] (Pryor, J., dissenting).

Alabama's past three execution proceedings imposed needless physical and emotional suffering on inmates to such an extent that Alabama paused its lethal injection executions and undertook an internal review of its procedures. Shockingly, however, that review resulted in *no substantive changes* to Alabama's procedures or to the qualifications of those carrying out lethal injection executions.

Mr. Barber presented unrebutted evidence that his physical condition makes him *even more likely* to suffer the same fate as the prior three botched executions. Alabama *concedes* that there is a readily available alternative method of execution

[1] Record citations are to the Appendix to the Petition for Writ of Certiorari, which is being filed concurrently with this Application.

(nitrogen hypoxia) that would completely avoid the risk of such needless physical and emotional suffering. Yet the Court of Appeals, in a 2-1 decision, affirmed a district court ruling depriving Mr. Barber a preliminary injunction that would prevent Alabama from subjecting him to a fourth lethal injection execution that will likely be botched in the same manner as the prior three.

Mr. Barber's request is narrow. He asks this Court for nothing more than to require Alabama to use the readily available alternative means of executing him that does *not* create a substantial risk of needless physical pain and emotional suffering. Alternatively, Alabama could make substantive changes to its lethal injection procedures to address the undeniable risk of needless suffering that the prior three attempts have revealed.

Importantly, while this request arrives at this Court on the same day as the scheduled execution, Mr. Barber has not delayed in bringing his claim. His claim arose because of the *State's* demonstrated failure to carry out lethal injection executions consistent with Eighth Amendment standards. He filed his claim after the State failed to revise its lethal injection protocols or the qualifications of those carrying out lethal injection executions and when the State still had not set his execution date. Indeed, the State set Mr. Barber's execution date of execution immediately *after* Mr. Barber filed this litigation. Put simply, the urgent need for this Court to act is a result of the State's rush to execute Mr. Barber by a highly unreliable protocol for lethal injection despite the presence of a readily available alternative.

Mr. Barber is scheduled to be executed by lethal injection this evening. The impending execution date may preclude this Court from considering Mr. Barber's petition before the scheduled execution or giving effect to this Court's judgment in the event the petition is granted, thus necessitating this application.

The issuance of a stay is left to this Court's discretion, guided by four factors:

> (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).

In the context of a stay pending the Court's ruling on a petition for certiorari, an applicant 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). Applying these factors, the Court should grant the application and stay Alabama's use of its challenged lethal injection protocol to execute Mr. Barber pending a decision on his petition.

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

a. A prolonged execution due to an extended failure to obtain IV access superadds pain and terror in violation of the Eighth Amendment.

It is reasonably likely that this Court will grant certiorari because the lower courts failed to adhere to this Court's precedents, and went far beyond the bounds of Eighth Amendment law, when they held that *no* amount of physical and psychological suffering imposed by an hours-long attempt to start IV access in a lethal injection can ever violate the Eighth Amendment.[2] This Court has made clear that a punishment is unconstitutionally cruel when it "'superadds' pain well beyond what's needed to effectuate a death sentence." *Bucklew v. Precythe,* 139 S. Ct. 1112, 1127 (2019). And the undisputed evidence in this case shows that Alabama's last three executions involved just that—protracted efforts to establish IV access that far exceeded what was necessary to effectuate the lethal injection executions.

Indeed, the unrebutted testimony of medical experts established that IV access should normally take no more than 15 minutes and should never take more than an hour, even in a difficult case. *See* Pet. App. 394a, 66:22-25 (expert testimony stating that a peripheral IV line takes less than 10 minutes to set); Pet. App. 231a-232a ¶ 14 (nurse affidavit stating that a peripheral IV line takes approximately 5-10 minutes to set); Pet App. 172a-173a ¶¶ 11, 15 (same). Yet the IV Team in Alabama repeatedly punctured Mr. James over the course of 3 hours; repeatedly punctured Mr. Miller

[2] *See, e.g.*, Pet. App. at 23a n.20 (Eleventh Circuit holds, under its decision in *Nance v. Comm'r, Ga. Dep't of Corr.*, 59 F.4th 1149, 1157 (11th Cir. 2023), that *any* amount of "futile attempts to obtain IV access" cannot cause an unconstitutional level of pain).

over the course of 90 minutes; and repeatedly punctured Mr. Smith over the course of 2 hours. Pet. App. 156a-158a. The undisputed evidence thus showed the IV attempts were protracted beyond what is reasonably necessary.

The three medical experts retained by Mr. Barber—whose testimony is entirely unrebutted in this case—also stated that the longer a medical professional takes to start an IV line, the more pain the patient experiences. *See, e.g.*, Pet. App. 173a ¶¶ 15-16. The undisputed evidence thus establishes that the past three executions of Mr. James, Mr. Miller, and Mr. Smith all caused needless suffering. Judge Pryor highlighted that unnecessary pain in her dissent:

> Mr. Miller testified by affidavit in this case that during the repeated, protracted efforts, he felt his "veins being pushed around inside [his] body by needles, which caused [him] great pain and fear." Doc. 50-10 at 3. One of the many attempts to access a vein in in his foot likely hit a nerve and "caused sudden and severe pain" like he "had been electrocuted," which made his "entire body shake in the restraints." *Id.* at 4. And Mr. Smith described (under oath) that he experienced "severe physical pain and emotional trauma" during the attempts to access his veins. Doc. 50-14 at 1. Those efforts included including repeated needle insertions in his collarbone area to gain access through a central line which he said felt like "stabbing." Doc. 50-13 at 5. As members of the IV team moved on from attempts in his extremities to the collarbone-area insertions, Mr. Smith was "very fearful because he did not know what was happening." *Id.* at 38. These collarbone "needle jabs . . . caus[ed] him severe pain."
>
> Pet. App. 54a-55a (Pryor, J., dissenting).

Although the Eighth Amendment does not guarantee a painless death, *Bucklew*, 139 S. Ct. at 1124, it also does not permit States to disregard the pain imposed in the course of an execution. Alabama's pattern of subjecting condemned persons to lengthy periods of multiple painful attempts to establish IV lines that go

well beyond what is reasonably necessary to effectuate death raises a serious and substantial Eighth Amendment claim that warrants a grant of certiorari.

b. A State must do more than merely substitute personnel with the same qualifications, and extend the time window available, in response to repeated and consistent failures to carry out an execution without imposing prolonged needless physical suffering and mental anguish.

This Court will likely grant review of Mr. Barber's case because it is a question of national importance whether and how a State may continue to carry out an execution protocol despite a clear pattern of failed lethal injection executions and the presence of an undisputed readily available alternative.

The Eleventh Circuit decision raises the serious constitutional concern that this Court acknowledged in *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion). In *Baze*, this Court reasoned that "a hypothetical situation involving a series of abortive attempts at electrocution would present" the kind of Eighth Amendment concerns that a singular "mechanical malfunction" does not. *Id.* (cleaned up). Put simply, a pattern of botched executions matters when considering whether a State's prospective use of a method of execution presents a substantial risk of cruel and unusual punishment.

The Eleventh Circuit, however, concluded that Alabama has addressed the concerns raised by its prior botched executions by: extending the time frame within which Respondents can attempt to execute Mr. Barber; expanding the pool of medical personnel who could serve on the IV team; "requiring that all members of the IV Team be currently certified or licensed in the United States"; and hiring a new team of IV

personnel. Pet. App. 27a-28a. None of these "changes" constitute serious efforts to fix Respondents' pattern of botched execution after botched execution.

First, regarding the extended time frame, expanding the time available for the State of Alabama to puncture Mr. Barber with needles "increases the risk that he will suffer a constitutional violation." Pet. App. 61a (Pryor, J., dissenting). As Judge Pyror explained in her dissent:

> It may be that the expanded execution time frame will allow the State to complete Mr. Barber's execution before the warrant expires. But it is unreasonable to conclude it will do anything to prevent Mr. Barber from suffering superadded pain. The expanded time frame merely affords the IV team six additional hours to attempt to establish an IV line, making it more, not less, likely that Mr. Barber will suffer additional pain inflicted through prolonged attempts to access his veins.

Id. at 31a. Giving Respondents more time to keep trying will cause even lengthier periods of physical and emotional suffering.

Second, regarding the new members to the IV Team, the State cannot "break" a pattern of botched executions merely by substituting in new personnel without any evidence about whether those personnel are more competent or differently credentialed than their predecessors. Additionally, the Eleventh Circuit's holding ignored the fact that Respondents *never claimed* that deficiencies with previous IV teams were the problem. The Eleventh Circuit misapplied *Baze* by holding that where a State denies any issues with its personnel, that State can nevertheless take credit for fixing a problem by choosing new personnel. *See* Pet. App. 27a n.24 (holding that it was reasonable for the District Court to "infer" that a new IV Team would "alleviate the IV access related issues," even though there is ***zero*** evidence in the record that

indicates the specific members of the IV Team were the reason for Alabama's three botched executions last year). In so holding, the Eleventh Circuit made the same fundamental error in logic as the District Court: assuming that a new IV Team will cure the problems in ADOC's lethal injection procedures, despite ADOC's insistence that last year's IV Team as not the cause of the problems in ADOC's lethal injection procedures.

The Eleventh Circuit also erred by affirming the District Court's ruling on the basis of a single newly-added sentence to Alabama's lethal injection protocol, which states that IV Team members must be "certified or licensed in the United States." *See* Pet. App. 26a-28a. This language is a meaningless change—not only because it is vague and does not require a certification in any medical field—but also because Respondents never argued they did not have the *same requirement* for medical IV Team members before. Yet the Eleventh Circuit found this new sentence to constitute "evidence" that the State would be able to "ensure successful constitutional executions" going forward. *Id.* at 26a-27a.

Each of the State's "changes" reflect no meaningful change at all. The State presented no evidence that its prior failures to achieve venous access in a reasonable period of time was due to the specific lack of skill or qualifications of its IV team. Similarly, the State presented no evidence that any new members of the execution team are especially skilled to address the problem. Different individuals with the same qualifications are the *same* with respect to what is constitutionally relevant:

the likelihood that Mr. Barber will suffer a prolonged execution that imposes needless mental anguish and physical suffering.

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

Mr. Barber is scheduled to be executed this evening using the same failed lethal injection procedures and practices that lead to the needless terror and suffering of the three men who came before him. This timing means Mr. Barber will likely die before this Court can consider his petition. Mr. Barber, if subjected to Alabama's lethal injection procedure, will experience an execution that subjects him to hours of attempts to establish IV access that, in so doing, violates his Eighth Amendment rights. In no set of circumstances—including the execution context—is it necessary to spend hours attempting to establish IV access. Both in the district court and the Eleventh Circuit, Respondents did not contest that this prong weighs in Mr. Barber's favor. Absent a stay, Mr. Barber faces irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Mem.) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted).

III. Issuance of the stay will not substantially injure the State, and the public interest lies in favor of granting the stay.

Issuance of a brief stay of execution pending the Court's consideration of Mr. Barber's execution serves both the State's and public's interest in ensuring that capital punishment does not violate the Eighth Amendment. While the public has an interest in the finality of criminal convictions, a brief stay of Mr. Barber's execution so that this Court may consider a petition of certiorari identifying significant

constitutional issues is a *de minimis* impairment of that interest. The Eleventh Circuit grossly misinterpreted this Court's vacatur of the Eleventh Circuit's stay in the 2022 *Smith* case as "implicitly telling us" that this Court considered the State's "interest in enforcing the criminal judgment" outweighed the severe risk of an Eighth Amendment violation.[3] *See* Pet. App. 22a n. 19 (citing *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13846, 2022 WL 19831029 (11th Cir. Nov. 17, 2022); *Hamm v. Smith*, 143 S. Ct. 440 (2022)). But as the Eleventh Circuit conceded, "we do not know why the stay in *Smith* was vacated," *see* Pet. App. 22a n. 19. The Eleventh Circuit erred by inferring weighty legal conclusions from a vacatur order that did not include any written opinion.

The public interest lies strongly in Mr. Barber's favor. "[T]he public interest is served when constitutional rights are protected." *Melendez v. Sec'y, Fla. Dep't of Corr.*, No. 21-13455, 2022 WL 1124753, at *17 (11th Cir. Apr. 15, 2022) (per curiam) (internal quotation marks and citation omitted).

The very limited discovery Respondents have provided is replete with examples of members of the Alabama public pleading with Governor Ivey to take ADOC's issues with lethal injection executions seriously, and urging Defendants to

[3] Tellingly, in the *Smith* case, *precisely* what the plaintiff warned this Court about came to pass—he was subjected to an hours' long failed attempt to establish IV access, and his execution was called off as a result. *See* Pet. App. at 32a (Pryor, J., dissenting) ("Mr. Smith asked a panel of this Court—including myself—to stay his execution because he feared he would be subjected to superadded pain and terror as the State carried out his death sentence. The State called his claim speculative and asked us to trust that ADOC was prepared to perform the execution without incident. We now know that Mr. Smith was right.").

conduct a complete and transparent investigation. *See, e.g.,* Pet. App. 244a-249a (letter urging Governor Ivey and ADOC to resolve important questions in their investigation: "What is the selection process (is it merit- or skill-based) for execution team members? What are the qualifications of the people in charge of . . . setting the I.V.s for the execution?"). Moreover, in halting executions in Alabama in November of 2022, Governor Ivey emphasized the need to get lethal injection executions right for the sake of the members of the victims' families. *See* Pet. App. 125a.

Further, Mr. Barber is not responsible for the exigent circumstances necessitating his appeal. He diligently filed his Eighth Amendment claim in federal court after pursuing a stay and discovery before the Alabama Supreme Court. Crucially, Governor Kay Ivey created the emergent circumstances now facing the Court by choosing an execution "time frame"—30 hours beginning on July 20th—*after* Mr. Barber filed suit in federal court. Respondents created this emergency, and now seek to punish Mr. Barber for it.

CONCLUSION

As Judge Pryor observed in her dissent from the order below, "Three botched executions in a row are three too many. Each time, ADOC has insisted that the courts should trust it to get it right, only to fail again." Pet. App. 70a (Pryor, J., dissenting). Today marks the fourth consecutive time that ADOC will strap a condemned man down to its execution gurney and subject him to needless hours of pain and suffering. For these reasons, the Court should grant this Application and stay Mr. Barber's execution pending disposition of his Petition for Writ of Certiorari. If the Court grants Mr. Barber's Petition, a stay is warranted to give effect to the judgment of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I, Robert N. Hochman, do hereby certify that, on this 20th of July, 2023, I caused a copy and an electronic copy of the Application for A Stay of Execution in the foregoing case to be served by email on the following party:

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