No. 23A664

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

EXECUTION SCHEDULED FOR JANUARY 25, 2024

REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION PENDING PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

"[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983). Accordingly, a stay of execution may be granted when necessary to "give non-frivolous claims of constitutional error the careful attention they deserve." *Id.* And while a stay of execution is unquestionably the exception and not the rule, it is difficult to imagine a more exceptional case than one where a state intends to make a second attempt to execute a person by a never-before-used method of execution after having already subjected that same person to hours of superadded pain while trying and failing to execute him by a different method 14 months earlier, resulting in serious (and persistent) physical and emotional torment.

The State's arguments to the contrary rest largely on its assertion that its previous failed attempt was merely an "accident," just like *Resweber*, and so, in the State's estimation (and to borrow a colloquial adage), there is "nothing to see here." Nothing could be further from the truth—or further from the unrefuted facts in Mr. Smith's Postconviction Petition, which control. The State's desire to employ its never-before-used nitrogen hypoxia protocol to moot Mr. Smith's claims and shield from the public any further information about its string of execution failures and deliberate indifference—culminating in its failed attempt to execute Mr. Smith in November 2022—does not outweigh the significant constitutional question at issue. The State had every reason to know that its IV team would be unable to establish IV access during Mr. Smith's attempted execution; indeed, the same thing had happened in the State's two preceding executions (one failed, one completed only after more than 3 hours), and nothing had changed. Pet. App. 39a-40a, ¶ 22, 25-35. Instead of investigating its failures, the State of Alabama asked this Court to lift a stay that was in

place on the day of the planned execution so that it could go ahead anyway, and it failed again. *Id.* It should not now be heard to complain about litigating the substantial constitutional questions caused by its string of failures.[1]

ARGUMENT

I. Mr. Smith's Motion for a Stay Is Procedurally Proper.

The State's argument that Mr. Smith was necessarily required to seek additional relief in the state courts should be rejected because it is illogical and ignores the realities of Mr. Smith's unique status as one of only two living execution survivors in the United States.

The State's insistence that Mr. Smith's stay application should have been made to a state court because it "relies on disputed factual contentions that Smith has never proven" is illogical. Opp'n at 7. Mr. Smith's Postconviction Petition was dismissed for failure to state an Eighth Amendment violation, so his unrefuted allegations—to which the State never responded—"must be accepted as true." *McBurnett v. State*, 266 So. 3d 122, 126 (Ala. Crim. App. 2018) (citation omitted). Accordingly, there are no "disputed factual

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[1] The State also criticizes Mr. Smith for opposing a second execution attempt by nitrogen hypoxia because, the State says, he "litigated successfully for the method of execution he will receive," Opp'n at 3, but that argument is too clever by half. There is no dispute that no state nor the federal government has *ever* executed anyone by nitrogen hypoxia. The State therefore had to write a nitrogen hypoxia protocol essentially on a blank slate, and at the time Mr. Smith raised the option of nitrogen hypoxia, the State had not yet released its Protocol to the public. That protocol was not disclosed to Mr. Smith—or anyone outside the Alabama Attorney General's Office and the Alabama Department of Corrections and their advisors—until the Attorney General moved on August 25, 2023 to set Mr. Smith's execution date. *See Smith v. Hamm*, No. 2:22-cv-497, DE 104, 104-1, 108 at 11-12, 108-3 (M.D. Ala.). Relatedly, the State faults Mr. Smith for not moving more quickly to block this nitrogen-hypoxia execution following his failed execution. Opp'n at 3 (accusing Mr. Smith of "wait[ing] six months to bring this second postconviction petition"). As explained more fully in Section III below, the State's assertion of delay is disingenuous, as Mr. Smith began pursuing the instant claim weeks after the failed attempt. But more importantly—and ironically—up until the State filed its August 25, 2023 motion to set an execution date, the State was insisting that it was unwilling to use nitrogen hypoxia for Mr. Smith's execution because he had not elected that method via a form provided by the state. Indeed, the State's position had been that nitrogen hypoxia was not an available method of execution because it had not developed a protocol for it—a position it maintained until this Court denied its petition for a writ of certiorari on that issue on May 15, 2023. *Hamm v. Smith*, 143 S. Ct. 1188 (2023).

contentions" to be decided. That the State may now wish to present its own narrative does not alter the fact that Mr. Smith's unrefuted allegations control.

The State similarly accuses Mr. Smith of "depriv[ing] the Court of any record upon which it could base [its] ruling." Opp'n at 8. But as the State acknowledges, the question at this stage is whether "there is a reasonable probability that this Court will grant review and a fair prospect that the Court would reverse." *Id.* (citing *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers)). And Mr. Smith's factual allegations, as pleaded in his Postconviction Petition, are all the record that is needed to decide if those allegations, taken as true, state an Eighth Amendment violation such that there is a reasonable probability of granting review and a fair prospect of reversal. The State's position further ignores that Mr. Smith *did* seek to make an evidentiary record in the state court, but the circuit court granted the State's motion to dismiss and summarily denied his Postconviction Petition without an evidentiary hearing.

At bottom, the State's various criticisms of Mr. Smith's efforts to seek redress for the cruel (and unconstitutional) ordeal he has experienced ignores the realities of Mr. Smith's unique status as an execution survivor who now faces a second execution attempt. Contrary to the State's contention, Mr. Smith made diligent efforts to pursue the Eighth Amendment claim presented in his petition, which did not and could not have arisen until the State's failed execution attempt on November 17, 2022. As explained in Section III below, Mr. Smith began pursing that claim just weeks after the failed execution by amending his complaint in his then-pending action to enjoin his execution by lethal injection, and he filed in Postconviction Petition three months before the State had even

moved to set an execution date. Mr. Smith was deprived of the opportunity to develop the evidentiary record the State now claims is somehow essential to Mr. Smith's stay request when the circuit court dismissed his petition without allowing an evidentiary hearing on August 11, 2023. Pet. App. 28a-30a.[2] He then appealed to the Alabama Court of Criminal Appeals three months before any execution date was set. Thus, at the time he filed his Postconviction Proceeding in the circuit court and appealed the denial of that petition, there was nothing to stay.

As to the State's assertion that Mr. Smith should have sought further relief from the Alabama Supreme Court, it is undisputed that he separately opposed the setting of an execution date in the Alabama Supreme Court on the ground that setting a date would be premature while this post-conviction proceeding was pending. *See Smith v. Hamm*, No. 24-10095, Dkt. No. 28 at 6-9 (11th Cir. Jan. 17, 2024). As such, Mr. Smith has litigated the issues presented by his stay request in the Alabama courts, and requesting that the Alabama Supreme Court rule on the likelihood of success on the merits of a constitutional argument it had already rejected would have been a futile exercise. In sum, Mr. Smith diligently sought relief below, and the State's assertion that it would be "highly irregular" for the Court to rule "solely on allegations, not evidence" is baseless. Opp'n at 1; *see Hill v. McDonough*, 547 U.S. 573, 578 (2006) (Court granted stay of execution pending resolution of case presenting purely legal issue where no evidentiary or factual record was developed below).

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[2] There was no basis to seek a stay of execution in the circuit court because at that time, there was nothing to stay, as no execution date was set; indeed as of May 2023, when Mr. Smith filed his Postconviction Petition, the State was representing that it had no "immediate plans" to move to set an execution date. *See Smith v. Hamm*, No. 2:22-cv-497, DE 93 at 7:1-2 (M.D. Ala. May 24, 2023).

II. Mr. Smith Has Shown a Likelihood of Success on His Claim That a Second Execution Attempt Following a Previous, Cruelly Willful Attempt Violates the Eighth Amendment.

In arguing that Mr. Smith is unlikely to succeed, the State misconstrues both the Postconviction Petition and the Alabama Court of Criminal Appeals' decision below. Mr. Smith is likely to succeed on the merits, and the State has failed to show that the decision below rests on independent and adequate state law grounds.

A. Mr. Smith Is Likely To Succeed on His Eighth Amendment Claim.

The State's response to Mr. Smith's Eighth Amendment argument rests primarily on its unsupported narrative of what occurred on the evening of November 17, 2022, when it tried and failed to execute Mr. Smith. As the State now tells it, what happened to Mr. Smith was simply an accident that it couldn't have anticipated and that wasn't in any way willful or cruel. That is false, and in any event, because Mr. Smith's allegations were never refuted in the courts below, those allegations must be taken as true at this stage.

Most significantly, Mr. Smith has alleged that his was the third consecutive execution that State officials botched for the same reason: its incompetence and inability to set IV lines. Pet. App. 39a-40a ¶ 22, 25-27. State officials did no investigation after the first two botched executions and before attempting to execute Mr. Smith. Pet. App. 39a-40a ¶ 22, 27. Given the previous two botched executions and State officials' failure to investigate and remedy their cause, the officials responsible for Mr. Smith's execution "knew or should have known . . . that the IV team would have great difficulty establishing IV access, resulting in severe physical and psychological pain to Mr. Smith." Pet. App. 40a ¶ 28. Those officials "further knew or should have known" that the same alleged consequences that had befallen Alan Miller just months earlier during and after his failed execution stated an

Eighth Amendment claim. Pet. App. 40a-41a ¶ 29. State officials nevertheless "recklessly and knowingly charged ahead with deliberate indifference to Mr. Smith's rights and with the same results," repeatedly jabbing him with needles in his arms and hands, and by attempting to insert a central line. Pet. App. 41a ¶ 30-32.

Given those unrefuted allegations, the State's argument that this case is "almost identical" to the claims in *Resweber* fails. *See* Opp'n at 13; *see generally State of Louisiana ex rel. Francis v. Resweber*, 362 U.S. 459 (1947). As the State itself argues, "five justices in *Resweber* agreed that the Constitution does not prohibit a state from executing a prisoner" following a failed first attempt "*provided that*" the state "did not intentionally, or maliciously, inflict unnecessary pain during the first, failed execution." Opp'n at 12-13 (quoting *Broom v. Shoop*, 963 F.3d 500, 512 (6th Cir. 2020) (emphasis added)). Mr. Smith's allegations, which must be taken as true, make clear that the State's failed attempt was no accident. It was the result of a malicious course of conduct—one in which the State inflicted hours of pain on Mr. Smith when it knew or should have known that it would be unable to achieve IV access.

The State next claims that the facts in *Resweber* were "more egregious" than those here, Opp'n at 13-14, because, by the State's reasoning, being strapped to a gurney for hours, jabbed with needles in both hands and arms, and enduring a failed central line procedure is not as bad as the electric shock of unknown strength or duration at issue in *Resweber*. Initially, there is no factual basis for the State's reasoning. But in any event, the State's comparison skirts the proper constitutional question: whether the first attempt was the result of an unforeseeable accident or the result of a single, cruelly willful attempt.

Pet. at 10-16. Mr. Smith's alleged facts, which are undeniably true at this stage of the case, establish the latter.

Indeed, the State itself concedes that *Baze v. Rees*, 553 U.S. 35, 50 (2008) "created a distinction between accidents (no Eighth Amendment problem) and executions "involving a series of abortive attempts," which would create a "potential Eighth Amendment problem." Opp'n at 15. But the State does not and cannot explain why the facts pleaded in Mr. Smith's petition do not fall into the second category of "potential Eighth Amendment problem[s]." Instead, the State's *ipse dixit*—made without authority and contrary to Mr. Smith's allegations—is that the previous attempt was an accident.

Finally, the State's suggestion that a ruling in this case would open the floodgates to other challenges should be rejected. Mr. Smith's claim presents the extreme hypothetical situation contemplated by Justice Frankfurter in *Resweber*: one in which a second execution attempt is contemplated after a previous cruelly willful attempt that resulted in hours of needless pain because State officials knew or should have known that they could not establish IV access. *See Resweber*, 329 U.S. at 470 (Frankfurter, J., concurring). And to the extent the State is suggesting that it anticipates more failed executions giving rise to similar challenges, that is a reason to grant certiorari and clarify the standard, not deny it.

B. The State Fails To Show That the Decision Below Rests on Independent and Adequate State Law Grounds.

The State fails to rebut the presumption that "there is no independent and adequate state ground for a state court decision when the decision fairly appears . . . to be interwoven with federal law." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

The State concedes, as it must, that state pleadings standards are not independent when their application is "intertwined" with a federal constitutional question. Opp'n at 10. The State also cites *Frazier v. Bouchard*, 661 F.3d 519 (11th Cir. 2011), which directly undermines its assertion that the decision below rested on adequate *and independent* state law grounds. In *Frazier*, the Eleventh Circuit concluded that a dismissal for failure to comply with Alabama Rule of Criminal Procedure 32.6(b)'s pleading requirements "is not, at least in this instance, an independent and adequate state ground sufficient to insulate the relevant claim from federal review." *Id.* at 524. There, the Court of Criminal Appeals had "summarily dismissed" the petitioner's ineffective assistance of counsel claims "because they fail to meet the specificity and full factual disclosure and pleading requirements of rules 32.4 and 32.6(b)" of the Alabama Rules of Criminal Procedure. *Id.* at 526. The Eleventh Circuit held that the Court of Criminal Appeal's dismissal of the ineffective assistance claim was a decision on the merits that "did not rest on an adequate and independent state law ground." *Id.* at 527.

Frazier's reasoning applies equally here, as the adequacy of the pleading cannot be separated from the legal standard that governs such a claim. The Alabama Court of Criminal Appeals' decision is interwoven with federal law—more specifically, the court's incorrect interpretation of the Eighth Amendment standard to be applied to the facts of this case. That is most clearly shown by the court's conclusion that Mr. Smith "made a bare allegation that he suffers from post-traumatic stress disorder causing difficulty sleeping, nightmares, hypervigilance, hyperarousal, and disassociation, *without alleging specific facts regarding how those symptoms rise to the level of a constitutional violation*." Pet.

App. 22a (emphasis added). Of course, whether a given set of facts "rise[s] to the level of" an Eighth Amendment violation is a question of federal law and demonstrates that the court's conclusion about the sufficiency of Mr. Smith's allegations cannot be extricated from its interpretation of the Eighth Amendment.

The interwoven nature of the analysis is further highlighted by the court's reasoning that faults Mr. Smith for not "alleg[ing] specifically how many times the team attempted to insert the IV lines, or exactly how long the attempts continued." *Id.* The Eighth Amendment question, properly formulated, does not depend on whether that pain was more extreme than the alleged electric shock of unspecified strength and duration in *Resweber*, as the Court of Criminal Appeals reasoned. It depends on whether the first attempt was the result an unforeseeable accident or the result of a single, cruelly willful attempt. Pet. at 10-16. Although the Alabama Court of Criminal Appeals nitpicks the specificity of Mr. Smith's allegations of pain, it said nothing about the specificity and adequacy of Mr. Smith's allegations about *the State's conduct*—particularly, its decision to proceed with the lethal injection attempt notwithstanding that it knew or should have known that its attempt likely would fail and proceeded with deliberate indifference anyway. Accordingly, the State fails to show that the "same judgment would be rendered by the state court" under the proper Eighth Amendment standard. *See* Opp'n at 10.

In short, the Alabama Court of Criminal Appeals' discussion of the pleading standard is plainly based on its erroneous conclusion that the correct test under *Resweber* is whether being strapped to a gurney for hours and repeatedly jabbed with needles is more or less painful than an electric shock of unknown strength. Those are not adequate and

independent state law grounds because they are intertwined with the Court's incorrect Eighth Amendment analysis, nor do they "greatly complicate" the constitutional issue to be decided. *See* Opp'n at 10.

III. The Equities Favor a Stay.

The State has no meaningful response to Mr. Smith's showing that the equities favor a stay. The State contends that the equities weigh in its favor because Mr. Smith previously alleged that nitrogen hypoxia was an available and feasible method of execution that would reduce the intolerable risk posed by the State's then-plan to attempt to execute him for a second time. Opp. 17. The State contends that Mr. Smith has now changed his position to assert "last-minute" claims to delay his execution. None of that is true.

First, Mr. Smith has not changed his position that nitrogen hypoxia is an available and feasible method of execution. *See also supra* n.1. His petition does not ask this Court to rule on the constitutionality of nitrogen hypoxia as a method of executing condemned people. Mr. Smith's petition asks this Court to consider whether the Eighth Amendment prohibits another attempt to execute him by any method after ADOC's previous cruelly willful attempt; the availability of nitrogen hypoxia, lethal injection, or any other method is not relevant to that issue. Judicial estoppel does not apply here because it "requires a party's later position to be contradictory or 'clearly inconsistent' from an earlier one." *Hoefling v. City of Miami*, 811 F.3d 1271, 1278 (11th Cir. 2016) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

Second, Mr. Smith's petition does not arise from a "last-minute" claim to delay his execution. As an initial matter, the State's assertion that Mr. Smith "waited six months" to

bring his action is disingenuous. Opp'n at 3. Mr. Smith first raised this claim just weeks after his failed execution attempt by asserting it in a Second Amended Complaint in his Section 1983 action related to the lethal injection attempt. *See Smith v. Hamm*, No. 2:22-cv-00497, DE 71 (M.D. Ala. Dec. 6, 2022). State officials moved to dismiss, arguing that the claim could only be brought in a habeas proceeding. *Id.*, DE 78 at 8-11. Mr. Smith then withdrew his claim in federal court and filed his state postconviction claim three months *before* the State moved for authority to attempt to execute him again. The emergent nature of Mr. Smith's application is due to the State's plan to execute him before he has exhausted his appeals from dismissal of his Postconviction Petition.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's application for stay pending petition for write of certiorari.

Respectfully submitted.

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