

No. _____

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

APPLICATION FOR STAY OF EXECUTION

Mr. Smith's execution is scheduled for November 17, 2022, at 6:00 p.m. CST.

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

Kenneth Eugene Smith respectfully requests that this Court stay his execution pending the disposition of his petition for writ of certiorari that he is filing today. That petition presents important questions regarding the constitutionality of executing an individual contrary to his capital sentence jury's determination that he be sentenced to life imprisonment without the possibility of

parole—a practice that is no longer permitted anywhere in the United States. The threatened injury to Mr. Smith outweighs the harm that a stay would cause the State, and such relief is in the public interest. A stay is warranted to consider the weighty issues raised. *Lonchar v. Thomas*, 517 U.S. 314, 320-21 (1996); *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983).

To receive a stay, Mr. Smith must make a strong showing that he is likely to succeed on the merits of his claim. *Nken v. Holder*, 556 U.S. 418, 426 (2009). This Court also balances the harm to the parties and the public interest. *Id.* As set forth below, Mr. Smith satisfies those factors.

First, Mr. Smith is likely to prevail on the merits. He is facing execution in November 17, 2022 because his trial judge overruled the jury’s determination by a vote of 11 to 1 that he be sentenced to life imprisonment without the possibility of parole. As the Eleventh Circuit has recognized, if Mr. Smith’s trial had occurred today, he could not have been eligible for execution. *Smith v. Comm’r, Ala. Dep’t of Corrs.*, 850 F. App’x 726, 726 n.1 (11th Cir. 2021) (citing Ala. Code § 13A-5-47 (2017)). Nor would he be subject to execution anywhere else in the United States, as every state that once permitted the practice of judicial override has abandoned it. That legislatures throughout the country have abolished or do not permit judicial override of capital jury sentencing determinations constitutes “the ‘clearest and most reliable objective evidence of contemporary values’” that shows the practice is inconsistent with “‘evolving standards of decency that mark the progress of a maturing society’” and violates the Eighth Amendment to the United States

Constitution as applied to the States through incorporation into the Fourteenth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citations omitted).

Second, Mr. Smith will be irreparably harmed absent a stay. *See Nken*, 556 U.S. at 426. There is nothing more final and irreversible than death. Without a stay of his execution, Mr. Smith faces an unconstitutional death that will strip him of his “final dignity.” *Miller v. Hamm*, No. 2:22-CV-506-RAH, 2022 WL 4348724, at *21 (M.D. Ala. Sept. 19, 2022), *vacated*, No. 22 No. 22A258, 2022 WL 4391940 (U.S. Sept. 22, 2022) (citing *Smith v. Comm’r, Ala. Dep’t of Corrs.*, No. 21-13581, 2021 WL 4916001, at *5 (11th Cir. Oct. 21, 2021) (Pryor, J., concurring)). ADOC’s last two execution attempts are the only evidence needed to support this assertion.

Finally, the public interest lies in Mr. Smith’s favor. “The public interest is served when constitutional rights are protected.” *Melendez v. Sec’y, Fla. Dep’t of Corrs.*, No. 21-13455, 2022 WL 1124753, at *17 (11th Cir. Apr. 15, 2022) (internal quotation marks and citation omitted); *see also Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 736 (6th Cir. 2021) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” (internal quotation and citation omitted)); *Ray v. Comm’r, Ala. Dep’t of Corrs.*, 915 F.3d 689, 701 (11th Cir. 2019) (“the public has a serious interest in the proper application and enforcement of the Establishment Clause”); *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same). Carrying out a sentence that no longer comports with “evolving standards of decency that mark the progress of a maturing society” is not in the public interest. Moreover, Mr. Smith has diligently pursued his claim. On

September 30, 2022, the Alabama Supreme Court issued an order scheduling his execution for November 17, 2022. On November 3, 2022, Mr. Smith moved the Alabama Supreme Court to stay the execution and for relief from his unconstitutional sentence. The Court denied that motion on Thursday, November 10, 2022.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Smith asks that this Court grant this application and stay his execution.

Respectfully submitted,

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