

Nos. 23-5145 & 23A51

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

**REPLY BRIEF IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI AND APPLICATION FOR A
STAY OF EXECUTION**

******EXECUTION SCHEDULED FOR JULY 20, 2023**

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

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CAPITAL CASE

Respondents (1) misrepresent the nature of James Edward Barber’s constitutional claim, and (2) blame Mr. Barber for supposed “delay” in bringing his case. Mr. Barber’s “core allegation” is not that the IV Team lacks sufficient medical expertise or that lethal injection executions are unconstitutional. Opposition (“Opp.”) at 10. The core claim is that Alabama has botched three consecutive executions and, after undertaking a review, has admitted it made *no material change*. Moreover, Mr. Barber cannot be blamed for this emergency filing. *Id.* at 17. The State set an execution date *after* Mr. Barber filed his claim, a claim which would never have had to be filed but for Alabama’s refusal to make any material change in how it is carrying out lethal injections after its three failed attempts.

I. Unable to Refute Mr. Barber’s Claim, Respondents Misrepresent the Core Issue of This Case.

Respondents do not dispute that the last three executions in the State of Alabama were botched. They also do not dispute that all three executions involved hours-long attempts to establish IV access, even though they describe that process as a “common procedure.” Opp. at 12. And they concede that no evidence in the record shows that replacing ADOC’s IV Team addresses the underlying issues plaguing the lethal injection process. Unsurprisingly, then, Respondents seek to distract this Court from their repeated failures by mischaracterizing the basis of Mr. Barber’s complaint. According to Respondents, Mr. Barber is challenging the “medical expertise” of the IV Team and the State’s use of lethal injection as a form of execution. *See* Opp. at 10-11. He is not.

Instead, and as is reflected in two complaints, dozens of exhibits, and hundreds of pages of evidence, including the affidavits of several experts, Mr. Barber’s claim is about one issue—the “substantial risk of severe harm” he imminently faces due to: (i) the failures of ADOC’s past three executions, (ii) the State’s failure to acknowledge deficiencies in its execution procedures and refusal to make any meaningful changes, and (iii) Mr. Barber’s specific physical conditions that heighten his risk of prolonged vein access and suffering. On this last point specifically, ADOC has repeatedly failed to access Mr. Barber’s veins in the past, and his body mass index is such that accessing his veins is more difficult than usual.

To grant certiorari and rule in Mr. Barber’s favor, this Court need not, as Respondents suggest, disturb the well-settled understanding that a prisoner is not guaranteed a painless death (Opp. at 11), and that lethal injection executions are permissible under the Eighth Amendment (Opp. at 12). This case presents a much narrower issue: whether there can ever be an Eighth Amendment violation through repeated punctures to establish IV access, no matter how many futile attempts are made or for how long. The Eleventh Circuit’s answer to that question was “no,” but this Court has repeatedly made clear that a punishment which “superadds’ pain well beyond what’s needed to effectuate a death sentence” is, in fact, cruel. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). And that is precisely what Mr. Barber will likely endure this evening absent intervention from this Court—a “lingering death” over the course of several hours as the State attempts over and over again to establish IV access, which is far beyond what is necessary to carry out his sentence.

The Court should grant certiorari, stay Mr. Barber’s execution, and clarify when a condemned inmate faces a “substantial risk of serious harm” under the Eighth Amendment.

II. The State of Alabama, not James Barber, Caused The Urgent Timeline Before This Court.

Mr. Barber did not lie in wait with his claim in an attempt to interrupt a scheduled execution. Rather, Mr. Barber brought this lawsuit as soon as possible, in order to be executed on this date by the readily alternative method of nitrogen hypoxia.¹ The emergency conditions attendant to Mr. Barber’s Application for Stay are entirely the making of the State of Alabama.

Mr. Barber could not have brought this claim even one year ago. The State’s pattern of difficulty in establishing IV access emerged in the fall of 2022. After that pattern became public, in November of 2022, the Governor ordered a moratorium on all execution proceedings in the State—including ordering the State Attorney General to withdraw his motion for Mr. Barber’s execution date in the Alabama Supreme Court—in order to investigate and correct ADOC’s problems with IV access for lethal injections. From November to February 2023, ADOC “investigated” its own failings. During this time, the public, including Mr. Barber and his counsel, had no idea whether ADOC would ever attempt another

¹ Mr. Barber’s genuine belief that he should be executed by nitrogen hypoxia was reinforced by the State’s representation to the district court that it could, if ordered, execute Mr. Barber via nitrogen hypoxia. *See* Pet. App. 581a.

lethal injection, or whether it would switch to the readily available alternative of nitrogen hypoxia. It would truly have been speculative for Mr. Barber to have filed a lawsuit regarding ADOC's lethal injection IV access problems when he did not know if Alabama would ever again attempt a lethal injection execution.

ADOC neither meaningfully investigated nor corrected the problems with its execution procedures. Instead, on February 24, 2023, ADOC made a cursory announcement that it was "prepared as possible" to attempt another lethal injection. On that same day, the Attorney General moved for an execution warrant for Mr. Barber in the Alabama Supreme Court. February 24, 2023, was the first day Mr. Barber knew he would be the next in line to face a lethal injection execution in Alabama.

The State claims that Mr. Barber sat on his rights from February 24 to May 25, when he filed this lawsuit. But, as Judge Pryor explained in her dissent from the Eleventh Circuit's opinion, "Mr. Barber was not doing 'nothing' between February and May—he was litigating his case in state court." *See* Pet. App. 69a (Pryor, J., dissenting) (explaining that Mr. Barber immediately began contesting his execution in the Alabama Supreme Court, including filing a motion to stay based on the three botched executions that took place in 2022). The Alabama Supreme Court denied Mr. Barber's requested relief on May 3, 2023, and Mr. Barber filed this lawsuit on May 25, 2023. Thus, Mr. Barber acted far more quickly than the example that this Court disapproved of in *Bucklew*, when the Court noted that an inmate waited too long to bring an available claim when the claim was brought "just 10 days before his scheduled execution." *Bucklew*, 139 S. Ct. at 1134.

Just days after Mr. Barber initiated this litigation, Governor Ivey chose to set an execution date of July 20, 2023, leaving Mr. Barber less than two months to litigate his Eighth Amendment claims. Governor Ivey's choice of execution date was an attempt to take advantage of precedent that frowns upon last-minute court challenges, and it was an attempt to pull the rug out from federal review of the serious constitutional problem of state torture. This Court should not reward her actions. Governor Ivey manufactured this emergency, and it would be perverse to punish Mr. Barber as a result.

CONCLUSION

The petition for writ of certiorari and application for stay of execution should be granted.

Respectfully submitted,

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