No. 24-_____

In the Supreme Court of the United States

WILLIE JAMES PYE,

Petitioner,

v.

TYRONE OLIVER, Commissioner, Georgia Department of Corrections, CHRISTOPHER CARR, in his official capacity as the Attorney General of the State of Georgia, STATE BOARD OF PARDONS AND PAROLES, SHAWN EMMONS, Warden, Georgia Diagnostic & Classification Prison

Respondents.

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

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MOTION FOR A STAY OF EXECUTION PENDING CERTIORARI

CAPITAL CASE: EXECUTION SCHEDULED TODAY, MARCH 20, 2024

TO: THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

Petitioner Willie James Pye, a death-sentenced prisoner in the State of Georgia, respectfully requests that this Court stay his execution, currently scheduled for 7:00 p.m. **TODAY**, March 20, 2024, until further Order of this Court, in order to permit the consideration and disposition of his petition for writ of certiorari to the Eleventh Circuit Court of Appeals, filed concurrently with this motion.

JURISDICTION

Mr. Pye invokes this Court's jurisdiction to stay his execution under 28 U.S.C. § 2102(f) and Rule 23 of the Rules of the Supreme Court of the United States.

PROCEDURAL HISTORY

On March 11, 2024, Mr. Pye initiated the underlying 42 U.S.C. § 1983 action in the United States District Court for the Northern District of Georgia seeking declaratory and injunctive relief. Doc. 1. Mr. Pye concurrently filed a motion for a temporary restraining order or preliminary injunction restraining Defendants' from moving forward with his execution. Doc. 3.

Following a motions hearing on March 15, 2024, the District Court entered an order denying Mr. Pye's motion for a TRO and dismissing Mr. Pye's Complaint. Doc. 12. Mr. Pye appealed that dismissal to the Eleventh Circuit Court of Appeals and simultaneously filed an emergency motion for an order staying his execution pending appeal on March 18, 2024. Defendants filed their response brief on March 19, 2024.

Yesterday afternoon, at approximately 1 p.m., the panel directed the parties to submit supplemental letter briefs regarding a possible affirmative defense—that Defendants had not raised—no later than 4 p.m. Mr. Pye filed his reply brief and supplemental letter brief by 4 p.m. The panel denied Mr. Pye's motion for a stay of execution in an Order issued last night, the evening of March 19, 2024. Earlier today, Mr. Pye moved the panel to reconsider its order. That motion was denied.

Mr. Pye now files together herewith a Petition for Writ of *Certiorari* to the Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE STAY

Mr. Pye is scheduled for execution in three hours, though the Defendants have contractually agreed not to pursue the execution of similarly situated death row prisoners in Georgia.

In order to receive a stay of execution, a petitioner must show: 1) irreparable injury if no stay is granted; 2) a "reasonable probability that four (4) members of the Court will consider the issue [presented] sufficiently meritorious to grant certiorari," *Graves v. Burnes*, 405 U.S. 1201 (1972) (Powell, Circuit Justice), or a reasonable probability that a plurality of the Court would grant relief on an original habeas petition; and 3) a likelihood of success on the merits. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Fare v. Michael C.*, 439 U.S. 1310 (1978) (Rehnquist, Circuit Justice). Mr. Pye meets this standard.

A. Irreparable Injury

If this Court does not grant a stay, Mr. Pye will be executed at 7:00 p.m. tonight. This clearly constitutes irreparable injury. *See, e.g., Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, C. J.) (granting a stay of execution and noting the "obvious irreversible nature of the death penalty"); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (the "irreversible nature of the death penalty" constitutes irreparable injury and weighs heavily in favor of granting a stay).

Further, Mr. Pye's claims address whether his life will be unconstitutionally truncated because Defendants have denied him Due Process and the Equal Protection of the Laws by denying to a class of death-sentenced prisoners a benefit

that they have explicitly extended to other death-sentenced prisoners in Georgia. The potential injury is not only his death, but his early death pursuant to an arbitrary and unequal classification imposed by the State.

B. Probability That This Court Will Grant Certiorari.

As outlined in Mr. Pye's accompanying Petition for Writ of *Certiorari,* he is likely to obtain a grant of *certiorari.* The Eleventh Circuit panel below, in determining that Mr. Pye is not entitled to injunctive relief, interposed an affirmative defense not previously raised by any party. As shown in the petition, this is a grossly erroneous application of the TRO standard requiring this Court's intercession.

In the courts below, the Defendants only disputed the first factor in the TRO equities analysis—substantial likelihood of success on the merits of Mr. Pye's underlying constitutional claims—and did not raise any affirmative defenses to the underlying complaint before either the District Court or the Eleventh Circuit Court of Appeals. Thus, in order to prevail, Mr. Pye was simply required to make a prima facie showing that he is entitled to relief. *See* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, § 2948.3 Grounds for Granting or Denying a Preliminary Injunction—Probability of Success on the Merits, 11A Fed. Prac. & Proc. Civ. § 2948.3 (3d ed.) ("All courts agree that plaintiff must present a prima facie case but need not show a certainty of winning."). Mr. Pye did that.

The panel, however, ignored the parties' arguments as to likelihood of success on the merits and sua sponte injected a possible res judicata affirmative defense

into the case. It then "conclude[d] that … res judicata likely bars [Mr. Pye's] federal complaint." Order at 4.

But this Court has been clear: It was not Mr. Pye's burden to disprove Defendants' unraised affirmative defenses—it was Defendants' burden to show that it was substantially likely to succeed on the merits of its defense. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (holding that "the burdens at the preliminary injunction stage track the burdens at trial"); *Ashcroft v American Civil Liberties Union,* 542 U.S. 656 (2004) (the burden of proving any defenses fails to the non-movant). But Defendants did not maintain that the defense applied at all, let alone demonstrated they were likely to prevail on that basis.

This was an abuse of discretion. "No extraordinary circumstances justified the panel's takeover of the appeal." *United States v. Sineneng-Smith*, 590 U.S. 371, 140 S. Ct. 1575, 1581 (2020).

C. Likelihood of Success on the Merits.

Mr. Pye is entitled to a stay because he is able to show both that there is a reasonable likelihood that this Court will grant *certiorari* on the basis of the question presented, and that Mr. Pye will ultimately prevail on the merits of his underlying Equal Protection claim.

First, the merits of his underlying Equal Protection tort claims. In order to state a claim for relief under the Equal Protection Clause, a plaintiff must "show that the State will treat him disparately from other similarly situated persons."

Arthur v. Thomas, 674 F.3d 1257, 1262 (11th Cir. 2012) (quotation omitted). A plaintiff must also show that such disparate treatment either burdens a fundamental right, targets a suspect class, or is not rationally related to a legitimate government interest. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Mr. Pye can show that the State has unequally burdened a fundamental right on the basis of a classification that cannot survive strict scrutiny, or even rational basis review.

On April 14, 2021, the Attorney General of the State of Georgia, on behalf of the Executive, entered into a written agreement with, among others, the Federal Defender Program, Inc. ("the Federal Defender") regarding the resumption of executions in Georgia following the COVID-19 pandemic (the "Agreement"). This Agreement was negotiated and drafted at the behest of the Criminal Matters Sub-Committee of the Judicial COVID-19 Task Force to ensure that the capital defense bar was able to provide adequate counsel to death-sentenced clients facing potential execution by defining the necessary client access, public health conditions, and spacing between execution warrants. The express, and obvious, intent of the Agreement was to preserve effective lawyer-client engagement and attorney representation during the frantic time period associated with execution proceedings.

In furtherance of those goals, the Agreement specified three conditions that must occur prior to the resumption of executions:

- "the final COVID-19 judicial emergency order entered by the Chief Justice of the Supreme Court of Georgia expires;
- "the Georgia Department of Corrections lifts its suspension of legal

visitation, and normal visitation resumes;" an

- "a vaccination against COVID19 is readily available to all members of the public."

See Fed. Defender Program, Inc., 315 Ga. at 321. The Agreement further provided that the Attorney General would "not pursue an execution warrant of any prisoner other than Mr. Raulerson before a total of at least six months after the time the above-three conditions are met." *Id*.

One year later, the State attempted to move forward with the execution of Virgil Presnell—one of the prisoners Defendants now concede was explicitly protected by the Agreement—notwithstanding the fact that neither the second nor third condition of the Agreement had been satisfied and without providing the agreed-upon notice. Following an emergency hearing in the Superior Court of Fulton County, the trial court concluded that Mr. Presnell and his counsel the Federal Defender had a substantial likelihood of success on the merits of their breach-of-contract claim and issued an interlocutory injunction stopping Mr. Presnell's execution. On appeal, the Supreme Court of Georgia issued a unanimous decision affirming the trial court's injunction, explaining that the Agreement "formed a valid written contract," that there was evidence the prison's modified visitation procedures "continue[d] to impose significant limitations," and that vaccines were still not available to "all members of the public." *Fed. Def. Program, Inc.*, 315 Ga. at 344, 351.

In other words, multiple courts have now concluded that the conditions necessary to ensure the "adequate[] represent[ation]" of capital clients in their

clemency proceedings and pre-execution litigation—conditions that the State itself proposed—have not been met. Furthermore, while Defendants now agree that the State cannot execute a certain class of death row prisoners until those conditions have been satisfied, it has simultaneously taken the position that it is free to execute all other death row prisoners even before the satisfaction of those conditions. As alleged in Mr. Pye's underlying § 1983 action, the Defendants' attempt to create a distinct, disfavored class of death row prisoners, one without the critical procedural protections being provided to others, is plainly in violation of the Equal Protection and Due Process Clauses.

Mr. Pye is similarly situated to the favored class of death row prisoners. Defendants have undeniably conferred the benefit of the Agreement on those death row prisoners they maintain are subject to the Agreement, while simultaneously refusing to grant that benefit to otherwise identically situated death-row prisoners, like Mr. Pye. This classification is not a basis for treating Mr. Pye differently. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("[The Equal Protection Clause] keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.") (emphasis added).

Mr. Pye and all those on death row retain a fundamental right to life under the Fourteenth Amendment to the United States Constitution. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring in part and concurring in the judgment) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."). Defendants' disparate

treatment undeniably constitutes an infringement of Mr. Pye's fundamental right to continue living and is subject to strict scrutiny.

Alternatively, Mr. Pye's equal protection claim warrants, at least, some form of heightened scrutiny under *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). In *M.L.B.*, this Court assessed a state's civil appeal fee requirements, a scheme normally assessed only for rationality. The Court nevertheless held that a case "involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake." Id. at 116–17. Here, where the stakes are even higher than M.L.B., some form of heightened scrutiny is likewise demanded.

Even assuming, arguendo, that the rational basis standard applies here, Defendants' disparate treatment of Mr. Pye and the other death row prisoners in the disfavored class is without any legitimate governmental or penological interest and must fail. At the risk of stating the obvious, the timing of the Eleventh Circuit's disposition of Mr. Pye's habeas appeal provides no reasonably conceivable basis for the classification of who is, and who is not, entitled to the critical procedural protections guaranteed in the Agreement before the extinguishment of their life. What matters is that the harms the Agreement's conditions were designed to protect against still exist today.

Second, Mr. Pye is also reasonably likely to prevail on the merits of his Due Process §1983 claim. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the

dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). *See also Morrissey v. Brewer*, 408 U.S. 471, 481-84 (1972) (the State has great discretion in setting policy as to parole decisions, but must nonetheless make those decision in accordance with the Due Process Clause); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (analyzing whether the state's postconviction proceedings comported with "the fundamental fairness mandated by the Due Process Clause"); *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring) (concluding that procedural safeguards do apply in clemency proceedings); *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) ("When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures.").

When Defendants extended critical procedural protections to a class of death row prisoners, guaranteeing members of that class the ability to prepare for and be adequately represented in their clemency proceedings and pre-execution litigation, they were required to act in accord with the Due Process Clause.

Here, Mr. Pye clearly has established such a liberty interest in his clemency proceedings and pre-execution litigation. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring) ("I do not, however, agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards."); *Yates v. Aiken*, 484 U.S. 211, 218 (1988) (post-

conviction proceedings are subject to due process protections). Moreover, Mr. Pye also has a separate state liberty interest, created by Defendants' Agreement, in adequate representation for all end-stage litigation. *Cooke*, 562 U.S. at 220 ("Whatever liberty interest exists is, of course, a state interest created by California law. There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures."). Accordingly, Defendants' arbitrary deprivation of Mr. Pye's liberty interests violates the Constitution. And where, as here, Defendants' deprivation of Mr. Pye's liberty interests results from arbitrary line-drawing, that inadequate process violates the Constitution and entitles him to the declaratory and injunctive relief he sought below.

In sum, Mr. Pye has demonstrated a probability that this Court will grant certiorari on the question presented by his accompanying petition, and a likelihood of success on the merits of his claims. A stay is necessary and appropriate.

CONCLUSION

Wherefore, for the reasons set forth above and in Mr. Pye's concurrently filed petition for certiorari, this Motion for a Stay of Execution should be granted.

Respectfully submitted this, the 20th day of March, 2024.

/s/ Gretchen M. Stork
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2024, a true and correct copy of the foregoing Petitioner's Motion for a Stay of Execution Pending Certiorari was served electronically via sgraham@law.ga.gov upon Respondent's counsel as follows:

Sabrina Graham
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Dated: This, the 20th day of March, 2024.

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