No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAMIE MILLS,

Petitioner,

v.

JOHN HAMM,
Commissioner of the
Alabama Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

****** Mr. Mills' execution is scheduled from 6:00 p.m. CST on May 30, 2024 until 6:00 a.m. CST on May 31, 2024. ******

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May 29, 2024

CAPITAL CASE

QUESTIONS PRESENTED

Up until Joe James' execution in July 2022, the expectation was that in Alabama, consistent with the prevailing practice, the most overwhelming part of the execution process, when the condemned enters the chamber until the time of death, would take minutes. See, e.g., Arthur v. Comm'r, Ala. Dep't of Corr., 680 F. App'x 894, 913 (11th Cir. 2017) (noting that execution process takes "minutes").

In the last two years, however, the State of Alabama has botched at least four out of the last six executions, forcing condemned prisoners to the execution chamber and strapping them to the execution-gurney for hours. While these executions have been carried out in secret without access to counsel, evidence of this extended execution process has come to light through survivor stories after botched executions as well as from independent autopsies.

Mr. Mills filed a § 1983 complaint requesting very limited and readily implementable modifications to Alabama's current execution process: prohibiting Defendants from unnecessarily restraining Mr. Mills on the execution-gurney while stay litigation is pending, and requiring the State to permit Mr. Mills' legal counsel to be present with phone access in the execution chamber.

These facts give rise to two important constitutional questions:

1. Whether given the unique pattern in Alabama's recent executions, in which Defendants have misrepresented critical facts and prohibited access to courts or counsel, Mr. Mills is likely to succeed on his claim that unnecessary, cruel, and prolonged restraint on the gurney, as well as refusals to provide information regarding ongoing litigation or steps in the execution process violates the Eighth Amendment.

2. Whether, based on this unique and acute context where there can be no enforcement of the relief sought without the presence of counsel, Mr. Mills is entitled to the presence of counsel and access to courts pursuant to the Sixth Amendment and the Due Process Clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Jamie Mills. Respondents are John Hamm, in his capacity as Commissioner of Alabama Department of Corrections, Kay Ivey, in her capacity as Governor of the State of Alabama, Terry Raybon, in his capacity as Warden of Holman Correctional Facility, and Steve Marshall, in his capacity as Alabama Attorney General. No Party is a corporation.

RELATED PROCEEDINGS

State v. Mills, Marion County Circuit Court, No. CC-2004-402. Convicted on August 23, 2007; sentenced on September 14, 2007.

Mills v. State, Alabama Court of Criminal Appeals, No. CR-06-2246. Opinion remanding the case issued June 27, 2008; opinion on return to remand issued September 26, 2008; rehearing denied December 12, 2008.

Ex parte Mills, Alabama Supreme Court, No. 1080350. Opinion issued September 3, 2009; rehearing denied November 24, 2010.

Mills v. Alabama, United States Supreme Court, No. 10-10180. Petition for a writ of certiorari denied June 29, 2012.

Mills v. State, Marion County Circuit Court, No. CC-2004-402.60. Order dismissing majority of claims issued July 19, 2013; order dismissing remainder of claims issued January 14, 2014.

Mills v. State, Alabama Court of Criminal Appeals, No. CR-13-0724. Opinion issued December 11, 2015; rehearing denied February 26, 2016.

Ex parte Mills, Alabama Supreme Court, No. 1150588. Petition for a writ of certiorari denied May 20, 2016.

Mills v. Dunn, United States District Court for the Northern District of Alabama, No. 6:17-cv-00789-LSC. Opinion and order dismissing habeas petition issued November 30, 2020.

Mills v. Commissioner, Alabama Department of Corrections, United States Court of Appeals for the Eleventh Circuit, No. 21-11534. Order denying certificate of appealability issued August 12, 2021; order denying motion for reconsideration issued October 6, 2021.

Mills v. Hamm, United States Supreme Court, No. 21-7109. Petition for a writ of certiorari denied April 18, 2022.

Mills v. State, Alabama Supreme Court, No. 1080350. Order granting State's motion to authorize execution entered March 20, 2024.

Mills v. Hamm, et al., United States District Court for the Middle District of Alabama, No. 2:24-cv-253-ECM. Memorandum Opinion and Order denying motion for preliminary injunction and motion for expedited discovery entered May 21, 2024.

Mills v. Hamm, et al., United States Court of Appeals for the Eleventh Circuit, No. 24-11689. Order denying motion in the alternative for a stay of execution entered May 28, 2024.

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Petitioner Jamie Mills respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama denying Mr. Mills' Motion for Preliminary Injunction and Expedited Discovery is attached as Appendix B. DE 26. The Eleventh Circuit decision affirming the District Court decision is attached as Appendix A. Doc. 16-1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Mr. Mills' Complaint, DE 1, attached as Appendix C, under 28 U.S.C. §§ 1331, 1343(a)(3), 2201(a), and 1367(a) because Mr. Mills asserted four federal claims arising under 42 U.S.C § 1983.

The district court denied Mr. Mills' motions for a preliminary injunction and for expedited discovery on May 21, 2024. DE 26. Mr. Mills filed a timely notice of appeal on May 24, 2024. See DE 27.[1]

[1] "DE" citations are to entries on the docket for the District Court for the Middle District of Alabama in this case. "Doc." citations are to documents filed on the docket of the United States Court of Appeals for the Eleventh Circuit in this case.

The United States Court of Appeals for the Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. Accordingly, this Court retains the power of direct review under 28 U.S.C. § 1291. Thus, this Court has the jurisdiction to review Mr. Mills' appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. Amend. I.

The Sixth Amendment to the United States Constitution provides, in relevant part: "the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. Amend. VI.

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

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Factual Background

Historically, the most overwhelming part of the execution process, when the condemned enters the execution chamber until the time of death, has taken a relatively short period of time, often only minutes. See Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 301 (Tenn. 2005) ("[I]n the execution of Robert Glen Coe in April of 2000[,] Coe entered the execution chamber at 1:07 a.m. and the IV catheters were inserted by 1:21 a.m. . . . the lethal injection drugs were injected at 1:32 a.m. Coe was pronounced dead at 1:37 a.m."); see also California First Amend. Coal. v. Woodford, 299 F.3d 868, 881 (9th Cir. 2002) ("During the Bonin execution, 17 minutes passed between the time Bonin entered the execution chamber and the time the saline solution was set and running . . . during the Williams execution, it took 17 minutes to escort Williams into the chamber, secure him to the gurney and insert the intravenous lines. For the Siripongs execution, the same process took only 10 minutes, and it took about six minutes for the Babbitt execution."); see also Baze v. Rees, 553 U.S. 35, 68 (2008) (Alito, J., concurring) (lethal injection process takes three to 15 minutes).

Up until Joe James' execution in July 2022, Defendant's expectation was that Alabama was aligned with this prevailing practice and that the process would take minutes, as evidenced by the State's media advisory ahead of his execution date. See DE 23-1 ("The execution of Alabama death row inmate Joe Nathan James Jr. (the condemned) is set for 6 p.m. on July 28, 2022 . . . At approximately 6:30

p.m., ADOC officials, along with family members of the victim and condemned, if willing, will return to the Media Center for comment.").

Due to the relative brevity of time spent behind the curtain, Alabama's practice of conducting part of the execution in secret was viewed as a less constitutionally significant part of the execution process. See, e.g., Arthur v. Comm'r, Ala. Dep't of Corr., 680 F. App'x 894, 913 (11th Cir. 2017) (citing "practical difficulties" in advocating mid-execution where execution process takes "minutes").

In the last two years, however, the State of Alabama has extended the execution process, bringing condemned prisoners to the execution chamber and strapping them to the execution-gurney for hours. Placing and holding a condemned individual on the gurney for extended periods of time without any legitimate justification is unnecessarily cruel. While these executions have been carried out in secret without access to counsel, evidence of this extended execution process has come to light through survivor stories and independent autopsies.

A process that is lengthy, adversarial, and without any mechanism to address violations of critical rights, predictably creates a carelessness and disregard for human suffering or compliance with procedures. Most critically, however, the Constitution does not allow for situations in which there is no remedy for constitutional violations—there must be a remedy. The creation of this torturous process is no longer hypothetical, but has occurred in the following executions:

Joe James

In Joe James' July 28, 2022 execution, evidence establishes that Mr. James

was placed on the execution-gurney at 6:23 p.m. but IV access was not established until 8:52 p.m. See DE 15-2. Following Mr. James' execution, Defendant Hamm reported that "nothing out of the ordinary" happened. See PX-19.[2] However, an independent autopsy revealed that during the time he was restrained to the gurney, Mr. James suffered multiple puncture wounds, pools of deep bruising, and cuts indicative of a cut-down procedure. DE 1, at ¶ 110.

It also appeared Mr. James was unconscious when the curtain was opened and that because of this, he was unable to give a last statement. See DE 1, at ¶ 111; see also PX-21. That night, Defendants told reporters that Mr. James was not sedated prior to opening the curtain, however, since that time, ADOC has stated it "cannot confirm" whether Mr. James was fully conscious before the execution. Id.

Alan Miller

During the State's September 22, 2022 attempt to execute Alan Miller, Mr. Miller was restrained to the execution-gurney beginning at 9:55 p.m. but the IV was not installed until 11:20 p.m. Id.

After IV access was achieved, the gurney was tilted in a vertical angle. DE 1, at ¶¶ 58-59.[3] Cynthia Riley, ADOC regional director testified that the gurney is tilted "[s]o that the condemned will have a -- for his last words." DE 25, at 93, attached as Appendix D. She confirmed that there is no other reason why the gurney would be tilted and at multiple times described the procedure as a

[2] "PX" refers to Plaintiff's exhibits admitted at the May 14, 2024 evidentiary hearing before the Middle District Court.

[3] Ms. Riley testified that the execution-gurney cannot be tilted straight up and down, at a 90 degree angle with the floor, but that the gurney can tilt, although she was unable to provide a specific angle. DE 25, at 89-90.

"protocol." Id. at 92-3 ("We have a certain amount of steps that we do with that protocol for that bed.").

While Defendants contended that Alan Miller's execution was called off because of difficulties in establishing IV access, DE 15, at 44, the Execution Log and Ms. Stewart's testimony are inconsistent with this representation. Mr. Miller's IV was established at 11:20 p.m. and according to the Execution Log, he was "ready to push", DE 15-3, meaning that the injection of drugs could begin. Mr. Miller was then raised to give his last statement. This rules out Defendant's assertion that IV access and litigation were the reason his execution could not proceed.

Critically, Mr. Miller remained in this position, on the execution-gurney, cruelly and unnecessarily, for another 28 minutes before his IV was removed. DE 15-3. He was not told what was happening and was worried the execution would proceed without an opportunity to give his last statement. DE 1, at ¶¶ 58-61. He asked an officer to pass on his final words but the officer did not respond. Id. at ¶ 62. During this process Defendants' representatives could be seen observing from an adjacent room, and several were in the chamber itself. Id. at ¶¶ 55-56. Mr. Miller expressed the severe pain he was in from being held in this tilted position for over 20 minutes but no one told him what was happening or responded. Id. at ¶ 63. No "legitimate reason" was revealed for the State's actions in leaving Mr. Miller hanging from the gurney for at least 20 minutes. Miller v. Hamm, 640 F. Supp. 3d 1220, 1242 (M.D. Ala. 2022).

Kenneth Smith

During the State's first attempt to execute Kenneth Smith, Mr. Smith was placed on the gurney at 8:01 p.m. See DE 15-4. Attempts to establish IV access, however, did not begin until 10:20 p.m. Id. During the entirety of the over-two-hour period, Mr. Smith was restrained to the execution-gurney, despite entry of a court-ordered stay at 7:59 p.m. DE 1, at ¶ 31; see also PX-5, at ¶ 152 (Defendants' Answer to Kenneth Smith's Second Amended Complaint: "Admitted that the Eleventh Circuit issued a stay at 7:59 p.m."). Defendants never told Mr. Smith about the stay and did not remove him from the gurney despite requests from Mr. Smith's counsel via email that Defendants stop the execution process while the stay was in place. DE 1, at ¶¶ 32-35. While he was restrained to the gurney for over two hours, with no information, Mr. Smith was afraid that he would be killed without the ability to address his family or the victim's family as planned. Id. at ¶ 36. As the U.S. Supreme Court vacated Mr. Smith's stay at approximately 10:20 p.m., the IV team entered the chamber to begin to establish access. Id. at ¶ 38; see also DE 15-4. Mr. Smith was not told of the U.S. Supreme Court decision to vacate the stay. DE 1, at ¶¶ 38-41; Hamm v. Smith, 143 S. Ct. 440 (2022).

During the prolonged attempts that followed to establish IV access, Mr. Smith requested to speak to his attorneys or the court and provided his district court case number. DE 1, at ¶ 41. After attempts to establish IV access in his arms and hands failed, the IV team tilted the gurney so that Mr. Smith's head was below his feet. Id. at ¶¶ 41-42. No one explained what was happening. Id. at ¶ 43. Several

of Defendants' representatives were present in the chamber during this process with phones. Id. at ¶¶ 41-41, 43; see also DE 25, at 77 (Defendants admitted at the May 14, 2024 hearing that an attorney from the Attorney General's office was present, and that attorneys representing ADOC are typically present with phones).

After Mr. Smith was placed in a tilted position, a member of the IV team approached Mr. Smith with a syringe containing clear liquid. DE 1, at ¶ 45. Mr. Smith believed this injection to be similar to the injection that had reportedly caused Joe James to be sedated and unconscious before the start of his execution, and the injection that was prohibited by the district court. DE 1, at ¶ 47. Mr. Smith repeatedly asked for his counsel and asked the representatives for the State who were present in the chamber to contact the district court. Id. at ¶ 48. The representatives refused and ignored his repeated pleas. Id. at ¶ 49. After multiple attempts to establish IV access failed, a decision was made to stop the execution. Id. at ¶ 50. The execution log provided by Defendants establishes that he was removed from the execution-gurney at 11:32 p.m. DE 15-4. After this botched execution attempt, Defendant Ivey blamed the IV team's inability to establish IV access on litigation: "[J]ustice could not be carried out tonight because of last minute legal attempts to delay or cancel the execution." DE 1, at ¶ 107. The IV team, however, entered the chamber at 10:20 p.m., DE 15-4, over an hour and a half before the execution warrant expired.

James Barber

James Barber was placed on the gurney at 12:14 a.m. but the death warrant

was not read until 1:31 a.m. DE 15-5. Evidence emerged at the May 14, 2024 hearing that his prolonged restraint had nothing to do with efforts to gain IV access and that the IV was placed within minutes of his restraint on the gurney. DE 25, at 74-75, 77-78; see also DE 15-5. Nor was the restraint due to any resistance. Defendants conceded that the cause of his prolonged restraint was a delay in witness transportation and that while the ADOC's own protocol allowed witnesses to be transported prior to placement on the gurney, Defendants' practice is to delay witness transportation from the staging area, over three miles from the prison, until after the condemned is restrained and IV access is obtained. DE 25, at 75, 77-78; DE 15-1, Ala. Dep't. of Corr. Execution Procedures, at 15, 17 (Aug. 2023). Defendants offered no reason for this practice in delaying transporting witnesses.

Kenneth Smith

During Kenneth Smith's nitrogen execution, on January 25, 2024, Mr. Smith was never apprised of the U.S. Supreme Court's denial of his petition for a writ of certiorari and motion for a stay of execution, including a dissenting opinion from one of the justices. DE 1, at ¶ 79; see also Smith v. Hamm, 144 S. Ct. 414 (2024) (Sotomayor, J., dissenting).

Following Mr. Smith's execution, Defendant Marshall gave a press conference in which he described Mr. Smith's execution as "textbook" and consistent with filings made by the Attorney General's office, as well as Mr. Smith's experts. PX-14. Likewise, Defendant Hamm described the execution as "expected." PX-18. In litigation prior to Mr. Smith's nitrogen execution, however, Defendants filed, as an

exhibit, a prior pleading from Mr. Smith in which he referenced an expert report establishing that during a properly executed nitrogen protocol, "at seventeen-to-twenty seconds [the condemned] will lose consciousness." PX-15, at 23.

Witness accounts established this was not the case. The victim's family corroborated the horror of the prolonged process, "We were told by some people that worked [in the prison system] that he'd take two or three breaths and he'd be out and gone. That ain't what happened . . . With all that struggling and jerking and trying to get off that table, more or less, it's just something I don't ever want to see again." PX-16.

Reporter Marty Roney, who witnessed the execution, documented that it took approximately four to five minutes for Mr. Smith to lose consciousness, from 7:57 p.m. to 8:02 p.m., during this time Mr. Smith was convulsing, shaking, and gasping for air. PX-18.

B. Procedural Background

Mr. Mills was convicted of capital murder and sentenced to death in the Marion County Circuit Court in 2007. In a motion for a new trial, on direct appeal, and throughout state postconviction and federal habeas corpus proceedings, Mr. Mills asked prosecutors whether the District Attorney and the State's central witness, JoAnn Mills, truthfully testified that the State offered nothing in exchange for her testimony, and at each stage the State asserted that their testimony was truthful. In reliance on the State's representations, Mr. Mills was denied habeas relief by the Northern District in November 2020, Mills v. Dunn, No.

6:17-CV-00789-LSC, 2020 WL 7038594, at *60, 78-79 (N.D. Ala. Nov. 30, 2020), and was denied a certificate of appealability on August 12, 2021. Mills v. Comm'r, Ala. Dep't of Corr., No. 21-11534, 2021 WL 5107477 (11th Cir. Aug. 12, 2021). The United States Supreme Court denied certiorari on April 18, 2022. Mills v. Hamm, 142 S. Ct. 1680 (2022).

On January 29, 2024, the State filed a motion requesting the Alabama Supreme Court to authorize Mr. Mills' execution. DE 14-1.

On March 7, 2024, Mr. Mills also filed a Response to the State's January 29, 2024, motion to authorize Mr. Mills' execution, requesting that the Alabama Supreme Court deny the motion, or wait to authorize Mr. Mills' execution, until his critical claims of newly discovered evidence could be addressed. DE 14-4.

On March 20, 2024, the Alabama Supreme Court rejected Mr. Mills' request and authorized the Governor to schedule an execution date. DE 14-5. On March 27, 2024, Governor Ivey authorized Defendant Hamm to carry out Mr. Mills' execution to occur beginning at 12:00 a.m. on Thursday, May 30, 2024, and expiring at 6:00 a.m. on Friday, May 31, 2024. DE 14-6.

Following this decision, on April 5, 2024, Mr. Mills filed a Rule 60 motion with the Northern District Court seeking to obtain relief from the court's prior dismissal of his federal habeas petition, which had been premised on the State's misrepresentations that no plea deal existed. The district court set a briefing schedule on April 8 that provided until May 8 for the case to be fully briefed. Order, Mills v. Hamm, Case No. 6:17-cv-00789-LSC, DE 43 (N.D. Ala. Apr. 8, 2024).

Briefing was completed on April 16, 2024. After a month passed with no action by the district court, Mr. Mills filed his motion for a stay. On May 17, 2024, the district court denied Rule 60 relief and the stay motion.

Based on the pending Rule 60 litigation and the pattern established by the State's recent executions, Mr. Mills filed a § 1983 Complaint on April 26, 2024 in the Middle District Court. See DE 1. In the complaint, Mr. Mills raised four claims asserting that he is at imminent risk of being subjected to an unnecessarily prolonged and torturous execution process at the hands of Defendants with unreviewable authority, without the presence of counsel or access to the courts.

In response, Defendants agreed to voluntarily refrain from restraining Mr. Mills on the execution-gurney only during a court-ordered stay and asked the court to dismiss Mr. Mills' complaint. See DE 15.

On May 14, 2024, the district court held a hearing on Mr. Mills' motions for preliminary injunction and expedited discovery. See DE 25, Hearing Transcript. At the hearing, Defendants affirmed that Mr. Mills **will be restrained to the execution-gurney while litigation is ongoing**—Defendant Hamm testified: "If there's no stay in place, then we will move him to the execution chamber." DE 25, at 67; see also id. at 66 ("If there's no stay in place, we will proceed.").

On May 21, 2024, the district court denied Mr. Mills' motion for a preliminary injunction and his motion for expedited discovery. See DE 26. Mr. Mills timely filed a notice of appeal, DE 27, and filed his initial brief on appeal with the Eleventh Circuit on May 24, 2024, doc. 11. On May 28, 2024, the Eleventh Circuit denied Mr.

Mills' alternative request for a stay of execution pending appeal of his request for a preliminary injunction. Doc. 16-1.

REASONS FOR GRANTING THE PETITION

Currently, the risk of unnecessary torture is elevated in the State of Alabama. Five of the last six executions have been marked by unnecessary and prolonged suffering. While State officials declare these executions "textbook," witnesses, including family members of the condemned and of the victims, report that the executions have been horrific and not what the State led them to believe would happen.

Given this unique and recent history, Defendants should allow counsel to be in the chamber with a means to access the courts. There is no way to establish that what occurs is constitutional or humane otherwise. In the lower courts, Mr. Mills has asserted an achievable remedy that is directly tied to the disturbing accounts of recent executions.

Mr. Mills has established that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Ramirez v. Collier, 595 U.S. 411, 421 (2022) (quoting Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008)).

I. UNNECESSARILY RESTRAINING MR. MILLS, WITHOUT ACCESS TO COUNSEL OR ANY MEANS OF KNOWING THE STATUS OF HIS APPEALS, VIOLATES THE EIGHTH AMENDMENT.

Mr. Mills is likely to succeed on his Eighth Amendment claim because, as the Eleventh Circuit acknowledges, the "[i]nfliction of pain is unnecessary and wanton . . . if it 'totally' lacks penological justification." Doc. 16-1, at 6. The Execution Logs and evidence admitted in this case establish that prisoners are held on the execution-gurney for prolonged periods of time for absolutely no reason: Mr. Smith was held on the execution-gurney for over two hours while a court-ordered stay was in place, and *before* the IV team began attempts to establish IV access. DE 1, at ¶¶ 32-38; DE 15-4. Mr. Miller continued to be restrained on the execution-gurney for 28 minutes *after* IV access was established and before his execution was called off. DE 15-3. In Mr. Barber's case, he was held on the execution-gurney, for an hour *after* IV access was established before the curtains were opened. DE 15-5.

"[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty." Ford v. Wainwright, 477 U.S. 399, 405 (1986). Subjecting a condemned prisoner for prolonged periods to the execution-gurney without legitimate reason and without access to counsel causes "unnecessary and wanton pain and suffering," and constitutes cruel and unusual punishment in violation of the Eighth Amendment.

"[B]eing strapped to the gurney for up to four hours and at one point being placed in a stress position for an extended period of time, goes 'so far beyond what [is] needed to carry out a death sentence that [it] could only be explained as

reflecting the infliction of pain for pain's sake.'" Smith v. Hamm, No. 2:22-CV-497-RAH, 2023 WL 4353143, at *7 (M.D. Ala. July 5, 2023) (internal citation omitted); see also Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("The use of the hitching post" for hours on end "unnecessar[ily] and wanton[ly] inflicted pain, . . . and thus was a clear violation of the Eighth Amendment.") (internal citations and quotations omitted); Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974) (finding that "handcuffing inmates to the fence and to cells for long periods of time . . . forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" violates the Eighth Amendment).

Mr. Mills is not requesting "avoidance of all risk of pain in carrying out executions," as characterized by the Eleventh Circuit. Doc. 16-1, at 6 (quoting Baze v. Rees, 553 U.S. 35, 47 (2008)). Instead, he is requesting that executions in Alabama be carried out in a manner that at a minimum honors the fundamental concept of dignity that underlies the Eighth Amendment. Hope, 536 U.S. at 738 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)) (finding restraint "under these circumstances violate[s] the 'basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man.'"). The Eleventh Circuit's characterization of the execution process, that Defendants will "merely [ ] place[ ] him on a gurney in preparation for execution," doc. 19-1, at 6, or Defendants' disingenuous description of the gurney as "a bed equipped with straps and a pair of padded arm boards, housed in a climate-controlled building," doc. 12, at 18, ignores the disturbing reality of Alabama's recent executions and the very real torture that

a condemned prisoner experiences in the *unnecessary* and prolonged restraint to the execution-gurney that occurs in Alabama.

This Court has long-recognized that the uncertainty of waiting in prison under the threat of execution is "one of the most horrible feelings to which [a person] can be subjected." In re Medley, 134 U.S. 160, 172 (1890). The dehumanizing effect of restraining a condemned person unnecessarily on the execution gurney for prolonged periods is undeniable. In re Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."). This has likewise been recognized by experts in military and war-related torture, including by an expert who evaluated Kenneth Smith after his November 2022 botched execution: "What Kenny Smith experienced was one of the most severely debilitating traumas a person can endure—that of being purposely brought almost to the point of death . . . The experience of anticipating one's death in real time has been shown to flood the body with neurophysiological survival responses that involve cardiac, respiratory, gastrointestinal, perceptual, and cognitive reactions in the short term and potential long-term changes in neurochemical functioning." DE 23-6, Report of Psychological Evaluation by Dr. Katherine Porterfield, at 29 (Nov. 17, 2023).

Defendants have established that Mr. Mills will be restrained to the execution-gurney during pending litigation, DE 25, at 66-67, confirming that Mr. Mills' execution will be more akin to Mr. Smith's prolonged confinement to the

gurney during his stay of execution. This factor was not present in Mr. McWhorter's execution—he had no pending litigation by the afternoon of his execution.

Mr. Mills has established the "risk of particular discomfort and humiliation" that will occur to him, with no penological justification. Hope, 536 U.S. at 738; see also Farmer v. Brennan, 511 U.S. 825, 833 (1994) (whether conduct serves "legitimate penological objectiv[e]" interest is part of analysis in determining whether conduct at issue is "gratuitous" or unnecessary.).

In addition to prolonged and unnecessary restraint to the execution-gurney, the lack of information both in the execution process and regarding ongoing litigation creates an execution process that violates the Eighth Amendment: Mr. Mills has pointed to Kenneth Smith's distress that he would be unable to address his witnesses or his family. DE 1, at ¶ 36. He asked officers where his witnesses were and feared they would not make it in time. Id. Mr. Smith was provided no information about what was happening or why he was held on the execution-gurney—he also had no knowledge that a court-ordered-stay was in place. Id. at ¶¶ 35–36. When Mr. Smith believed the Defendants were violating the district court's order prohibiting intramuscular sedation, and repeatedly asked for his counsel or for Defendants' representatives in the chamber to contact the court, the representatives refused and ignored his pleas. Id. at ¶¶ 45-49. After his execution was called off, Mr. Smith was unable to move his arms, stand, walk, or dress himself without assistance. Id. at ¶ 51. Because this entire process is carried out in secret without counsel, Mr. Smith's counsel was left without information as to the

status or condition of Mr. Smith, even after emailing Defendants' attorneys seeking this information. Id. at ¶ 52. At no point during this process were Defendants seeking to protect Mr. Smith's dignity and Eighth Amendment rights and instead sought to increase his "discomfort and humiliation." Hope, 536 U.S. at 738.

Mr. Mills also pointed to Alan Miller's treatment in which he was left hanging from the execution-gurney for over 20 minutes after attempts to establish IV access were abandoned. See DE 1, at ¶ 59. No one explained what was happening and Mr. Miller was deeply distressed that he would be unable to give his last statement. Id. at ¶¶ 60–61. He asked for information or to pass on his last words and officers in the chamber did not respond. Id. at ¶ 62. He expressed the severe pain and discomfort that he was experiencing from the position he was restrained in, while no IV access was being attempted, but no one took action or explained what was happening. Id. at ¶ 63. None of this treatment can legitimately be characterized as necessary or anything other than aimed at creating "discomfort and humiliation." Hope, 536 U.S. at 738.

Mr. Mills' request that Defendants refrain from restraining him to the execution-gurney for no reason is limited and reasonable. Defendants' unwillingness to comply with such an achievable and humane request indicates the culture that has developed in Alabama around executions, and is fostered by a total lack of accountability.

II. DEFENDANTS' TOTAL BAN ON ACCESS TO COUNSEL AND TO THE COURTS IN THE EXECUTION CHAMBER IS UNREASONABLE.

In its opinion, the Eleventh Circuit failed to address the merits of Mr. Mills' access to courts claim, simply finding it unlikely to succeed based on the court's erroneous finding that Mr. Mills was not likely to "succeed on the merits of his other claims." Doc. 16-1, at 8.

In the pleadings before the Eleventh Circuit, Defendants argued that the factors in Turner v. Safley, 482 U.S. 78 (1987) weigh against Mr. Mills because the relief Mr. Mills seeks would jeopardize the confidentiality of execution team members' identities. Doc. 12, at 31-31. This argument is supported solely by speculation and conjecture that attorneys would illegally disclose privileged information. Id. Defendants dismiss the relevance of other states who have been able to accommodate counsel in the chamber without jeopardizing these security concerns. Id. Defendants, however, cannot point to a single instance in which an attorney violated a confidentiality agreement or protective order.

Defendants further fail to establish how their security concerns are not alleviated by a confidentiality agreement and access to a landline, in place of a cell phone with recording capabilities. Defendants simply assert that "[a]dding an *adverse* attorney to the chamber and giving him or her unrestricted ability to observe the IV team and execution team would jeopardize the confidentiality of the process, the safety of the prison, and the State's future ability to carry out judicial executions." Doc. 12, at 31. Such categorical bars have been rejected in the spiritual advisor context:

> Alabama mainly asserts the need to close the execution chamber to all but those whom the warden has found "trustworthy." . . . But that does not justify the State's categorical bar. Alabama can take any number of measures to ensure that a clergy member will act responsibly during an execution. The State can do a background check on the minister; it can interview him and his associates; it can seek a penalty-backed pledge that he will obey all rules. . . What the State cannot do, consistent with strict scrutiny, is simply presume that every clergy member will be untrustworthy—or otherwise said, that only the harshest restriction can work. . . Relatedly, Alabama identifies "disturbances [that] have arisen around executions in the past." . . . But its two examples concern close family members of inmates. The State cannot jump from those (dissimilar) incidents to a conclusion that even well-vetted clergy members risk disrupting an execution.

Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (Kagan, J., concurring in denial of application to vacate injunction, joined by Breyer & Sotomayor & Barrett, JJ.); see also Smith v. Comm'r, Ala. Dep't of Corr., 844 F. App'x 286, 293 (11th Cir. 2021) (finding "ADOC failed to meet its burden to show its current policy is the least restrictive means of furthering its compelling interest in maintaining security").

Defendants then cite to other cases in which counsel for Mr. Smith and Mr. Miller filed pleadings following their "aborted executions in 2022," which "described individuals present in the chamber and their alleged conversations." Doc. 12, at 31. At the time of these filings, however, no protective or confidentiality agreements were in place. Alan Miller filed his Second Amended Complaint following his botched execution on October 12, 2022. See Second Amended Complaint, Miller v. Hamm, Case No. 2:22-cv-506, Doc. 85 (M.D. Ala. Oct. 12, 2022). Defendants sought a protective order over two weeks later, on October 27, 2022. See Motion for Protective Order, Miller v. Hamm, Case No. 2:22-cv-506, Doc. 102 (M.D. Ala. Oct. 27, 2022). In Kenneth Smith's case, he filed his Second Amended Complaint,

following his botched execution, on December 6, 2022. See Second Amended Complaint, Smith v. Hamm, Case No. 2:22-cv-497, Doc. 71 (M.D. Ala. Dec. 6, 2022). **Defendants never sought a protective or confidentiality order as part of this case**, indicating that disclosure of the information in Mr. Smith's complaint, regarding what occurred in the chamber, was not sufficiently concerning to warrant the need for such an order or that the effects were not so concerning to the Defendants.

More importantly, Defendants' reference to these cases have no bearing on Mr. Mills' attorneys ability and willingness to comply with a protective order. Were counsel to breach these terms, such conduct would be readily reviewable, and sanctionable. Further, the examples cited involving Miller and Smith were not the result of attorneys in the execution chamber leaking information, but were the result of condemned prisoners who survived execution attempts reporting what they endured. Presence of counsel with a confidentiality or protective agreement would ensure that such issues would not repeat themselves.

As to the other Turner factors, the "deference" Defendants assert they are entitled to, doc. 12, at 29, only exists where there are alternative means to exercise the right at issue. Turner, 482 U.S. at 90 ("Where 'other avenues' remain available for the exercise of the asserted right . . . courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'") (internal citations omitted). Here, Defendants' total bar on a prisoner's access to their counsel or to the courts in the execution chamber

undermines the need to defer to Defendants in gauging the validity of the requirements. Additionally, "the existence of obvious, easy alternatives [to the restriction] may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." Id. at 90. The ability to have counsel in the chamber with a confidentiality agreement in place and access to a phone without recording capabilities, directly undermines the rationality of a total prohibition on access to counsel and the courts. At the May 14, 2024 hearing, Defendants further conceded that it is possible to have counsel in the chamber if an officer "s[a]t there with the attorney and ma[d]e sure that the attorney did not take improper recordings or have improper contact with the inmate." DE 25, at 82-83.

Additionally, it is possible to maintain Defendants' interests through less restrictive means, as demonstrated by the presence of attorneys for Defendants, with phones, in the execution chamber. DE 25, at 77. Other jurisdictions are also instructive as to the feasibility of such measures—and the fact that a prohibition is not necessary to protect the concerns at issue. Ramirez v. Collier, 595 U.S. 411, 444 (2022) (Kavanaugh, J., concurring) (citing to other jurisdictions' practices of allowing a prisoner's religious advisor "into the execution room" as influencing the Court's analysis and demonstrating "less restrictive alternatives could still satisfy the State's compelling interest").

Other jurisdictions have maintained security and decorum while allowing counsel to be present throughout the execution process and with access to a phone to petition the court to protect Eighth Amendment and Due Process rights. See, e.g.,

Coe v. Bell, 89 F. Supp. 2d 962, 967 (M.D. Tenn. 2000), vacated on other grounds, 230 F.3d 1357 (6th Cir. 2000) (finding plaintiff has the right under the First, Eighth and Fourteenth Amendments to have access to his counsel during the last hour before the execution and to have counsel witness the execution with access to a telephone); see also McGehee v. Hutchinson, 463 F. Supp. 3d 870, 922 (E.D. Ark. 2020), aff'd sub nom. Johnson v. Hutchinson, 44 F.4th 1116 (8th Cir. 2022) ("Director Kelley testified that she allowed two attorney witnesses to be present for each execution in April 2017, and the Deputy Director of the ADC held a cell phone that did not have a camera provided by the attorney witnesses and that was given to the attorney witnesses to use, if requested. Director Kelley was not aware of any issues with that practice during the April 2017 executions."); Zagorski v. Haslam, No. 3:18-CV-01205, 2018 WL 5454148, at *4 (M.D. Tenn. Oct. 29, 2018), aff'd, 741 F. App'x 320 (6th Cir. 2018) (enjoining the State "from proceeding with the plaintiff's execution unless his attorney-witness is provided with immediate access to a telephone during the time preceding and during the execution" to ensure right of access to ok the courts); Cooey v. Strickland, No. 2:04-CV-1156, 2011 WL 320166, at *7 (S.D. Ohio Jan. 28, 2011) (finding "there is unquestionably a right to access the courts involved in the context of executions that inherently injects the issue of access to counsel into this discussion" and that the ability to communicate with counsel throughout the execution is what "makes the presence of counsel of any potential value" and "renders meaningful the ability of counsel to access a court on an inmate's behalf").

In Coe, the Middle District of Tennessee held that "[t]he state certainly has no legitimate interest in depriving the Plaintiff of access to the courts to assert a claim of cruel and unusual treatment" and that "**the public interest is best served by insuring that executions are carried out in a constitutional manner**." Coe, 89 F. Supp. 2d at 966 (emphasis added); see also id. ("given society's (and the state's) interest in assuring that capital punishment is carried out in a humane manner and the minimal inconvenience to the state, this court finds the plaintiff's position well taken"). The court reaffirmed this in 2018 in Zagorski, a decision that was affirmed by the Sixth Circuit. Zagorski, 2018 WL 5454148, at *4.

III. MR. MILLS HAS A CONSTITUTIONALLY PROTECTED RIGHT TO THE ASSISTANCE OF HIS COUNSEL IN THE EXECUTION CHAMBER.

Whether a right to counsel exists requires an "examination of the event [at issue] in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." United States v. Ash, 413 U.S. 300, 313 (1973). An examination of the event at issue here—the prolonged period of restraint in the execution chamber after all access to counsel is cut off, while stay litigation is pending, and while attorneys for the State are present and attorneys for the condemned are prohibited—demonstrates the need for the assistance of counsel.

The Eleventh Circuit failed to address the unique features of Alabama's execution process that require the presence of counsel. Mr. Mills' claim is not that as a matter of right in all states, an execution is a "proceeding to which the Sixth Amendment extends the right to counsel." Doc. 16-1, at 5-6. Instead, his claim is

limited to the facts and circumstances at issue in Alabama where Defendants, represented by counsel, engage in adversarial conduct over a prolonged period of time with no regard for the rights of the condemned and without the presence of an attorney. This is the only period Mr. Mills has to obtain review of Defendants' compliance with procedures and the Constitution and Defendants will not recognize his own efforts to advocate for himself, as demonstrated by the first attempted execution of Kenneth Smith. Before Kenneth Smith's November 2022 execution date, the district court ordered ADOC not to employ a cutdown procedure or intramuscular sedation during Mr. Smith's execution and warned that "[s]anctions will be swift and serious if counsel and the Commissioner do not honor or abide by their representations and stipulations." Smith v. Hamm, No. 2:22-CV-497-RAH, 2022 WL 10198154, at *5 (M.D. Ala. Oct. 16, 2022). Mr. Smith attempted to monitor the State's compliance and when he believed the State was attempting to sedate him, he asked the State's representatives "if they had any authority to call the Court to report that his constitutional rights were being violated; they did not respond." PX-9, ¶¶ 183-84. He asked to speak to his lawyers or the court and provided his district court case number. Id. at ¶ 186. Defendants' representatives refused and ignored his repeated pleas. Id. at ¶¶ 201-02.

Without the presence of counsel, Mr. Smith had no means of monitoring or compelling Defendants' compliance with the district court's order prohibiting Defendants from using intramuscular sedatives. This Court has recognized that the

subjective ability of a defendant to advocate for himself is a relevant factor in assessing the need for counsel:

> Although the accused was not confronted [in the lineup at issue in United States v. Wade, 388 U.S. 218 (1967)] with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial.

Ash, 413 U.S. at 312-13.

In Ash, this Court found that the Sixth Amendment right to counsel addresses two concerns: (1) "the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system" and (2) "a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." Id. at 307-09; see also Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) ("It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."). While in Ash this Court found that a photo array was not a critical stage because the "the opportunity to cure defects at trial causes the confrontation to cease to be 'critical,'" Ash, 413 U.S. at 316, here there is no opportunity to cure.

In Wade, this Court found that its Sixth Amendment jurisprudence easily allowed extension of counsel to an in-person lineup. The similarity to trial was apparent, and counsel was needed to render assistance in counterbalancing any

"overreaching" by the prosecution. United States v. Wade, 388 U.S. 218, 235 (1967) (recognizing right to counsel in order to protect constitutional rights beyond just right against self-incrimination). This Court noted that the need for counsel's presence is linked, not just to protect against self-incrimination, but to protect other constitutional rights that may be encroached upon by the State: "[N]othing decided or said . . . links the right to counsel only to protection of Fifth Amendment rights." Id. at 223–24, 226 (internal citations omitted).

As demonstrated by Defendants' refusal to contact counsel or the court when requested by Mr. Smith, prisoners in Alabama "only have this fundamental access to the courts if they have access to their counsel because it is not Plaintiffs but their counsel who would contact a court if needed during the events immediately preceding and constituting the actual execution." Cooey, 2011 WL 320166, at *9; see also id. at *11 ("Passive observation without necessary communication undercuts meaningful access to the courts.").

The Eleventh Circuit relies on Whitaker v. Collier, doc. 16-1, at 6, for the proposition that the Sixth Amendment "'right to appointed counsel extends to the first appeal, and no further,'" 862 F.3d 490, 501 (5th Cir. 2017) (quoting Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). Finley, however, held only that "a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review," Coleman v. Thompson, 501 U.S. 722, 756 (1991), and did not address the issue of whether condemned prisoners have a Sixth Amendment right to the presence of retained counsel during the execution.

Whitaker is also distinguishable because in that case, the Fifth Circuit found that plaintiffs failed to meet the pleading requirements for an Eighth Amendment method of execution claim because plaintiffs had not asserted factual allegations establishing the likelihood of something going wrong during the execution that access to counsel could address. Whitaker, 862 F.3d at 501. In contrast here, Mr. Mills has established that Defendants unnecessarily restrain prisoners on the execution-gurney with wanton disregard for the suffering this causes, and that Defendants will subject him to an intolerable risk of torture, cruelty, or substantial pain while litigation is pending. DE 25, at 66-67.

Further, Defendants' concerns regarding confidentiality and security are unfounded. Counsel can enter into a confidentiality agreement regarding the identities of the IV team and following security protocols, as presumably other persons present in the chamber do. See, e.g., Lopez v. Brewer, 680 F.3d 1084, 1089 (9th Cir. 2012), Berzon, J. concurring in part, dissenting in part ("The state's interest in maintaining the confidentiality of IV Team members also cannot justify this restriction, as facility chaplains are assured access on the morning of the execution under the new protocol; presumably, chaplains are as observant as lawyers regarding who is present at the site of the execution. Moreover, the attorneys for condemned prisoners in Arizona have been required to agree to confidentiality regarding the identity of the individuals preparing to carry out the execution before obtaining access to their clients and have done so—without, as far as the record shows, any breaches in confidentiality.")

Mr. Mills requires the presence of counsel to effectuate his right of access to the courts, to enforce his Eighth Amendment rights, and to communicate with him about pending litigation. Counsel is necessary to ensure that these rights are protected and to petition the courts in the event Defendants proceed as they have in the recent past. Without counsel present, Mr. Mills will be in the same position Mr. Smith was in, unable to access the courts should Defendants unnecessarily subject him to prolonged restraint on the execution-gurney or proceed with the execution process while a stay has been ordered. Mr. Mills has established a reasonable likelihood that he will prevail on this claim.

IV. THE EQUITIES WEIGH IN MR. MILLS' FAVOR.

The relief Mr. Mills seeks—an injunction prohibiting Defendants from unnecessarily restraining Mr. Mills on the execution-gurney while stay litigation is pending or without legitimate reason and with wanton disregard for his suffering, and ordering the State to permit Mr. Mills' legal counsel to be present with phone access in the execution chamber—is limited and readily implementable before his May 30, 2024 scheduled execution. Other jurisdictions provide attorney access in recognition of the need to enforce a condemned prisoner's constitutional rights. See, e.g., PX-13, Tennessee Execution Protocol, at 65 (July 2018) (providing for presence of defense counsel in execution chamber during placement on gurney and initiation of IV).

Already in response to this lawsuit, Defendants have agreed to not place Mr. Mills on the execution-gurney while a court-ordered stay is in place, DE 15, at 3,

which demonstrates how straightforward Mr. Mills' limited requests are. To undertake the equities analysis as if Mr. Mills needed a stay of execution at the time of his request was legal error. The record here established that the relief Mr. Mills seeks is imminently feasible with limited burden being placed on Defendants, and no burden placed on the victims.

First, Defendants have cited no reason for placing a condemned prisoner on the execution-gurney while stay litigation is pending. And Defendants admit that placing Mr. Mills or taking him off the gurney is imminently feasible: Defendant Hamm testified that Mr. Mills would be taken off the gurney if a stay is entered. See DE 25, at 62.

Second, with regard to the presence of counsel, Defendants cited two potential burdens the requested relief would impose. First, a "restructuring of resources to accommodate an attorney—particularly one with a cellphone capable of capturing photos and videos." See DE 26, at 54. The Eleventh Circuit did not address in any way Mr. Mills' concession that, "[t]he phone doesn't have to be a cell phone with recording capabilities, just the ability to communicate with the legal team and the courts." DE 25, at 97-98. Second, Defendants cited the need to protect the identities of the execution team but cited no reason why the same measures taken to ensure that other persons in the chamber—the IV Team, officers, State's attorneys, and spiritual advisor—cannot apply to counsel for Mr. Mills. Counsel's compliance with these measures, unlike Defendants' compliance with the Constitution when the execution proceedings are conducted in secret, is readily

reviewable. This Circuit and the Supreme Court have rejected such categorical bars in the spiritual advisor context:

> Alabama mainly asserts the need to close the execution chamber to all but those whom the warden has found "trustworthy." . . . But that does not justify the State's categorical bar. Alabama can take any number of measures to ensure that a clergy member will act responsibly during an execution.

Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (Kagan, J., concurring in denial of application to vacate injunction, joined by Breyer & Sotomayor & Barrett, JJ.).

The Eleventh Circuit found that it was irrelevant that Mr. Mills "does not 'need' a stay." Doc. 16-1, at 9. This reasoning, however, is contrary to this Court's precedent. See Ramirez v. Collier, 595 U.S. 411, 433 (2022) (finding that "**the balance of equities and public interest tilt in Ramirez's favor [because] Ramirez 'does not seek an open-ended stay of execution.'** . . . Rather, he requests a tailored injunction") (emphasis added).

Because Defendants could have immediately implemented the relief requested without any delay to the scheduled execution date, to undertake the equities analysis only as if Mr. Mills were seeking a stay of execution was legal error. In cases in which the State and victims' interests in carrying out an execution weighed heavily, the plaintiff's request would have prohibited the execution from moving forward, as opposed to "merely [ ] effect[ing] an alteration of the manner in which it is carried out." Ledford v. Comm'r, Ga. Dep't of Corr., 856 F.3d 1312, 1320 (11th Cir. 2017) (quoting Jones v. Allen, 485 F.3d 635, 640 (11th Cir. 2007)) (challenging lethal injection protocol and seeking a stay of execution); see also

Brooks v. Warden, 810 F.3d 812, 824-25 (11th Cir. 2016) (finding equities not to lie in plaintiff's favor where relief sought would bar entire method and where stay is sought and necessary for requested relief); Jones, 485 F.3d at 641 (finding equities not to tilt in Plaintiff's favor where "to allow Jones to proceed on his § 1983 challenge in district court, the implementation of the State's judgment would be delayed many months, if not years. Jones, in essence, would receive a reprieve from his judgment"); Diaz v. McDonough, 472 F.3d 849, 851 (11th Cir. 2006) (finding equities do not support injunction motion filed three days before execution where execution cannot proceed under relief sought). In those cases, the harm was that the execution could not take place as scheduled with the relief requested. Id.; see also Bucklew v. Precythe, 587 U.S. 119, 141 (2019) (citing plaintiff's failure to identify a "feasible" or "readily implemented," alternative such that the execution could proceed).

By treating Mr. Mills' motion as requiring a stay of execution, the lower court's equitable weighing was clearly incorrect. Smith, 844 F. App'x at 288 (quoting Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1226 (11th Cir. 2005) (per curiam)) (reversal of district court's preliminary injunction required "if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect.").

In Willie Smith's case, Mr. Smith sought an order from the district court enjoining Defendants from executing him without his pastor present. Id. at 293-94.

Mr. Smith filed his request several weeks prior to his execution, and the Eleventh Circuit found that while it was possible that Mr. Smith could have brought the action earlier, "delay is not dispositive." Id. at 294; see also Nelson v. Campbell, 541 U.S. 637, 646 (2004) (finding delay not to be dispositive where "Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled."). Given the ability to move forward with Mr. Smith's execution with Mr. Smith's pastor present, the court found that the irreparable injury to Mr. Smith and the public interest in carrying out constitutional executions outweighed any harm to the State or to the victims. Id. at 294-95. The Eleventh Circuit therefore reversed the district court's denial of Mr. Smith's motion for injunctive relief and granted an "injunction requiring the ADOC to permit Smith to have Pastor Wiley present in the execution chamber at the time of execution." Id. at 295; see also id. at 292 ("unless the ADOC has proved that it cannot accommodate Pastor Wiley's presence in the Smith's execution chamber, it must allow him to be there"). This did not require the court to stay Mr. Smith's execution, as this decision was reached the day prior to his execution with sufficient time for Defendants to comply with the injunction. Because, however, the Defendants appealed the ruling to thisCourt, the State created an untenable situation where they were unable to carry out Mr. Smith's execution as scheduled.[4]

[4] The State's ready implementation of the Eleventh Circuit's ruling after the Supreme Court declined to vacate the injunction demonstrates just how achievable Mr. Smith's request was in the time before his execution. See Supreme Court's ruling Exhibit A to Defendants' Notice of Execution Motion, Smith v. Dunn, No. 2:21-cv-99, Doc. 36-1 (M.D. Ala. July 6, 2021) (seeking new execution date after amending protocol "to allow [Smith's] spiritual advisor to minister to him in the chamber."); see also Dunn v. Smith, 141 S. Ct. 725, 726–27 (2021) (Kavanaugh, J.,

This Court, however, denied the State's motion to vacate the injunction. Dunn v. Smith, 141 S. Ct. 725 (2021). Neither the Eleventh Circuit nor this Court balanced the delay caused by the State's continued litigation and unwillingness to comply with the Eleventh Circuit's injunction *against* Mr. Smith. That is precisely, however, what the district court, and Eleventh Circuit, did in Mr. Mills' case. See Doc. 16-1, at 8-10; see also DE 26, at 28 ("according to Mills, the Defendants could easily implement his requests for relief prior to his May 30 execution. This argument misses the mark because it ignores that thirty-four days is woefully insufficient to fully litigation these issues").

Additionally, the Eleventh Circuit's finding that Mr. Mills' claims would have been ripe before the facts giving rise to his Rule 60 motion emerged and before it became clear that litigation in that case was likely to be ongoing on May 30 ignores controlling law. Doc. 16-1, at 9-10. A lawsuit filed by a condemned prisoner who had no claims pending in any court and no execution date would be dismissed for lack of standing.

> While we assume that Arthur retains his constitutional right of access until the completion of any execution, Arthur has not offered anything more than the speculative, conjectural possibility that something might go wrong during his execution which would subject him to cruel and unusual punishment in violation of the Eighth Amendment and that therefore [his friend-witness] must have a cell phone in the viewing room to call a court to present an Eighth Amendment claim.

Arthur, 680 F. App'x at 909; see also Defendants Motion to Dismiss, Miller v.

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dissenting) ("States that want to avoid months or years of litigation delays because of this RLUIPA issue **should figure out a way to allow spiritual advisors into the execution room, as other States and the Federal Government have done.**") (emphasis added).

Hamm, et al., 2:24-cv-197, Doc. 30, at 8 n. 1 (M.D. Ala. April 29, 2024) ("The *only* way that Miller would be subjected to further risk of harm or injury is if the Alabama Supreme Court issued an execution warrant. To that end, **Miller's complaint also appears to be unripe, seeking only hypothetical relief** against actions that none of the Defendants can currently undertake.") (bold emphasis added); Arthur, 680 F. App'x at 909 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)) ("While standing may be based on an imminent injury, that injury must still be concrete and particularized, as opposed to conjectural or hypothetical."). The district court in its order acknowledged the requirement that Mr. Mills demonstrate an "injury in fact," to establish standing. DE 26, at 20 (finding Mr. Mills has standing and citing Smith v. Comm'r, Ala. Dep't of Corr., 2021 WL 4817748, at *3 (11th Cir. Oct. 15, 2021); Moody v. Holman, 887 F.3d 1281, 1286 (11th Cir. 2018)).

Finally, "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 quotations and citation omitted). Allowing counsel to be part of these proceedings will not overly burden the State, but will help ensure that the factual record is clarified and subject to checks on the State's misrepresentations. Gardner v. Florida, 430 U.S. 349, 356 (1977) (where sentencing process not undertaken with transparency or access to counsel, there exists "no [] opportunity for petitioner's counsel to challenge the accuracy or materiality of [] information"). Mr. Mills' "'proposal [is] sufficiently detailed to permit a finding that

the State could carry it out "relatively easily and reasonably quickly.'" Bucklew v. Precythe, 587 U.S. 119, 141 (2019) (quoting McGehee v. Hutchinson, 854 F. 3d 488, 493 (8th Cir. 2017)).

The Eleventh Circuit did not undertake a meaningful weighing of the equities and instead focused entirely on what it found to constitute "inequitable conduct" due to Mr. Mills' purported delay in filing. Doc. 16-1, at 8; see also id., at 10 (noting Mr. Mills' filing was made "on the cusp of a three-day-holiday weekend."). Mr. Mills earnestly seeks the relief he is requesting and will undeniably suffer at the hands of Defendants if this Court does not intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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