

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

APPLICATION FOR STAY OF EXECUTION

****** 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. ******

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

Jamie Mills respectfully requests that this Court stay his execution pending the disposition of his petition for writ of certiorari that he is filing contemporaneously with this application.

Given the unique and disturbing pattern of recent executions in Alabama, Mr. Mills requires a stay of execution to ensure that he is not restrained to the

execution-gurney for prolonged and unnecessary periods of time, and with wanton disregard for his suffering, and that he is provided access to counsel and to the courts, to receive information about the execution process and ongoing litigation. Access to counsel and the courts is also necessary to ensure some mechanism for accountability and a remedy for constitutional violations. Currently, a substantial portion of the execution process occurs in secret—and, where misconduct and torturous treatment *has* occurred, Defendants have misrepresented the facts and were never held accountable.

Although Mr. Mills did not require a stay of execution at the initiation of this litigation, as the remedy he requests was readily available and possible to implement before his scheduled execution, Mr. Mills now requires a stay in order to prevent what could become a long and torturous night without this Court’s intervention. Ramirez v. Collier, 595 U.S. 411, 433 (2022) (where petitioner “request[ed] a tailored injunction” that did not require a stay, the balance of equities and public interest “tilt” in petitioner’s favor); 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.”).

In determining whether Mr. Mills is entitled to a stay of execution, this Court considers the following factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

Id. at 434 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The third and fourth factors “merge when the Government is the opposing party.” Id. at 435; see also Swain v. Junior, 958 F.3d 1081, 1091 (11th Cir. 2020).

As this Court held in Barefoot v. Estelle, a stay should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve.” 463 U.S. 880, 888 (1983), superseded on other grounds by 28 U.S.C. § 2253(c). A stay of execution should be issued when a court cannot “resolve the merits [of a claim] before the scheduled date of execution . . . to permit due consideration of the merits.” Id. at 889; see also 28 U.S.C. § 2101(f); Sup. Ct. R. 23.

ARGUMENT

I. MR. MILLS IS LIKELY TO PREVAIL ON HIS § 1983 CLAIMS.

First, Mr. Mills is likely to prevail on his Eighth Amendment claim. As pleaded in his accompanying petition for a writ of certiorari, Mr. Mills has demonstrated that in Alabama’s most recent executions, Defendants have subjected condemned prisoners to an unnecessarily prolonged and torturous execution process, without any regard for the suffering the process *unnecessarily* causes. See, e.g., DE 15-5, 15-4, 15-3, 15-2 (Defendants’ Execution Logs admitted in this case).

Defendants have also established that Mr. Mills will be restrained to the execution-gurney while litigation is pending: “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.”).

Restraining a condemned person on the execution-gurney for a prolonged period, without legitimate reason and without access to counsel or an enforcement mechanism, constitutes the gratuitous infliction of wanton and unnecessary pain in violation of the Eighth Amendment. See, e.g., Smith v. Hamm, 2023 WL 4353143, at *7 (M.D. Ala. July 5, 2023) (alterations in original) (quoting Bucklew, 587 U.S. at 137) (“being 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.”); 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).

In addition, Mr. Mills has demonstrated that he requires the presence of counsel and access to the courts to ensure his Eighth Amendment rights are protected and to provide a remedy in the event his rights are violated. Defendants’ presence and assurances do not assuage any of Mr. Mills’ concerns based on their conduct in Alabama’s most recent executions and direct misrepresentations about the events. He similarly has demonstrated that 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 unique need for counsel in the current context of Alabama's most recent executions is illustrated by Kenneth Smith's attempts to ensure the process complied with the district court's order prohibiting the use of intramuscular sedation and Defendants' refusal to respond to his requests for information or to contact his attorneys or the court. PX-9, ¶¶ 183-202. Mr. Mills is entitled to counsel at his execution pursuant to the Sixth Amendment because he "require[s] aid in coping with legal problems or assistance in meeting his adversary." United States v. Ash, 413 U.S. 300, 313 (1973).

II. MR. MILLS WILL BE IRREPARABLY HARMED ABSENT A STAY.

Mr. Mills will be irreparably harmed absent a stay because he likely will be subjected to an unnecessarily prolonged and torturous execution process. Nken v. Holder, 556 U.S. 418, 435–36 (2009); see also DE 25, at 66-67. While Defendants may carry out Mr. Mills' execution, Defendants do not have the right to unnecessarily torture Mr. Mills during the process. Bucklew, 587 U.S. at 137 (Punishments historically "understood to be cruel precisely because . . . they went so far beyond what was needed to carry out a death sentence.").

The harm of an unnecessarily torturous execution, punctuated by the terror accompanied by a total lack of information as to the process, to the status of appeals, or to a means to remedy constitutional violations simply cannot be remedied through monetary means after the fact. Ramirez, 595 U.S. at 433 (finding

irreparable harm where “[c]ompensation paid to his estate would not remedy this harm”). “There is no do-over in this scenario.” Smith v. Comm’r, Ala. Dep’t of Corr., 844 F. App’x 286, 294 (11th Cir. 2021) (finding irreparable harm to outweigh any allegations of delay where “ADOC will likely execute Smith” without relief on his meritorious claim); see also Dunn v. Smith, 141 S. Ct. 725 (2021) (denying State’s application to vacate stay).

III. THE PUBLIC INTEREST IS IN MR. MILLS’ FAVOR.

The public interest is unquestionably in Mr. Mills’ favor. “[T]he 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); see also Labrador v. Poe by & through Poe, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring, joined by Alito & Thomas, JJ.) (public interest aligns with constitutionality of actions or law); Smith, 844 F. App’x at 294 (recognizing that “neither Alabama nor the public has any interest in carrying out an execution in a manner that violates . . . the laws of the United States”) (internal citation omitted). Likewise, the public has an interest in accurate information about executions carried out by public officials—Mr. Mills is not seeking to halt his execution altogether, but seeks to ensure accurate information and a remedy in the event Defendants proceed with his execution as they have in the past.

As this Court has recognized in the spiritual advisor context, it is possible to ensure safety and security while also allowing condemned prisoners to exercise critical constitutional rights. Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (Kagan, J.,

concurring, joined by Breyer & Sotomayor & Barrett, JJ.) (“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.”); see also Ramirez v. Collier, 595 U.S. 411, 431 (2022) (“We do not see how letting the spiritual advisor stand slightly closer, reach out his arm, and touch a part of the prisoner's body well away from the site of any IV line would meaningfully increase risk. And that is all Ramirez requests here.”). The same considerations apply in this context—undersigned counsel can undergo security precautions and can agree to an enforceable confidentiality agreement. Mr. Mills’ requests are reasonably limited and allow for Defendants’ to continue to exercise their compelling interests throughout the execution process.

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)).

Additionally, at the May 14, 2024 hearing in the Middle District Court,

Defendants 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.

Further, Mr. Mills’ requested relief is limited to the unique situation taking place in Alabama right now. He is not asserting a right to counsel or to access the courts in all executions nationwide. However, here, where the last five of six executions have been marked by unacceptable delays, unnecessary and wanton disregard for suffering, and public misrepresentations by Defendants, Mr. Mills requires the presence of counsel and access to the courts to ensure his execution process complies with the Constitution.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Mills respectfully requests that this Court grant this application and stay his execution.

Respectfully submitted,

/s/Charlotte R. Morrison
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