

No. 07A451

CAPITAL CASE

(Execution Scheduled for December 6, 2007)

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,
Petitioner,

v.

RICHARD F. ALLEN, *et al.*,
Respondents.

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

**RESPONDENTS' OPPOSITION TO
ARTHUR'S APPLICATION FOR STAY OF EXECUTION**

The respondents reply as follows to Arthur's application for a stay of execution. Arthur seeks a stay of execution pursuant to 28 U.S.C. § 2101(f) to allow this Court time to decide his pending petition for certiorari. In regards to the procedural history of this case, the district court dismissed Arthur's complaint because: (1) Arthur unreasonably delayed in filing his § 1983 action, and (2) solely due to that delay the merits could not be litigated without the entry of a stay of execution. (The district court's order can be found at pages A1-A13 in

Arthur's appendix to the petition.) The Eleventh Circuit affirmed; ruling that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief. (The Eleventh Circuit's opinion can be found at pages A14-A23 in Arthur's appendix to the petition.) The respondents oppose Arthur's request for a stay of execution for the following reasons.

1. Arthur's sole ground for seeking a stay of execution is to allow this Court adequate time to decide his pending petition for certiorari. This Court's website docketing system indicates Arthur's petition for certiorari has been distributed for the November 30, 2007 conference. Thus, if this Court denies certiorari review, there is no need for a stay of execution. In addition, Arthur's petition for certiorari has been pending for over two months. A stay of execution is not needed to allow this Court adequate time to decide Arthur's petition for certiorari.

2. Arthur must satisfy the requirements of a stay like any other stay applicant. A stay of execution is "an equitable remedy" and "is not available as a matter of

right." Hill v. McDonough, 126 S.Ct. 2096, 2104 (2006). As such "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Id. Furthermore, [b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." Id. (citing Calderon v. Thompson, 523 U.S. 538, 556 (1998)).

"[L]ike other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Id. Specifically, because a stay of execution is tantamount to a preliminary injunction, this Court may grant a stay only if the movant shows that: (1) he has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000). Arthur has not

contended that he meets any of these requirements for a stay.

Arthur must, in addition, satisfy a concern of unique significance in this context: "A court considering a stay [of execution] must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" Id. (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)). Thus, to obtain a stay of execution, Arthur must demonstrate both (1) that he did not unreasonably delay in filing his federal civil rights lawsuit and (2) a likelihood of success on the merits. Arthur has not contended that he meets either of these requirements.

3. This Court, in allowing method-of-execution challenges to be raised in a civil rights action, firmly ruled that a stay of execution should not be granted if the inmate filed is claim with inexcusable delay. The law applied by the Eleventh Circuit in affirming the dismissal of Arthur's late filed claim is discussed in this Court's decision in Nelson v. Campbell, 541 U.S. 637 (2004). There, this Court explained why its decision in that case

would not "open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests." See Nelson, 541 U.S. at 649. In that explanation, this Court discussed its earlier decision in Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992), which had vacated a stay of execution entered by the federal appeals court in a § 1983 lawsuit challenging the method of execution, even though the Court recognized that the claim may have been cognizable under § 1983. The reason this Court had concluded that the inmate was not entitled to a stay of execution in Gomez is that he had "waited until the 11th hour to file is challenge despite the fact that California's method of execution had been in place for years." Nelson, 541 U.S. at 649.

This Court reiterated in Hill that a stay of execution is an equitable remedy, not available as a matter of right, and that federal courts considering a stay request must be "sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill, 126 S.Ct. at 2104. The equitable principles articulated by this Court and applied by the Eleventh Circuit are:

(1) 'sensitivity to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts,' (2) the plaintiff's satisfaction of 'all of the requirements for a stay, including a showing of a significant possibility of success on the merits,' (3) the application of 'a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay,' and (4) protection of the 'States from dilatory or speculative suits.'

Arthur, at A18 (quoting Hill v. McDonough, ___ U.S. ___, ___, 126 S.Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50, 124 S.Ct. 2117, 2126)). In Hill, this Court cited to opinions from a number of federal courts that had exercised their equitable powers to dismiss this type of lawsuit on grounds that the claim about the lethal injection procedures and protocol was too speculative or had been filed too late. Id. at 2104 (citing Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005); White v. Johnson, 429 F.3d 572 (5th Cir. 2005); Boyd v. Beck, 404 F.Supp.2d 879 (E.D. N.C. 2005)). Although not passing judgment on those decisions, this Court did say that "federal courts can and should protect States from dilatory and speculative suits." Id.

In denying equitable relief to Arthur, the Eleventh Circuit correctly applied this Court's precedent. The Court properly ruled that "courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date. Arthur at A19 (quoting Rutherford, 466 F.3d at 974) (also citing and quoting Hill, __ U.S. at __, 126 S.Ct. at 2104). Thus, the Eleventh Circuit concluded that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief. Arthur, at A19-A23.

4. This Court has addressed virtually the same set of circumstances presented in this case in the last eight months involving stay applications filed by Alabama death-row inmates: Aaron Jones, Darrell Grayson, and Luther Williams. Indeed, Grayson and Williams filed virtually identical petitions for certiorari, and Arthur's is almost

identical to those. All of these inmates filed a § 1983 action challenging Alabama's method-of-execution upon the conclusion of habeas corpus proceedings - typically, this Court's denial of certiorari. The plaintiff inmates, including Arthur, do not offer legitimate reasons for waiting to file their lethal-injection challenge. It is obvious that their late-filed claims have more to do with delaying an execution than it does seeking an alteration in Alabama's execution protocol. This Court denied equitable relief in those cases and should do the same here.

Arthur filed his § 1983 action with unjustifiable delay by filing it approximately a month after the conclusion of federal habeas review. See Arthur at A2 (noting that this Court denied certiorari review on April 16, 2007, and that Arthur filed his § 1983 action on May 14, 2007). The district court stated that "[t]he Eleventh Circuit has declined to determine precisely when such a suit becomes ripe, but it has clearly rejected the notion that denial of certiorari is required." Arthur at A8. This Court, in Jones, Grayson, and Williams, has rejected requests for equitable relief that were filed at or near the conclusion

of federal habeas review. This Court should do likewise here.

When Arthur filed his petition for writ of certiorari in this Court (from denial of federal habeas relief) on January 11, 2007, it should have been clear to him that a denial of that petition would remove the final obstacle to a lifting of the state-court automatic stay of execution. See Alabama Rules of Appellate Procedure, Rule 8(d)(1).¹ It should have been equally clear that once the Alabama Supreme Court lifted the automatic stay, Arthur might have as few as 30 days before the date of execution. Id. (requiring the date of execution to be "not less than 30 days" from the date of the order setting the execution date). At the time Arthur filed his petition for certiorari, therefore, he should have been aware, at the very least, that the likely execution of his sentence was rapidly approaching. Instead of diligently filing a method-of-execution claim, Arthur waited an additional four months to file his § 1983 action.

¹ The state-court automatic stay is in place until the death-row inmate exhausts his state and federal appeals. See Rule 8(d)(1), Ala. R. App. P.

Any contention that a § 1983 action is premature and unripe until the conclusion of federal habeas review is off the mark. Because a § 1983 lawsuit and federal habeas corpus petition are mutually exclusive causes of action, there is no impediment to filing a § 1983 action while state or federal appeals are actively being pursued. See Nelson v. Campbell, 541 U.S. 637, 643 (2004); Hutcherson v. Riley, 468 F.3d 750, 754 (11th Cir. 2006). Issues that are not cognizable in habeas corpus are cognizable under § 1983. Parallel litigation thus poses no difficulty. There can be no serious contention that Arthur's lethal-injection claim is ripe only after this Court denies certiorari on federal habeas review. Arthur's lethal-injection claim was ripe in 2002 when Alabama changed its method of execution to lethal injection. If Arthur had filed his lethal-injection claim in 2006, when other Alabama inmates began filing their lethal-injection claims, his challenge would not have been dismissed on ripeness grounds.

Although this Court has not expressly determined when a method-of-execution becomes ripe, it has implicitly ruled that raising such a challenge after federal habeas proceedings is too late. In Gomez, this Court vacated a

stay of execution because, among other reasons, the "claim could have been brought more than a decade ago." Gomez, 503 U.S. at 654, 112 S.Ct. 1652. The Gomez Court also ruled that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation." Id. Thus, this Court has ruled that waiting until to the conclusion of federal habeas proceedings to file a method-of-execution challenge that has been available for years is too late.

Finally, it is telling that Arthur now attempts to leverage the "hydraulic pressure" of the combination of a late filing and a pending execution to his advantage, when he could have brought this claim years ago. Had Arthur filed this action within two years of his sentence being changed to lethal injection by operation of law, for example, none of these issues would have to be discussed. The State filed its motion for an execution date at the appropriate time; it was Arthur who failed to bring his civil rights lawsuit at a time that would have allowed full consideration of his claims.

Because the Eleventh Circuit properly applied this Court's precedent, Arthur cannot show a reasonable


likelihood of success on the merits. Being unable to show a likelihood of success on the merits, he certainly has not overcome the equitable presumption that he is not entitled to a stay due to his unreasonable delay. Therefore, this Court should deny Arthur's application for a stay of execution.

CONCLUSION

The respondents respectfully request that this Court deny Arthur's motion to stay the execution.

Respectfully submitted,

TROY KING
ALABAMA ATTORNEY GENERAL



J. CLAYTON CRENSHAW
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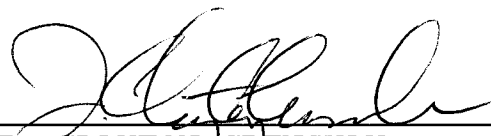
CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2007, I filed the foregoing with the Supreme Court of the United States via electronic mail as follows:

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