

No. 21-13581

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

WILLIE B. SMITH, III,

Plaintiff-Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:19-cv-927-ECM-SMD (Hon. Emily C. Marks)

EMERGENCY MOTION FOR STAY OF EXECUTION PENDING APPEAL

ALLYSON R. DU LAC
SPENCER J. HAHN
JOHN ANTHONY PALOMBI
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, AL 36104
(334) 834-2099
Allyson_duLac@fd.org
Spencer_Hahn@fd.org
John_Palombi@fd.org

Counsel for Plaintiff-Appellant

EXECUTION SET FOR OCTOBER 21, 2021, AT 6 P.M. CENTRAL

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Allyson R. du Lac, Spencer J. Hahn, and John Anthony Palombi, counsel of record for Willie B. Smith III, in compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, certify the following listed persons and parties may have an interest in the outcome of this case:

1. Anderson, Richard D. – counsel for Commissioner Dunn and Warden Raybon in the underlying proceedings;
2. Bowdre, A. Barrett – Deputy Solicitor General for the State of Alabama, and counsel for Commissioner Dunn and Warden Raybon on appeal;
3. du Lac, Allyson R. – Assistant Federal Defender and counsel for Mr. Smith in the underlying proceedings and on appeal;
4. Doyle, Stephen M. – United States Magistrate Judge for the Middle District of Alabama – magistrate-judge in the underlying proceedings;
5. Dunn, Jefferson - Commissioner, Alabama Department of Corrections;
6. Freeman, Christine A. – Executive Director, Middle District of Alabama Federal Defender Program, Inc.;
7. Hahn, Spencer J. – Assistant Federal Defender and counsel for Mr. Smith in the underlying proceedings and on appeal;
8. LaCour, Edmund G., Jr. – Solicitor General for the State of Alabama, and counsel for Commissioner Dunn and Warden Raybon on appeal;

9. Marks, Emily C. – Chief United States District Judge for the Middle District of Alabama – judge in the underlying proceedings;
10. Palombi, John – Assistant Federal Defender and counsel for Mr. Smith in the underlying proceedings and on appeal;
11. Raybon, Terry – Warden, Holman Correctional Facility;
12. Simpson, Lauren – counsel for Commissioner Dunn and Warden Raybon in the underlying proceedings and on appeal;
13. Smith, Leslie S. – supervising attorney for the Capital Habeas Unit of the Middle District of Alabama Federal Defender Program, Inc.

/s/ Allyson R. du Lac

ALLYSON R. DU LAC

/s/ Spencer J. Hahn

SPENCER J. HAHN

/s/ John Anthony Palombi

JOHN ANTHONY PALOMBI

FEDERAL DEFENDERS FOR THE MIDDLE
DISTRICT OF ALABAMA

817 SOUTH COURT STREET

MONTGOMERY, ALABAMA 36104

(334) 834-2099

Allyson_duLac@fd.org

Spencer_Hahn@fd.org

John_Palombi@fd.org

Appellant Willie B. Smith, III, pursuant to Fed. R. App. P. 8(a)(2)(A)(1), hereby moves for a stay pending appeal of the District Court's denial of his motion for preliminary injunction seeking to prohibit the State of Alabama from executing him in any manner other than with nitrogen hypoxia.

To grant a stay pending appeal, this Court considers four 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. *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). Because a stay is an equitable remedy, the Court must also consider "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

Mr. Smith's simultaneously filed brief challenging the District Court's denial of his motion for preliminary injunction sets out the bases for granting that motion and in turn, why his motion for stay of execution pending appeal should be granted. Mr. Smith's brief supports the conclusion that he has a substantial likelihood of

success on appeal, and in the interests of time in this emergency situation, he will not repeat all of those arguments here, but instead incorporates them by reference.¹

Further, the equities favor Mr. Smith. The irreparable harm he will suffer without a stay pending appeal is plain: he will be executed while his case is pending, allowing the Defendants to unilaterally moot an action that was filed before his habeas case was final. The public will not be harmed by a stay of execution to allow Mr. Smith to finish his timely filed suit. His suit is in the public interest as an attempt to vindicate rights conferred upon all disabled Americans through a federal statute. If anything, the public will be harmed by the State's attempt to prematurely end a lawsuit that was filed 23 months ago.

Finally, to address the *Nelson* factor, there can be no question that Mr. Smith did not unduly delay his lawsuit. In fact, he brought his lawsuit at a time which would have allowed the suit to be resolved without need to resort to issuance of a stay. It is only the unilateral action of Defendants who have now twice attempted to stop a suit that was filed before his challenge to his conviction was over and was in discovery and scheduled for trial. Denial of a stay would encourage the state to short circuit

¹ Although Mr. Smith maintains—as set forth in his brief and throughout this litigation—he need not prove that he would have opted for nitrogen hypoxia in June 2018 had he been able to understand the Election Form to prevail, in an abundance of caution and to the extent it matters, he respectfully submits the attached declaration on the issue.

any lawsuit by merely setting an execution date, regardless of when the lawsuit began.

CONCLUSION

Mr. Smith respectfully requests that this Court stay Mr. Smith's execution until it can reach a decision on the merits of the appeal. Additionally, if this Court reaches a decision on the merits in Mr. Smith's favor prior to the expiration of the execution warrant, he respectfully requests that it stay his execution (or enjoin Defendants from executing him using anything other than nitrogen hypoxia) until the District Court can enter the preliminary injunction.

Respectfully submitted,

/s/ Allyson R. du Lac

ALLYSON R. DU LAC

/s/ Spencer J. Hahn

SPENCER J. HAHN

/s/ John Anthony Palombi

JOHN ANTHONY PALOMBI

FEDERAL DEFENDERS FOR THE MIDDLE

DISTRICT OF ALABAMA

817 SOUTH COURT STREET

MONTGOMERY, ALABAMA 36104

(334) 834-2099

Allyson_duLac@fd.org

Spencer_Hahn@fd.org

John_Palombi@fd.org

CERTIFICATE OF COMPLIANCE

The foregoing Emergency Motion complies with the type-volume limitations of Eleventh Circuit Rule 27(d)(2)(A) because the Motion contains 597 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

The motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I certify that, on October 19, 2021, I electronically filed the foregoing **Emergency Motion for Stay of Execution** with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

Edmund J. LaCour, Jr., Esq.
Lauren Simpson, Esq.
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152

/s/ John A. Palombi

Declaration of Willie B. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE B. SMITH III,

Plaintiff,

v.

JEFFERSON DUNN, Commissioner, Alabama
Department of Corrections,

&

TERRY RAYBON, Warden, Holman
Correctional Facility,

Defendants.

No. 19-cv-00927-ECM-SMD

CAPITAL CASE

**Execution Set for
October 21, 2021**

DECLARATION OF WILLIE B. SMITH

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a resident of Alabama and over the age of 19.
2. I was supposed to be deposed on October 12, 2021. My lawyers told me the deposition was cancelled because my case was dismissed.
3. If I had testified last week, I would have said the following:
 - I did not understand the Election Form because I am slow and have trouble reading.
 - If I had understood the Election Form, I would have signed it and handed it in in June 2018.

- A hall runner gave out the Election Form.
- Captain Emberton never gave me the Election Form.
- Captain Emberton never talked to me about the Election Form or the new law.

4. I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 18th day of October, 2021.

Willie B Smith III
Willie B. Smith, III