Nos. 23-5145 & 23A51
CAPITAL CASE

In the
Supreme Court of the United States

JAMES BARBER,
Petitioner,
v.
KAY IVEY, GOVERNOR OF THE STATE OF ALABAMA, ET AL.,
Respondents.

On Petition for Write of Certiorari to the
Alabama Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED (RESTATED)

Whether the district court abused its discretion in denying Barber's motion to preliminary enjoin his impending execution based on its factual finding following an evidentiary hearing that Barber failed to show that he is likely to suffer cruel and unusual punishment when the prison's IV team seeks to gain intravenous access for the lethal injection.

PARTIES

The parties to the proceeding are as follows:

Petitioner James Barber was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Kay Ivey, in her official capacity as Governor of Alabama, John Q. Hamm, in his official capacity as Commissioner of the Alabama Department of Corrections, Terry Raybon, in his official capacity as Warden of Holman Correctional Facility, Steve Marshall, in his official capacity as the Alabama Attorney General, and three John Does were defendants in the district court and appellees in the court of appeals.

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INTRODUCTION

Petitioner James Edward Barber is entitled to neither a stay of his execution nor a grant of his petition for a writ of certiorari. Twenty years ago, Barber murdered a seventy-five-year-old woman named Dorothy Epps by beating her to death with a claw hammer. He was sentenced to death for this horrific crime. Now that the sentence is set to be executed, he argues that his execution by lethal injection will violate the Eighth Amendment's prohibition against cruel and unusual punishment. As evidence, he points to three instances last year in which the IV team for the Alabama Department of Corrections (ADOC) had trouble accessing veins of the condemned inmate during an execution. Due to a confluence of events—including health issues specific to the individual inmates and last-minute litigation brought by the inmates that dramatically shortened the window for ADOC officials to conduct the executions—two of the executions had to be called off when the team could not gain intravenous access. Barber alleges the same thing will happen to him, that he will therefore face multiple needle punctures, and that those needle punctures constitute cruel and unusual punishment.

The district court disagreed. Following discovery and an evidentiary hearing, the court found that, following the executions invoked by Barber, the Governor of Alabama directed ADOC to "undertake a top-to-bottom review of the state's execution process." Pet. App'x 75a. ADOC did so, pausing executions for a number of months while it reviewed its procedures, met with prison officials in other states, and revised its practices. As a result of the review, ADOC hired an entirely new IV team, and the State amended its procedural rules to provide for a longer time frame

for executions to take place—a direct response to past delays caused by inmates who (like Barber today) tried to run out the clock on the death warrant through last-minute litigation. The district court found that "[t]hese intervening actions cut off the emerging pattern of past practices that could have elevated Barber's claims from purely speculative to actionable." Pet. App'x 92a. The court also found that Barber had made only general allegations that could apply to many inmates rather than specific allegations, supported by evidence, that would likely make IV access particularly difficult *for him*. Pet. App'x 87a–88a ("Barber makes no allegation in his complaint that he has a specific, physical condition or infirmity that makes it more difficult to access his veins."). Based on these factual findings, the district court denied Barber's motion for a preliminary injunction.

The Eleventh Circuit affirmed in a published opinion based on several grounds. *See Barber v. Gov. of Ala.*, No. 23-12242, -- F. 4th --, 2023 WL 4622945 (11th Cir. Jul. 19, 2023) (Pet. App'x 1a–70a). First, rejecting Barber's argument that the district court's factual findings were clearly erroneous because they had not properly accounted for ADOC's past "fail[ures] to carry out a lethal injection," the Court of Appeals explained that "Barber's arguments suffer from a fatal flaw—they are premised on the assumption that protracted efforts to obtain IV access (*i.e.*, 'repeatedly pricking him with a needle') would give rise to an unconstitutional level of pain." Pet. App'x 21a (cleaned up). In fact, the court noted, "the Eighth Amendment does not guarantee a prisoner a painless death," and thus does not

prohibit attempts—even unsuccessful ones—to gain intravenous access for lethal injection. Pet. App'x 21a (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019)).

Second, the Court of Appeals alternatively held that "even if repeated, protracted attempts at IV access on a condemned inmate could create a substantial risk of serious harm," Barber had not carried his burden of showing that the district court's factual findings were clearly erroneous. Pet. App'x 24a. In particular, the Court of Appeals noted that the district court found, as a matter of fact and "[b]ased on the testimony and evidence presented," "that the evidence was insufficient to establish that Barber faced individualized risks that would complicate IV access to his veins" and that "the intervening changes made by the ADOC" rendered Barber's claim that ADOC personnel would have trouble accessing his veins "purely speculative." Pet. App'x 26a.

Finally, the Court of Appeals held that Barber's "delay also weighs in favor of denying Barber's request for a stay." Pet. App'x 30a n.28. Barber delayed at least months before bringing the sort of "last-minute application that the Supreme Court strongly disfavors." *Id.*

Barber now comes to this Court to attack the district court's factual findings. Though he nominally argues that the decisions below somehow conflict with *Bucklew* and *Baze v. Rees*, 553 U.S. 35 (2008), the crux of his petition asks this Court to reweigh the evidence the district court heard at the evidentiary hearing. "Contrary to the findings of the courts below," he asserts, "the evidence in the record demonstrates that the supposed changes that Respondents made…did not address

or even relate to the underlying issues causing the repeated failures" to gain intravenous access. Pet. 13. This Court should not grant the petition merely to review whether the district court's factual findings were clearly erroneous—which, as the Court of Appeals correctly held and ably explained, they were not. The Court should deny the petition and allow Barber's execution to proceed, twenty years after he murdered Dorothy Epps.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below

On December 16, 2003, a Madison County jury found James Barber guilty of the capital offense of murdering Dorothy Epps during the course of a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama. C. 270.[1] The jury recommended by a vote of eleven to one that Barber should be sentenced to death, and on January 9, 2004, the trial court followed the jury's recommendation. *Id.* at 270–76.

Barber's conviction and death sentence were affirmed on direct appeal. *Barber v. State*, 952 So. 2d 393, 464 (Ala. Crim. App. 2005), *cert. denied*, No. 1041603 (Ala. 2006), *cert. denied*, 549 U.S. 1306 (2007) (mem.).

Barber next filed a counseled Rule 32 petition for state postconviction relief and an amended petition in the Madison County Circuit Court. C32. 14–81, 539–605. Following an evidentiary hearing, the circuit court denied his petition. C32.

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1. Record citation are as follows:

C.	Clerk's record on direct appeal
R.	Transcript on direct appeal
C32.	Rule 32 (state postconviction) record

1115–82. The Alabama Court of Criminal Appeals affirmed in an unpublished memorandum, *Barber v. State*, CR-13-1167 (Ala. Crim. App. Apr. 10, 2015), and the Alabama Supreme Court denied certiorari, *Ex parte Barber*, No. 1141028 (Ala. Sept. 25, 2015).

Having failed to obtain relief in the state courts, Barber filed a 28 U.S.C. § 2254 petition in the United States District Court for the Northern District of Alabama. After briefing, the district court denied and dismissed his habeas petition. *Barber v. Dunn*, 5:16-cv-00473, 2019 WL 1098486 (N.D. Ala. Mar. 8, 2019). The district court denied a certificate of appealability. Order, *Barber v. Dunn*, 5:16-cv-00473, 2019 WL 1979433, at *6 (N.D. Ala. May 3, 2019).

Barber moved the Eleventh Circuit for a COA. The court granted his motion as to only one claim, and after briefing and argument, affirmed. *Barber v. Comm'r, Ala. Dep't of Corr.*, 861 F. App'x 328 (11th Cir. 2021). This Court denied certiorari. *Barber v. Hamm*, 142 S. Ct. 1379 (2022) (mem.).

On August 5, 2022, the State of Alabama moved to set Barber's execution date. Barber opposed the motion, but before an order issued, Governor Kay Ivey initiated a "pause" in the carrying out of executions in order to conduct a review of death penalty procedures following two incidents in which the ADOC was unable to obtain intravenous access on two other men who were scheduled for execution. On November 21, the State moved to withdraw its motion to set Barber's execution. That motion was granted on December 1. ADOC's review concluded on February 24,

2023, and the State moved to set Barber's execution the same day. Barber again opposed the motion in the Alabama Supreme Court.

On May 3, the Alabama Supreme Court granted the State's motion, authorizing Governor Ivey to set the time period for Barber's execution. Twenty-two days later, on May 25, Barber filed his original complaint in this matter. On May 30, Governor Ivey set Barber's execution for a thirty-hour period beginning at midnight on July 20, 2023.

On June 5, Barber filed his motion for preliminary injunction. Acting with speed, *the very next day*, the district court set the matter for an evidentiary hearing on July 5, less than a month later—and approximately two weeks before the scheduled execution. Recognizing the tight timeline for creating an evidentiary record for the upcoming hearing, Defendants agreed during a June 8 telephone conference to voluntarily respond to Barber's requests for production and interrogatories. No Rule 26(f) conference was held, and depositions were never discussed.

Defendants worked diligently to respond to Barber's requests in a very tight timeframe. Directly refuting the Complaint's pure speculation that the personnel employed to obtain the necessary IV access would not possess appropriate "certifications or licenses," Pet. App'x 116a, Defendants produced their credentials in a redacted form to protect their identity. Those credentials were admitted into the record at the evidentiary hearing, demonstrating that the personnel who would

be "responsible for setting IV lines" are licensed by appropriate licensing bodies and possess certifications relevant to their field. Pet. App'x 623a–36a.

Instead of acknowledging the reasonable conclusion that medical personnel "performing vascular access insertion and management are qualified and competent to perform those services based on their licensure and certification" and that certified EMTs, paramedics, and nurses "probably" work in the medical field, Barber instead sought to amend his complaint on the fly, speculating that appropriate licensure and certification might not mean anything after all and that the real concern was experience. Pet. App'x 116a 404a, 418a–19a. Defendants rebutted that speculation with an affidavit containing information that would not surprise any reasonable person: that the candidates for the IV team had been asked about whether they had "extensive and current experience setting IV lines." Pet. App'x at 492a.

Properly relying, in part, on that affidavit, the district court denied Barber's motion for preliminary injunction on Friday, July 7, less than two weeks before Barber's scheduled execution. Pet. App'x 90a, 92a–93a. While Barber could have immediately appealed that order, he did not. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965) (orders "granting or denying preliminary injunctions [] are appealable").[2] Instead, he chose to wait until 10:52 p.m. on a Sunday, four days after the hearing, to file *an amended complaint* alleging for the first time information that he has known for almost twenty years. Pet. App'x 273a–326a.

2. Decisions of the Fifth Circuit entered prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Barber has not sought a preliminary injunction with respect to the amended complaint, nor has the district court evaluated its merits or the likelihood of success of the claims it presents. After filing the amended complaint, Barber waited a further two days to file his notice of appeal at 9:59 p.m. on July 11. DE58. The next day, at 2:25 p.m., Barber filed his motion to expedite briefing.

Briefing concluded on Sunday, July 16, and oral arguments were held on Monday, July 17. On Thursday, July 19, at 6:46 p.m. Eastern Time, the Eleventh Circuit denied Barber's Motion for Stay of Execution and affirmed the district court.

Barber filed his petition for writ of certiorari and stay application in this Court at 12:45 p.m. Eastern Time this afternoon.

B. Statement of the Facts

In May 2001, James Barber stopped by Dorothy Epps's house in Harvest, Alabama. *Barber*, 952 So. 2d at 401. Her husband was out of town on a business trip, so she was alone at the time. *Id.* at 402. Prior to that day, Mrs. Epps and Barber had a friendly relationship. *Id.* at 401, 457. He and her daughter had dated in the past, and Mrs. Epps had hired him to do repair work on her home. *Id.* at 401, 404–05. There was no evidence of forced entry, so she most likely invited him inside. *Id.* at 401, 457.

After entering her house, Barber struck Mrs. Epps, who was seventy-five years old and weighed one hundred pounds, in the face and then beat her to death with his fists and a claw hammer. *Id.* at 401. The medical examiner testified that Mrs. Epps had seven skull fractures, nineteen head lacerations, bleeding over her

brain, and multiple rib fractures. *Id.* Barber's bloody footprints were found on her back and buttocks area. *Id.* at 403; R. 899–900.

Mrs. Epps also had multiple defensive wounds on her hands and arms, establishing that she was facing Barber at times, was conscious and aware of what was happening, and tried to fend off his blows with her bare hands. *Barber*, 952 So. 2d at 401–02. The evidence further established that Mrs. Epps tried to get away from him. *Id.* Crime scene investigators discovered blood spatter from her wounds all over the area of the house where she was found, including on the furniture, floor, walls, and ceiling. *Id.* at 402.

During the attack, Barber placed his hand in a puddle of Mrs. Epps's blood that had spilled on a counter. *Id.* A latent print examiner compared the bloody print from the counter to Barber's known palm print and testified that the prints were identical. *Id.* After his arrest, Barber voluntarily "confessed to the commission of this crime, admitting that he struck Mrs. Epps with a claw hammer, grabbed her purse, and ran out of the house." *Id.*

REASONS FOR DENYING THE PETITION

The first reason that this Court should deny Barber's petition is that it is splitless, fact-bound, and fails to present this Court with any cert-worthy issue. After an evidentiary hearing, the district court correctly denied Barber's motion for preliminary injunction because he could not show a substantial likelihood of success on the merits. The Eleventh Circuit affirmed, finding that the district court had not clearly erred in its factual findings nor abused its discretion in denying Barber's

motion. Barber presents no "compelling reasons" for granting certiorari review. SUP. CT. R. 10.

The second reason Barber's petition should be denied is because his delay in bringing this claim is unexplained and inexcusable. As the Eleventh Circuit observed, "nothing" prevented Barber from filing his complaint prior to May 25, 2023. In considering the equities, Barber's delays weighed against his stay requests in the district court and in the Eleventh Circuit. Taken together, Barber's decisions indicate that the primary motivation for his delays was the hope that he could stave off execution, which is set for *today*, July 20, 2023.

At bottom, Barber has not raised any cert-worthy issue. Barber has unreasonably delayed in bringing his challenge to the district court. This Court should, therefore, deny Barber's petition for writ of certiorari. *See* SUP. CT. R. 10.

I. The Lower Courts Did Not Abuse Their Discretion in Denying Relief.

A. Barber's Claim Below

Barber's 42 U.S.C. § 1983 lawsuit was predicated on a single core allegation: that the State of Alabama's lethal injection protocol ("the protocol") would subject him to cruel and unusual punishment because the personnel entrusted in the protocol with obtaining the necessary intravenous access lack "sufficient relevant medical expertise" to successfully carry out that stage of the protocol. Pet. App'x 102a. Given the record before it, the district court acted well within its discretion when it denied the motion for preliminary injunction. As that court correctly recognized, Barber failed to demonstrate a substantial likelihood of success on his claim that ADOC's lethal injection protocol is "*sure or very likely* to cause serious

illness and needless suffering" to him. Pet. App'x 84a, 92a (emphasis in original) (quoting *Baze*, 553 U.S. at 50 (plurality opinion)). Likewise, in reviewing that decision and denying Barber's motion for a stay, the Eleventh Circuit did not decide "an important federal question in a way that conflicts with relevant decisions of this Court" or otherwise warrants this Court's review. SUP. CT. R. 10.

B. Attempts to Obtain IV Access Do Not Amount to Cruel and Unusual Punishment.

The Eleventh Circuit's first reason for affirming the district court was that Barber's complaint failed to present a legitimate claim of an Eighth Amendment violation. As an initial matter, as the Eleventh Circuit observed, Barber had the burden of showing an "objectively intolerable risk of intolerable harm," and this Court has never "found a method of execution cruel and unusual." Pet. App'x 19a.

At heart, Barber's claim is that methods of execution that require obtaining intravenous access—a procedure that is ubiquitous in the medical community[3]—amount to cruel and unusual punishment, despite that fact that "lethal injection is by far the most common method of execution." *Nance v. Ward*, 142 S. Ct. 2214, 2219 (2022). The Eleventh Circuit addressed a claim substantially similar to Barber's in *Nance v. Commissioner, Georgia Department of Corrections*, 59 F.4th 1149, 1157 (11th Cir. 2023), where it held:

> Nance did not plausibly allege that a futile attempt to locate a vein would give rise to a constitutionally intolerable level of pain. After all, "the Eighth Amendment does not guarantee a prisoner a painless

3. Indeed, on cross-examination, Barber's own expert witness acknowledged that in all her experience as an expert witness in the IV-related medical malpractice field, she had never heard of anyone suing over the number of needle sticks necessary to obtain IV access. Pet. App'x 428a.

> death," but rather it forbids the use of "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Bucklew*, 139 S. Ct. at 1124 (alteration adopted) (citation and internal quotation marks omitted).

Id. The panel below followed *Nance*, holding:

> Barber's arguments suffer from a fatal flaw—they are premised on the assumption that protracted efforts to obtain IV access (i.e., "repeatedly pricking him with a needle") would give rise to an unconstitutional level of pain. And we expressly concluded that such efforts would not rise to that level in *Nance*.

Pet. App'x 21a. Obtaining intravenous access is a common procedure that is unquestionably necessary to the state's interest in carrying out lawful executions. Barber would have this Court grant certiorari on a claim that an IV team who had the appropriate licenses, certifications, and experience *might* have difficulty accessing his veins so that multiple sticks were required. But embracing Barber's standard would effectively bar *any* lethal injection execution, as well has calling into question innumerable other situations where IV access must be obtained in a carceral setting.

Barber's position seems to be that when IV access is difficult, necessitating multiple or prolonged attempts to find the two points of venous access required, it becomes "cruel and unusual" because it superadds pain "well beyond what's needed to effectuate a death sentence." Pet. 3, 14–15. The Eleventh Circuit squarely and properly rejected that argument, and Barber presents no genuine conflict between the Eleventh Circuit's opinion and the opinions of this Court.

First of all, Barber misapprehends the meaning of this Justice Frankfurter's hypothetical "series of abortive attempts at electrocution" that this Court discussed

in *Baze v. Rees*, 553 U.S. 35, 50 (2008). First of all, it is readily apparent that Justice Frankfurter's hypothetical was intended to address multiple attempts to execute *the same person* by *the same method* with no intervening changes. After all, in *Resweber*, the majority held that, presumably after the "mechanical difficulty," was repaired, "[e]ven the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution." *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). Barber does not contend that *he* has been subject to "a series of abortive attempts at electrocution." Instead, he seems to be arguing for a principle that if a state *ever* has difficulties with more than one execution in a row, it can never attempt to execute anyone else by that method. Second, what matters to Justice Frankfurter's hypothetical, as this Court has addressed it, is not the "innocent misadventure" but whether state officials "take reasonable measures" to address a perceived problem. *Farmer v. Brennan*, 511 U.S. 825, 847 n.9 (1994). And, as the courts below found, reasonable measures have been taken to address the difficulties that Alabama officials encountered in preparing for the executions of Alan Miller and Kenneth Smith: an expanded time period to alleviate the time pressure created by last-minute legal challenges and a new and expanded IV team.

In arguing for his "series of attempts" attack on his lawful execution, Barber resorts to speculation about what might happen to him this evening. To support his speculations, Barber again relies heavily on the Eleventh Circuit's decision in *Smith*

v. Commissioner, Alabama Department of Corrections, No. 22-13781, 2022 WL 17069492 (11th Cir. Nov. 17, 2022), as he did in the courts below. But the Eleventh Circuit properly distinguished its unpublished decision in that case, holding:

> To the extent that *Smith* may have constituted persuasive authority on the issue of whether repeated IV access attempts can constitute superadded pain and presents a "substantial risk of harm" for purposes of an Eighth Amendment claim, we squarely rejected that argument in *Nance*—a published case which binds us here.

Pet. App'x 23a.

Moreover, Barber does not, and cannot, point to any conflict between the Eleventh Circuit's decision and the decision of any other court of appeals, much less any conflict with a decision of this Court. Indeed, to the extent that other circuits have addressed similar claims, they have rejected the notion that protocols requiring intravenous access violate the Eighth Amendment. *See, e.g.*, *Cooey v. Strickland*, 589 F.3d 210, 228 (6th Cir. 2009) (rejecting a challenge to Ohio's protocol that placed no time limit on attempts to obtain IV access); *Jackson v. Danberg*, 594 F.3d 210, 227 (3d Cir. 2010) (rejecting an argument that "speculat[ed] about what those officials might do" in the event that IV access attempts encountered difficulties); *Clayton v. Lombardi*, 780 F.3d 900, 901 (8th Cir. 2015) (rejecting a claim that an inmates characteristics presented a "heightened likelihood that intravenous (IV) access will be difficult").

Contrary to Barber's contention that the "decisions below disregard *Baze* and *Bucklew*," the courts below appropriately cite to and *rely* on those decisions. Moreover, the Eleventh Circuit's rationale clearly recognizes the import of this

court's discussion of Justice Frankfurter's hypothetical in recognizing that, to the extent any "emerging pattern" of difficulties with lethal injection existed, ADOC officials took appropriate steps to address it. Because Barber has failed point to any split or conflict, this Court should deny certiorari.

II. Barber's Claim Is a Poor Vehicle for Certiorari Review.

In any event, Barber's case would be a poor vehicle for the question of whether efforts to obtain IV access could amount to cruel and unusual punishment. First, Barber's claim is heavily fact-bound, and those facts do not fall in his favor. Both *Nance* and *Smith* involved claims that the condemned faced individualized risks of harm based on medical conditions. As the Eleventh Circuit recognized:

> *Nance* notwithstanding, even if repeated, protracted attempts at IV access on a condemned inmate could create a substantial risk of serious harm, *Smith* does not establish that the district court abused its discretion in denying Barber's request for a preliminary injunction.[21] As the district court explained, Smith identified specific medical conditions and risk factors unique to him that made IV access difficult. Barber, on the other hand, did not.

Pet. App'x 24a. Thus, to the extent Barber relied on the facts alleged in *Smith*, his reliance was misplaced. Similarly, the Court also explained that, unlike Barber, Nance alleged that he had "weak veins" that would render obtaining IV access more difficult, and hence more painful. Pet. App'x 21a.

While Barber did file an eleventh-hour amended petition that raised claims regarding specific medical conditions, that complaint wasn't filed until two days *after* the district court denied his motion for a preliminary injunction. As the Eleventh Circuit explained, "[b]ecause the initial complaint was the complaint before the district…we focus on the allegations in the initial complaint, rather than

the allegations in the amended complaint[.]" Pet. App'x 14a n.16. And even then, Barber's evidence was weak tea:

> Although at the evidentiary hearing, Barber's counsel asserted that Barber had a BMI "identical" to Smith and higher than James, Barber provided no details during his testimony concerning his BMI, and he presented no other evidence to establish that a particular BMI presents an elevated risk of complications with IV access to veins or that James's and Smith's BMIs gave rise to the difficulties in accessing their veins. Barber also testified at the evidentiary hearing that, on "a few" occasions in the last two decades, the ADOC had issues accessing his veins and had to prick him multiple times. However, he also testified that on other occasions the ADOC had no issues accessing his veins.

Pet. App'x 25a (footnote omitted). Moreover, as the Eleventh Circuit also noted, Barber's "new" facts presented an additional problem: because they were not new at all, but instead decades old, they "would present a time-bar issue[.]" Pet. App'x 25a n.23. Thus, reliance on Barber's at best equivocal testimony about difficulties he had had in giving blood in the past were doubly problematic and render this petition a poor vehicle to reach the question presented.

Further, as he did in the courts below, Barber relies heavily on his allegations about attempts to gain intravenous access in three prior scheduled executions—the "pattern" that the Eleventh Circuit discussed in its unpublished decision in *Smith*. *Smith*, 2022 WL 17069492, at *5. Here the facts cut against him again. As the Eleventh Circuit explained, "evidence presented during the evidentiary hearing established that '[n]one of the members of the current IV [T]eam were involved in the previous three execution attempts.'" Pet. App'x 12a. That evidence came from Defendant Raybon, the statutory executioner, who

ensured that the candidates for the IV team had been asked about whether they had "extensive and current experience setting IV lines." Pet. App'x 492a. "Thus, Barber could not 'show that the investigation and corresponding changes [would] not address the pattern of prolonged efforts to obtain IV access' identified in *Smith*." Pet. App'x 12a–13a.

This Court has long recognized that district courts should protect state-court judgments from claims that "are pursued in a 'dilatory' fashion or based on 'speculative' theories." *Bucklew*, 139 S. Ct. at 1134. And that is just what the district court did in this case. As the Eleventh Circuit recognized, even considering Barber's "new" facts, "'Barber's allegations [were] too speculative to give rise to an Eighth Amendment claim upon which he [would be] substantially likely to prevail.'" Pet. App'x 13a. Given the splitless, fact-bound nature of Barber's petition, this Court should not grant certiorari.

III. The Equities Weigh Against Granting a Stay.

Finally, just as they did below, the equities weigh against granting a stay. An inmate plaintiff "is not entitled to a stay of execution 'as a matter of course' [and] the traditional stay factors…govern a request for a stay pending judicial review." *Nken v. Holder*, 556 U.S. 418, 426 (2009). These are "(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." *Nken*, 556 U.S. 425–26.

Barber falls at the first hurdle because he is unlikely to prevail on the merits. As discussed above, Barber's petition presents this Court with a splitless claim that was plainly rejected by the district court after taking written and testimonial evidence at an evidentiary hearing. The district court denied Barber's motion for a preliminary injunction, and the Eleventh Circuit affirmed. Pet. App'x 30a. To prevail on the merits of this appeal, Barber must show that the Eleventh Circuit "abused its discretion" in denying his stay motion. *Kemp v. Smith*, 463 U.S. 1321, 1322 (1983). Especially considering the weak and speculative nature of Barber's claims, he is not likely to meet that standard.

Moreover, as the Eleventh Circuit noted, the remaining factors also weigh against Barber:

> Because Barber cannot satisfy the first preliminary injunction factor, we need not consider the other factors. *Grayson*, 869 F.3d at 1238 n.89. Nevertheless, those factors also weigh in the State's favor. *See Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 701 (11th Cir. 2019) (explaining that "[t]he remainder of the factors we apply when considering a stay amount to a weighing of the equitable interests of the petitioner, the government, and the public"). Because Barber cannot show that he faces a substantial risk of serious harm if he is executed by lethal injection, he cannot show that he faces an irreparable injury if the stay is not granted. And, if a stay is issued, it would substantially impair the State's strong interest in seeing Barber's lawfully imposed sentence carried out in a timely manner, and it would be adverse to the public's interest in seeing the sentence carried out as well. *See id.* ("[A]s the Supreme Court has recognized, the [S]tate, the victim, and the victim's family also have an important interest in the timely enforcement of [the inmate's] sentence."). Thus, the district court did not clearly abuse its discretion in denying Barber's request for a preliminary injunction. Finally, because the test for a preliminary injunction and a motion for stay of execution mirror one another, we **DENY** Barber's motion for a stay of execution from this Court.

Pet. App'x 30a–31a n.29. As this Court has observed, "[c]ourts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134. Barber is scheduled to be executed *today*, he has known the State was seeking an execution date since August 5, 2022, and had all the facts necessary to bring his action no later than November 2022. Nonetheless, he delayed until May 25, 2023, to raise a claim he could have raised long ago, and did not seek this Court's intervention until 12:45 p.m. Eastern *this afternoon*. Moreover, Barber is not the only party whose interests are at stake. The State of Alabama has a well-established interest in seeing that executions are carried out in a timely manner. Perhaps more importantly, Dorothy Epps, Smith's victim, has survivors who have already waited overlong to see justice done. Rewarding Barber's gamesmanship with additional delay at this late hour would work harm to those interests. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.")

CONCLUSION

For the foregoing reasons, this Court should deny Barber's petition for writ of certiorari and deny his motion for stay of execution.

Respectfully submitted,

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Nos. 23-5145 & 23A51
CAPITAL CASE

In the
Supreme Court of the United States

JAMES BARBER,
Petitioner,
v.
KAY IVEY, GOVERNOR OF THE STATE OF ALABAMA, ET AL.,
Respondents.

PROOF OF SERVICE

I, Richard D. Anderson, do hereby certify that on this date, July 20, 2023, I served a copy of the enclosed BRIEF IN OPPOSITION on counsel for Petitioner Barber by email, as follows:

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