No. 24A60
CAPITAL CASE

In the
Supreme Court of the United States

KEITH EDMUND GAVIN,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Motion for Stay of Execution

OPPOSITION TO MOTION FOR STAY OF EXECUTION

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INTRODUCTION

Keith Edmund Gavin is scheduled to be executed **TODAY**, July 18, 2024, for the 1998 capital murder of William Clinton Clayton, Jr., in Centre, Alabama. Gavin was convicted of murder in Illinois on June 9, 1982, and served 17 years of a 34-year sentence before being paroled from Illinois prison in February 1998. Within weeks of his release, Gavin came to Alabama, where he shot and killed an innocent man and then fled the scene, according to reports by four eyewitnesses. *See Gavin v. State*, 891 So. 2d 907 (Ala. Crim. App. 2003). He was swiftly apprehended, and he confessed to a jailhouse employee. Gavin was convicted of two counts of capital murder—(1) murder during robbery and (2) murder by a convicted murderer—and sentenced to death. Gavin's appeals from his conviction for capital murder and denial of his petitions for postconviction relief have been fully litigated at the state and federal levels. *See Gavin v. Comm'r*, 40 F.4th 1247 (11th Cir. 2022), *cert. denied.*, 143 S. Ct. 2438 (2023) (mem.).

In June 2024, nearly twenty-five years after his conviction, Gavin filed a pro se successive state postconviction petition, challenging one of the two capital murder counts for lack of jurisdiction. His petition was denied because he failed to pay the filing fee despite his ability to do so. Now, Gavin asks this Honorable Court to stay his execution on the ground that he is indigent or so that he may pay the filing fee and the state circuit court may rule on the merits of his petition.[1]

1. Motion for Stay of Execution ("Stay Mot.") at 2.

Gavin's motion is due to be denied for several reasons. ***First***, this is purely a state-law issue, and the circuit court acted in accordance with Alabama law. ***Second***, a stay of execution would only serve to delay Gavin's execution and not result in relief, as the claims he raises are meritless. ***Finally***, the public interest weighs in favor of allowing the State to carry out his execution, and Gavin's multi-decade delay should not be excused.

I. Procedural posture

Nearly two months after the Alabama Supreme Court set Gavin's execution on April 25, 2024, Gavin initiated a state civil proceeding through pro hac vice counsel from Sidley Austin LLP and Bradley Arant Boult Cummings, LLP.[2] A practicing Muslim, Gavin requested that his body not be autopsied following his execution. The State defendants agreed to settle the lawsuit and not autopsy Gavin's body, and on July 15, 2024, the parties filed a joint stipulation of dismissal.[3] As far as the State defendants knew, that would be Gavin's final litigation, as his civil complaint had plainly stated, "Mr. Gavin does not anticipate any further appeals or requests for stays of his execution."[4]

To the surprise of counsel on both sides, on June 17, 2024—several weeks after Gavin had represented that the civil lawsuit would be his only legal action—Gavin filed a pro se Rule 32 petition for postconviction relief in the Cherokee County Circuit

2. Complaint for Emergency Injunctive and Declaratory Relief, *Gavin v. Billy et al.*, 03-CV-2024-900914 (Montgomery Cnty. Cir. Ct. June 14, 2024), Doc. 2.
3. Joint Stipulation of Dismissal, *Gavin v. Billy et al.*, 03-CV-2024-900914 (Montgomery Cnty. Cir. Ct. July 15, 2024), Doc. 20.
4. Complaint ¶ 18, *Gavin*, 03-CV-2024-900914, Doc. 2.

Court.[5] This was a successive Rule 32 petition,[6] and Gavin argued therein that the trial court lacked jurisdiction to convict him of capital murder under section 13A-5-40(a)(13) of the Code of Alabama, which makes capital "[m]urder by a defendant who has been convicted of any other murder in the 20 years preceding the crime." His rationale? In 1982, Gavin was convicted of murder in Cook County, Illinois, and Alabama "lacked subject matter jurisdiction under territorial principles of law to try, convict and sentence [Gavin] to death" because the first murder occurred out of state.[7] Gavin served only the Cherokee County District Attorney, who had not been handling his recent litigation.

On July 10, the circuit court dismissed Gavin's Rule 32 petition because Gavin had not paid the requisite filing fee and did not qualify for in forma pauperis (IFP) status. In Gavin's IFP declaration, he had stated:

> I, Keith Gavin, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.[8]

While the court agreed that Gavin was not presently employed and had "no pensions, annuities, or life insurance payments" or "gifts or inheritance,"[9] the court found that Gavin had falsified his financial records. Looking at Gavin's Inmate Deposit Balance

5. Rule 32 Petition, *Gavin v. State*, 13-CC-1998-000061.61 (Cherokee Cnty. Cir. Ct. June 16, 2024), Doc. 3.
6. Successive Rule 32 petitions are barred under Rule 32.2 of the Alabama Rules of Criminal Procedure unless the petitioner raises a jurisdictional claim or shows good cause why the claims could not have been brought in the first petition.
7. Rule 32 Petition at 2.
8. In Forma Pauperis Declaration at 2, *Gavin v. State*, 13-CC-1998-000061.61 (Cherokee Cnty. Cir. Ct. July 17, 2024), Doc. 1.
9. Order at 1, *Gavin v. State*, 13-CC-1998-000061.61 (Cherokee Cnty. Cir. Ct. July 10, 2024), Doc. 7.

Sheet, the court discovered that "Gavin has been receiving at least one hundred and thirty dollars per month for the last twelve months consecutively. His gross deposits total exactly $2,811.00."[10] As this was considerably higher than the amount needed to file the Rule 32 petition,[11] the court denied Gavin's motion for IFP status and dismissed the petition.[12] The court's decision was based on state precedent:

> "[A]n inmate who has appreciably more than the amount necessary to pay a filing fee deposited in his inmate account in the 12 months preceding the filing of an [In Forma Pauperis] request is not indigent as that term is defined in Rule 6.3(a), Ala. R. Crim. P. Wyre has $876.52 deposited to his account in that period—more than twice the amount necessary to pay the filing fee. Thus, he is not indigent."
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> *Cloud v. State*, 234 So. 3d 538 (Ala. Crim. App. 2016) citing *Ex Parte Wyre*, 74 So. 479 (Ala. Crim. App. 2011).

Id. On July 12, Gavin filed a pro se motion in the Alabama Supreme Court, citing his right to due process and equal protection and seeking a stay so that the circuit court could make "factual findings" as to his underlying challenge to his conviction for capital murder.[13] The State objected, and the Alabama Supreme Court denied the motion on July 16.[14]

Gavin filed the motion at bar on July 17.

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10. *Id.* at 2.
11. Per the Cherokee County Clerk's Office, the filing fee for a Rule 32 petition is $294.50.
12. Order at 2, *Gavin*, 13-CC-1998-000061.61, Doc. 7.
13. Motion to Stay of Execution or Grant Injunction of Execution, *Ex parte Gavin*, No. 1030368 (Ala. July 12, 2024).
14. Order, *Ex parte Gavin*, No. 1030368 (Ala. July 16, 2024).

II. The Court should deny the motion.

Gavin's petition for postconviction relief was denied, so to show a likelihood of success he must show a reasonable likelihood that his appeal from that denial would succeed. *Cf. Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). On this posture, the Court gives "considerable weight" to the decisions below. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983); *see also Respect Maine PAC v. McKee*, 562 U.S. 996 (2010) (Kennedy, J., in chambers) (requiring significant justification for "judicial intervention that has been withheld by lower courts" (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)); *cf. Bateman v. Arizona*, 329 U.S. 1302, 1304 (1976) ("In all cases, the fact weighs heavily 'that the lower court refused to stay its order pending appeal.'") (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)). Because the Alabama Supreme Court denied injunctive relief, Gavin has "an especially heavy burden." *Edwards v. Hope Medical Group for Women*, 512 U.S. 1301 (1994) (Scalia, J., in chambers).

A. The motion should be denied because the petition raises an issue that is purely a matter of state law.

The Court should deny Gavin's motion for stay of execution because, despite references to due process, the issue before the Court is purely a matter of state law: whether a state petition may be considered when the petitioner fails to pay the filing fee and is not, by the terms of state law, indigent. Though Gavin invokes (at 2) the due process right to be heard, this isn't a case where an inmate found to be indigent was denied access to the courts for failing to pay a filing fee. The circuit court found instead that Gavin is not indigent under state law, and in substance that is what he

takes issue with. Gavin has thus failed to present a matter worthy of certiorari under Rule 10 of the Supreme Court Rules or the grant of a stay of execution.[15]

Moreover, the state circuit court acted properly, as the Alabama Supreme Court found in denying Gavin's July 12 motion for stay of execution. The circuit court correctly dismissed Gavin's successive Rule 32 petition because Gavin is not indigent as that term is defined in Rule 6.3(a) of the Alabama Rules of Criminal Procedure. It also properly found, based on this fact, that it lacked jurisdiction to address the merits of his claims. Under Alabama law, "[a]bsent the payment of a filing fee required by § 12-19-70, Ala. Code 1975, or the granting of a request to proceed in forma pauperis, the trial court fails to obtain subject matter jurisdiction to consider a postconviction petition." *Smith v. State,* 840 So. 2d 943, 945 (Ala. Crim. App. 2002) (cleaned up). Thus, the circuit court *could not* have decided the merits of Gavin's case due to lack of jurisdiction. As the Alabama Court of Criminal Appeals has explained, where an inmate lacks IFP status and the filing fee is not paid, a circuit court's dismissal of a Rule 32 petition on the merits is "void because that court did not have jurisdiction to entertain the petition." *Madden v. State,* 885 So. 2d 841, 844 (Ala. Crim. App. 2003).

Therefore, this Court should not grant Gavin's motion for stay of execution because the matter before the Court is purely one of state law, and in any case, the state court followed Alabama law in dismissing Gavin's petition.

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15. *See, e.g.*, *Arthur v. Dunn*, 580 U.S. 977 (2016) (mem.) ("I do not believe that this application meets our ordinary criteria for a stay. This case does not merit the Court's review: the claims set out in the application are purely fact specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three.") (statement of Roberts, C.J.).

B. In the alternative, granting a stay of execution would be futile because Gavin challenges only one of the two counts of capital murder for which he was convicted.

This Court also should deny Gavin's motion on futility grounds. Although the circuit court did not rule on the merits of Gavin's Rule 32 petition, even if the state courts were to grant relief, deciding that Alabama could not consider Gavin's 1982 Illinois murder conviction in convicting him of the 1998 capital murder (highly unlikely, given the terms of the statute),[16] Gavin would still face a capital murder conviction from that trial.

Gavin was convicted of ***two*** counts of capital murder for Clayton's death: murder following another murder in the previous twenty years, and murder committed during the course of a robbery. *Gavin v. State*, 891 So. 2d 907, 926 (Ala. Crim. App. 2003). The jury recommended 10–2 that he be sentenced to death, and the trial court accepted that recommendation. *Id.* at 926–27. The robbery-murder conviction carried with it an "overlapping" statutory aggravating circumstance, *see* ALA. CODE § 13A-5-49(4), which was proven beyond a reasonable doubt by the jury's unanimous guilt-phase verdict. Thus, even if Gavin's conviction based on the 1982 murder were removed from consideration, he would still have been convicted of capital murder and eligible for the death penalty—and quite likely sentenced to death, as the trial court's sentencing order notes that the court found *no mitigating*

16. *See* ALA. CODE § 13A-5-40(a)(13) ("The following are capital offenses: (13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b); and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction."). Other States have similar capital murder crimes on their books. *See, e.g.*, IND. CODE § 35-50-2-9(b)(7)-(8).

circumstances to exist. *Gavin*, 891 So. 2d at 995. It would not be unusual for an Alabama jury to recommend a death sentence for murder during a robbery. *See, e.g.*, *Riley v. State*, 166 So. 3d 705 (Ala. Crim. App. 2013) (affirming death sentence for murder during robbery that jury had recommended unanimously). Additionally, even if the prior murder could not be an element of the crime of capital murder, it still would have been before the jury at sentencing as an aggravating circumstance. *See* ALA. CODE § 13A-5-49(2) ("The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person.").

Gavin's crime was heinous, and even without one of his capital murder convictions, he still would have been sentenced to death. Shortly after Gavin was paroled for the 1982 murder, he traveled to Alabama with his cousin, Dewayne Meeks, "[t]o pick up some girls…and just to really get away." *Gavin*, 891 So. 2d at 927. On the evening of March 6, 1998, the two men stopped at an intersection, and Gavin left the vehicle, claiming he was going to ask the driver of a Corporate Express Delivery Systems courier van for directions. Instead, he fired two shots into the van, hitting Clayton, the driver. Gavin pushed Clayton out of the driver's seat and took off with Clayton still in the van. *Id.* at 927–28. When law enforcement attempted to stop the vehicle, Gavin jumped out and shot at the pursuing officer before fleeing into the woods. The officer found Clayton, who was "still alive, but barely," and radioed for assistance. *Id.* at 928–29. Clayton was pronounced dead on arrival at the hospital. *Id.* at 929. As for Gavin, a search dog tracked him into the woods, where he was found hiding in a creek; as he was brought out, he said, "I hadn't shot anybody and I don't

have a gun." *Id.* The murder weapon, a .40 caliber Glock pistol, was recovered near the woods; it belonged to Meeks, and the bullets and shell casings recovered matched the gun. *Id.* at 930. A supervisor at the county jail testified that Gavin later said, "Dewayne didn't do anything," "I did it," and "Dewayne should not be in here," *Id.* Clayton, the sole victim, was a married father of seven.

Thus, the Court should deny the motion on futility grounds.

C. The equities weigh heavily against Gavin.

1. The State and public interests favor denial of the motion.

Granting Gavin's stay would undoubtably delay today's execution, for he is challenging his conviction for capital murder. That delay would undermine the powerful interest—shared by the State, the public, and the victims of Gavin's crime—in the timely enforcement of his sentence. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). An unpunished murder is an intrinsic and ongoing harm to those interests and to the rule of law. A quarter-century is far too long to wait for justice. "Only with real finality" can we "move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "To unsettle these expectations," especially at the eleventh hour, "is to inflict a profound injury to…the State and the victims of crime alike." *Id.*

2. Gavin's decades-long delay is inexcusable.

Because "[e]quity strongly disfavors inexcusable delay," *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020), "last-minute claims arising from long-known facts" can justify "denying equitable relief," *Ramirez v. Collier*, 595 U.S.

411, 434 (2022). That "well-worn principle[] of equity" holds true even "in capital cases." *Id.* Undue delay, even for "a few months," *Wreal, LLC v. Amazon.com*, 840 F. 3d 1244, 1248 (11th Cir. 2016), but especially for "years," *Benisek v. Lamone*, 585 U.S. 155, 160 (2018) (per curiam), is strongly disfavored. The reason is plain: Failure to act with "urgency" suggests that instead of needing an "extraordinary and drastic remedy," *Wreal*, 840 F. 3d at 1247–48, a plaintiff is engaged in "manipulation," *Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam).

This is exactly the kind of "'last-minute' claim relied on to forestall an execution" that this Court does "not for a moment countenance." *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022); *see Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) ("Last-minute stays should be the extreme exception, not the norm, and…'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'"); *Hill*, 547 U.S. at 584–85; *Gomez*, 503 U.S. at 654 ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."). "Courts should police carefully against attempts…to interpose unjustified delay." *Bucklew*, 587 U.S. at 150. Gavin's petition for postconviction relief challenges his conviction from November 1999. He has "long-known" how his crime of murder in Illinois in 1982 factored into his trial after he murdered again in Alabama. *Ramirez*, 595 U.S. at 434. He nonetheless waited nearly twenty-five years to file this action. The delay is entirely of his own making, and his motion can be denied for that reason alone.

Any further delay here would be unjustified and extraordinary. After decades, Gavin is scheduled to be executed ***today*** and has endeavored to proliferate eleventh-

hour litigation for the purpose of deliberate delay. "The people of [Alabama], the surviving victims of [Gavin's] crimes, and others like them deserve better." *Bucklew,* 587 U.S. at 150. Such gamesmanship, which would thwart the State's and society's strong interests in carrying out just and lawful sentences, should not be rewarded.

CONCLUSION

Gavin's eleventh-hour motion for stay of execution is due to be denied. It is untimely, it concerns an issue of state law—an issue, to be sure, that the state courts correctly decided—and returning this case to the state courts for further proceedings would be an unjust exercise in futility.

Respectfully submitted,

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