

## IN THE SUPREME COURT OF ALABAMA

EX PARTE JEFFREY LYNN BORDEN )  
IN RE: )  
JEFFREY LYNN BORDEN, ) Case No. 1961943  
Respondent, ) DEATH PENALTY CASE  
v. ) EXECUTION SCHEDULED FOR  
STATE OF ALABAMA, ) OCTOBER 5, 2017  
Petitioner. )

**EMERGENCY MOTION TO VACATE EXECUTION DATE**

Jeffrey Lynn Borden, through counsel, hereby moves this Court to vacate its order of August 28, 2017, scheduling his execution for October 5, 2017. This execution date should be vacated because the United States Court of Appeals for the Eleventh Circuit has recently ordered the District Court for the Middle District of Alabama to conduct a trial on the constitutionality of Alabama's method of execution. Because there are open and substantial constitutional issues concerning the method that Alabama intends to use to execute Mr. Borden, it is not the "appropriate time" for "an order fixing a date of

execution," as required by Rule 8(d)(1), Alabama Rules of Appellate Procedure.

In support of this Motion, Mr. Borden states as follows:

1. On June 23, 2017, the State of Alabama filed a motion in this Court pursuant to Rule 8(d), Alabama Rules of Appellate Procedure, to set an execution date for Mr. Borden.

2. In opposing the State's motion, Mr. Borden explained that his lethal injection lawsuit, which had been summarily dismissed by the United States District Court, was pending on appeal in the Eleventh Circuit. He further noted that, based on oral argument in a related appeal,<sup>1</sup> the same issues raised in Mr. Borden's suit were likely to be remanded for a trial on the merits.<sup>2</sup>

At the time, he also noted that the State's main argument in opposition to his appeal was that an earlier

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<sup>1</sup> *Grayson, et al. v. Dunn (Frazier)*, \_\_ F.3d \_\_ (11th Cir. Sept. 1, 2017), 2017 WL 3815265 (attached as Ex. A).

<sup>2</sup> Mr. Borden's prediction proved accurate. See *Frazier*, slip op. at 74-79.

Eleventh Circuit decision<sup>3</sup> represented the law of the case, foreclosing appellate relief. The Eleventh Circuit has since expressly held that the law of the case doctrine does not apply to Mr. Borden or his fellow appellants with respect to *Smith*.<sup>4</sup>

3. On August 28, 2017, this Court set Mr. Borden's execution for October 5, 2017.

4. On September 1, 2017, the Eleventh Circuit held that the District Court improperly granted summary judgment in favor of the State on a civil rights complaint challenging the constitutionality of Alabama's method of execution. The Eleventh Circuit vacated the District Court's order and remanded the case with instructions to hold a trial on the merits of the complaint.

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<sup>3</sup> *Grayson v. Warden (Smith)*, 672 F. App'x 956 (11th Cir. 2016) (unpublished).

<sup>4</sup> *Frazier*, slip op. at 72 ("It stands to reason that if the District Court's decision did not apply to the four other plaintiffs [including Mr. Borden], whose complaints were identical [to Smith's], we could hardly say that even though our affirmance of the Court's decision was not binding in those plaintiffs' cases, it is somehow binding in Appellants' cases.").

Plaintiffs in that case challenged the lethal injection protocol, alleging violations of the Eighth Amendment's prohibition against cruel and unusual punishment.

Specifically, they argued that Alabama's present execution protocol violates the Eighth Amendment because it uses potassium chloride without adequately anesthetizing the condemned.

5. Mr. Borden has a case pending in the Eleventh Circuit in which he made the same claims as the *Frazier* Plaintiffs before the same District Court, and his claims were summarily dismissed. *West, et al. v. Commissioner et al.*, 17-11536-P. The same panel that ordered a trial in Mr. Frazier's case is reviewing Mr. Borden's case.

6. Because the *Frazier* Plaintiffs' case will still be pending for trial on October 5, 2017, this Court should vacate Mr. Borden's execution date. The Eleventh Circuit ordered that the District Court hold a trial on the constitutionality of the protocol, and gave instructions on narrowing the issues for trial, and stated that it expected expert witnesses to be called for each party.

7. A stay of execution should issue "if there is a substantial question to be preserved for further proceedings in the courts." *Ex parte Baldwin*, 456 So. 2d 129, 138 (Ala. 1984), *aff'd sub nom. Baldwin v. Alabama*, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985)(quoting *Rosenberg v. United States*, 346 U.S. 273, 288 (1953)). The fact that a trial will be held on the constitutionality of the method of execution that the State intends to use on Mr. Borden indicates that this is not "the appropriate time" for entry of an order fixing a date of execution.

8. Mr. Borden respectfully requests that this Court grant this motion and vacate the order setting his execution date for October 5, 2017.

Respectfully submitted,

/s/ Leslie S. Smith  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on September 6, 2017, I electronically filed the foregoing pleading with the Clerk of the Court using the ACIS system, and a copy has been served upon the following, via first class postal service:

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/s/ Leslie S. Smith  
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