

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11536

CHARLES LEE BURTON, 2:14-cv-01028

Plaintiff - Appellant,

ROBERT BRYANT MELSON, 2:14-cv-01029

Plaintiff - Appellant,

GEOFFREY TODD WEST, et al 2:12-cv-00316

Plaintiffs,

versus

WARDEN,
COMMISSIONER, ALABAMA DOC, Defendants.

TORREY TWANE MCNABB, 2:13-cv-00781

Plaintiff - Appellant,

JEFFERY LYNN BORDEN, 2:14-cv-01030

Plaintiff - Appellant,

versus

COMMISSIONER, ALABAMA DOC,

WARDEN, CF HOLMAN

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before TJOFLAT, ROSENBAUM, and JILL PRYOR, Circuit Judges.

BY THE COURT:

Jeffery Lynn Borden is an Alabama death row inmate scheduled to be executed on October 5, 2017. In *Burton et al. v. Warden, Commissioner, Alabama Department of Corrections*, we reversed the District Court's grant of the Alabama Department of Correction's ("ADOC") Federal Rule of Civil Procedure Rule 12(b)(6) motion to dismiss Mr. Borden's complaint, which challenges Alabama's current method of execution via lethal injection, and remanded the case to the District Court for further proceedings. No. 17-11536, __ F.3d __, 2017 WL 3916984, at *1 (11th Cir. Sept. 6, 2017). Before the Court now is Mr. Borden's emergency motion to stay his execution. For the reasons that follow, we enjoin Mr. Borden's execution through October 19, 2017.

As a preliminary matter, based on the arguments he has advanced in support of a stay, we construe Mr. Borden's motion as an application under the All Writs Act, 28 U.S.C. § 1651(a), for an order enjoining his execution.¹ The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act is a codification of the federal courts' "inherent power and . . . constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *Procup v. Strickland*, 792 F.2d 1069, 1074 (11th Cir. 1986) (en banc). The Act is an extraordinary remedy that, under exceptional circumstances, provides a court broad authority to issue an appropriate writ. We first discuss our authority under the All Writs Act and second explain why Mr. Borden has demonstrated that the circumstances of his case warrant an All Writs Act injunction.

"[D]espite its express language referring to 'aid of . . . jurisdiction,' the All-Writs Act also empowers federal courts to issue injunctions to protect or effectuate their judgments." *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993); *see Teas*

¹ Mr. Borden's "request for a preliminary injunction is not predicated on any independent cause of action; instead, he requests the injunction solely for the purpose of allowing time to pursue his appeal." *Hill v. McDonough*, 464 F.3d 1256, 1258 (11th Cir. 2006). "As such, the injunction sought is not a 'traditional' injunction, but instead one grounded in the authority of the federal courts under the All Writs Act." *Id.*

v. Twentieth Century Fox Film Corp., 413 F.2d 1263, 1266 (5th Cir. 1969) (a court under the All Writs Act is empowered to “effectuate its judgments *and to prevent any interference with it.*” (emphasis added)).² The Act gives federal courts the power to “safeguard not only ongoing proceedings, but *potential future proceedings, as well as already-issued orders and judgments.*” *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004) (emphasis added). Thus, to obtain an injunction under the All Writs Act, Mr. Borden “must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else’s action or behavior.” *Id.* at 1099-1100.³

Accordingly, provided he has shown that the circumstances warrant it, we have the authority under the All Writs Act to enjoin Mr. Borden’s execution using Alabama’s current lethal injection protocol, which Mr. Borden has challenged, to protect our mandate in *Burton*. Although the *Burton* decision issued on September 6, 2017, the mandate has not yet issued and will not issue until October 5, 2017. “This court retains jurisdiction over an appeal until it has issued a mandate to implement its disposition.” *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 645, 649

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

³ “The requirements for a traditional injunction,” such as a showing of a substantial likelihood of success on the merits of a claim, “do not apply to injunctions under the All Writs Act.” *Klay*, 376 F.3d at 1100. Rather, the Act permits a court to “compel acts necessary to . . . facilitate the court’s effort to manage the case to judgment” without respect to the merits of the case proceeding to judgment. *Id.* at 1102 (internal quotation marks omitted).

(11th Cir. 1990) (quoting *United States v. Cook*, 592 F.2d 877, 880 (5th Cir. 1979)). Moreover, provided the circumstances warrant it, our injunction can extend beyond issuance of the mandate. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) (“Since the Court of Appeals could at some stage of the . . . proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs [under the All Writs Act] reaching them.”); see also *Green v. Warden*, 699 F.3d 364, 367-68 (7th Cir. 1983) (“The exercise of this power [under the All Writs Act] is appropriate both in cases where jurisdiction of the Court of Appeals has already attached as well as cases where the Court of Appeals has merely potential appellate jurisdiction.”).

Mr. Borden has shown that his case presents exceptional circumstances that warrant an injunction under the All Writs Act. His § 1983 challenge began in September 2016 (long before the State obtained a warrant for his execution) and is ongoing today. Moreover, in a case raising a similar challenge, *Grayson et al. v. Warden, Commissioner, Alabama Department of Corrections*, we recently held that there is a genuine issue of material fact regarding whether Alabama’s current method of execution violates the Eighth Amendment’s prohibition on cruel and unusual punishment and remanded for further proceedings. No. 16-16876, ___ F.3d ___, 2017 WL 3815265, at *2-3 (11th Cir. Sept. 1, 2017). Mr. Borden’s execution

on October 5, 2017 would interfere with our ability to give effect to—and prevent interference with—these decisions.

While it is true that a party seeking an injunction pending appeal ordinarily should move first in the district court, *see* Fed. R. App. P. 8(a)(1), in this case, it is impracticable for the District Court to take up a motion for an All Writs Act injunction at this juncture, as Mr. Borden’s execution is scheduled for the very day our mandate issues, October 5. *See* Fed. R. App. P. 8(a)(2)(A). That would leave no opportunity for the District Court to consider such a motion or to effectuate our directive, as we have outlined it in our September 6, 2017 opinion in this case. Our September 6 decision reversed the District Court’s dismissal of Mr. Borden’s complaint, noting that “the Complaint alleges facts that, if proven true, would satisfy both prongs of the *Baze*⁴ standard.” *Burton*, 2017 WL 3896423, at *9. For this reason, we ordered the remand of Mr. Borden’s case to the District Court for further proceedings.

If, however, Mr. Borden is executed before those proceedings are even given the opportunity to occur, our mandate will be frustrated. Particularly because no time at all exists between the issuance of our mandate and the date of Mr. Borden’s scheduled execution—it would not be practicable for this Court to require Mr. Borden to file his motion in District Court first. The All Writs Act, however, gives

⁴ *See Baze v. Rees*, 553 U.S. 35 (2008) (setting forth the requirements for establishing an Eighth Amendment method of execution challenge).

us the authority to decide the motion before us to ensure that our prior decision has effect. *See Wesch*, 6 F.3d at 1470. Together, these circumstances warrant an All Writs Act injunction that will protect the integrity of our decision about Mr. Borden's § 1983 claim in *Burton*. *See Klay*, 376 F.3d at 1099-1100.⁵

Moreover, despite the State's strong interest in carrying out its judgments, Mr. Borden has shown that the equities lie in his favor. *See Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir. 2006). Specifically, Mr. Borden was not responsible for any delay in bringing the litigation of his claim to its present posture. Mr. Borden initiated his § 1983 challenge on September 7, 2016, long

⁵ Our injunction implicates neither the Anti-Injunction Act nor the *Younger* abstention doctrine. *See* 28 U.S.C. § 2283 (the Anti-Injunction Act); *Younger v. Harris*, 401 U.S. 37 (1971) (setting forth the so-called *Younger* abstention doctrine). Even assuming for purposes of this order that Mr. Borden's execution warrant constitutes a state-court proceeding, neither bars the action we take today. Section 1983 "is an Act of Congress that falls within the 'expressly authorized' exception of [the Anti-Injunction Act]," which otherwise prohibits the federal courts from enjoining ongoing state court proceedings. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). And *Younger* abstention is inapplicable for two independent reasons. First, *Younger* applies when, in the face of an ongoing state-court criminal proceeding, a litigant files suit in federal court to challenge the state statute under which he was charged. *Younger*, 401 U.S. at 39. The procedural posture of this case is quite the opposite. Mr. Borden was in the middle of an ongoing federal proceeding challenging the constitutionality of Alabama's method of execution when the State initiated proceedings to obtain a warrant for his execution. Because the District Court had already held "proceedings of substance on the merits," its decision on the motion to dismiss, *Younger* is inapplicable because there is no "ongoing state proceeding." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (stating that "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits"). Moreover, it would be wholly improper for Mr. Borden to challenge in that state "proceeding"—to the extent it can be defined as a state criminal proceeding—the constitutionality of the State's intended method of execution, especially in light of the fact that he had an ongoing challenge in federal court for well over a year. Second, *Younger* applies only when a party seeking relief in federal court will not suffer irreparable loss that is "both great and immediate." *Id.* at 45, 48-49. There can be little doubt that loss of life is irreparable, great, and immediate.

before the State obtained a warrant for his execution on August 28, 2017. The claim thereafter lay dormant on the District Court's docket until January 26, 2017, when, pursuant to the parties' joint motion, the Court consolidated his case with those of other Alabama inmates challenging the State's lethal injection protocol. Then, on March 31, 2017, the District Court dismissed Mr. Borden's complaint pursuant to a Rule 12(b)(6) motion the State had filed in cases consolidated with Mr. Borden's. Mr. Borden timely appealed the dismissal, and his case has since remained in the bosom of this Court pending disposition of his appeal.⁶ In light of this procedural history, Mr. Borden's motion to enjoin his execution pursuant to the All Writs Act could hardly be described as "dilatory." *Hill*, 464 F.3d at 1259 (refusing to grant an injunction under the All Writs Act to allow a prisoner to pursue his § 1983 claim "on the eve of execution" when the prisoner intentionally delayed filing his claim and seeking reconsideration of his appeal in an effort to "necessitate a stay" of his execution).

⁶ Indeed, even before we issued a decision in *Burton*, Mr. Borden moved in the Alabama Supreme Court to vacate the order setting his execution based on this Court's determination in *Grayson* that summary judgment for the State was improper on another group of Alabama death row inmates' § 1983 method of execution challenge. Then, the morning after our opinion in *Burton* issued (which held that the District Court erred in concluding as a matter of law that Mr. Borden's § 1983 complaint was filed out of time), Mr. Borden filed a supplemental motion to vacate his execution date in the Alabama Supreme Court. On September 15, before the Alabama Supreme Court had ruled on the motion to vacate, Mr. Borden moved for an injunction in this Court. The Alabama Supreme Court summarily denied Mr. Borden's motion for a stay on September 20, 2017.

The equities in this case favor our use of the All Writs Act to enjoin Mr. Borden's execution until our mandate issues and the District Court has had an opportunity to proceed accordingly. At that stage, should Mr. Borden move for a stay in the District Court, that Court will have authority to protect its jurisdiction to resolve Mr. Borden's claim, taking into account the same considerations we discuss today.⁷

Our decision to enjoin Mr. Borden's execution is not an indictment of Alabama or its officials. We recognize the State's interest in carrying out its judgments, but our authority under the All Writs Act extends to those who have not "engaged in wrongdoing" but nonetheless "are in a position to frustrate . . . the proper administration of justice, and . . . even those who have not taken any affirmative action to hinder justice." *Klay*, 376 F.3d at 1100 (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977)). And because "[t]he requirements for a traditional injunction," such as a showing of a substantial likelihood of success on the merits of a claim, "do not apply to injunctions under the All Writs Act," we are not passing judgment on the ultimate merits of Mr. Borden's claim. *Id.* That said, considering our decisions in *Burton* and *Grayson*,

⁷ And if the District Court decided a motion for injunction under the All Writs Act, we would have jurisdiction to review its decision. *See, e.g., Burr & Forman v. Blair*, 470 F.3d 1019, 1026 (11th Cir. 2006) (reviewing a district court's grant of injunctive relief under the All Writs Act); *United States v. Machado*, 465 F.3d 1301, 1308 (11th Cir. 2006) (reviewing a district court's denial of injunctive relief under the All Writs Act for abuse of discretion); *Klay*, 376 F.3d at 1096 (reviewing a district court's grant of injunctive relief under the All Writs Act).

there is a significant federal interest in bringing this constitutional litigation to a final judgment. *See Klay*, 376 F.3d at 1102 (explaining that a court may use the All Writs Act to “compel acts necessary to . . . facilitate the court’s effort to manage the case to judgment” (internal quotation marks omitted)).

A court “may grant a writ under [the All Writs Act] whenever it is ‘calculated in [the court’s] sound judgment to achieve the ends of justice entrusted to it.’” *Id.* at 1100 (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)).

Under the circumstances of this case, we have concluded that an injunction is warranted to give the District Court enough time to receive our mandate and proceed accordingly. We therefore enjoin the State from executing Mr. Borden using its current method of execution through October 19, 2017.

INJUNCTION GRANTED.