Nos. 16-602 and 16A451
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS ARTHUR,
Petitioner,

v.

JEFFERSON S. DUNN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI AND TO THE MOTION FOR STAY OF EXECUTION

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EXECUTION SCHEDULED FOR NOVEMBER 3, 2016

QUESTIONS PRESENTED
(Restated)

1. Did the circuit court err in affirming the denial of Arthur's motion to amend his complaint to plead the firing squad as an alternative execution protocol where the firing squad is not contemplated by state statute and where Arthur never showed that Alabama's current lethal injection protocol is unconstitutional, per se or as applied to him?

2. Did the circuit court err in affirming the denial of Arthur's Eighth Amendment method-of-execution claim where Arthur failed to plead and prove a feasible, readily available alternative that in fact significantly reduces a substantial risk of pain, as was his burden under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015)?

3. Did the circuit court err in affirming the denial of Arthur's as-applied claim where Arthur failed to show that the use of midazolam is very likely to cause him to experience a painful heart attack and failed to name a feasible, readily available alternative?

4. Did the circuit court err in affirming the denial of Arthur's Equal Protection claim where the testimony of the individuals trained in the consciousness assessment showed that the consciousness assessment has been performed in full at all executions since its introduction?

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INTRODUCTION AND OPPOSITION TO THE MOTION FOR A STAY OF EXECUTION

Arthur has failed to advance any compelling reason for this Court to review his case, let alone grant a stay of execution. Certiorari review is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10; *see also Fay v. Noia*, 372 U.S. 391, 436 (1963). Moreover, a stay pending disposition of a petition for writ of certiorari should be granted only where there are "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

Here, Arthur's petition fails to present any compelling reason or substantial ground to warrant this Court's attention. The Eleventh Circuit Court of Appeals correctly affirmed the district court's denial of relief in this matter, and the lower court is due to be affirmed. As evidenced, below, Arthur's petition presents neither compelling grounds nor important federal questions warranting certiorari review. Additionally, the thorough opinion of the Eleventh Circuit makes reversal in this case highly unlikely.

Addressing Arthur's Fourteenth Amendment claim first, a stay is not an appropriate remedy because both lower courts determined that the Alabama Department of Corrections ("ADOC"), has consistently performed its "pinch test" in every execution since it was adopted, a situation that undercuts Arthur's claim of a circuit split. Further, Arthur would be protected by an order requiring the ADOC to conduct the "pinch test" at his execution, resolving any concern as to Arthur's specific case.

Nor do Arthur's Eighth Amendment claims support the issuance of a stay. Turning to the third Eighth Amendment question *actually* presented, this Court has clearly stated that an Eighth Amendment § 1983 claim may be denied if a petitioner fails to plead or prove either element set forth in *Baze v. Rees*, 553 U.S. 35 (2008), or *Glossip v. Gross*, 135 S. Ct. 2726 (2015).[1] Thus, Arthur's claim that the Eleventh Circuit erred by affirming on the basis that he failed to prove an alternative method of execution that was known and available is patently without merit.

Likewise, Arthur's appeal regarding the district court's denial of leave to amend his complaint to include firing squad does not support the issuance of a stay. Wholly ignored by Arthur is the Eleventh Circuit's alternate ground that this claim was barred by laches. *Arthur v. Comm'r, Ala. Dep't of Corrs.*, No. 16-15549, at 110 n.35 (11th Cir. Nov. 2, 2016). The lower court determined that Arthur's failure to seek leave to amend his 2011 complaint to allege the firing squad as an alternative method of execution until August 2015, constituted an "alternative and independent ground" for affirming the trial court. *Id.*

In any event, the lower court's decision is in harmony with this Court's Eighth Amendment jurisprudence. In *Baze*, this Court clearly stated that Kentucky's method-of-execution statute, prohibiting physicians from participating in an execution other than to certify cause of death, rendered any alternative method requiring physician participation unavailable. *Id.* at 46, 59 (citing KEN. REV. STAT.

1. The third Eighth Amendment ground presented in Arthur's petition is different than the third question presented. *Compare* Pet. (I) *with* Pet. 27–32. Respondents address the claim *actually argued* in the petition rather than the issue suggested by the "Questions Presented."

ANN. § 431.220(3)). In fact, Arthur's attempt to challenge Alabama's method of execution through the use of § 1983 by pleading a non-statutory alternative method of execution has been foreclosed by this Court since *Hill v. McDonough*, 547 U.S. 573, 579–80 (2006), and *Nelson v. Campbell*, 541 U.S. 637 (2004).

As was explicitly stated in *Hill*, the controlling factor in *Nelson* that distinguished the § 1983 Eighth Amendment claim from a petition for writ of habeas corpus, was the fact that the challenged procedure was not "required by law" and injunctive relief "would not prevent the State from implementing the sentence." *Hill*, 547 U.S. at 579–80. In *Hill*, the Court relied on the fact that Florida law provided authority to its department of corrections to craft a lethal injection protocol using other drugs, such that Florida could not argue an injunction "would leave the State without any other practicable, legal method of executing Hill by lethal injection." *Id.* at 580. Thus, "Hill's challenge appear[ed] to leave the State free to use an alternative lethal injection procedure." *Id.* at 580–81. Further, this Court clearly relied on the fact that "the injunction Hill seeks *would not necessarily foreclose the State from implementing the lethal injection sentence under present law*, and thus it could not be said that the suit seeks to establish 'unlawfulness [that] would render a conviction or sentence invalid.'" *Hill*, 547 U.S. at 585 (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)) (emphasis added). Under these limited circumstances, the condemned inmates in *Nelson* and *Hill* were permitted to seek relief under § 1983. Because the lower court's decision is in harmony with this Court's Eighth Amendment jurisprudence, a stay of execution would be inappropriate.

Finally, there can be no question but that *Baze* and *Glossip* require a petitioner to establish that their pleaded alternative drug is available to the State for use in a lethal injection. If the interpretation of *Glossip* Arthur advances was the proper Eighth Amendment standard, then the condemned prisoners should have prevailed. After all, no party in *Glossip* disputed that pentobarbital was manufactured or available for medical use inside the United States; rather, the issue was that its manufacturer refused to allow the use of the drug in executions and took steps to restrict its sale. *Glossip*, 135 S. Ct. at 2733. Unlike the highly speculative testimony of Arthur's expert that it is possible that somewhere, a pharmacy exists that might be able to obtain the ingredients and produce pentobarbital, this Court, in *Glossip*, accepted as a given fact that pentobarbital was made and generally available outside of the lethal injection context.

If, as Arthur contends, the question of feasibility and ready availability is whether a drug is capable of being *made*, not whether it is available to a department of corrections for use in execution, *Glossip* would have ended with a much different result. But *Glossip* was decided against the petitioners, and the relevant fact was that "Oklahoma eventually *became unable to acquire the drug through any means*." *Glossip*, 135 S. Ct. at 2733 (emphasis added). Here, there is substantial proof in the record that the ADOC has become unable to acquire pentobarbital through any means.

Tellingly, not even the dissent, below, believes Arthur's evidence in this regard was non-persuasive. *Arthur*, No. 16-15549, at 134 (Wilson, J., dissenting)

(recognizing that the "'difficult realities' surrounding lethal injection drugs" renders proof of a viable lethal injection "not practicable").

For these reasons, and as set forth more fully below, a stay of execution should not be granted in this case.

STATEMENT OF THE CASE

The death sentence underlying Arthur's 42 U.S.C. § 1983 lawsuit—incidentally, his fifth such lawsuit[2]—was imposed after Arthur committed his second murder. The facts and procedural history of Arthur's trial for the murder of Troy Wicker, his direct appeal, and the collateral review of his conviction were set forth in *Arthur v. Allen*, 452 F.3d 1234, 1238–43 (11th Cir. 2006). In all, the State of Alabama tried Arthur three times and obtained a death sentence based on a jury recommendation of death at each trial.

The current, active death warrant in this case represents the seventh occasion the Alabama Supreme Court has had to order the execution of Arthur's lawful sentence. The prior six execution dates were stayed based on Arthur's long-term manipulation of the federal and state courts through civil litigation and successive collateral attacks. In the most notable case, Arthur received a reprieve based on the presentation of perjured testimony. *Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010).

2. *See Arthur v. King*, 500 F.3d 1335 (11th Cir. 2007) (first); *Arthur v. Allen*, 248 F. App'x 128 (11th Cir. 2007) (second); *Arthur v. Ala. Dep't of Corrs.*, No. 07-15877 (11th Cir. July 29, 2008) (third); *Arthur v. Allen*, 574 F. Supp. 2d 1252 (S.D. Ala. 2008) (fourth). Arthur's daughter also filed a § 1983 petition on his behalf prior to his second execution date. *Stone v. Allen*, No. 07-0681-WS-M, 2007 WL 4209262 (S.D. Ala. Nov. 27, 2007).

A. Arthur's 42 U.S.C. § 1983 litigation before the district court.

In 2011, a national shortage of sodium thiopental caused the Alabama Department of Corrections ("ADOC") to amend its lethal injection protocol to allow for the use of pentobarbital as the first drug in its three-drug sequence. Immediately, Arthur filed this § 1983 action challenging that protocol on Eighth Amendment grounds. He later filed an amended complaint asserting an equal protection claim in addition to his Eighth Amendment cause of action.

The district court dismissed Arthur's complaint on the basis that the Eighth Amendment claim was time-barred and that the equal protection claim failed to state a cognizable claim. The Eleventh Circuit, in a split decision that has become an outlier case within the circuit, reversed and remanded for further proceedings. *See Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. 2012); *see also Brooks v. Comm'r, Ala. Dep't of Corrs.*, 810 F.3d 812, 822 n.10 (11th Cir. 2016); *Gissendanner v. Comm'r, Ga. Dep't of Corrs.*, 779 F.3d 1275, (11th Cir. 2015); *Mann v. Palmer*, 713 F.3d 1306, 1313–14 (11th Cir. 2013) (distinguishing *Arthur* and noting its "narrow holding").

On remand, the district court scheduled an evidentiary hearing, which triggered extensive discovery. In total, the parties deposed two ADOC correctional officers (twice), an ADOC warden, a former ADOC warden (twice), an ADOC chaplain, the ADOC's general counsel (twice), a lay minister, and the ADOC's expert. After an evidentiary hearing, the district court denied the State's motion for summary judgment. Before the case could proceed to trial, however, the State became unable to obtain pentobarbital for use in lethal injections.

On September 11, 2014, the ADOC modified its protocol to permit midazolam as the first drug. The modified protocol called for the sequential administration of three drugs: (1) 500 milligrams of midazolam hydrochloride, (2) 600 milligrams of rocuronium bromide, and (3) 240 milliequivalents of potassium chloride. Arthur's second amended complaint contended that the use of midazolam created a substantial risk of serious harm and vaguely alleged that other states used one-drug compounded pentobarbital protocols.

The district court issued discovery and scheduling orders and set a final hearing for May 2015. The Alabama Supreme Court then set Arthur's execution for February 19, 2015. After the Eleventh Circuit clarified that its prior stay of execution was no longer in place, Arthur obtained a stay of execution from the district court pending a final trial.

During discovery, the district court continued the trial pending this Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). After that decision was announced on June 29, 2015, the State filed renewed motions to dismiss and for summary judgment, and the court issued a show cause order concerning what discovery, if any, Arthur contended was necessary. The court then issued a final discovery order.

Thereafter, Arthur sought leave to amend his complaint for a third time. The amendment asserted two claims: an Eighth Amendment claim and an equal protection claim. While he asserted only one Eighth Amendment cause of action, Arthur included several factual allegations and conclusions concerning why the use of midazolam would be unconstitutional, such as it would fail to reliably induce a

sufficient anesthetic state and it might cause him to suffer a heart attack. Arthur also alleged that compounded pentobarbital and sodium thiopental were known and available alternatives to midazolam, despite the fact that he had previously argued and presented evidence that pentobarbital would cause him to suffer a painful heart attack.

For the first time, despite the approaching trial and the fact that all the discovery and litigation to that point had centered on lethal-injection drugs, Arthur sought to amend his complaint to allege the firing squad as a proposed alternative method of execution. The district court allowed amendment of the complaint to allege compounded pentobarbital and sodium thiopental as proposed alternatives, but it denied leave to include the firing squad.

The court set the trial for January 12–13, 2016. In preparation, the parties engaged in extensive discovery, including seven depositions from medical experts and a third deposition of the ADOC's general counsel. The court then bifurcated the trial, limiting the first setting to two issues: (1) Arthur's equal protection claim and (2) the availability of an alternative method of execution to the ADOC's current protocol under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip*.

At trial, the district court heard *ore tenus* testimony from three attorneys who had attended executions; Anne Hill, the ADOC's general counsel; Dr. Gaylen Zentner and Dr. Alan Kaye, Arthur's expert witnesses; and Don Blocker, a lay minister whose videotaped deposition was submitted. In addition, the State presented deposition testimony of numerous ADOC correctional officers. The court found that Arthur failed

to meet his burden to prove that (1) his alleged alternative lethal injection drugs are available to the ADOC or (2) the ADOC deviated from its protocol by failing to conduct a pinch test.

Arthur did not present any evidence of a source that could and would provide compounded pentobarbital or sodium thiopental to the ADOC.[3] In fact, he failed to question a single source. By contrast, the ADOC contacted nearly thirty potential sources for compounded pentobarbital, including pharmacies and other departments of corrections, but none were willing or able to provide it to the ADOC.

Arthur's chief witness was Dr. Zentner, a pharmacist with a Ph.D. in pharmaceutical chemistry. His testimony did not include specific evidence of availability to the ADOC and was limited to the broad, unsurprising conclusions "that there are compounding pharmacies that have the skills and licenses to perform sterile compounding of pentobarbital sodium" and that there are sources for the ingredients listed online. But Dr. Zentner's testimony on cross-examination highlighted the difficult realities faced in attempting to obtain compounded pentobarbital. For instance, although he was a licensed pharmacist and had training to compound drugs, he had never compounded pentobarbital and did not have the appropriate facilities to compound any drug. Dr. Zentner also conceded that he did not contact any of the pharmacies he identified regarding whether they were willing to compound pentobarbital. In fact, he contacted only two pharmacies to ask whether they had the facilities to compound drugs generally.

3. On appeal, Arthur does not dispute sodium thiopental's unavailability.

Despite the fact that pharmaceutical companies have implemented procedures to prevent their products from being used in executions, Dr. Zentner did not ask any companies about their willingness to sell the ingredients for pentobarbital to the ADOC. Further, Dr. Zentner had never personally purchased these ingredients. Finally, he admitted that sodium thiopental was no longer "an approved product in the U.S."

Anne Hill testified about the ADOC's unsuccessful efforts to obtain compounded pentobarbital. She stated that the ADOC had contacted at least twenty-nine potential sources in an attempt to obtain the drug, including the pharmacies Dr. Zentner identified and the departments of corrections of Virginia, Georgia, Texas, and Missouri. But no source was willing and able to sell it to the ADOC; as Hill explained, "[T]he answer…has always been no." While two companies suggested they might be capable of compounding pentobarbital, they "were unable to obtain the ingredients." Moreover, none of the state entities were willing to disclose their sources. Hill concluded, "I have yet to find anyone who would provide compounded pentobarbital to the [ADOC]."

Based on this evidence, the district court found that "[p]entobarbital is not feasible and readily implemented as an execution drug in Alabama, nor is it readily available to the ADOC, either compounded or commercially." Specifically, the court held:

> Arthur failed to prove that compounded pentobarbital is readily available to the ADOC. Proof that another state has procured it, that with effort it can be compounded (maybe by a willing Alabama compounding pharmacy but maybe not), and indications on the internet

> that a supplier offers to sell the active ingredients, do not prove a feasible and readily available product. At best, it proves a "maybe."

Rejecting Arthur's contention that it was the ADOC's burden to prove his alternative drugs were unavailable, the court held that this evidence demonstrated the Respondents' inability to obtain pentobarbital.

Arthur also failed to prove that the ADOC would not conduct the entire consciousness assessment during his execution. The witnesses concerning this claim fell into two camps: (1) lay witnesses who observed executions, were not familiar with the consciousness assessment, and claimed not to have seen a pinch test, and (2) ADOC officials who had performed the pinch test, were familiar with it, or had assisted in its implementation.

Arthur's primary witnesses were Matt Schulz, Christine Freeman, and Stephen Ganter of the Federal Defenders Office, who had observed their clients' executions and claimed not to have seen the pinch test conducted. All three admitted that they were either unaware of the consciousness assessment or did not know its specifics when they witnessed the executions. Ganter testified that the officer performing the assessment had blocked his view of the inmate's arm. Arthur then presented the videotaped deposition of Don Blocker, a lay minister who witnessed several executions from the inmate's family's viewing room. Blocker claimed that he never saw an inmate pinched but freely admitted that the pinch test could have been performed and that he just did not see it.

Anne Hill also testified concerning the consciousness assessment. She explained that the inmate is pinched on "the back of their arm" and that there have

been no changes to the assessment since its implementation in 2007. She had witnessed nine or ten executions since 2007, and all parts of the assessment, including the pinch test, had been performed each time. Specifically, Hill stated, "I've seen the test conducted," and "I'm able to see the team member who's conducting the assessment, their arm, their hand actually go down behind the arm and, you know, pinch." Hill testified that the full assessment is mandatory and, further, that she was present at Eddie Powell's execution and the pinch test was performed.

The State introduced deposition testimony from two correctional officers who conducted the pinch test, two wardens who oversaw executions with the consciousness assessment, and the chaplain who was present in the execution chamber. This testimony confirmed that the pinch test has been performed in every execution after it was added to the protocol. The two officers testified that they administered the pinch test in every execution in which they participated. Finally, the chaplain testified that he had observed the full assessment being conducted in every execution.

Based on this testimony, the court held, "[T]he evidence establishes that the pinch test was performed in all executions that the ADOC has conducted after the ADOC adopted the consciousness assessment and incorporated it as a mandatory part of the written execution protocol."

B. Arthur's appeal to the Eleventh Circuit.

Arthur filed timely notice of appeal to the Eleventh Circuit. On November 2, 2016, that court affirmed the judgment of the district court in a 111-page opinion.

Arthur v. Comm'r, Ala. Dep't of Corrs., No. 16-15549 (11th Cir. Nov. 2, 2016). After presenting the facts of Arthur's litigation history, the proceedings below in the present matter, and the framework provided by *Baze* and *Glossip*, the court made the following conclusions.

First, the court held that the district court did not err in determining that Arthur failed to carry his burden of showing that pentobarbital is a feasible, readily available alternative method of execution available to the ADOC. *Arthur*, No. 16-15549, at 66–74. The district court's finding that pentobarbital is not available to the ADOC was not clearly erroneous in light of the evidence presented, including Anne Hill's testimony that she was unable to procure pentobarbital, despite her best efforts, and Dr. Zentner's inability to name a source of the drug. The court expressly held, "[T]he fact that other states in the past have procured a compounded drug and pharmacies in Alabama have the skills to compound the drug does not make it available to the ADOC for use in lethal injections in executions." *Id.* at 69. As for Arthur's suggestion that the facts that compounding pharmacies in Alabama are theoretically capable of making pentobarbital and that other states have been able to compound the drug should satisfy his burden of proving an available alternative, the court disagreed, explaining, "To adopt Arthur's definition of 'feasible' and 'readily implemented' would cut the Supreme Court's directives in *Baze* and *Glossip* off at the knees." *Id.* The court also noted that even though *Glossip* did not impose a requirement on the State to make a "good faith effort" to obtain pentobarbital, the ADOC had made this effort by contacting twenty-nine potential sources. *Id.* at 71.

Finally, the court rejected Arthur's claim concerning the alleged risk of pain in the ADOC's protocol, as both the Eleventh Circuit and this Court have upheld three-drug protocols using midazolam. *Id.* at 72 (citing *Glossip*, 135 S. Ct. at 2739–40; *Brooks v. Warden*, 810 F. 3d 812, 818–19 (11th Cir. 2016)).

Second, the court held that the district court did not abuse its discretion in limiting Arthur's discovery concerning the ADOC's attempts to obtain pentobarbital. *Id.* at 74–76. The district court allowed Arthur general discovery as to the State's "'efforts to obtain pentobarbital, including whether the pentobarbital was obtained and, if not, the reasons why it could not be obtained,'" which, as the Eleventh Circuit noted, was "precisely what Arthur needed to prove his Eighth Amendment Claim." *Id.* at 75. Arthur claimed that the ADOC should have been required to disclose the names of the potential suppliers it contacted, but the court disagreed, determining that the district court's decision did not result in substantial harm to Arthur and that Arthur's arguments about what this discovery would have revealed constituted "pure speculation." *Id.* at 76

Third, the Eleventh Circuit found that the district court did not err in granting the State summary judgment on Arthur's "as applied" Eight Amendment claim. *Id.* at 77–93. The court found that Arthur failed to meet his burden "to present evidence sufficient to create a genuine issue of disputed material fact as to whether midazolam creates a substantial risk of severe pain as applied to him uniquely 'when compared to the known and available alternatives' for his execution as applied to him." *Id.* at 77–78 (quoting *Glossip*, 135 S. Ct. at 2737; *Gissendaner v. Comm'r, Ga. Dep't of Corr.*,

803 F.3d 565, 568–69 (11th Cir. 2015)). As Arthur had not established that a one-drug sodium thiopental or pentobarbital protocol was available to the ADOC, the only alternative he named consisted of "material and extensive modifications to Alabama's current protocol," such as gradual administration of midazolam and extensive medical monitoring, which he still claimed would not eliminate the risk of heart attack. *Id.* at 78–79. The court explained why this alternative was no alternative at all:

> *Glossip* cautions us that prisoners cannot successfully challenge a method of execution "'merely by showing a slightly or marginally safer alternative.'" 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 51, 128 S. Ct. at 1531). But a "marginally safer" alternative is, at best, all that Arthur has suggested. It is not enough to meet his burden under *Glossip* and *Baze*.

Id. at 81. Moreover, Arthur declined to provide sufficient specifics about his modified protocol to make it implementable. *Id.* at 82. Finally, the court addressed Arthur's claim that the use of 500 milligrams of midazolam would cause him uniquely to suffer a heart attack, explaining that Arthur "failed to present any admissible evidence" that the bolus would cause him to have a heart attack before he is fully sedated. *Id.* at 84. The court held that the district court did not abuse its discretion in excluding Dr. Strader's opinion under *Daubert*, noting that the steps to a heart attack in Dr. Strader's methodology were "speculative and not reliable," and that "[w]ithout even one of these steps, Dr. Strader's opinion folds like a house of cards." *Id.* at 86.

Fourth, the Eleventh Circuit held that the district court's findings concerning the performance of the consciousness assessment were not clearly erroneous. *Id.* at

93. The court further held that the district court did not err in rejecting Arthur's claim that the execution team is insufficiently trained to gauge consciousness:

> To satisfy Arthur, all ADOC execution team members must pinch inmates with approximately identical force and pinch as hard as they can because this is the standard used in a medical setting. But this is not what the Constitution requires. In *Baze*, the petitioners faulted Kentucky's protocol for lacking a system to monitor the prisoner's anesthetic depth. 553 U.S. at 58–59, 128 S. Ct. at 1536. Although Kentucky had other safeguards in place, including "visual inspection" by the warden and deputy warden of whether the inmate was unconscious, the petitioners requested that "qualified personnel . . . employ monitoring equipment, such as a Bispectral Index (BIS) monitor, blood pressure cuff, or EKG to verify that a prisoner has achieved sufficient unconsciousness before injecting the final two drugs." *Id.* at 59, 128 S. Ct. at 1536. The petitioners claimed that visual inspection by the warden and deputy warden "is an inadequate substitute for the more sophisticated procedures they envision." *Id.* The Supreme Court rejected the petitioners' argument, writing that "these supplementary procedures, drawn from a different context, are [not] necessary to avoid a substantial risk of suffering." *Id.* at 60, 128 S. Ct. at 1536.
>
> And in *Glossip*, the Supreme Court pointed to its conclusion in *Baze* that "although the medical standard of care might require the use of a blood pressure cuff and an [EKG] during surgeries, this does not mean those procedures are required for an execution to pass Eighth Amendment scrutiny." 135 S. Ct. at 2742. Thus, the *Glossip* Court concluded, "the fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is *constitutionally adequate* for purposes of conducting an execution." *Id.*

Id. at 95–96 (emphasis in original).

Finally, the Eleventh Circuit affirmed the district court's denial of Arthur's motion for leave to amend his complaint to plead the firing squad as an alternative under *Baze* and *Glossip*. *Id.* at 97–110. The court first stated that it affirmed "on multiple grounds, including futility, as Arthur never showed Alabama's current lethal injection protocol, *per se* or as applied to him, violates the Constitution." *Id.* at

97–98. Turning to the Alabama statute, ALA. CODE § 15-18-82.1 (1975), the court explained that there are two methods of execution permitted in Alabama, lethal injection and electrocution, and that only if they are held to be unconstitutional can the ADOC use another method of execution. *Id.* at 99–100. Therefore, the ADOC is currently without legal authority to employ the firing squad, and Arthur "is not free to simply disregard [the statutorily approved] methods (and substitute his own) without satisfactorily establishing that those methods violate the constitutional command barring cruel and unusual punishment." *Id.* at 102. The court further noted that in Utah and Oklahoma, the only states that allow for the firing squad, it is not the primary method of execution in either state. *Id.* at 103. In conclusion, the court wrote that "[a]bsent a showing that Alabama's chosen methods of execution present an unconstitutional risk of severe pain, Alabama is under no obligation to deviate from its widely accepted, presumptively constitutional methods in favor of Arthur's retrogressive alternative," i*d.* at 105, an alternative that Alabama has never used and that would require much more than simply buying ammunition to employ.

REASONS FOR DENYING THE WRIT

I. CERTIORARI REVIEW IS UNWARRANTED BECAUSE THE DECISION BELOW COMFORMS TO THIS COURT'S DECISIONS IN *BAZE*, *GLOSSIP*, *HILL*, AND *NELSON*.

Arthur's first question presented seeks certiorari review on the basis that the Eleventh Circuit's decision contravenes *Glossip* on three grounds. First, Arthur suggests that the decision below contravenes *Glossip* in that the lower court found that the firing squad was not a feasible and readily available alternative. Second,

Arthur asserts that the Eleventh Circuit misapplied *Glossip* when it determined that the relevant question for Eighth Amendment purposes was whether an alleged alternative drug was available to the ADOC. Finally, Arthur's third ground alleges that reliance on the unavailability of an alternative drug as a ground for denying a § 1983 Eighth Amendment claim runs contrary to *Glossip*.[4] As shown below, certiorari is due to be denied because the lower court's decision directly follows this Court's Eighth Amendment jurisprudence.

A. The trial court properly denied Arthur's motion for leave to amend his 42 U.S.C. § 1983 complaint to add a claim about the firing squad.

Arthur seeks to paint the lower court's determination that the firing squad could not be asserted as a legitimate Eighth Amendment alternative method of execution as contravening *Glossip*. There are several reasons why the Court cannot grant certiorari on this claim.

First, there is no split of authority on this question. No court has ever addressed a claim by an inmate that he would rather be executed by firing squad than lethal injection. Inmates do not make such claims because, as this Court noted in *Baze*, "the "firing squad" has "given way to more humane methods, culminating in today's consensus on lethal injection." *Baze*, 553 U.S. at 62, 128 S.Ct. at 1538.

Second, this claim was first raised in a purported amended pleading in the district court, and the district court denied that amendment because, in addition to

4. The third Eighth Amendment ground presented in Arthur's petition is different than the third question presented. *Compare* Pet. (I) *with* Pet. 27–32. Respondents address the claim *actually argued* in the petition rather than the issue suggested by the "Questions Presented."

futility, it was untimely. After four years of litigation involving multiple amended complaints, the district court denied Arthur's request for leave to amend to include the firing squad, which was (1) an alternative method of execution that is not contemplated by Alabama law, (2) had not been addressed by discovery or previous hearings, and (3) was radically difference from the claims, arguments, and evidence previously submitted to the court about lethal injection drugs. The court of appeals affirmed the district court on this ground as well as the ground of futility.

Third, in addition to its untimeliness, the lower courts were correct that this proposed amendment was futile.

Alabama law recognizes two methods of execution: lethal injection and electrocution. ALA. CODE § 15-18-82.1 (1975). Under this Court's jurisprudence, there is no conflict with a determination that the firing squad is not a feasible or readily implemented alternative. In fact, this Court's habeas and § 1983 Eighth Amendment jurisprudence have long been concerned with whether a proposed alternative is permitted by state law. In *Glossip*, for example, the Court did not contemplate methods of execution beyond those authorized by Oklahoma law.[5]

More importantly, *Baze* expressly rejected Arthur's position that federal courts must consider non-statutorily-authorized methods of execution as part of a § 1983 Eighth Amendment claim. The only alternatives put forth by the prisoners in *Baze*

5. Although the Court in *Glossip* mentioned the constitutionality of the firing squad and electrocution as methods of execution, those methods were expressly allowed by Oklahoma law. *See* OKLA. STAT. tit. 22, § 1014 (2015). Oklahoma's statute has since been amended to add nitrogen hypoxia as an authorized method of execution. Arthur's suggestion that the firing squad was not permitted under Oklahoma law is flatly wrong. Pet. 17.

involved the use of monitoring techniques or safeguards capable of being implemented within the scope of Kentucky's method-of-execution statute.[6] Those alternatives included switching to a one-drug protocol, discontinuing use of a paralytic, employing additional monitoring equipment, and using "qualified personnel" to verify that an inmate reached a sufficient level of unconsciousness prior to administration of the final two drugs. *Baze*, 553 U.S. at 58–59. None of these alternatives would have been barred by state law.

In contrast, Kentucky's method-of-execution statute prohibited physicians from participating in an execution other than to certify cause of death. *Id.* at 46, 59 (citing KEN. REV. STAT. ANN. § 431.220(3)). In addressing the inmates' argument that an anesthesiologist's participation would be a suitable alternative to Kentucky's current protocol, the Court wrote that the "asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing more than an argument against the entire procedure, given that both Kentucky law . . . and the American Society of Anesthesiologists' own ethical guidelines . . . prohibit anesthesiologists from participating in capital punishment." *Id.* at 59–60. Not only did the Court find that exceeding the scope of Kentucky's method of execution statute rendered the alternative invalid, but it also found that exceeding the nongovernmental ethical policies of the American Society of Anesthesiologists would render the proposed alternative invalid.

6. In *Baze*, 553 U.S. at 44, the Court noted that electrocution would be an alternative form of execution for Kentucky if lethal injection were unavailable.

This respect for state law method-of-execution statutes is evident in this Court's Eighth Amendment jurisprudence discussing the divergence of habeas and § 1983 Eighth Amendment claims. In fact, Arthur's attempt to challenge Alabama's method of execution through the use of § 1983 by pleading a non-statutory alternative method of execution has been foreclosed by this Court since *Hill v. McDonough*, 547 U.S. 573, 579–80 (2006), and *Nelson v. Campbell*, 541 U.S. 637 (2004). As was explicitly stated in *Hill*, the controlling factor in *Nelson* that distinguished the § 1983 Eighth Amendment claim from a petition for writ of habeas corpus was the fact that the challenged procedure was not "required by law" and injunctive relief "would not prevent the State from implementing the sentence." *Hill*, 547 U.S. at 579–80. In *Hill*, the Court relied on the fact that Florida law provided authority to its department of corrections to craft a lethal injection protocol using other drugs, such that Florida could not argue an injunction "would leave the State without any other practicable, legal method of executing Hill by lethal injection." *Id.* at 580. Thus, "Hill's challenge appear[ed] to leave the State free to use an alternative lethal injection procedure." *Id.* at 580–81. Under these limited circumstances, the condemned inmates in *Nelson* and *Hill* were permitted to seek relief under § 1983.

Arthur erroneously suggests that *Hill* rejected a government argument that a § 1983 plaintiff had to plead an authorized method of execution. Pet. 16. This bald assertion completely ignores this Court's clear statement that "the injunction Hill seeks *would not necessarily foreclose the State from implementing the lethal injection sentence under present law*, and thus it could not be said that the suit seeks to

establish 'unlawfulness [that] would render a conviction or sentence invalid.'" *Hill*, 547 U.S. at 585 (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)) (emphasis added). And while Arthur is technically correct that this Court denied the government's argument for a heightened pleading standard, his argument wholly ignores the clarification provided in *Glossip* recognizing that the government's position from *Hill* was actually an element of an Eighth Amendment claim brought pursuant to § 1983. *Glossip*, 135 S. Ct. 2738–39 (citing *Baze*, 553 U.S. 35).

In *Glossip*, this Court explained that the requirement of pleading and proving an available alternative method of execution ensures that the distinction between habeas corpus and § 1983 is preserved. *Id.* To prevail under § 1983, a plaintiff must establish that the relief requested would not bar imposition of the sentence as required by law. The legal question involves whether "the State can avoid [an unconstitutional risk of pain] while still being able to enforce the sentence ordering a lethal injection." *Hill*, 547 U.S. at 581. There is no question here that the State of Alabama cannot enforce a sentence of death by firing squad under current law. This is especially true where Arthur has not alleged that electrocution is unconstitutional.[7]

In fact, this Court has already addressed Arthur's fallacious and hyperbolic "slippery slope" argument that states will violate the Eighth Amendment with impunity by adopting burning at the stake as a statutory method of execution with

7. Alabama law names electrocution or lethal injection as the primary methods of execution. ALA. CODE § 15-18-82.1 (1975). In the event that both are held to be unconstitutional, a condemned inmate shall be executed by any constitutional method of execution. If only lethal injection were held to be unconstitutional, however, the other constitutional method of execution provided by state law would be electrocution.

no other alternatives. Such a method of execution would be properly challenged by habeas corpus. As the Court noted in *Nelson*:

> [I]mposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see ALA. CODE § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion.

541 U.S. at 644. *Hill* confirmed that the line between § 1983 and habeas is whether the suit seeks to challenge an execution procedure "required by law." 547 U.S. at 580.

Finally, this Court does not need to grant certiorari review to determine how to prevent states from adopting the gas chamber or burning at the stake as a sole method of execution. A federal court could quickly protect an inmate by striking down the method of execution under a properly filed habeas corpus action.

B. This Court's Eighth Amendment jurisprudence requires a § 1983 claimant to prove that the alternative method of execution is actually available to the State.

The Eleventh Circuit has faithfully applied this Court's requirement that a § 1983 petitioner plead and prove that an alternative method of execution is known and available to the state. Arthur's argument that the decision below extends *Glossip* too far cannot be squared with this Court's prior decisions.

The absurdity of Arthur's argument is best illustrated by the procedural and factual history of *Glossip*. If the argument Arthur advances were the proper Eighth

Amendment standard, then the condemned prisoners in *Glossip* should have prevailed. After all, no party in *Glossip* disputed that pentobarbital was manufactured or available for medical use inside the United States; rather, the issue was that its manufacturer refused to allow the use of the drug in executions and took steps to restrict its sale. *Glossip*, 135 S. Ct. at 2733. Unlike the highly speculative testimony of Arthur's expert that it is possible that somewhere, a pharmacy exists that might be able to obtain the ingredients and produce pentobarbital, in *Glossip*, this Court accepted as a given fact that pentobarbital was made and generally available outside of the lethal injection context.

If, as Arthur contends, the question of feasibility and ready availability is whether a drug is capable of being *made*, not whether it is available to a department of corrections for use in execution, *Glossip* would have ended with a different result. In that case, Dr. Zentner (Arthur's expert witness) could have testified that a major pharmaceutical concern makes pentobarbital commercially and carried the day for Arthur. But *Glossip* ended much differently, and the relevant fact was that "Oklahoma eventually *became unable to acquire the drug through any means*." *Glossip*, 135 S. Ct. at 2733 (emphasis added).

One need not engage in Arthur's convoluted semantics as to the definitions of "feasible" and "readily available" to see the obvious: *Glossip* concerns a state's ability to acquire a drug, not whether the drug can be manufactured. If *Glossip* accepted Oklahoma's inability to obtain pentobarbital from a manufacturer, then the lower courts faithfully applied the prior decisions of this Court when they relied on the

ADOC's inability to obtain the drug from a specific compounding pharmacy and Arthur's inability to point to any known supplier of the drug willing to provide it to the ADOC.

Arthur appears to suggest that the lower courts expected him to locate and purchase the pentobarbital. Pet. 24. Such hyperbole should not form the basis of a grant of certiorari. The lower courts did not ask Arthur to "negotiate and procure a supply of drugs on behalf of the State," *id.*, but they did expect him to identify a source of drugs from which the State could actually procure the drugs *for use in a lethal injection*.

Finally, Arthur's attack on the lower court's finding that the ADOC engaged in a "good faith" effort to find pentobarbital is not a worthy issue for certiorari review. Pet. 24–25. If, as Arthur contends, the ADOC's efforts were "self-serving" and disingenuous, he could have easily proven that fact by presenting evidence of multiple pharmacies willing and able to supply lethal injection drugs to the ADOC. But as the lower courts found, neither party could locate such a source. Even the dissent recognized that Arthur's evidence in this regard was non-persuasive. *Arthur*, No. 16-15549, at 134 (Wilson, J., dissenting) (recognizing that the "'difficult realities' surrounding lethal injection drugs" renders proof of a viable lethal injection "not practicable"). Based on the history of this case, no one can reasonably believe that the ADOC would ignore readily available sources of pentobarbital that would short-circuit Arthur's § 1983 litigation, permitting his execution long ago.

For these reasons, the lower court correctly applied *Glossip*, finding that Arthur was required to present proof that a source of pentobarbital was ready, willing and able to sell the drug to the ADOC for use in a lethal injection.

C. Denying an Eighth Amendment claim brought pursuant to § 1983 on the ground that the Plaintiff failed to present evidence that his alternative method of execution is actually known and available to the State is consistent with *Glossip* and *Baze*.

There is no compelling reason to grant certiorari review as to Arthur's final Eighth Amendment claim. Arthur's allegation that the Eleventh Circuit erred by disposing of his Eighth Amendment claim on the basis of his failure to plead and prove a known and available alternative method of execution flies in the face of the plain language of *Glossip*.

Initially, in *Glossip*, this Court explained the outcome of *Baze* as being dictated by the inmates' failure to establish both intolerable risks *and* because they failed to establish the existence of a known and available alternative method of execution. *Glossip*, 135 S. Ct. at 2737–38. Following that clear description of *Baze*'s outcome, this Court immediately noted that its "first ground of affirmance" was based on the petitioners' failure to prove a known and available alternative. *Id*. The second ground for affirmance was the petitioners' failure to prove an intolerable risk of pain. *Id*. at 2739. The lower court followed this Court's clear indication that failure to plead and prove either ground would be sufficient to deny an Eighth Amendment claim brought pursuant to § 1983.

Respectfully, this ground is not appropriate for certiorari review.

II. THERE IS NO CIRCUIT SPLIT FOR THIS COURT TO RESOLVE ON ARTHUR'S EQUAL PROTECTION CLAIM.

Next, Arthur alleges that the ADOC has "repeatedly and arbitrarily deviated from its voluntarily adopted safeguards" because execution team members failed to pinch condemned inmates with equal force. Pet. 33. He insists that the Eleventh Circuit's affirmance of the district court's finding that his Equal Protection claim was meritless creates a circuit split and therefore warrants certiorari review.

For this Court to grant certiorari due to a circuit split, one court of appeals must have entered a decision conflicting with another court of appeals "on the same important matter." Sup. Ct. R. 10(a). One of the primary purposes of demonstrating a circuit split is to present an opportunity for this Court to bring about uniformity of decision on these matters among the federal courts of appeals. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where the circuit disagreed on the proper application of federal habeas corpus statute "[b]ecause uniformity among federal courts is important on question of this order"). Here, Arthur has presented no area of disagreement between the Sixth and the Eleventh Circuits. Certiorari is unwarranted because the "split" to which Arthur points is a mere fabrication.

The only case Arthur cites in opposition to the Eleventh Circuit is *In re Ohio Execution Protocol Litigation*, 671 F.3d 601, 602 (6th Cir. 2012), a two-paragraph order denying the State of Ohio's motion to vacate a stay of execution and agreeing with the federal district court that "the State should do what it agreed to do: in other words it should adhere to the execution protocol it adopted." In the matter below, the

district court found that Ohio had possibly shown "a policy and pattern of deviations from the written execution protocol" and entered a stay of execution. *Cooey v. Kasich*, 801 F. Supp. 2d 623, 642, 656 (S.D. Ohio 2011). The situation in Arthur's case could not be more different, as here, a federal district court explicitly found that the ADOC execution team members had ***not*** deviated from their protocol. *Arthur*, No. 16-15549, at 93. Specifically, the district court found that "the consciousness assessment has been adequately performed in every instance in which it was required, [and] no deficiency in training, practice, or procedure is found." *Id.* at 94 (quotation omitted). Thus, the situation that gave rise to the Sixth Circuit opinion is inapposite to Arthur's case, and the "split" simply does not exist.

The important and recurring nature of the issue in conflict often plays a decisive role in this Court's consideration regarding whether to grant certiorari review. For example, in *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003), certiorari was granted "to resolve disagreement among the courts of appeals on a question of national importance," and in *Clay v. United States*, 537 U.S. 522, 524 (2003), certiorari was granted to review a "narrow but recurring question on which courts of appeals have divided." Arthur has attempted to manufacture a circuit split by citing to a two-paragraph order that ultimately concludes, just as the Eleventh Circuit did here, that a State should consistently follow its execution protocol.

Arthur's attempt to create the impression of a split is a backdoor method for gaining certiorari review of the district court's fact-finding, but ultimately this method is one that presents no compelling reason for such review. *See* Sup Ct. R. 10.

The district court's findings were not clearly erroneous—rather, they were supported by the evidence presented at the hearing and throughout this § 1983 lawsuit's many years of litigation. As for Arthur's claim that the natural variety in "hard" pinch strength between different individuals somehow amounts to a deviation from the execution protocol, the Eleventh Circuit disagreed:

> To satisfy Arthur, all ADOC execution team members must pinch inmates with approximately identical force and pinch as hard as they can because this is the standard used in a medical setting. But this is not what the Constitution requires. . . . It is enough that the district court found that Alabama does conduct the consciousness assessment as part of its lethal injection protocol, and the Supreme Court has made clear that the safeguards implemented during an execution need not match a medical standard of care. *See Baze*, 553 U.S. at 58–60, 128 S. Ct. at 1536; *Glossip*, 135 S. Ct. at 2742. Thus, whether the execution team at Holman pinches inmates with the same level of force used during medical practice is not dispositive of this claim. In other words, because a medical-grade pinch is not required under the Constitution, there can be no Equal Protection claim that such a medical-grade pinch is not uniformly performed.

Arthur, No. 16-15549, at 95–97. Therefore, certiorari is unwarranted on this claim.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request this Court deny certiorari review and Arthur's request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 3, 2016, I filed this brief by electronic mail to the Court's Clerk and in addition, I e-mailed an electronic copy of the brief to the following persons:

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