Nos. 16A451, 16-602

In the Supreme Court of the United States

THOMAS D. ARTHUR, PETITIONER

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

REPLY BRIEF FOR PETITIONER

SUHANA S. HAN
Counsel of Record
ADAM R. BREBNER
MEREDITH C. SHERMAN
STEPHEN S. MAR
AKASH M. TOPRANI
JUSTIN D. ROLLER
125 Broad Street
New York, NY 10004
(212) 558-4000
hans@sullcrom.com
Counsel for Petitioner Thomas D. Arthur

REPLY

1. The State claims that "[n]o court has ever addressed a claim by an inmate that he would rather be executed be [*sic*] firing squad than lethal injection." (Opp. 18.) That is incorrect. *See Kelley* v. *Johnson*, 2016 Ark. 268, 18 (2016). A petition for certiorari from that decision is pending with this Court.

2. According to the State, the district court dismissed Mr. Arthur's firing squad allegations as untimely. (Opp. 19.) That is also incorrect. The district court denied Mr. Arthur leave to plead the firing squad solely on the (erroneous) ground that that method is "not permitted by statute." The district court's order speaks for itself:

> The court will grant Arthur leave to amend his complaint to include all of these proposed allegations except those identifying a firing squad as an alternative method of execution. This is because execution by firing squad is not permitted by statute and, therefore, is not a method of execution that could be considered either feasible or readily implemented by Alabama at this time. *See* Ala. Code § 15-18-82.1(a)–(b).

Pet. App. 241a; *see also* Pet. App. 111a n.3 (dissent below explaining why the court of appeal panel majority's laches conclusion is incorrect).

3. The State also tries to brush away this Court's acknowledgment of the firing squad's feasibility in *Glossip*, stating that unlike under Alabama law, the firing squad was expressly permitted under Oklahoma law. The State is once again wrong. The firing squad is permitted in Oklahoma if, and only if, *three other methods of execution are held unconstitutional*. Okla. Stat. tit. 22, § 1014 (2016). In contrast, the Alabama Code allows for the firing squad (and any other "constitutional method of execution") if lethal injection *or* electrocution is held to be unconstitutional. Ala. Code § 15-18-82.1 (2002). If the firing squad is feasible in Oklahoma, as this Court said it was, then it is most certainly sufficiently feasible in Alabama to plead it in a complaint.

4. The State also attempts to rebut the contention the court of appeals' ruling allows states to insulate themselves from constitutional scrutiny, but to no avail. If a state adopts a single method of execution with no alternatives, the State argues, the proper way to challenge that is by way of a writ of habeas corpus. As an initial matter, the State has taken *the exact opposite position* in litigation. *See* Appellee's Brief, *McNabb* v. *Commissioner*, 727 F.3d 1334 (11th Cir. Oct. 1, 2012) (No. 12-13535) ("A § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures.").

Moreover, the State's purported solution is no solution at all. Even proceeding through a habeas petition, a method-of-execution challenger would still be required to satisfy the substantive elements of an Eighth Amendment claim, and as this Court made clear in *Glossip*, "plead[ing] and prov[ing] a known and available alternative" is a "substantive element[] of an Eighth Amendment method-of-execution claim."

135 S. Ct. at 2739. Thus, the State's purported solution does not resolve the problem Mr. Arthur identified with the district court's interpretation of *Glossip*: states would still be permitted to insulate their execution protocols from constitutional review. In the meantime, the State's position would muddy the waters regarding the appropriate procedural avenue for method-of-execution challenges. It should be rejected.

5. The State also misrepresents Mr. Arthur's position as being that a drug is "available" if it is "capable of being made." (Opp. 24.) Not so. Mr. Arthur's position is that where, among other things, (1) the active ingredient for a drug is available for sale, (2) pharmacists in the state have the facilities to compound it, (3) compounding the drug is a "straightforward" task, and (4) the drug is the most commonly used method of execution in the country, a *Glossip* plaintiff has met his burden of showing a "feasible" alternative method. Going one step farther and requiring a condemned prisoner to actually provide a specific willing source for the drug places an impossible burden on a condemned prisoner that *Glossip* does not contain.

6. The State also attempts to smooth over the circuit split between the court of appeals' ruling and the Sixth Circuit with respect to the Equal Protection claim, but cannot do so. The Sixth Circuit plainly held that where a state fails to "adhere to the execution protocol it adopted," that violates the Equal Protection clause. *In re Ohio Execution Protocol Litigation*, 671 F.3d 601, 602 (6th Cir. 2012). Here, according to the State's own expert, execution guards were performing the mandatory consciousness assessment so that it was the same as if it had never

been done at all. That surely is a failure to "adhere to the execution protocol [Alabama] adopted."

7. The panel majority itself acknowledged the impossible burden it was placing on condemned prisoners. The dissent charged that the majority's opinion "will foreclose all but lethal-injection-alternative challenges and that inmates *can never win* such suits due to the secrecy surrounding executions and states' admitted challenges in locating sources for the drugs." Pet. App. 105a (emphasis added). The majority did not dispute this in responding to the dissent. Instead, it merely remarked that "[t]hese practical constraints do not rob the State of Alabama, or any other state, of its right to choose the method of execution it wishes to use." Pet. App. 105a. Thus, the dissent below is correct that if the panel majority's opinion stands, "relief under *Baze* and *Glossip* is now a mirage for prisoners across Alabama and Florida"—like Mr. Arthur. Pet. App. 115a.

8. Permitted to stand, the court of appeals' opinion also advises states that they need not adequately train their execution staff to conduct executions. According to the court of appeals, a state might need to conduct its safeguards—not adequately or appropriately, just that it was conducted. Thus, the court of appeals endorses the very lax approach that has plagued states with botched executions. Pet. App. 138a. (noting that 7.12% or 1,054 of lethal injection executions in the United States from 1900-2010 were botched).

CONCLUSION

For the foregoing reasons and those set forth in his petition and stay application, Mr. Arthur's execution should be stayed.

Respectfully submitted,

SUHANA S. HAN
Counsel of Record
ADAM R. BREBNER
MEREDITH C. SHERMAN
STEPHEN S. MAR
AKASH M. TOPRANI
JUSTIN D. ROLLER
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Fax: (212) 558-3588
Email: hans@sullcrom.com

Counsel for Petitioner
Thomas D. Arthur

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