

**COPY**

\*\*\*THIS IS A CAPITAL CASE\*\*\*

No. 16-6496

---

In the Supreme Court of the United States

---

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD,  
TERRICK NOONER, JACK JONES, MARCEL WILLIAMS,  
KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE

*Petitioners*

v.

WENDY KELLEY, in her official capacity  
as Director, Arkansas Department of Correction,  
and ARKANSAS DEPARTMENT OF CORRECTION

*Respondents*

---

On Petition for a Writ of Certiorari to the  
Supreme Court of Arkansas

---

SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI

---

TM 427

RECEIVED  
SUPREME COURT U.S.  
POLICE OFFICE

2016 DEC 22 P 3:44

MEREDITH L. BOYLAN

*Counsel of Record*

GEORGE KOSTOLAMPROS

VENABLE LLP

575 7th Street, NW

Washington, DC

(202) 344-4000

MLBoylan@Venable.com

GKostolampros@Venable.com

*Counsel for Petitioners*

(Additional counsel follows)

---

JENNIFFER HORAN  
Federal Public Defender  
Eastern District of Arkansas

JOHN C. WILLIAMS  
Ass't Federal Public Defender  
1401 W. Capitol, Ste. 490  
Little Rock, AR 72201  
(501) 324-6114  
john\_c\_williams@fd.org

*Counsel for Petitioners McGehee,  
Nooner, Ward, and Marcel Williams*

JENNIFER MERRIGAN  
JOSEPH PERKOVICH  
PHILLIPS BLACK  
P.O. Box 2171  
New York, NY 10008  
(212) 400-1660  
j.merrigan@phillipsblack.org  
j.perkovich@phillipsblack.org

*Counsel for Petitioner Ward*

JEFF ROSENZWEIG  
300 Spring Street, Ste. 310  
Little Rock, AR 72201  
(501) 372-5247  
jrosenzweig@att.net

*Counsel for Petitioners  
Johnson, Jones, Lee, and  
Kenneth Williams*

DEBORAH R. SALLINGS  
35715 Sample Road  
Roland, AR 72135  
deborahsallings@gmail.com

*Counsel for Petitioner Davis*

TABLE OF CONTENTS

Supplemental Brief..... 1

Conclusion..... 5

Addendum A – Sworn Declaration of Spencer J. Hahn (Dec. 13, 2016)

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arthur v. Dunn</i> , 16-602 (U.S.).....	5 n.3
<i>Fears v. Morgan</i> , No. 16-4737 (6th Cir.).....	4
<i>First Amendment Coal. of Ariz., Inc. v. Ryan</i> , No. 14-1447 (D. Ariz.).....	3
<i>Glossip v. Gross</i> , 135 S. Ct. 2726 (2015) .....	3
<i>Grayson v. Warden</i> , No. 16-17167 (11th Cir.).....	1
<i>In re Ohio Execution Protocol Litigation</i> , No. 11-1016 (S.D. Ohio).....	4, 4 n.2
 <b>Other Authorities</b>	
Kent Faulk, <i>Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed for 13 Minutes During Execution</i> , ALABAMA.COM (Dec. 9, 2016).....	2
Gary A. Harki, <i>For Execution of Ricky Gray, Virginia Plans to Use Drug Involved in 3 Botched Executions Elsewhere</i> , THE VIRGINIAN- PILOT (Dec. 1, 2016) .....	3
Ohio Dept. Rehab. & Corr., <i>Execution Schedule</i> .....	4
Andrew Welsh-Huggins, <i>Ohio Plans January Execution Using New 3- Drug Combination</i> , ASSOCIATED PRESS (Oct. 3, 2016) .....	4

### SUPPLEMENTAL BRIEF

Petitioners asked the Court to review the Arkansas Supreme Court's judgment because, in part, failure to do so "will likely precipitate a wave of executions that—as the record here shows, and as no court has found otherwise—will be intolerably painful." Pet. at 20. There is now "intervening matter not available at the time of [Petitioner's] last filing" that further supports this reason for a grant. S. Ct. R. 15.8.

First, on December 8, 2016, the State of Alabama executed Ronald Bert Smith with a lethal injection of 500 mg midazolam followed by 600 mg rocuronium bromide followed by 240 mEq potassium chloride. *See Grayson v. Warden*, No. 16-17167, slip op. at 4 (11th Cir. Dec. 7, 2016). This drug protocol is substantially equivalent to the one Respondents propose to use here: 500 mg midazolam followed by 100 mg vecuronium bromide (like rocuronium bromide, a paralytic) followed by 240 mEq potassium chloride. According to the report of a journalist present at the execution, Smith "heaved and coughed" for thirteen minutes and took thirty-four minutes to die:

During 13 minutes of the execution, from about 10:34 to 10:47, Smith appeared to be struggling for breath and heaved and coughed and clenched his left fist after apparently being administered the first drug in the three-drug combination. At times his left eye also appeared to be slightly open.

A Department of Corrections captain performed two consciousness checks before they proceeded with administering the next two drugs to stop his breathing and heart.

The consciousness tests consist of the corrections officer calling out Smith's name, brushing his eyebrows back, and pinching him under his left arm.

Smith continued to heave, gasp and cough after the first test was performed at 10:37 p.m. and again at 10:47 p.m. After the second one, Smith's right arm and hand moved.

\* \* \*

Alabama Prison Commissioner Jeff Dunn said that the execution went as outlined in the prison system's execution protocol. "We followed our protocol," he said.

Dunn said there was no discussion among prison officials about stopping the execution once Smith started coughing and heaving.

An autopsy will be performed on Smith's body and that will provide any information on any "irregularities" in the execution.

Dunn contradicted witnesses who said Smith reacted to the consciousness tests. "From where I was seated I didn't see any reaction to the consciousness assessment," he said.

Dunn declined to provide details of the protocol the state uses.

Kent Faulk, *Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed for 13 Minutes During Execution*, ALABAMA.COM (Dec. 9, 2016), available at <http://bit.ly/2gIWtDp>.

The journalist's report is consistent with the description offered by Spencer J. Hahn, one of Smith's attorneys, in a sworn declaration. *See* Add. A. According to Hahn, two minutes after the midazolam began flowing, Smith began having "regular asthmatic-sounding barking coughs every ten seconds or so." Add. A ¶7. "He also lifted his head and looked around, moved his arms, clenched his left hand, and moved his lips in what appeared to be an attempt to say something. [His] eyes never closed, and he moved and coughed regularly through approximately the next fifteen minutes." *Id.* Smith was awake after the first consciousness check, "as he

was still moving his head, hands and arms, coughing, and attempting to speak.” Add. A ¶8. After the second consciousness check, Smith’s “eyes remained open” (despite a guard’s attempt to push his left eye closed), and Smith “moved his right arm.” Add. A ¶10–11. “Shortly thereafter, they must have administered the paralytic, as [Smith’s] breathing became very shallow and he stopped moving. His eyes remained open, with the left eye opening further as his breathing became imperceptible.” Add. A ¶11.

Second, on December 19, 2016, the Arizona Department of Corrections agreed to settle a challenge to its use of midazolam in lethal injections. The last time Arizona used midazolam—in the execution of Joseph Wood on July 23, 2014—the condemned inmate “gasp[ed] and snort[ed] for nearly two hours” before dying. *Glossip v. Gross*, 135 S. Ct. 2726, 2791 (2015) (Sotomayor, J., dissenting). The Arizona Department of Corrections has now agreed that it “will never again use midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection execution.” Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claim One, ECF No. 152 at 1, *First Amendment Coal. of Ariz., Inc. v. Ryan*, No. 14-1447 (D. Ariz. Dec. 19, 2016). Arizona should be removed from the list of midazolam states Petitioners previously provided to the Court. Pet. at 5 n.2.

Arizona’s abandonment of midazolam aside, other executions using midazolam are imminent. Since Petitioners filed their reply brief, Virginia has announced that it will execute Ricky Gray on January 18, 2017, using midazolam obtained from a compounding pharmacy. Gary A. Harki, *For Execution of Ricky Gray, Virginia*

*Plans to Use Drug Involved in 3 Botched Executions Elsewhere*, THE VIRGINIAN-PILOT (Dec. 1, 2016), available at <http://bit.ly/2hdvO1u>.<sup>1</sup> Executions using midazolam have also been scheduled in Ohio for this coming February (Ronald Phillips), March (Gary Otte), and April (Raymond Tibbetts). Ohio Dept. Rehab. & Corr., Execution Schedule, available at <http://bit.ly/2hdvTVC>; Andrew Welsh-Huggins, *Ohio Plans January Execution Using New 3-Drug Combination*, ASSOCIATED PRESS (Oct. 3, 2016), available at <http://apne.ws/2gFIBOf>.<sup>2</sup> The district court stayed all three executions on December 19, 2016. Order, ECF No. 834, *In re Ohio Execution Protocol Litigation*, No. 11-1016 (S.D. Ohio Dec. 19, 2016). An appeal to the Sixth Circuit is pending. *Fears v. Morgan*, No. 16-4737 (6th Cir. Dec. 20, 2016). Finally, as previously explained, Respondents intend to carry out a host of midazolam executions in Arkansas if this Petition is denied. Pet. at 4.

In sum, the prolonged Smith execution—which, according to what the state prison commissioner told the press, “followed protocol”—simply underscores the importance of this case. Smith’s execution and Arizona’s action offer additional reasons for concern about midazolam; the willingness of other states to press forward heightens the impetus for review. In this case, Petitioners presented evidence that the midazolam protocol will cause them extreme pain; the trial court

---

<sup>1</sup> Petitioners inadvertently omitted Virginia from the list of midazolam states in the Petition.

<sup>2</sup> Phillips and Tibbetts were originally scheduled to die in January and February, respectively. On December 21, 2016, the Governor of Ohio granted each a brief reprieve. Notice of Reprieve, ECF No. 848, *In re Ohio Execution Protocol Litigation*, No. 11-1016 (S.D. Ohio Dec. 21, 2016).



credited that evidence; and the Arkansas Supreme Court didn't grant Respondents' request to reverse that part of the trial court's ruling. *See* Pet. at 5–6, 15–16; Reply Br. at 13–14. Without review, the Arkansas Supreme Court and other courts<sup>3</sup> will continue to misapply *Glossip*'s pleading standard by requiring statutorily available alternatives—a result that would end further inquiry into midazolam's efficacy and “thwart the development of more humane methods of execution” by limiting judicial review. Amicus Br. for the Louis Stein Center at 21. If this Petition is not granted, troubling executions like Smith's will inevitably continue.

#### CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

DECEMBER 22, 2016

Respectfully submitted,



---

MEREDITH L. BOYLAN  
GEORGE KOSTOLAMPROS  
VENABLE LLP  
575 7th Street, NW  
Washington, DC  
(202) 344-4000  
MLBoylan@Venable.com  
GKostolampros@Venable.com

*Counsel for Petitioners*

---

<sup>3</sup> *See Arthur v. Dunn*, 16-602 (U.S.).

SWORN DECLARATION OF SPENCER J. HAHN

STATE OF ALABAMA )  
 )  
COUNTY OF MONTGOMERY )

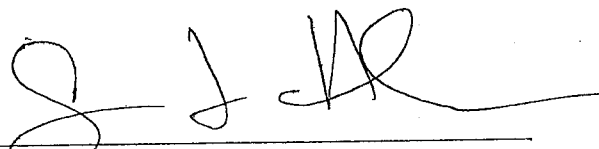
I, Spencer J. Hahn, a resident of Montgomery, Alabama, hereby declare, under penalty of perjury, the following:

1. I am an Assistant Federal Defender in the Capital Habeas Unit of the Federal Defenders for the Middle District of Alabama, in Montgomery, Alabama, where I have worked since October 1, 2014. I have been licensed to practice law since 2004.
2. Ron Smith designated me and our Executive Director, Christine Freeman, to witness his execution. This declaration contains my observations of what occurred immediately before, during, and after Ron's execution.
3. At approximately 10:20 p.m., Christine and I, along with members of the press (including Kent Faulk) who had been waiting in a van next to our transport car, were escorted into the witness room. While waiting, I had noticed two people in an Etowah County Medical Examiner vehicle; they remained outside.
4. I asked the corrections officer who drove us if anyone from the victim's family was present, and was told that someone was. Once inside the witness room, I heard a radio transmission that witnesses were being taken to room 8, followed by footsteps and the shadows of feet passing our (closed) door. Whoever was in room 8 was allowed to leave before we did, as I heard a similar radio transmission about room 8, and saw the reverse of what I saw after the first message. They left and entered through the other end of the hall from us and the press.
5. The Warden read the death warrant to Ron, offered him a chance to make any final statement ("No, ma'am"), and the Warden left the room.
6. Shortly thereafter, the second guard left the room, and the prison chaplain approached Ron, held his right hand, and kneeled in front of him for a minute or so. As the prison chaplain approached, Ron appeared to be mouthing, repeatedly, what I believe was the Lord's Prayer.

7. The midazolam began around 10:30 p.m. The first thing I noticed was that Ron ran his tongue around his lips several times, as if he had a dry mouth. Then, at 10:31:55 p.m. (according to the clock above his gurney) Ron began having difficulty breathing, including regular asthmatic-sounding barking coughs every ten seconds or so. He also lifted his head and looked around, moved his arms, clenched his left hand, and moved his lips in what appeared to be an attempt to say something. Ron's eyes never closed, and he moved and coughed regularly throughout approximately the next fifteen minutes.
8. Both before and after the first consciousness check, it was obvious Ron was still awake, as he was still moving his head, hands and arms, coughing, and attempting to speak. He reacted to the arm pinch by moving his arm toward his body (away from the source of pain).
9. Sometime before the administration of the second dose of midazolam, I heard raised voices coming from the Commissioner's room. Although I couldn't make out the words, the tone indicated panic or, at the very least, extreme stress.
10. Ron again began to exhibit the signs he did after the first dose of midazolam. After several more minutes, a second consciousness check was done, during which Ron continued to move and his eyes remained open. While touching his left eyelid, the guard pushed it closed, but it opened as soon as he removed his finger.
11. Ron moved his right arm after the second consciousness check. Shortly thereafter, they must have administered the paralytic, as Ron's breathing became very shallow and he stopped moving. His eyes remained open, with the left eye opening further as his breathing became imperceptible.
12. The curtains were closed without anyone having approached Ron and, when I stood to leave, I, on my tiptoes, looked over the top of the curtain, and saw no signs of the EKG or anyone checking Ron. Leaving the building, I noticed that both members of the medical examiner's office were still in their truck.

I hereby declare, pursuant to 28 U.S.C. 1746, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 13th day of December, 2016.

A handwritten signature in black ink, appearing to read 'S. J. Hahn', written over a horizontal line.

Spencer J. Hahn  
Assistant Federal Defender

\*\*\*THIS IS A CAPITAL CASE\*\*\*

No. 16-6496

---

In the Supreme Court of the United States

---

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD,  
TERRICK NOONER, JACK JONES, MARCEL WILLIAMS,  
KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE

*Petitioners*

v.

WENDY KELLEY, in her official capacity  
as Director, Arkansas Department of Correction,  
and ARKANSAS DEPARTMENT OF CORRECTION

*Respondents*

---

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties required to be served with the Petitioners' Supplemental Brief in Support of Petition for a Writ of Certiorari. Specifically, in compliance with S. Ct. R. 29.3, I emailed and hand-delivered a copy of these documents to below-listed counsel on December 22, 2016:

Lee Rudofsky, Solicitor General  
Nicholas Bronni, Assistant Solicitor General  
Jennifer Merritt, Assistant Attorney General  
Office of the Attorney General  
323 Center Street, Suite 200  
Little Rock, AR 72201  
501.682.1319  
Counsel for Respondents



---

MEREDITH L. BOYLAN