No. 16-602

In the Supreme Court of the United States

THOMAS D. ARTHUR, PETITIONER

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., RESPONDENTS

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

CAPITAL CASE

PETITION FOR REHEARING

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CAPITAL CASE

PETITION FOR REHEARING

Pursuant to Rule 44.2, petitioner Thomas D. Arthur respectfully petitions for rehearing of this Court's February 21, 2017 Order denying Mr. Arthur's petition for a writ of certiorari.

Under this Court's decision in *Glossip* v. *Gross*, 135 S. Ct. 2726, 2731 (2015), a method-of-execution challenger must plead and prove a "known and available alternative method of execution that entails a lesser risk of pain." As Mr. Arthur explained in his petition for certiorari, this requirement has engendered confusion among jurists, leading to split decisions in both the Court of Appeals for the Eleventh Circuit and the Arkansas Supreme Court.

Following this Court's denial of Mr. Arthur's petition for certiorari, on March 7, 2017, the Court of Appeals for the Sixth Circuit heard oral argument in *In re Ohio Execution Protocol Litigation*, No. 17-3076 (6th Cir.). There, the Sixth Circuit is reviewing a preliminary injunction enjoining the State of Ohio from using a lethal injection protocol that is nearly identical to Alabama's. The district court there not only found that Ohio's protocol creates a "substantial risk of serious harm," but also declined to follow the decision of the Eleventh Circuit in Mr. Arthur's case regarding the interpretation of *Glossip*'s "known and available alternative" requirement. Because the appeal before the Sixth Circuit has been expedited, a decision is expected from the Sixth Circuit very soon.

If the court affirms, a circuit split with the Eleventh will ripen, warranting this Court's review.

Mr. Arthur respectfully submits that the issues raised in his petition for certiorari warrant rehearing in light of the *Ohio Execution Protocol* litigation. As Mr. Arthur set forth in his petition for certiorari, there is substantial evidence that the midazolam-based execution protocol used in Alabama (and Ohio) will result, and has resulted, in torturous executions, and yet the misinterpretation of *Glossip* by the lower courts has prevented review of that evidence on the merits. Similar issues with Arkansas' execution protocol have been raised by petitioners in *Johnson* v. *Kelley*, No. 16-6496. Nevertheless, in light of this Court's denial of certiorari in this case and *Johnson*, Alabama has moved the Alabama Supreme Court for an "expedited execution date" for Mr. Arthur to be "set before any other pending motions to set an execution date are addressed,"[1] and Arkansas is rushing to execute the petitioners in *Johnson* at the fastest pace anywhere since the death penalty resumed in 1977, scheduling eight executions over ten days next month.[2] This Court should not permit Alabama and Arkansas to execute their way out of confronting the constitutional inadequacies of their execution protocols, particularly given that a similar execution method has now been enjoined in Ohio.

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[1] *See* Notice of Filing, *Arthur* v. *Dunn*, No. 2:16-cv-866, ECF No. 30-1 (M.D. Ala. Feb. 22, 2017).

[2] Matthew Haag & Richard Fausset, *Arkansas Rushes to Execute 8 Men in the Space of 10 Days*, N.Y. Times (Mar. 3, 2017) https://www.nytimes.com/2017/03/03/us/arkansas-death-penalty-drug.html?_r=1.

REASONS FOR GRANTING THE PETITION

In October 2016, Ohio announced its current lethal injection protocol, which is substantially similar to Alabama's—it calls for two 250 mg doses of midazolam, followed by a paralytic and then potassium chloride. *See In re Ohio Execution Protocol Litig.*, 2017 WL 378690, at *7 (S.D. Ohio Jan. 26, 2017). In response, three condemned prisoners in Ohio filed complaints alleging (among other things) that Ohio's protocol violated the Eighth Amendment, and moved for a preliminary injunction barring Ohio from carrying out the execution. *See id.* at *7. The district court held a five-day evidentiary hearing on the motion starting on January 3, 2017. *Id.* at * 2.

The district court granted the preliminary injunction on January 26, 2017. *See id.* at *59. After considering expert evidence from both plaintiffs and defendants, and the numerous problematic executions using midazolam-based protocols—including evidence not before this Court in *Glossip*—the district court concluded that "midazolam as the first drug in Ohio's present three-drug protocol will create a 'substantial risk of serious harm' or an 'objectively intolerable risk of harm' as required by *Baze* [v. *Rees*, 553 U.S. 35 (2008)] and *Glossip*." *In re Ohio Execution Protocol Litig.*, 2017 WL 378690, at *53.

The district court also held that "Plaintiffs have met their burden to identify a sufficiently available alternative method of execution to satisfy *Baze* and *Glossip*." *Id.* at *54. Most importantly, although the district court recognized that "compounded pentobarbital will not be available to Ohio to permit it to execute the . . . Plaintiffs on the dates now set," it observed that this Court's decision in *Glossip* did not "imply that an identified alternative to a problematic

method must be available immediately." *Id*. In doing so, the district court necessarily rejected Ohio's argument, based on the Eleventh Circuit's decision in Mr. Arthur's case, that "[t]he evidentiary burden on [Plaintiffs] is to show that 'there is *now* a source for [alternative drugs] that would sell [them] to [Ohio] for use in executions." State Actor Defendants' Memorandum Contra Plaintiffs' Motion for a Stay of Execution, Temporary Restraining Order, and Preliminary Injunction, *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, ECF No. 730 at 10-11 (S.D. Ohio Nov. 18, 2016) (quoting *Arthur* v. *Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1302 (11th Cir. 2016)) (alterations and emphasis in original). Thus, the district court found that an alternative execution method was reasonably available because Ohio had the means to obtain compounded pentobarbital. *Id* at *53-54.

After the district court denied the State's motion for a stay, *see In re Ohio Execution Protocol Litig.*, 2017 WL 489738 (S.D. Ohio Feb. 7, 2017), Ohio appealed to the Court of Appeals for the Sixth Circuit, which ordered expedited proceedings; the appeal was fully briefed on February 17, 2017, and oral argument was held on March 7, 2017. During the hearing before the Sixth Circuit, that court appeared skeptical of Ohio's position and of Ohio's reliance on the Eleventh Circuit's reasoning in this case. *See*, *e.g.*, Oral Argument, *In re Ohio Execution Protocol Litig.*, No. 17-3076, at 14:53-15:09 (6th Cir.) (JUDGE STRANCH: "So the question becomes: How many people do you have to see go through horrific executions before [expert evidence on midazolam's inefficacy] can be considered, without regard to whether you can wrangle all the experts onto one

page."); *id.* at 27:58-28:04, 28:26-28:44 (MR: MURPHY: ". . . the State agrees with the *Arthur* decision, that [an alternative under *Glossip*] has to be an alternative under state law"; JUDGE MOORE: "But the concern that I'm getting at is that if the State says that there's only one alternative that we allow, which is a barbiturate, and it's illegal to bring them in, then you are making it impossible for someone to provide an available alternative."). Given the expedited nature of the appeal, a decision is expected in the near future.

If the Sixth Circuit affirms, this will create a conflict between the circuits (and the Arkansas Supreme Court). The likelihood of a circuit split—and the district court's decision rejecting the Eleventh Circuit's reasoning in *Arthur*—presents "substantial grounds not previously presented" warranting rehearing of this Court's denial of Mr. Arthur's petition for certiorari. Sup. Ct. Rule 44.2.[3]

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[3] Additionally, a case remains pending before the Court of Appeals for the Eleventh Circuit addressing the same issue as Mr. Arthur's case. *See Boyd* v. *Warden, Holman Correctional Facility*, No. 15-14971 (11th Cir.). That case was argued before the Eleventh Circuit in September 2016, and despite the decision by a different panel in Mr. Arthur's case in November 2016, *Boyd* remains pending. This suggests that the *Boyd* panel does not consider itself bound by the panel in Mr. Arthur's case, and may arrive at a different result. If the *Boyd* court does indeed rule differently from the panel in Mr. Arthur's case, that would be a further compelling grounds for rehearing of Mr. Arthur's petition for certiorari.

CONCLUSION

For the reasons set forth above, this Court should grant rehearing and grant Mr. Arthur's petition for a writ of certiorari.

Respectfully submitted.

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MARCH 20, 2017

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and that it is presented in good faith and not for delay.

Suhana S. Han

Counsel of Record