10-22-2021

Motion for Leave to File and Brief for Amici Curiae Legal Scholars and Academics in Support of Petitioner

David Rudenstine

No. 21-439

IN THE

Supreme Court of the United States

MICHAEL NANCE,

Petitioner,

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* LEGAL SCHOLARS AND ACADEMICS IN SUPPORT OF PETITIONER

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UNOPPOSED MOTION FOR LEAVE TO FILE

Amici Curiae, a group of legal scholars and academics of United States constitutional law, hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit. All parties received timely notice of the filing of this brief pursuant to S. Ct. R. 37.2(a). Petitioner consents to, and Respondent does not oppose, the filing of this brief.

Amici have dedicated their careers to the study, teaching and practice of United States constitutional law, including the death penalty and methods of execution. Many *amici* have written scholarly articles on these topics. Many *amici* also submitted an amicus brief in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), to apprise the Court of information regarding the availability of alternative methods of execution to be considered in clarifying the applicable Eighth Amendment standard for method-of-execution challenges. The issues in this case relate to the rights secured by the Court's *Bucklew* decision.

The attached brief will assist the Court in determining whether to grant *certiorari*. The brief analyzes the significance of the Eleventh Circuit's decision in light of modern Eighth Amendment jurisprudence and practice. The brief discusses the use of 42 U.S.C. § 1983 as the standard procedural vehicle for method-of-execution challenges, and the implications of the Eleventh Circuit's ruling that such challenges must be brought instead via a habeas petition where a prisoner alleges an alternative method not currently authorized under state law. The brief includes relevant materials not brought to the attention of the Court by the parties. *See* Sup. Ct. R. 37.1.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae[2] are legal scholars and academics who have dedicated their careers to the study, teaching and practice of United States constitutional law, including the death penalty and methods of execution. Many *amici* have written scholarly articles on these topics.

Many *amici* listed below earlier wrote to this Court in 2018 by submitting a brief in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), to apprise the Court of information regarding the availability of alternative methods of execution to be considered in clarifying the applicable Eighth Amendment standard for method-of-execution challenges. *Amici* agreed with the Court's clear statement in that case that prisoners challenging an unconstitutional method of execution are not limited to proposing alternative methods already authorized by state law. They are particularly concerned today that the decision below violates this Court's own guidance by foreclosing prisoners' previously protected ability to allege well-established and available alternative methods of execution that are not yet authorized under a given state's law.

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1. *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of the filing of this brief. Petitioner consents to, and Respondent does not oppose, the filing of this brief.

2. The views expressed by *amici curiae* are their own and not those of the institutions where they teach. The list of institutions to which *amici curiae* belong is provided for identification purposes only.

The below *amici* respectfully submit this brief urging the Court to grant the petition for *certiorari*.

- William W. Berry III, Montague Professor of Law, University of Mississippi School of Law
- Christopher L. Blakesley, Emeritus Professor of Law, William S. Boyd School of Law
- Marc D. Falkoff, Interim Associate Dean for Academic Affairs and Professor of Law, Northern Illinois University College of Law
- Brian Gallini, Dean and Professor of Law, Willamette University College of Law
- Catherine M. Grosso, Professor of Law, Michigan State University College of Law
- Janet C. Hoeffel, Catherine D. Pierson Professor of Law, Tulane Law School
- Daniel LaChance, Winship Distinguished Research Professor in History (2020-23) and Associate Professor, Department of History, Emory University
- Colin Miller, Professor of Law & Thomas H. Pope Professorship in Trial Advocacy, University of South Carolina School of Law
- David Rudenstine, Sheldon H. Solow Professor of Law, Cardozo Law School, Yeshiva University

- Austin D. Sarat, William Nelson Cromwell Professor of Jurisprudence and Political Science; Chair of Political Science, Amherst College

- Kenneth Williams, Professor of Law, South Texas College of Law Houston

SUMMARY OF ARGUMENT

In order to challenge a state's proposed method of execution as cruel and unusual under the Eighth Amendment, a prisoner must also allege a known and available alternative. *Glossip v. Gross*, 576 U.S. 863 (2015). State and lower courts previously took an overly-restrictive view of *Glossip* and summarily dismissed method of execution challenges which alleged any alternative method that was not already authorized under state law, effectively allowing state law to set the parameters for prisoners' Eighth Amendment challenges. In response to this recognized problem, this Court provided clear guidance by holding that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019). Justice Kavanaugh wrote separately "to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law—a legal issue that had been uncertain before today's decision." *Id. at* 1137 (Kavanaugh, J., concurring) (internal citations omitted).

In the decision below, the Eleventh Circuit created a circuit split by holding that condemned prisoners in that circuit are now required to challenge the method of

execution via a habeas petition if they allege alternative methods not authorized under state law, while identically situated petitioners in the Sixth Circuit *must* bring those claims as a 42 U.S.C. § 1983 challenge to be heard. The Eleventh Circuit's decision misinterprets black letter law and upsets well-established practice. A habeas claim is one that implies invalidity of the conviction or sentence altogether, while a claim that "would not necessarily spell speedier release, however, . . . may be brought under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (internal quotation omitted). Challenges to the method and protocol by which a prisoner is to be executed are properly brought under § 1983, after federal habeas proceedings conclude and the petitioner becomes subject to imminent execution.

Moreover the decision below effectively circumvents any meaningful opportunity to raise non-statutory alternatives. Method of execution claims are not ripe when the first habeas petition must be filed and they are not adequate grounds to file a successive petition later. Under the Eleventh Circuit's decision, any state could prevent prisoners from ever effectively petitioning for Eighth Amendment relief by simply authorizing a single method. Similarly, a state could authorize multiple unconstitutional methods, knowing prisoners would never have an effective forum to seek a constitutional alternative.

If allowed to stand, the Eleventh Circuit's decision will create a patchwork of Eighth Amendment rights limited by state law, which is contrary to the supremacy of the Constitution and this Court's authority. A decision by this Court is needed to clarify the appropriate procedural vehicle for prisoners to allege non-statutory but otherwise

available alternative methods of execution, to ensure the proper administration of the judicial system and prevent unconstitutional executions.

ARGUMENT

I. The Eleventh Circuit's procedural maneuver has circumvented this Court's recent decision in *Bucklew* to deny prisoners meaningful Eighth Amendment review of their executions

This Court has held that in order to challenge a state's proposed method of execution as cruel and unusual under the Eighth Amendment, a prisoner must also allege a known and available alternative method. *See Glossip v. Gross*, 576 U.S. 863 (2015). Prior to this Court's decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), states and lower courts had been taking an overly-restrictive view of *Glossip* and summarily dismissing method of execution challenges which alleged an alternative that was not already authorized under state law. This had the perverse outcome of eviscerating a prisoner's right to challenge the constitutionality of his method of execution based on whether the state where he had been sentenced to death had contemplated another method which may be more humane. In response to this recognized problem, this Court provided clear guidance by holding that "[a]n inmate seeking to identify an alternative method of execution is *not* limited to choosing among those presently authorized by a particular State's law" 139 S. Ct. at 1128 (emphasis added). The Eleventh Circuit's ruling seeks to effectively relegate challenges such as these to a successive habeas petition, which of course cannot be brought on these grounds. This would fundamentally undermine *Bucklew*,

dooming all such claims to fail. This cannot be how this Court intended its recent decision to be interpreted, and clear guidance is needed to establish consistent practice.

A. Before *Bucklew*, states and lower courts overstated the *Baze-Glossip* burden to circumvent as-applied challenges by requiring prisoners to allege only alternative methods of execution that were already authorized by state statute.

To challenge a method of execution as "cruel and unusual" in violation of the Eighth Amendment, a prisoner must demonstrate that the state's proposed method of execution presents a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 and n.9 (1994)). In *Baze v. Rees*, a plurality of the Court wrote that in order to succeed on such an Eighth Amendment challenge, "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993). The plurality also explained that the petitioner must identify an alternative method of execution that is "feasible, readily implemented, and [would] in fact significantly reduce a substantial risk of severe pain." *Id.* at 52.

Expanding on *Baze*, this Court later laid out a two-prong test for challenging a state's method of execution as cruel and unusual. *See Glossip v. Gross*, 576 U.S. 863 (2015). A petitioner must plead and prove: (1) that the state's execution method poses a substantial risk of

severe pain; and (2) that there is a "known and available" alternative method of execution that is "feasible, [and] readily implemented" that "significantly reduce[s] a substantial risk of severe pain." *Id.* at 877-82. *Glossip* however "provided little guidance as to when an alternative method of execution is 'available,'" *McGehee v. Hutchinson*, 854 F.3d 488, 500 (8th Cir. 2017) (Kelly, J., dissenting), resulting in lower courts addressing the "known and available" requirement inconsistently and incorrectly.

In the years after *Glossip*, many states successfully argued for an overly constrictive interpretation of the requirement to plead an "available alternative," with lower courts limiting alternatives to only methods already prescribed in a state statute and for which the necessary elements were in the state's "medicine cabinet" at the time. The Eleventh Circuit held that allowing a petitioner to amend his complaint to allege an alternative method not authorized under Alabama state law would have been futile, in part because petitioner was "not entitled to veto the Alabama legislature's constitutional choice as to how Alabama inmates will be executed" and because "Alabama is under no obligation to deviate from its widely accepted, presumptively constitutional methods in favor of [the petitioner's] retrogressive alternative." *Arthur v. Commissioner, Ala. Dept. of Corrections*, 840 F.3d 1268, 1318 (11th Cir. 2016), *abrogated in part by Bucklew*, 139 S. Ct. 1112. Similarly, The Supreme Court of Arkansas rejected the firing squad—one of the nation's oldest and most easily performed forms of execution—as an alternative to lethal injection, determining that because "[e]xecution by firing squad is not identified in the statute as an approved means of carrying out a sentence of death . . .

it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution." *Kelley v. Johnson*, 496 S.W.3d 346, 359–60 (Ark. 2016). *See also Arthur v. Dunn*, 195 F. Supp.3d 1257, 1260 n.5 (M.D. Ala. 2016) ("A firing squad is not a legal method of execution in Alabama."); *Boyd v. Myers*, No. 2:14-CV-1017-WKW, 2015 WL 5852948, at *4 (M.D. Ala. Oct. 7, 2015), *aff'd sub nom. Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853 (11th Cir. 2017) (holding that Boyd failed to meet his burden of pleading a feasible and readily available alternative because he "identifie[d] a firing squad and hanging as two feasible and readily available alternatives . . . [b]ut those two methods are not permitted by statute in Alabama"); *Bible v. Davis*, No. 4:18-CV-1893, 2018 WL 3068804, at *9 (S.D. Tex. June 21, 2018), *aff'd*, 2018 WL 3156840 (5th Cir. June 26, 2018) (holding that Bible failed to prove that either firing squad or nitrogen hypoxia were feasible or readily implemented because "Texas law and protocol allow for the State to use only one method of execution: lethal injection" and "switching to either of Bible's proposed alternatives would require new statutory law and the formulation of new protocol.").

This overly-restrictive interpretation of *Glossip*'s requirements gave rise to perverse and inconsistent results. Firing squad, for example, was held as not "known and available" in Arkansas, *Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016), Alabama, *Arthur v. Dunn*, 195 F. Supp. 3d 1257 (M.D. Ala. 2016), and Texas, *Bible v. Davis*, 2018 WL 3068804 (S.D. Tex. June 21, 2018), despite being a method of execution that is simple to implement, older than the United States, and used in Utah as recently as 2010. *See* Death Penalty Information Center, *State and Federal Info, Utah*, http://www.deathpenaltyinfo.org/state-and-federal-info/state-by-state/utah.

The decision by the Eleventh Circuit in this case risks recreating these perverse and unfair outcomes by requiring states and lower courts in the Eleventh Circuit to dismiss virtually all method-of-execution challenges raising non-statutory alternative methods, even though prisoners in other states remain able to meaningfully allege such alternatives in line with *Bucklew*. Such inconsistency of interpretation is directly contrary to this Court's supreme authority and will create an unacceptable patchwork of Eighth Amendment rights dependent on state law.

B. *Bucklew* provided clear guidance that inmates may allege an available alternative that is not then authorized by state law.

This Court's decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) clarified and built upon the *Baze-Glossip* pleading standard. The Court reiterated that to establish whether a "State's chosen method of execution cruelly 'superadds' pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." 139 S. Ct. at 1125 (citing *Baze*, 553 U.S. at 52 and *Glossip*, 576 U. S. at 877). The Court provided a clear rejection of states' overly-restrictive interpretation of *Glossip* by holding that:

> [T]he burden [a prisoner] must shoulder under the *Baze-Glossip* test can be overstated. An inmate seeking to identify an alternative method of execution is not limited to choosing among

> those presently authorized by a particular State's law. . . So, for example, a prisoner may point to a well-established protocol in another State as a potentially viable option. *Bucklew*, 139 S. Ct. at 1128.

Justice Kavanaugh, who joined the decision, wrote separately "to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law—a legal issue that had been uncertain before today's decision. Importantly, all nine Justices today agree on that point." *Id. at* 1136 (Kavanaugh, J., concurring) (internal citations omitted).

Although the Court stated that "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim," and quoted *Hill v. McDonough* for the proposition that "if the relief sought in a 42 U.S.C. §1983 action would 'foreclose the State from implementing the [inmate's] sentence under present law,' then 'recharacterizing a complaint as an action for habeas corpus might be proper,'" *id.* at 1128 (quoting *Hill v. McDonough*, 547 U.S. 573, 582–583 (2006)), the Court did not reach a decision on that question. Moreover the Court went on to emphasize that "the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." *Id.*

In light of this holding, the Court saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128–29. Yet under the Eleventh Circuit's ruling, such an outcome would be virtually certain in any of the 14 states that,

along with the federal government, authorize only one method of execution. *See* Death Penalty Information Center, *Methods of Execution,* https://deathpenaltyinfo.org/executions/methods-of-execution. The Eleventh Circuit would require any prisoner alleging an alternative method of execution that is not authorized by that state's law to raise their claim in a futile habeas petition. Given that method of execution claims are extremely unlikely to be ripe when a prisoner's first habeas petition is due to be filed, such claims would have to be raised in a successive petition where they are doomed to fail for not meeting the strict jurisdictional requirements of 28 U.S.C. § 2244(b)(2). Thus, by eliminating 42 U.S.C. § 1983 as a vehicle for such challenges, the Eleventh Circuit has attempted to return to the confusion of the pre-*Bucklew* era, destroying *Bucklew*'s clear mandate that prisoners may allege methods of execution that are not presently permitted under state law. The resulting patchwork approach, in which a prisoner's Eighth Amendment rights are prescribed and limited by the relevant state's law, is incompatible with the fundamental principle emphasizing a "necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *See Martin v. Hunter's Lessee*, 14 U.S. 304, 347–348, (1816) (internal quotations omitted).

II. Certiorari should be granted to address the circuit split created by the Eleventh Circuit and reaffirm this Court's decision on alternative methods pleadings in *Bucklew*.

The decision below has created a circuit split such that condemned prisoners in the Eleventh Circuit are now required to challenge a method of execution via a habeas

petition if they allege alternatives not authorized under state law, while identically situated petitioners in the Sixth Circuit *must* bring those claims as a § 1983 challenge to be heard. The Eleventh Circuit's interpretation upsets well-established practice and effectively circumvents any meaningful opportunity to raise non-statutory alternatives, because such claims are not ripe when the first habeas petition must be filed and they are not adequate grounds to file a successive petition later. Thus the Eleventh Circuit decision could prevent prisoners in any of the states that authorize a single method of execution from ever effectively petitioning for Eighth Amendment relief, whatever that method may be. Similarly, a state that authorizes several unconstitutional methods would require a prisoner to choose between pleading one of those methods rather than allowing for constitutional alternatives to be raised. A decision by this Court is needed to clarify the appropriate procedural vehicle for prisoners to allege non-statutory but otherwise available alternative methods of execution, to ensure the proper administration of the judicial system and prevent unconstitutional executions.

A. Resolving the circuit split regarding the procedural vehicle for method-of-execution claims is necessary for the timely administration of the judicial system.

The Eleventh and Sixth Circuits are now split on whether method-of-execution claims must proceed in habeas or under § 1983, which will create inconsistency in a field where reliability and strict adherence to procedural safeguards are of utmost importance. In the decision below, the Eleventh Circuit held that because

Petitioner challenged Georgia's only authorized method of execution, he challenged the validity of his sentence itself and therefore was required to raise the claim through a habeas petition. The Sixth Circuit Court has reached the exact opposite position. In the case of an Ohio prisoner who challenged all statutorily authorized methods of execution in a habeas petition, the Sixth Circuit held that because Ohio would still be permitted to execute the petitioner if he were successful after "simply need[ing] to find a method that comports with the Eighth Amendment," the challenge was required to be raised as a straightforward § 1983 claim. *In re Campbell*, 874 F.3d 454, 465-66 (6th Cir. 2017). These opposite holdings create intolerable state-by-state inconsistency in an area of heightened constitutional importance, and this Court should promptly resolve the issue.

The writ of habeas corpus has long been understood as providing "a means of contesting the lawfulness of restraint and securing release." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020), while § 1983 claims concern conditions of confinement and sentencing, *Nelson v. Campbell*, 541 U.S. 637, 643-45 (2004). A habeas claim is one that implies invalidity of the conviction or sentence altogether, while a claim that "would not necessarily spell speedier release, however, . . . may be brought under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (internal quotation omitted). In practice, this has consistently been understood to mean that challenges to the method and protocol by which a prisoner is to be executed are properly brought under § 1983, after federal habeas proceedings conclude and the petitioner becomes subject to imminent execution. To hold otherwise is simply a misunderstanding of black letter law. As Justice Scalia wrote,

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a 'quantum change in the level of custody,' . . . It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody. *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (internal citation omitted).

The Eleventh Circuit's reasoning in drawing the opposite conclusion—that invalidating Georgia's only authorized execution method as applied to Petitioner would necessarily imply the invalidity of his sentence—is inaccurate. Were the lethal injection to be held unconstitutional as applied to Petitioner, he would remain on death row in Georgia. The people of Georgia and their representatives would simply be required to authorize one of many other available methods, like the firing squad that petitioner alleged. South Carolina amended its laws to allow the firing squad and electric chair earlier this year, *see* Emily Bohatch, *SC House passes bill bringing back electric chair, introducing firing squad*, STATE (May 6, 2021), https://www.thestate.com/news/politics-government/article251151894.html, while Alabama, Oklahoma and Mississippi chose to authorize execution by nitrogen hypoxia in 2018, *see* Kim Chandler, *Alabama says it has built method for nitrogen gas execution*, AP NEWS (Aug. 7, 2021), https://apnews.com/article/alabama-executions-57c6d76d5a0f6b4a8ecb2324b7a68004. Nothing would prevent Georgia from taking a similar step to authorize a method that does not violate Petitioner's constitutional rights.

The need for rigorous procedural protections and the highest standard of reliability in capital cases is clear and well recognized by this Court. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("the penalty of death is qualitatively different from a sentence of imprisonment . . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). The Eleventh Circuit's decision below does not realistically reflect the timeframes for capital cases, and could require courts to pass judgment on questions that are not yet ripe for judicial review because they rely "upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 296 (1998) (citations omitted). Congress has established a strict statute of limitations for federal habeas petitions that requires a federal habeas claim to be brought within one year of the conviction being final. 28 U.S.C. § 2244(d)(1)(A). As this Court has noted however, an execution date is often not set for decades after a conviction is finalized. In 2019, the average length of time between sentencing and execution for prisoners on death row in the United States was 264 months, or 22 years. Statista, *Average time between sentencing and execution for inmates on death row in the United States from 1990 to 2019*, https://www.statista.com/statistics/199026/average-time-between-sentencing-and-execution-of-inmates-on-death-row-in-the-us/.

It is increasingly unlikely that the method of execution authorized and used by a state at the time a prisoner files

his habeas petition will be the same method in use when his execution date is set some 20+ years later. States are changing their methods of execution with increasing frequency, especially as lethal injection drugs that were previously in common use have become unavailable on the open market. Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, New Yorker (May 21, 2016), https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs. It has become common practice for states to adopt execution protocols for each specific execution, based on the materials available. For example, Joseph Wood was executed in Arizona on July 23, 2014 under a protocol confirmed by the state on June 25. *See, e.g.*, *Wood v. Ryan*, 759 F.3d 1076, 1078 (9th Cir. 2014), *vacated*, 573 U.S. 976 (2014), and Mark Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was 'Gasping and Struggling to Breathe*,' Washington Post (Jul. 23, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/. Billy Ray Irick was executed on August 9, 2018 under a new protocol announced by Tennessee on January 8 of the same year. *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 611 (Tenn. 2018). Seemingly in recognition of these trends, District Courts in the Eleventh Circuit regularly dismiss method of execution challenges in habeas petitions for being unripe. *See Butts v. Chatman*, No. 5:13-cv-194, 2014 WL 185339, *4 (M.D. Ga. Jan. 15, 2014) ("Georgia's lethal injection protocol and procedures change frequently . . . Even if this Court allowed discovery and held an evidentiary hearing now, the evidence developed would likely be irrelevant by the time [petitioner's] execution is scheduled . . . [petitioner's] lethal injection claim is premature and should be brought in a 42 U.S.C. § 1983

action."); *Tollette v. Chatman*, No. 4:14-cv-110, 2014 WL 5430029, *9 (M.D. Ga. Oct. 22, 2014) ("Any discovery regarding Georgia's current lethal injection procedures is likely to have no relevance when, and if, [petitioner's] execution is scheduled. As the Georgia Supreme Court noted, Georgia has recently found it necessary to make repeated alterations to its lethal injection procedures. It is likely that the procedures will change again before [petitioner's] execution is scheduled.") (citations omitted); *Sealey v. Chatman*, No. 1:14-cv-00285, 2017 WL 11477455, *38 (N.D. Ga. Nov. 9, 2017), *aff'd sub nom. Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338 (11th Cir. 2020) ("It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court.").

Under settled practice, a state can adopt a new method at this late stage and prisoners can test its constitutionality by filing a straightforward § 1983 claim. Under the Eleventh Circuit's logic however, the many prisoners who find themselves in this position would have been required to know whether the state's new method of execution would violate their constitutional rights before it was adopted in order to allege an alternative method that may be widely available and simple to implement but not authorized by state law. In practice, the Eleventh Circuit would require prisoners to anticipate an unconstitutional manner of execution (even one resulting from a medical condition that may thereafter develop or worsen) and prophylactically raise that challenge too early in the process, wasting valuable time and judicial resources in reviewing a method that will very likely not be used on the day of the execution. The Court should accept this petition

to clarify when such challenges must be raised, consistent with due concern for prisoners' Eighth Amendment rights and the need for an actual "case or controversy."

B. Requiring alternative methods of execution not authorized by state statute to be raised in a habeas petition allows states to circumvent such challenges altogether by authorizing a single method or several unconstitutional methods.

The Eleventh Circuit's decision in this case would require any prisoner alleging an alternative method of execution that is not authorized by state law to raise their claim in a habeas petition. Given that capital cases commonly take more than a decade to litigate, it is virtually impossible that any such claim would be ripe at the time a prisoner files their first habeas petition. And any successive petition on these grounds would be doomed to fail for lack of jurisdiction, as Congress has strictly limited successive petitions to claims related to new and retroactive rules of constitutional law or new, clear and convincing evidence of innocence. *See* 28 U.S.C. § 2244(b)(2). Thus by eliminating § 1983 as an avenue for these challenges, the Eleventh Circuit would allow any state to circumvent any and all challenges to its execution protocol, including by simply authorizing only one method.

If a state can shield a potentially cruel and unusual punishment from review by not authorizing any constitutional alternatives, then that state effectively has a veto power over capital prisoners' Eighth Amendment rights. Any state would be able to authorize impermissibly cruel and unusual execution methods, like being drawn

and quartered, and could prevent the federal courts from conducting a meaningful review by simply failing to authorize any constitutional alternatives. More likely, a state might authorize an entirely new method that has never been used or tested in the United States, and its reliability and constitutionality could never be assured because it would not be subjected to adversarial process. And were a Petitioner to raise medical circumstances that make an execution method cruel and unusual as applied to him, as in the instant case, a method of execution "known" and recognized could be denied to him simply because it was not listed in the state statute, even if it would alleviate unconstitutional suffering. This simply cannot be the law.

Robust testing at every stage of a judicial dispute is central to our adversarial justice system, which "assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). A prisoner's opportunity to confront and test opposing evidence is considered a "bedrock procedural guarantee," *Crawford v. Washington*, 541 U.S. 36, 42 (2004), and the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970). Providing an interested party with the chance to "contest [the opposing side's arguments] and produce evidence in rebuttal" is fundamental to ensuring that "honest error or irritable misjudgment" do not interfere with the decision making process. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (internal quotation omitted). And it has long been established by this Court that the need for reliability and strict adherence to procedural protections is highest where a petitioner's very life is at stake. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been

particularly sensitive to insure that every safeguard is observed.") (opinion of Stewart, J.); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment[.]")(internal quotation omitted).

Allowing each state to determine the "available" methods of execution and potentially avoid all review of those methods against feasible alternatives will balkanize Eighth Amendment jurisprudence, leading to arbitrary results. Without question, "state laws respecting crimes, punishments, and criminal procedure are . . . subject to the overriding provisions of the United States Constitution." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). Yet the Eleventh Circuit's decision does bring this principle into question, by allowing state statutes to determine which prisoners are given an effective vehicle to challenge the unconstitutional method of execution to be used to kill them. This cannot be what this Court intended when it held so clearly that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Bucklew*, 139 S. Ct. at 1128. Clear, additional guidance is needed now to provide prisoners clarity on when and how these challenges must be filed, to ensure consistency of practice and preservation of this most critical Eighth Amendment right. If this Court fails to grant the instant petition, petitioners in the Eleventh Circuit and any others that adopt the Eleventh Circuit's reasoning may be deprived of the rights secured by *Bucklew*, and more unconstitutional executions are likely to be the result.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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