No. __________

In the
Supreme Court of the United States

CAREY DALE GRAYSON,
Petitioner,
v.

JOHN Q. HAMM, COMMISSIONER,
TERRY RAYBON, WARDEN
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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EXECUTION SET FOR NOVEMBER 21, 2024, AT 6:00 P.M. CENTRAL

CAPITAL CASE

QUESTIONS PRESENTED

Alabama has conducted the only two executions by nitrogen hypoxia in history, executing Kenneth Smith and Alan Miller this year. In doing so, Alabama became the first jurisdiction to use a new method of execution since Texas first employed lethal injection in 1982. Before Mr. Smith's execution, Alabama represented to this Court he would be unconscious within "seconds" following the administration of nitrogen gas. Instead, according to the execution team captain—responsible for assessing consciousness—Mr. Smith was conscious for several minutes after his breathing air was cut off. The same captain testified that, once the nitrogen began flowing, Mr. Miller's execution went the same as Mr. Smith's.

The Founders drafted, and the States ratified, the Eighth Amendment, to guarantee no execution would employ superadded pain, terror, or disgrace. In recent decades, this Court and lower courts have focused on the pain prohibition. In denying relief below, the District Court concluded conscious suffocation does not violate the Eighth Amendment or *Baze v. Rees*, 553 U.S. 35 (2008).

The questions presented are:

1. Does the Eighth Amendment's prohibition on cruel and unusual punishment bar a method of execution that includes conscious suffocation?

2. Does the Eighth Amendment prohibit a method of execution that involves superadded terror?

PARTIES

Petitioner is Carey Dale Grayson. Respondents are John Q. Hamm, the Commissioner of the Alabama Department of Corrections, and Terry Raybon, the Warden of Holman Correctional Facility. Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

These proceedings are directly related to this case under Rule 14.1(b)(iii):

- *Grayson v. Comm'r, Ala. Dep't of Corr., et al.*, No. 24-13660-P (11th Cir. Nov. 18, 2024)
- *Grayson v. Hamm, et al.*, No. 2:24-cv-00376-RAH-KFP (M.D. Ala. Nov. 6, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carey Dale Grayson respectfully requests this Court grant a writ of *certiorari* to review the decision of the Court of Appeals for the Eleventh Circuit affirming denial of his motion for a preliminary injunction.

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama denying Mr. Grayson's preliminary injunction motion is unpublished and attached as Appendix B. Pet. App. 14a. The decision of the Eleventh Circuit Court of Appeals affirming the District Court's decision is published and attached as Appendix A. Pet. App. 1a.

JURISDICTION

The District Court had subject matter jurisdiction over Mr. Grayson's Amended Complaint under 28 U.S.C. §§ 1331, 1343(a)(3), and 2201(a) because Mr. Grayson asserted federal claims under 42 U.S.C. § 1983. Following the District Court's denial of Mr. Grayson's preliminary injunction motion, he timely appealed.

The United States Court of Appeals for the Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. This Court retains the power of direct review under 28 U.S.C. § 1291, and thus, has jurisdiction to review Mr. Grayson's appeal.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

In 2018, Alabama amended its method of execution statute, Ala. Code § 15-18-82.1, permitting execution by nitrogen hypoxia. On January 25, 2024, Respondents made Kenneth Eugene Smith the first person in history executed by nitrogen hypoxia.[1] In the lead-up to that execution, opposing *certiorari*, Alabama told this Court: "Smith will be unconscious in under a minute," and "the experts agree that nitrogen hypoxia is painless because it causes unconsciousness in seconds."[2] That did not happen.

According to the execution team captain, Mr. Smith was conscious for "a few minutes" or "several minutes or so" *after* the breathing air was cut off and the nitrogen began to flow.[3] The same captain could only say he checked Mr. Miller for consciousness approximately six minutes after the nitrogen began flowing.[4] Even after two executions under the nitrogen hypoxia protocol (Protocol) in which consciousness was not lost for approximately 120 (Miller) and 180 (Smith) seconds, Respondents' expert witness, Joseph Antognini, M.D., opined the Protocol "will lead to unconsciousness within 10 to 40 seconds after the nitrogen begins to flow

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[1] ECF No. 42 at 4. All references to ECF Nos. are to the District Court record unless noted otherwise.

[2] Opp'n to Application for Stay of Execution Pending Pet. for Writ of Certiorari and Br. in Opp'n, *Smith v. Comm'r, Ala. Dep't of Corr., et al.*, Nos. 23-6562 & 23A688 (Jan. 25, 2024), at 20-21.

[3] ECF No. 87 at 146:14-147:0, 156:17-157:2; *see also* Pet. App. at 60a ("[T]he nitrogen hypoxia protocol was successful and resulted in death in less than 10 minutes and loss of consciousness in even less time").

[4] ECF No. 87 at 151:1-12. Without citing the record, the District Court found Mr. Miller was unconscious "in less than two minutes." Pet. App. at 60a.

depending on the variables including the inmate's own actions."[5] Neither the Protocol nor Dr. Antognini's opinion changed to account for what happened in practice.

Mr. Grayson provided two feasible alternatives each of which significantly reduces the substantial risk of superadded pain and terror from conscious suffocation caused by the Protocol. First, he alleged a two-drug sedation regimen involving the sequential administration of midazolam[6] and ketamine, both low-level controlled substances. The second alternative involves the sequential intramuscular injection of ketamine and fentanyl. While Defendants—in limited discovery—declined to explain how they obtain controlled substances for executions, deeming it irrelevant,[7] the fact that they regularly obtain a controlled substance from a pharmacy or pharmacist for executions makes the controlled substances referenced in the alternatives and the material necessary for their administration available and feasible. Moreover, Mr. Grayson argued that, because other states have ready access to ketamine and fentanyl for executions, it is available. Eighth Amendment protections are not dependent on the competency of the executing State.

In denying the Motion, the District Court concluded *Baze* did not apply to nitrogen hypoxia because "conscious suffocation as mentioned in *Baze* is discussed in

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[5] Pet App. at 25a.

[6] Defendants have access to midazolam for use in executions; they used it last month. Kim Chandler, *Alabama executes man who killed 5 and asked to be put to death*, AP, Oct. 17, 2024, https://apnews.com/article/derrick-dearman-death-penalty-alabama-3bbb792e73b7c82faccea13ea8254009

[7] ECF No. 8 at 15 n.61.

the lethal injection context . . . and is thus inapplicable to the present case."[8] It continued, "Further, nothing in *Baze* holds that the per se existence of conscious suffocation automatically disqualifies an execution method as being unconstitutional."[9] In affirming denial of relief, the Eleventh Circuit found the District Court's legal error harmless because Mr. Grayson did not show the District Court's conclusion that there was no risk of conscious suffocation was clearly erroneous.[10]

This petition follows.

REASONS FOR GRANTING THE PETITION

I. This case involves a question of exceptional importance concerning a matter likely to recur (and already recurring).

First, Mr. Grayson's petition for writ of *certiorari* raises issues of national importance among the 27 states that permit capital punishment and the federal government. Specifically, it concerns whether the Eighth Amendment prohibits suffocating a conscious prisoner and whether a state's refusal to prevent conscious suffocation via a novel method of execution superadds terror and pain in violation of the Eighth Amendment. The District Court's decision centered on its legal conclusions that *Baze* only applies to lethal injection caused conscious suffocation and conscious suffocation alone is not sufficient to establish an Eighth Amendment

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[8] ECF No. 95 at 36 n.17 (citing *Baze*, 553 U.S. at 41, 53).

[9] *Id.*

[10] Pet. App. at 6a.

violation.[11] That interpretation of this Court's case law merits a grant of *certiorari*, especially since *Baze* was a plurality decision, and this involves the first new method of execution adopted since 1982.[12]

Second, this issue is likely to recur since three states—Alabama, Mississippi, and Oklahoma—have authorized nitrogen hypoxia, Nebraska is considering doing so,[13] and following Mr. Smith's execution, counsel for Respondents announced, "Alabama has done it, and now so can you, and we stand ready to assist you in implementing this method in your states."[14] It has already recurred,[15] and will continue as, in Alabama alone, "[m]ore than 40 death row [prisoners]" are subject to execution by nitrogen hypoxia.[16] Moreover, because President-elect Trump has promised to lift President Biden's moratorium on federal executions, federal

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[11] ECF No. 95 at 36 n.17.

[12] Kim Chandler, *Federal court says Alabama can carry out first nitrogen gas execution; Supreme Court appeal expected*, AP, Jan. 24, 2024, https://apnews.com/article/death-penalty-nitrogen-alabama-7e1c91026c2608604ef6498c658e5b33.

[13] Margery A. Beck, *Nebraska bill would add asphyxiation by nitrogen gas as form of execution for death row inmates*, AP, Jan. 5, 2024, https://apnews.com/article/death-penalty-nitrogen-nebraska-alabama-76bba87753 bc1ab20b0bc50a09991ec8.

[14] Jonathan Allen, *Alabama will help bring nitrogen asphyxiation executions to other states*, Reuters, Jan. 27, 2024, https://www.reuters.com/world/us/alabama-will-help-bring-nitrogen-asphyxiation-executions-other-states-2024-01-26/. Alabama also "provided the Oklahoma Department of Corrections with an unredacted version of its new protocol[.]" *Id.*

[15] *See Frazier v. Comm'r, Ala. Dep't of Corr.*, *et al.*, No. 2:24-cv-00732 (M.D. Ala. Nov. 15, 2024).

[16] Kim Chandler, *Alabama man shook violently on gurney during first-ever nitrogen gas execution*, AP, Jan. 26, 2024, https://apnews.com/article/nitrogen-execution-death-penalty-alabama-6d66344d3199f8c58f2408baa3df0738.

executions will likely resume,[17] and will be conducted by lethal injection or "any other manner prescribed by the law of the State in which the sentence was imposed or which has been designated by a court in accordance with 18 U.S.C. § 3596(a)." 28 C.F.R. § 26(a)(4).

Third, the questions presented go to the heart of the intent of the Framers and the original meaning of the Eighth Amendment's prohibition on cruel and unusual punishments. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), this Court first addressed the meaning of the Eighth Amendment, concluding that, although "[d]ifficulty would attend the effort to define with exactness the extent of" its coverage, the prohibition extended to methods that employed "unnecessary cruelty" or "circumstances of terror, pain, or disgrace" that are "superadded."[18] 99 U.S. at 135-36.

This Court should grant *certiorari* because this issue is likely to recur and is of exceptional importance.

II. This Court should grant certiorari to resolve a circuit split.

There exists an irreconcilable circuit split on the issue of whether a method of execution that causes conscious suffocation violates the Eighth Amendment. That split concerns whether pleading (or proving) conscious suffocation satisfies *Baze*'s

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[17] *See*, *e.g.*, Michael Ruiz, *Trump execution restart to put Boston Marathon bomber, Charleston church shooter, more killers in hot seat*, Fox News, Nov. 15, 2024, https://www.foxnews.com/us/trump-execution-restart-put-boston-marathon-bomber-charleston-church-shooter-more-killers-hot-seat ("President-elect Donald Trump has vowed to end the Biden-Harris administration's moratorium on federal executions when he returns to office next year, putting 40 federal death row inmates on notice.").

[18] The language—noting some punishments for "very atrocious crimes" involve "circumstances of terror, pain or disgrace" being "super-added"—is taken from Blackstone. 4 W. Blackstone, Commentaries on the Laws of England 370 (1769).

first prong: "the method presents a risk that is sure or very likely to cause serious illness and needless suffering[.]" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citing *Baze*, 553 U.S. at 50) (internal quotation marks and emphases omitted). The Sixth Circuit has adopted Defendants' interpretation of *Baze* and the Eighth Amendment, while the D.C. Circuit has gone with Mr. Grayson's approach. They cannot be reconciled.

The Sixth Circuit held (in the preliminary injunction context) the first prong not satisfied based on "the risks of sensations of drowning and suffocation" in a lethal injection protocol because it "looks a lot like the risks of pain associated with hanging[s]" which "have been considered constitutional for as long as the United States have been united." *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 289-90 (6th Cir. 2019). By contrast, the D.C. Circuit held (in the motion to dismiss context), an allegation that, "[a]s a result of" flash pulmonary edema caused by pentobarbital, "most, if not all, prisoners will experience excruciating suffering, including sensations of drowning and suffocation" while still conscious and sensate. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 132 (D.C. Cir. 2020) (quotation marks and citations omitted). The two circuits' interpretations of *Baze* and the Eighth Amendment cannot be reconciled and are unlikely to change. The Eleventh Circuit's resolution here did nothing to alleviate this split. Pet. App. 12a n.3 ("We are not sure that the Sixth Circuit is correct on this point" because "[n]othing in our Eighth Amendment jurisprudence suggests a special exemption for psychological terror or pain from the prohibition on cruelty.").

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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November 19, 2024