No. **18-1103**

IN THE

Supreme Court of the United States

PAUL ROSS EVANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 44.2, this Court is respectfully petitioned for rehearing of the denial of the petition for a writ of certiorari.

INTERVENING MATTER

The petition for a writ of certiorari was denied on April 1, 2019.

Intervening matter is provided by: *Bucklew v. Precythe*, 587 U. S. ___ (2019), No. 17-8151 (decided April 1, 2019); U. S. Patent No. 10,245,075 (issued April 2, 2019); and, *Garza v. Idaho*, 586 U. S. ___ (2019), No. 17-1026 (decided February 27, 2019).

Bucklew is deemed intervening because it was decided the same day as the petition for a writ of certiorari in this case. Patent '075 is deemed intervening because it was issued within the 25-day period for filing a petition for rehearing set forth in Rule 44.2. *Garza* is deemed intervening because it was decided after the petition for a writ of certiorari was filed in this case on February 19, 2019, and there is a lag in time experienced by prisoners in receiving access to recent decisions.

REASONS FOR GRANTING REHEARING

1.

Garza held that the presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U. S. 470 (2000), applies regardless of whether a defendant has signed an appeal waiver. *Garza, id.*, slip op. at pp. 3-14. Importantly, the Court held that "it is not the defendant's role to decide what arguments to press" on appeal and that forcing him to show in a postconviction proceeding "that he would have presented claims that would have been considered by

the appellate court on the merits" would be "unfair, ill advised, and unworkable" because "there is no right to counsel in postconviction proceedings and, thus, most applicants proceed *pro se*" (*id.*, slip op. at syllabus ¶ e and pp. 10-14).

By analogy to the present petition for a writ of certiorari, it follows from *Garza* that a movant for postconviction relief under 28 U. S. C. § 2255 cannot be time barred under Section 2255(f)(2) from prosecuting a claim of ineffective assistance as to appointed counsel, prior to one-year from the date he is able to decide what arguments to press. To hold otherwise would be contradictory, as if a *pro se* prisoner's appreciation of what arguments to press should be known, as if by osmosis, with respect to seeking postconviction relief, but not with respect to seeking direct appeal!

In other words, as the petition for a writ of certiorari argues (¶ 6, pp. 21-24), the appointment of counsel is a governmental action under Section 2255(f)(2), and an impediment to making a motion under Section 2255 as to appointed counsel's ineffective assistance is not removed until the movant is able to decide what arguments to press. Hence, in view of *Garza*, the district court erred in dismissing the motion under Section 2255 as time barred, given that the movant was not able to decide what arguments to press as to his ineffective assistance claims, until within one year of the date his motion was filed.

Rehearing should therefore be granted to address the conflict with *Garza*.

2.

Bucklew and Patent '075 have a combined effect.

In *Baze v. Rees*, 553 U. S. 35 (2008), a plurality of this Court concluded that a State's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." *Id.*, at 52. A majority of the Court subsequently held *Baze*'s plurality opinion to be controlling. *See Glossip v. Gross*, 576 U. S. ___ (2015). In *Bucklew*, *id.*, at ¶ 1 and pp. 8-20, the Court held that "*Baze* and *Glossip* govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain."

Patent '075 identifies a feasible, readily implemented alternative procedure to the lethal execution of unborn individuals in life-threatening ectopic pregnancies, namely, a nondestructive means of ectopic pregnancy management, in which both the mother and baby are spared the legal harm or evil of homicide in favor of a non-homicidal procedure. In the course of prosecution, the applicant presented evidence that four physicians—Wallace, Shettles, Clark, and Gaither—had published articles showing that the nondestructive management of ectopic pregnancies was feasible and readily implemented, and that it had been performed successfully with viable results even with the crude technology of the prior art. *See* U. S. Patent Appl. No. 14/214,897, Reply to Third Non-Final, filed 8/30/2018, pp. 45-62 ("Rebuttal of WANDS Analysis").

Hence, the result in *Bucklew* demands—irrespective of whether this Court upholds any right to terminate pregnancy—that a homicidal procedure, i.e., traditional abortion, is to be held violative of the Eighth Amendment, given that a feasible, readily

implemented non-homicidal alternative has been identified in view of Patent '075. *See* Patent '075, column 60, line 44—column 61, line 18 ("Non-Concepticidal Abortion"). *See also Gonzales v. Carhart*, 550 U. S. 124 (2007) (holding that the termination of pregnancy may be restricted to less gruesome procedures.)

Were this Court to hold that homicidal abortions are violative of the Eighth Amendment, it would strengthen petitioner's argument that he might have prevailed on an affirmative defense—save for appointed counsel's ineffectiveness—given that the result of his actions was to vindicate, for one day, the Fifth Amendment due process rights of members of the unborn population, to spare them the legal harm or evil of their scheduled homicides.

Rehearing should therefore be granted to address the conflict with *Bucklew* in view of Patent '075.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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APRIL 2019

CERTIFICATE OF PETITIONER

I, Paul Ross Evans, certify that, in compliance with Supreme Court Rule 44.2, this petition is presented in good faith and not for delay and that its grounds are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Electronic signature via Corrlinks: /PRE/

PAUL ROSS EVANS
PETITIONER