Nos. 24-7491& 24A1279 – CAPITAL CASE

IN THE
Supreme Court of the United States

RICHARD GERALD JORDAN,
Petitioner,

v.

MISSISSIPPI STATE EXECUTIONER, IN HIS OFFICIAL CAPACITY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

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EXECUTION SCHEDULED WEDNESDAY, JUNE 25, 2025, AT 7:00 P.M. EDT

CAPITAL CASE
QUESTION PRESENTED

In 1976, petitioner Richard Gerald Jordan executed a young mother after kidnapping her to extort money from her husband. A jury convicted him of capital murder, and, after his conviction and/or sentence were vacated on now-irrelevant technical grounds, he was sentenced to death for the last time nearly three decades ago. After countless rounds of litigation where petitioner has pressed increasingly frivolous claims, the Mississippi Supreme Court determined that petitioner has "exhausted all state and federal remedies for purposes of setting an execution date" and set petitioner's execution for today: Wednesday, June 25, 2025 at 7:00 p.m. EDT.

As with petitioner's two other recent petitions and last-minute stay applications in this Court (Nos. 24-959, 24A1143, 24-7474, 24A1261), this Court should deny relief here.

The question presented is whether this Court should review the Fifth Circuit's affirmance of the district court's rejection of petitioner's request for execution-stay relief on his method-of-execution claim (and denial of associated stay relief on appeal) in this Eighth Amendment challenge to Mississippi's three-drug lethal-injection protocol, when that decision soundly applied this Court's precedents and, in any event, the petition raises only meritless claims, does not satisfy any traditional certiorari criteria, and reflects a baseless, belated attempt to forestall petitioner's lawful punishment.

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The court of appeals' unpublished opinion affirming the district court's denial of preliminary-injunctive relief and denying petitioner's motions for an injunction pending appeal and for a stay of execution (Petition Appendix A (App.A.1-8)) is not yet reported. The district court's order denying petitioner's motion for preliminary-injunctive relief (Petition Appendix B (App.B.1-30)) also is not reported but is available at 2025 WL 1728266.

JURISDICTION

The court of appeals entered judgment on June 24, 2025. App.A.1-8. The petition for certiorari (Pet.) was filed on June 24, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Nearly fifty years ago, petitioner murdered Edwina Marter after kidnapping her to extort money from her husband. A jury convicted petitioner of capital murder and sentenced him to death. After petitioner's conviction and/or sentence were vacated on now-irrelevant technical grounds three times, he was sentenced to death for a fourth and final time in 1998. That sentence was affirmed on direct appeal, and this Court denied certiorari. Over the following decades, the Mississippi Supreme Court rejected numerous state post-conviction challenges to petitioner's conviction and/or sentence, and federal courts repeatedly denied him relief.

The present petition for certiorari arises from the court of appeals' affirmance of the district court's rejection of petitioner's request for execution-stay relief on his method-of-execution claim (and denial of associated stay relief on appeal) in this

challenge to Mississippi's three-drug lethal-injection protocol under the Eighth Amendment and 42 U.S.C. § 1983. App.A.1-8; App.B.1-30.

1. In 1976, petitioner kidnapped Edwina Marter from her home in Gulfport, Mississippi. *Jordan v. Epps*, 740 F. Supp. 2d 802, 808 (S.D. Miss. 2010). Petitioner had previously discovered that Mrs. Marter's husband was a commercial loan officer at a national bank. Petitioner tracked down the Marters' home and waited outside until Mrs. Marter was alone with her three-year-old son. Petitioner impersonated a utility worker to trick Mrs. Marter into letting him inside. He kidnapped Mrs. Marter at gunpoint, forced her to leave her son, and made her drive to a remote area. He then executed her by shooting her in the back of the head. *Ibid.*

Even though he had already killed Mrs. Marter, petitioner told her husband that she was still alive and demanded money to let her go. 740 F. Supp. 2d at 808. When petitioner retrieved the ransom from an agreed-upon location, officers tried to arrest him. He initially escaped but was later arrested at a roadblock. Petitioner confessed to killing Mrs. Marter and led police to her body. He also told police where he disposed of the murder weapon and where he hid the ransom money. *Ibid.*

2. Petitioner was tried as to his guilt or sentence (or both) four times. In the 1970s, 80s, and 90s, his capital-murder conviction and/or death sentence were vacated on procedural grounds three times. *See id.* at 810-16. In 1998, a jury sentenced him to death for the fourth and final time, the Mississippi Supreme Court affirmed that sentence, and this Court denied certiorari review. *Jordan v. State*, 786 So. 2d 987, 1030 (Miss. 2001), *cert. denied*, 534 U.S. 1085 (2002).

Petitioner challenged his conviction and sentence several times on state post-conviction review and in federal habeas proceedings. In 2005, the Mississippi Supreme Court denied petitioner's first petition for state post-conviction relief. *Jordan v. State*, 912 So. 2d 800, 809-23 (Miss. 2005). Petitioner sought federal habeas relief, which was denied. 740 F. Supp. 2d at 899; *see Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014) (denying certificate of appealability), *cert. denied*, 576 U.S. 1071 (2015). In 2017-2018, the state supreme court denied petitioner's second and third successive petitions for state post-conviction relief. *Jordan v. State*, 224 So. 3d 1252, 1252-53 (Miss. 2017), *cert. denied*, 138 S. Ct. 2567 (2018); *Jordan v. State*, 266 So. 3d 986, 991 (Miss. 2018). In December 2022 and November 2024, petitioner filed additional successive petitions for state post-conviction relief. *See Jordan v. State*, No. 2022-DR-01243-SCT (Miss. Dec. 13, 2022) (motion for leave to file successive petition); *Jordan v. State*, No. 2024-DR-01272-SCT (Miss. Nov. 13, 2024) (motion for leave to file fifth successive petition). In October 2024, the state supreme court denied the fourth successive petition. Order, *Jordan v. State*, No. 2022-DR-01243-SCT (Miss. Oct. 1, 2024). In early May 2025, the state supreme court denied the fifth successive petition. Order, *Jordan v. State*, No. 2024-DR-01272-SCT (Miss. May 1, 2025).

On May 1, 2025, the Mississippi Supreme Court set petitioner's execution for June 25, 2025. Order, *Jordan v. State*, No. 1998-DP-00901-SCT (Miss. May 1, 2025). On June 23, 2025, this Court denied certiorari review of the state supreme court's denial of petitioner's fourth successive petition. *Jordan v. Mississippi*, No. 24-959, 2025 WL 1727397 (June 23, 2025); *see* No. 24A1143 (associated stay application). As of this filing, petitioner also has pending with this Court a petition for certiorari

review of the state supreme court's denial of petitioner's fifth successive petition, and an associated stay application. *Jordan v. Mississippi*, Nos. 24-7474, 24A1261.

3. In 2015, petitioner and another Mississippi death-row inmate filed this collateral lawsuit challenging the State's three-drug lethal-injection protocol. *Jordan v. Fisher*, 823 F.3d 805, 808 (5th Cir. 2016). When suit was filed, the State's protocol called for either sodium pentothal or pentobarbital as the first drug. *Ibid.* After the protocol was amended to allow for the use of "midazolam as the first drug" if "sodium pentothal or pentobarbital" could not be obtained, the district court enjoined the State, on substantive and procedural due-process grounds, "from using pentobarbital, specifically in its compounded form, or midazolam" in any executions. *Id.* at 808-09. The Fifth Circuit later rejected the plaintiffs' due-process claims, vacated the district court's injunction, and remanded for further proceedings. *Id.* at 810-14.

After remand, the State refined its execution procedures. State law currently provides four methods of execution: lethal injection, nitrogen hypoxia, electrocution, and firing squad. Miss. Code Ann. § 99-19-51(1). But the State designates lethal injection as "the preferred method of execution." *Ibid.* The State's three-drug lethal-injection protocol provides for the administration of injections of "500 milligrams of midazolam (an anesthetic)," then "rocuronium bromide (a chemical paralytic)," then "potassium bromide (a chemical paralytic)." App.A.3. "Four minutes after the first injection, an official ensures the prisoner is unconscious and the IV line is working before administering the second and third injections." App.A.3-4.

The current operative complaint filed by petitioner (and his original co-plaintiff and two other inmates who have intervened) pleads two Eighth Amendment claims

under section 1983. App.B.3. Those claims allege that the State's "use of midazolam as the anesthetic in [its] three-drug lethal[-]injection protocol" violates their "right to be free from cruel and unusual punishment" (count IB), and that the State's use of its three-drug protocol violates their Eighth Amendment rights under "evolving standards of decency" (count III). App.B.3-4. (quotation marks omitted).

Over a month after the Mississippi Supreme Court (on May 1) set petitioner's execution, petitioner and his co-plaintiffs moved the district court (on June 4) for a preliminary injunction blocking the State from using its three-drug protocol to execute petitioner based on the claims in counts IB and III of the complaint. App.A.4; *see* App.B.6, 10-29. The district court held a hearing on June 14. App.A.4.

On June 20, the district court denied the preliminary-injunction motion, ruling that petitioner failed to prove a likelihood of success on the merits on the claims in counts IB and III and that none of the equitable factors favored injunctive relief staying petitioner's execution. App.B.9-30. First, the district court ruled that petitioner was not likely to succeed on his claim that the State's use of midazolam violates the Eighth Amendment. The district court said that the count IB claim failed under settled precedents that require a petitioner to prove that the State's "method of execution presents a risk that is sure or very likely to cause serious illness and needless suffering." App.B.11. The court determined (among other things) that "credible expert testimony" from both sides supported their positions (for petitioner, that midazolam "cannot" render him "unconscious" and "impervious" to the pain caused by the remaining drugs in the protocol (App.B.7); for the State, that the appropriate "500 mg dose" of midazolam will "render[ ]" petitioner "completely

unconscious and insensate to pain and noxious stimuli" (App.B.13)); that numerous federal courts have upheld three-drug protocols "using midazolam"; that "no evidence" showed that prior executions under the State's protocol caused "serious pain or needless suffering" to the inmates; and that petitioner's evidence related to methods of execution used by other states at most "presented evidence indicating a possibility of severe pain" but that was "not enough to carry [petitioner's] burden in seeking a stay of execution." App.B.20-22.

Second, the district court rejected petitioner's count III claim that an evolving-standards-of-decency analysis shows that the State's three-drug protocol violates the Eighth Amendment. App.B.23-29. As the district court explained, among other things, such an analysis conflicts with precedents of this Court that establish the standard that governs method-of-execution claims. App.B.23-29.

Third, the district court held that the equities favored the State and denial of stay relief. App.B.29. The court emphasized (among other things) that "almost fifty years" had elapsed between the murder of Edwina Marter and petitioner's scheduled execution date; that petitioner's "case" had been "reviewed" on "multiple occasions" in unsuccessful challenges to his conviction and sentence; and that "[s]taying an execution this late in the process—after an inmate has received the full gamut of due process available to him under our system of justice—would inflict a profound injury" to the "powerful and legitimate interest in punishing the guilty" which is "shared by the State and the victims of crime." App.B.29.

Petitioner appealed from the district court's ruling to the Fifth Circuit (on June 20) and moved for a stay of execution and an injunction pending appeal (on June 22).

App.A.4. On appeal, petitioner only pressed his method-of-execution claim (count IB) and abandoned his "evolving standards of decency" claim (count III). App.A.6.

5. On June 24, the court of appeals affirmed the district court's denial of petitioner's preliminary-injunction motion and denied his associated motions. App.A.4-8.

The court of appeals held that petitioner failed to "'make a clear showing'" that "'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.'" App.A.4-5. (quoting *Starbucks v. McKinney*, 602 U.S. 339, 345 (2024)). On likely success on the merits, petitioner's method-of-execution claim failed under the well-established two-part framework established by this Court in *Baze v. Rees*, 553 U.S. 35 (2008), *Glossip v. Gross*, 576 U.S. 863 (2015), and *Bucklew v. Precythe*, 587 U.S. 119 (2019). App.A.5-8. That framework requires the challenger to prove that the State's "method" of execution "presents a risk that is '*sure or very likely* to cause serious illness and needless suffering.'" *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 50). In addition, the challenger "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." *Bucklew*, 587 U.S. at 134; *see id.* at 135-140 (describing these requirements as "the *Baze-Glossip* test").

The court of appeals ruled that petitioner's likelihood-of-success-on-the-merits showing failed on the *Baze-Glossip* test's "sure or very likely to cause serious illness

and needless suffering" requirement for three reasons. App.A.6-8. One: The record here is "substantially similar to the one in *Glossip*," where this Court upheld the "same three-drug protocol" on a similar challenge "focused on 'the administration of 500 milligrams of midazolam'" and where Oklahoma had adopted "'safeguards'" similar to Mississippi's here. App.A.6 (quoting *Glossip*, 576 U.S. at 873, 886). And, although the evidence offered by "dueling experts" in this case "differed in some respects from the evidence in *Glossip*," the district court "carefully considered" the claims and determined that petitioner "'failed to establish that [the State's] use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.'" App.A.6 (quoting *Glossip*, 576 U.S. at 867). Two: The district court did not clearly err in finding that petitioner "offered no evidence that two prisoners recently executed under [the State's] protocol suffered any pain" and that "both parties offered credible expert testimony on whether 500 milligrams of midazolam would render [petitioner] fully unconscious," or in concluding that petitioner "failed to meet his burden to show that using midazolam would result in a substantial risk of severe pain." App.A.7. That conclusion was "entitled to deference" and aligned with similar scenarios involving competing expert testimony. App.A.7 (citing *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) (en banc) (per curiam); *Barr v. Lee*, 591 U.S. 979, 981 (2020)). Three: The State established that the execution would be stopped if it appeared that petitioner was "still conscious" after receiving the midazolam. App.A.7. That showed that petitioner is "not likely to suffer any pain"—if he remains "conscious" the execution will be halted and if he "fall[s] unconscious" "he will likely experience a painless death." App.A.7.

On the equities, the court of appeals held that "the balance of the equities and the public interest" weighed in the State's "favor." App.A.8. The court explained that the State has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts"; that "for nearly 50 years" petitioner's claims have received "repeated review" in this Court and at every other level; that "finality" has "acquire[d] an added moral dimension" in petitioner's case; and that "the public's interest in timely enforcement" of petitioner's "death sentence outweighs [his] request for more time." App.A.8 (quotation marks omitted). The court held that, given those factors, "the balance of the equities and the public interest" weighed in the State's "favor." App.A.8.

In the late evening after the court of appeals' June 24 decision and simultaneous entry of its judgment, petitioner filed the petition for certiorari at issue here, along with an emergency stay application.

REASONS FOR DENYING THE PETITION AND STAY APPLICATION

Petitioner disputes the lower courts' rulings and contends that this Court should decide whether lower courts must always "assess" and "compar[e]" "the substantiality of the risk of pain" from a method of execution to proffered alternative methods when ruling on claims under the *Baze-Glossip* test. Pet. 1. But he has not shown that the court of appeals or district court misapplied this Court's precedents. He presents only meritless fact-bound disagreements with the lower courts' rulings under those precedents, does not satisfy any traditional certiorari criteria, and has made submissions that reflect a baseless, last-minute attempt to forestall his lawful

punishment. The petition and accompanying emergency stay application should be denied.

I. Petitioner's Claim Is Meritless And Does Not Warrant Further Review.

The court of appeals rejected petitioner's bid for injunctive relief staying his execution by applying this Court's well-settled standards on method-of-execution claims and stay relief. That ruling is sound. Further review is unwarranted.

A. Petitioner's method-of-execution claim contends that the State's use of midazolam as the first drug in its three-drug lethal-injection protocol violates the Eighth Amendment by creating a risk that he will not be "fully anesthetized" during his execution and thus will experience "excessive pain." App.A.4, 5-6. He has failed to make a strong showing of likely merits success on that claim and the equities weigh against last-minute relief blocking his execution, as the court of appeals correctly ruled. App.A.4-8.

When carrying out a prisoner's death sentence, States must be "afford[ed] a measure of deference" in their "choice of execution procedures" because the Constitution "does not authorize courts to serve as boards of inquiry charged with determining best practices for executions." *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019) (quotation marks omitted). This Court's precedents thus require a prisoner challenging a State's execution procedures to satisfy a two-part test. *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019); *Glossip v. Gross*, 576 U.S. 863, 877 (2015); *Baze v. Rees*, 553 U.S. 35, 50 (2008). That *Baze-Glossip* test imposes an "exceedingly high bar." *Barr v. Lee*, 591 U.S. 979, 980 (2020). First, the prisoner must prove that the State's "method" of execution "presents a risk that is sure or very likely to cause

serious illness and needless suffering." *Glossip*, 576 U.S. at 877 (quotation marks omitted). That means the prisoner must establish a "substantial risk of serious harm." *Ibid.* (quotation marks omitted). Second, the "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." *Bucklew*, 587 U.S. at 134.

Petitioner cannot establish that the State's use of midazolam in its three-drug protocol is "sure or very likely to cause illness and needless suffering." As the court of appeals ruled, petitioner's merits showing fails under this Court's precedent, the district court's fact findings, and the State's safeguard procedures. App.A.5-8. On precedent: Petitioner's claim is materially the same as the claim this Court rejected in *Glossip*. He challenges the same three-drug protocol that *Glossip* upheld, on the same basis as the *Glossip* plaintiffs (by attacking the use of midazolam), where the State here has similar safeguards in place. App.A.6. And, to the extent petitioner suggests (Pet. 7, 29-31) that he has made a better evidentiary showing than the *Glossip* plaintiffs, that fails to prove that the district court's rulings here are clearly erroneous and instead shows nothing more than a fact-bound disagreement with the lower courts' view of his evidence. On fact findings: Petitioner cannot demonstrate that the district court clearly erred in concluding that he failed to establish that the State's use of midazolam will result in "a substantial risk of severe pain." App.A.6-7; *see* App.B.12, 20. He has "no evidence" that prisoners who were recently executed under the State's three-drug protocol "suffered any pain." App.A.6. Nor can he legitimately dispute (*contra* Pet. 32-38) that a contrary view fails to align with the

record here and with how courts have handled these claims on similar records. App.A.7. On safeguards: The record shows that the State will stop petitioner's execution if midazolam fails to render petitioner unconscious—thus ensuring he will likely experience a painless death. App.A.7. Petitioner protests that the State's evidence on that front is not "credible" (Pet. 38-40) but that just again shows a fact-bound disagreement with a point resolved against him—not grounds for this Court to grant certiorari and reverse.

At bottom, as the courts below ruled, petitioner's attack on the State's use of midazolam is no better than similar challenges that this Court and the lower courts have consistently rejected. *E.g.*, *Glossip*, 576 U.S. at 881-93; *In re Ohio Execution Protocol*, 946 F.3d 287, 290 (6th Cir. 2019*)*; *McGehee v. Hutchinson*, 854 F.3d 488, 492 (8th Cir. 2017) (en banc) (per curiam); *In re Ohio Execution Protocol*, 860 F.3d 881, 887-91 (6th Cir. 2017); *McGehee v. Hutchinson*, 463 F. Supp. 3d 870, 913-14 (E.D. Ark. 2020), *aff'd sub nom. Johnson v. Hutchinson*, 44 F.4th 1116 (8th Cir. 2022); *Glossip v. Chandler*, 2022 WL 1997194, at *18 (W.D. Okla. June 6, 2022). That dooms his challenge under the *Baze-Glossip* test and thus dooms his (third) last-minute bid for a stay of execution.

B. The bulk of the petition fails to address the questions that petitioner claims the petition presents. Pet. 1. Instead, petitioner largely rehashes his view of the evidence that the lower courts rejected (Pet. 12-25) and disputes the lower courts' findings and conclusions under this Court's precedents (*e.g.*, Pet. 33-40). To the extent petitioner does claim that this Court's precedents required the lower courts to assess his likelihood of success in showing the State's three-drug protocol "poses a risk of

severe pain" by "comparing" that protocol to a "one-drug alternative" (Pet. 26; *see id.* 25, 28-32), he fails to show how the approach taken by the court of appeals or district court misapplied this Court's precedents, conflicts with any decisions of any lower courts, or satisfies any other traditional certiorari criteria.

Contrary to petitioner's argument (Pet. 25-26), the *Baze-Glossip* test established by this Court's precedents does not require the court of appeals and the district court to determine whether the risk of pain associated with the State's three-drug execution protocol is substantial when compared to petitioner's proposed one-drug alternative method. Petitioner's argument largely rests on a misunderstanding of the *Baze-Glossip* test and misreading of this Court's decision in *Bucklew v. Precythe*, 587 U.S. 119 (2019).

The *Baze-Glossip* test requires a method-of-execution challenger to satisfy two separate requirements, as the lower courts here explained. App.A.5; App.B.11. The challenger first must establish that the State's chosen method of execution 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) (cleaned up). In other words, the inmate must prove that the execution protocol "creates a demonstrated risk of severe pain." *Id.* at 878 (cleaned up). Then, the inmate must *also* "show that the risk [of pain] is substantial when compared to the known and available alternatives," *ibid.* (cleaned up), and "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain," *id.* at 877 (cleaned up).

Bucklew did not change the *Baze-Glossip* test at all. *Contra* Pet. 25-26. Indeed, *Bucklew* demonstrates that the test has two requirements and that a failure on either

defeats a method-of-execution challenge. The *Bucklew* plaintiff brought an as-applied challenge to Missouri's lethal-injection protocol, arguing that the "protocol would cause him severe pain because of his particular medical condition." 587 U.S. at 126. Although the district court found that there was a triable issue of fact as to whether he met the first *Baze-Glossip* requirement, the court granted summary judgment on the second requirement—ruling the plaintiff "produced no evidence that his proposed alternative, execution by nitrogen hypoxia, would significantly reduce th[e] risk" of pain. *Id.* at 128. On appeal, the inmate plaintiff argued that the second requirement of the *Baze-Glossip* test should not apply to his as-applied challenge. *Id.* at 135. The plaintiff contended that a method of execution that presents "a substantial and particular risk of grave suffering due to the inmate's unique medical condition" is "manifestly cruel." *Ibid.* (cleaned up). The plaintiff thus maintained that he should not have to prove that there is an alternative method that substantially reduces that risk. *Ibid.*

This Court rejected the plaintiff's argument, holding that "identifying an available alternative is a requirement of all Eighth Amendment method-of-execution claims alleging cruel pain." 587 U.S. at 136 (cleaned up). In so holding, this Court explained that "decid[ing] whether the State has cruelly superadded pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by comparing that method with a viable alternative." *Ibid.* (cleaned up). Accordingly, *Bucklew* refused to overrule *Baze* and *Glossip* and made clear that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip*

test." *Id.* at 140. In short, *Bucklew* does not mandate that courts conduct a comparative analysis when a challenger cannot establish that the State's execution protocol poses a substantial risk of severe pain—as petitioner wrongly contends. Rather, this Court confirmed that satisfying the first requirement of the *Baze-Glossip* test is insufficient to prevail on a method-of-execution claim *and* to win such a challenge an inmate *must also* meet the second requirement—proving "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." 587 U.S. at 134.

There is no split among the lower courts—or between the lower courts and the decisions below—on the issue petitioner claims to present. Several courts have recognized that an analysis of both requirements of the *Baze-Glossip* test is not required, and that, where the inmate fails to satisfy the first prong, it is not necessary to consider the second prong. For example, the Eleventh Circuit has declined to analyze the second requirement after concluding that the challenger's claim failed on the first requirement. *Smith v. Commissioner, Alabama Department of Corrections*, 2024 WL 266027, at *8 n.7 (11th Cir. Jan. 24, 2024) ("We do not address Smith's alternative methods."). In another case, the Eleventh Circuit did not examine whether the risk of pain posed by the State's method of execution was substantial when compared to the plaintiff's alternative method because the district court did not address the second prong. *Barber v. Governor of Alabama*, 73 F.4th 1306, 1318 n.18 (11th Cir. 2023). And, as here, that court ruled that, because the plaintiff failed to "show that his method of execution creates a substantial risk of serious harm," he did

not "have a substantial likelihood of success on the merits of his Eighth Amendment challenge." *Id.* at 1320. Several district courts have reached the same conclusion. *See Nance v. Oliver*, 2025 WL 1211111, at *3 (N.D. Ga. Apr. 25, 2025) ("*Bucklew* does not require analysis of both prongs"); *McGehee v. Hutchinson*, 463 F. Supp. 3d 870, 914 (E.D. Ark. 2020) ("Because plaintiffs fail to meet their burden with respect to the first prong of *Baze/Glossip*, plaintiffs cannot prevail on their Eighth Amendment claim."); *Glossip v. Chandler*, 2022 WL 136886, at *9 (W.D. Okla. Jan. 14, 2022) ("[T]he comparison of a 'known and available alternative' ... is a live issue only if the prisoner has carried his burden of proof on [the] first prong.") (citation omitted).

The lower courts here correctly applied the law to reach the right result. That result squares with other sound decisions applying the *Baze-Glossip* test. And petitioner's case fails to satisfy any traditional certiorari criteria. The petition should be denied.

II. Petitioner's Last-Minute Stay Application Should Be Denied.

Under this Court's well-settled precedent, "a stay of execution" "is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). It is "an equitable remedy" that "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Ibid.* Where, as here, the court below has "denied a motion for a stay," the applicant seeking a stay bears "an especially heavy burden." *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers). And that is even more so when the applicant seeks a "[l]ast-minute stay[ ]" of execution, which "should be the extreme exception, not the norm." *Barr v. Lee*, 591 U.S. 979, 981 (2020) (per curiam).

To obtain a stay in this context, petitioner must show "a reasonable probability" that certiorari will be granted on his accompanying petition, "a significant possibility of reversal of the lower court's decision," and "a likelihood that irreparable harm will result" absent a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Petitioner cannot make any of those showings here.

On the merits: As thoroughly set forth above, petitioner's baseless method-of-execution claim was soundly rejected in well-reasoned opinions by the lower courts and does not present any issue warranting further review. *Cf. Bucklew v. Precythe*, 587 U.S. 119, 133 (2019) ("This Court has yet to hold that a State's method of execution qualifies as cruel and unusual, and perhaps understandably so."). There is thus no "reasonable probability" that the Court will grant certiorari on that claim—let alone a "significant possibility" that the Court would reverse the reasoned judgment below. *Barefoot*, 463 U.S. at 895. As explained, the district court reasonably concluded that petitioner is unlikely to succeed in showing a "substantial risk" that the State's three-drug protocol will cause him "severe pain." App.B.22. And the Fifth Circuit reasonably upheld that ruling, which is consistent with this Court's holding in *Glossip* and with the Court's broader Eighth Amendment jurisprudence. *See* App.A.6-8.

Petitioner says that "new" "sets of facts" show that his method-of-execution claim is likely to succeed under *Glossip*'s "analytical framework." Stay Application 6; *see* Stay Application 5-8. He points to his "expert declarations," which (petitioner says) show that midazolam "cannot" render him "unconscious and insensate to pain" and that the remaining drugs in the protocol will cause him "excruciating pain." Stay

Application 6. But the courts below rightly rejected petitioner's showing, which was rebutted by the State's own "credible expert testimony" that midazolam "w[ill] render [petitioner] fully unconscious" and by petitioner's failure to "offer[ ]" any "evidence" that "the two prisoners recently executed under [Mississippi's three-drug] protocol suffered any pain." App.A.6, 7; *see Barr*, 591 U.S. at 981 (rejecting stay of execution where plaintiffs' "new expert declarations" were countered by government's "competing expert testimony" and so plaintiffs failed to "ma[k]e the showing required to justify last-minute intervention by a Federal Court"). Petitioner also points to the "[ ]availab[ility]" of "one-drug protocol using pentobarbital," which "may have been unavailable" for the execution at issue in *Glossip*. Stay Application 6. But as explained, the possible availability of a different execution method does not itself show that the method at issue here "is sure or very likely to result in needless suffering." *Glossip*, 576 U.S. at 881. Petitioner has failed to make that "critical" showing (*ibid.*) and so he cannot demonstrate a significant possibility of success on his claim.

On irreparable harm: Petitioner does not claim that carrying out a lawful sentence in his case will cause him irreparable injury, and for good reason. Petitioner's guilt is not in question—he no doubt committed the heinous crime that sent him to death row. Decades of litigation have not demonstrated constitutional errors at his final sentencing in 1998, in his state post-conviction proceedings, or (as shown here) in the method of his execution. The Mississippi Supreme Court has upheld petitioner's conviction and sentence six times, and lower federal courts have denied him habeas relief. This Court has denied certiorari review at every turn. The

claims presented in petitioner's latest petition for certiorari do nothing to undermine those prior determinations. As the court of appeals observed, petitioner "has enjoyed repeated review of his claims" "for nearly 50 years." App.A.8. He has received the process he was due, his punishment is just, and his execution will be constitutional. In short, petitioner can show no irreparable harm that is not a direct consequence of the valid, constitutional, and long-final death sentence the jury imposed for his brutal murder of Edwina Marter.

Petitioner points to the "likelihood that [he] will experience pain" during his execution. Stay Application 8. But, again, the lower courts' reasoned opinions—as well was this Court's decision in *Glossip*—show that that possibility is not "likel[y]" at all. "[N]umerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain" during an execution. *Glossip*, 576 U.S. at 881. And the State's expert in this case "credibl[y]" opined that "a 500 mg dose" of midazolam—"about 100-200 times the normal therapeutic dose"—will "render[ ]" petitioner "completely unconscious and insensate to pain and noxious stimuli." App.B.13, 20. On top of that, as the courts below recognized, the State "will halt the execution" and will not administer the other drugs if the midazolam does not render petitioner "unconscious," further showing that petitioner "is not likely to suffer any pain." App.A.7; *see* App.B.30.

Petitioner also claims that the equities and the public interest favor granting him a "narrowly tailored injunction." Stay Application 9. But the equities and the public interest clearly favor denying relief. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S.

at 584. And "[o]nly with real finality can ... victims" "move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). In this case, petitioner psychologically tortured Mrs. Marter before executing her. He kidnapped his victim at gunpoint in front of her 3-year-old son, forced her to leave her child alone and to drive to a remote area, and then executed her before demanding a ransom from her husband. *Jordan v. Epps*, 740 F. Supp. 2d 802, 808 (S.D. Miss. 2010). The State, its law-abiding citizens, and Mrs. Marter's friends and family have a strong interest in justice being done. They have been denied that justice *for decades*. To delay petitioner's lawful execution any longer would cause further "profound injury" and would undermine the "powerful and legitimate interest in punishing the guilty." *Calderon*, 523 U.S. at 556.

CONCLUSION

The petition for a writ of certiorari and the emergency stay application should be denied.

Respectfully submitted.

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