

No. _____

**In the
Supreme Court of the United States**

CAREY DALE GRAYSON,
Petitioner,

v.

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

**APPLICATION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF CERTIORARI**

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

CAPITAL CASE
EXECUTION SET FOR NOVEMBER 21, 2024, AT 6 P.M. CENTRAL

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit Court of Appeals:

Carey Dale Grayson respectfully requests this Court stay his execution under Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for a writ of *certiorari*. See *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) (“Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.”); see also *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (Court may stay execution if needed to resolve issues raised in initial petition).

The standard for granting a stay of execution pending *certiorari* is well-established. In granting a stay of execution, this Court should consider the prisoner’s likelihood of having four justices on this Court vote to grant *certiorari*, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. See *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Here, these factors weigh in favor of staying Mr. Grayson’s execution. Moreover, because this Court has ultimate jurisdiction over the issues that could be raised, it has the authority to protect its jurisdiction by staying an execution that would otherwise moot the case—a step the Court took in *Bucklew v. Lombardi*, No. 13A1153.¹

¹ This Court “may issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

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: 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 v. Rees*, 553 U.S. 35 (2008), only applies to lethal injection induced conscious suffocation or when both conscious suffocation and the pain of potassium chloride are combined. The Eleventh Circuit found this was error but concluded it was harmless. This Court must take action to ensure the proper interpretation of its opinions, especially since *Baze* was a plurality decision, and to resolve a circuit split the Eleventh Circuit only expanded.

Second, this issue is likely to recur since three states—Alabama, Mississippi, and Oklahoma—in three circuits no less, have authorized nitrogen hypoxia, Nebraska is considering doing so,² and counsel for Respondents has announced, “Alabama has done it, and now so can you, and we stand ready to assist you in

² 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-76bba87753bc1ab20b0bc50a09991ec8>.

implementing this method in your states.”³ Moreover, President Biden’s moratorium on federal execution will be lifted when President-elect Trump takes office.⁴

Third, the relative harm to the State is negligible. Mr. Grayson is not seeking to avoid execution. Rather, he is seeking *certiorari* so this Court can address the scope and meaning of the Eighth Amendment and its precedent. And the only relief he seeks below is that his execution occurs in a way that comports with the Eighth Amendment. Over forty prisoners on Alabama’s death row opted to be executed by nitrogen hypoxia, reserving the right to challenge the constitutionality of the protocol, five years before Alabama announced its protocol. Two prisoners—Kenneth Eugene Smith and Alan Eugene Miller⁵—have been executed by nitrogen hypoxia, and their executions did not match what Respondents promised (including to this Court).⁶ Executing Mr. Grayson in the same way as Messrs. Smith and Miller will result in

³ 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 has even “provided the Oklahoma Department of Corrections with an unredacted version of its new protocol[.]” *Id.*

⁴ 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.”).

⁵ Neither signed the opt in form. Both were executed by nitrogen hypoxia after settling lawsuits that followed botched lethal injection attempts.

⁶ 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 Corrs., et al.*, Nos. 23-6562 & 23A688 (Jan. 25, 2024), at 20 (“Smith will be unconscious in under a minute”), 21 (“And the experts agree that nitrogen hypoxia is painless because it causes unconsciousness in seconds”).

an Eighth Amendment violation if Mr. Grayson's interpretation of the Eighth Amendment and *Baze* is correct. Adopting either of Mr. Grayson's alternatives will easily prevent this and both are feasible, especially given the ready availability of the materials needed.

Given this is the first new execution method used in the United States since lethal injection was first used in 1982,⁷ it is appropriate for this Court to reach the issues surrounding this novel method. Without a stay and grant of *certiorari*, this Court will continue to face the questions raised in the petition about this novel method, and Mr. Grayson will be subject to an execution with superadded terror and pain in 49 hours.

This Court should grant Mr. Grayson a stay of execution pending resolution of his petition for writ of *certiorari*, and if granted, until this Court issues a decision on the merits.

Dated: November 19, 2024

Respectfully submitted,

/s/ John Anthony Palombi
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Eric C. Brown
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FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA

⁷ 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>. The delay factor is, at worst, neutral, as Mr. Grayson seeks to challenge a novel method of execution that has never been assessed following a trial on the merits.

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CERTIFICATE OF SERVICE

I, John A. Palombi, a Member of the Bar of this Court, certify that, on November 19, 2024, as required by Rule 29.4(a) of the Rules of the Supreme Court of the United States, I served the enclosed Application for Stay of Execution Pending Certiorari on Counsel for Respondents by sending it via e-mail to:

Robert.Overing@AlabamaAG.gov

Respectfully submitted,
/s/ John A. Palombi
John A. Palombi