**NO. 15-7282**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**BRIAN KEITH TERRELL**

**Petitioner,**

**v.**

**HOMER BRYSON, DEPARTMENT OF CORRECTIONS, *ET AL.***

**Respondents.**

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**ON PETITION FOR WRIT OF CERTIORARI**
**TO THE ELEVENTH CIRCUIT COURT OF APPEALS**

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# RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI REVIEW AND MOTION FOR STAY OF EXECUTION

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**Petitioner is scheduled for execution after 7 p.m. (EST) on Tuesday, December 8, 2015.**

## QUESTION PRESENTED

Petitioner, Brian Keith Terrell, who is scheduled for execution today, December 5, 2015, sought a declaratory judgment and stay of execution in connection with claims attacking the method of execution that she lodged in a civil rights lawsuit filed on December 6, 2015. Georgia will use pentobarbital; Georgia has used pentobarbital as the single drug in its lethal injection protocol in five executions since July 17, 2012.

The district court denied relief and refused to stay the execution. The Eleventh Circuit affirmed. The petition for writ of certiorari that followed raises the following question:

1. Is it an abuse of discretion to stay an execution for claims attacking the method of execution when Petitioner fails to demonstrate a substantial risk of serious harm that is sure or very likely to cause serious illness and needless suffering?

2. Is it an abuse of discretion to stay an execution when Petitioner has not demonstrated any other constitutional violations?

## STATEMENT OF THE CASE

Petitioner was originally indicted by the Newton County Grand Jury on July 13, 1992, for malice murder, felony murder, and armed robbery. After three trials, on February 6, 2001, Petitioner was convicted of one count of malice murder and ten counts of forgery. The jury returned a sentence of death against Petitioner for the murder of John Watson, and the trial court entered its judgment and sentence of death on February 6, 2001. In addition, Petitioner was sentenced to ten consecutive ten-year sentences for the forgeries.

On February 26, 2001, Petitioner filed a motion for new trial, which was amended on July 3, 2001. Following a hearing, Petitioner's motion for new trial was denied on July 23, 2001.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on November 12, 2002. *Terrell v. State*, 276 Ga. 34, 572 S.E.2d 595 (2002). A timely motion for reconsideration was denied on December 13, 2002. Thereafter, Petitioner filed a petition for writ of certiorari in this Court, which was denied on October 6, 2003. *Terrell v. Georgia*, 540 U.S. 835 (2003).

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on August 20, 2004. On July 17, 2008, the state habeas corpus court denied relief as to Petitioner's convictions and granted relief as to Petitioner's death sentence. Respondent appealed and the Georgia Supreme Court

unanimously reinstated Petitioner's death sentence. *Hall v. Terrell*, 285 Ga. 448 (2009).

Petitioner filed his federal habeas petition on July 14, 2009. On May 9, 2011, this Court denied relief. Following briefing and oral argument, the Eleventh Circuit affirmed the denial of federal habeas relief on March 11, 2014. *Terrell v. GDCP Warden*, 744 F.3d 1255 (11th Cir. 2014).

On October 16, 2014, Petitioner filed a petition for writ of certiorari with this Court. The petition was denied December 1, 2014. *Terrell v. Chatman*, 135 S. Ct. 726 (2014).

An execution order was obtained on February 27, 2015 and Petitioner was scheduled for execution on March 10, 2015. Prior to this date, Respondent discovered on the night of Kelly Gissendaner's execution, but before Gissendaner had been escorted to the execution chamber, that the compounded pentobarbital to be used in her execution had precipitated. Respondent chose to cancel Gissendaner's execution and postpone all future executions until this issue could be understood and rectified. Once that was accomplished, the Respondent scheduled and carried out the executions of Kelly Gissendaner and Marcus Johnson as their convictions and sentences predated those of Petitioner without incident.

On November 23, 2015, the Superior Court of Gwinnett County issued an order directing the Georgia Department of Corrections ("GDC") to execute Petitioner between December 8, 2015, and December 15, 2015. (State v. Terrell, Indictment Nos. 92-CR-1072; 93-CR-946 through 955, Walton Co. Sup. Ct. November 23, 2015).

Petitioner filed a civil rights action under 42 U.S.C. § 1983 in the Northern District of Georgia on Sunday, evening, December 6, 2015, around 8:00 p.m. Respondent filed a Pre-Answer Motion To Dismiss And Response To Petitioner's Complaint on December 7, 2015. Petitioner filed his response to Respondent' motion to dismiss on December 8, 2015. Subsequently, the district court denied Petitioner's motion for a temporary restraining order and stay of execution and granted Respondent' motion to dismiss on December 8, 2015.

Petitioner appealed to the Eleventh Circuit Court of Appeals which affirmed the district court on n December 8, 2015 and denied the stay of execution. Now, Petitioner has appealed this order and also requests that this Court grant him a stay of execution.

## SUMMARY OF THE ARGUMENT

Petitioner alleges that because not one, but two, batches of pentobarbital precipitated on the evening of March 2, 2015 when Kelly Gissendaner's execution was canceled, that he has shown and Eighth Amendment violation with regard to

Georgia's method of execution. He **does not appear to argue that the use of compounded pentobarbital is unconstitutional** and indeed he concedes in his suggestion of an alternative method that the alternative method should not be another drug or method, but a new pharmacist. Without conceding that a new pharmacist would be a "new method," Appellee submits Petitioner does not show how, other than through speculation from an alleged expert, the past six executions using compounded pentobarbital from the same pharmacist has resulted in any botched executions. The timelines of the executions from both Kelly Gissendaner and Marcus Ray Johnson,[1] show that they were calm during the administration of the compounded pentobarbital, fell asleep within minutes of the injections and remained still until the time of death was announced. Petitioner has not shown how another batch of pentobarbital, which was never used, created a substantial change to Georgia's to method of execution removing his time-bar to this claim.

Petitioner also argues that this Court should overturn panel precedent and fine Georgia's confidentiality statute is unconstitutional. As correctly found by the

[1] Petitioner's expert speculation that because Johnson's eyes were partially open during the execution there must have been something wrong with the pentobarbital. The timeline shows Johnson was asleep by the end of the injection of the last syringe and did not move. There is no scientific evidence proffered by Petitioner that pentobarbital is a paralytic that keeps a person still while they are feeling pain from the effects of the drugs. The fact that his eyes remained open in death is not in any way unusual and Petitioner's expert's speculation on this is patently ridiculous.

district court, Petitioner fails to show how more information would help him prove Georgia's method of execution is a violation of the Eighth Amendment. The court did not abuse its discretion in making this finding as it is clear that all Petitioner really wants to know is the identity of the pharmacist. But Petitioner fails to show how knowing this identity will show that the use of compounded pentobarbital, which is Georgia's *method*, is unconstitutional.

The State of Georgia has implemented a method of execution whose purpose is to reduce the risk of pain and has faithfully worked to ensure that purpose is rigorously adhered to in all executions. The postponement of Petitioner's execution and subsequent actions by the Respondents to ascertain what occurred is proof positive of this, not evidence to the contrary.

## I. GEORGIA'S METHOD OF EXECUTION DOES NOT VIOLATE PETITIONER'S EIGHTH OR FOURTEENTH AMENDMENT RIGHTS.

Petitioner alleges the precipitation of the compounded pentobarbital during Kelly Gissendaner's formerly scheduled execution on March 2, 2015, shows that Georgia's method of execution is in violation of the Eighth and Fourteenth Amendments. This Eleventh Circuit Court of Appeals found Petitioner failed to show a "substantial risk of harm" pursuant to *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (U.S. 2015) and panel precedent. Petitioner has failed to show that the Eleventh Circuit's decision is not in accord with this Court's precedent.

Accordingly, this Court should decline to grant certiorari review.

Review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for "compelling reasons." Sup. Ct. R. 10. No compelling reason exists in this case to justify the exercise of this Court's certiorari jurisdiction. The Eleventh Circuit correctly affirmed the district court's denial of relief. That decision is not contrary to this Court's established precedent, nor does it conflict with a decision of another circuit or raise an important question that should initially be decided by this Court. Petitioner fails to identify a "compelling reason" for the Court to grant review. To merit a stay of execution, Petitioner must demonstrate irreparable injury, a reasonable probability that the Court would grant relief on an original petition, and a likelihood of success on the merits. *See Barefoot* v. *Estelle,* 463 U.S. 880, 893 (1983).

The Eleventh Circuit reviewed the district court's denial of a stay and injunctive relief for an abuse of discretion. *E.g., Mann* v. *Palmer,* 713 F.3d 1306, 1310(11th Cir. 2013) (denial of stay of execution reviewed for abuse of discretion); *Chavez* v. *Fla. SP Warden,* 742 F.3d 1267 (11th Cir. 2014) (temporary injunction reviewed for abuse of discretion), and the district court's dismissal of Petitioner's § 1983 complaint de novo. For Petitioner to be entitled to a preliminary injunction or a stay of execution he needed to show "a substantial likelihood of success on the merits" and that the balance of harms tipped in his

favor. *See DeYoung* v. *Owens,* 646 F.3d 1319, 1324 (11th Cir. 2011). When the requested relief is the "extraordinary remedy" of preliminary injunction, a movant must establish:

> (1) [she] has a substantial likelihood of success on the merits; (2) [she] will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest.

*DeYoung,* 646 F.3d at 1324 *(quoting Powell* v. *Thomas,* 641 F.3d 1255, 1257 (11th Cir. 2011). Petitioner failed to make these showings.

On March 2, 2015, GDC officials exercised one of "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements [that] are confided to officials outside of the Judicial Branch of Government" regarding executions. *Baze v. Rees*, 553 U.S. at 51 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861 (1979)). Specifically, officials noticed that, at some point during the intense litigation over when Kelly Gissendaner would be executed, the pentobarbital for use in Gissendaner's execution contained precipitate. Accordingly, Gissendaner's execution was postponed until the irregularity in the solution could be investigated. The problem was investigated and corrected as shown in the recent executions of Gissendaner and Marcus Ray Johnson that occurred without incident. As found by the district court, "The State conducted four executions before March 2 using pentobarbital, all of which were carried out without incident. It did not attempt to execute anybody using the defective

pentobarbital, and Gissendaner and Johnson were executed in September and November of this year, also without incident."

As correctly stated by the district court, to succeed on his challenge to Georgia's method Petitioner must "establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers" AND she "must identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip v. Gross*, 135 S. Ct. 2726, 2727 (2015) (internal quotation marks and citations omitted).

The district court held Petitioner had failed that the precipitation of drugs during Gissendaner's March 2, 2015 execution created a substantial risk of serious harm. Petitioner disagrees and claims he has adequately alleged a substantial risk but he ignores that his allegations are based upon speculation and insufficient proof. As correctly found in the concurring opinion by Judge Marcus of the Eleventh Circuit:

> Terrell has not come close to establishing a substantial likelihood that the State's lethal injection protocol has satisfied either of the two prongs required by the Supreme Court in Glossip and Baze...
>
> Terrell relies primarily on the facts surrounding the execution of Kelly Gissendaner and Marcus Johnson, two Georgia inmates who were executed earlier this year. Prior to Gissendaner's originally scheduled execution date, in March 2015, a doctor inspected the lethal injection drugs that were to be used and concluded that there may have been safety concerns because the liquid solution appeared to have

"precipitated," which means that white, solid materials had appeared in the liquid solution, causing it to appear cloudy. As a result, the State sent out two batches of its lethal injection drugs that had appeared precipitated to a laboratory for testing. The State also consulted with a pharmaceutical expert, and the Department of Corrections ran its own experiment on newly compounded pentobarbital. Notably, the State did not proceed with any executions until the testing process was completed, the State developed a proper course of action to keep precipitation from occurring in the future, and two new batches of compounded pentobarbital that did not precipitate were provided. Gissendaner was executed without incident in September. Johnson also was executed without incident in November. As for the first prong of the Glossip/Baze test, Terrell argues that before

Gissendaner's initial execution date in March, the State had received two batches of compounded pentobarbital solution that had precipitated. The affidavit of his expert, Dr. Michael Jay, opines, among other things, that "[i]f Ms. Gissendaner or Mr. Terrell had been injected with the cloudy lethal injection drugs from March 2, and the cloudiness was attributable to particulate matter from precipitated [Active Pharmaceutical Ingredients] or contaminants, they would have suffered immense pain." (Emphasis added). Recognizing, however, that Georgia had decided to postpone Gissendaner's execution once it realized the solution was cloudy, Dr. Jay offers only that "[t]here is a real possibility that a compounded formulation could have a dangerous pH level or be polluted with contaminants, but would not display any outward manifestations of its internal flaws" and "could result in excruciating pain and suffering upon injection."

This is the most that Dr. Jay says. This proffer does not begin to satisfy the standard established by the Supreme Court, show a substantial likelihood that Terrell will succeed on the merits of his claim, or establish that the district court abused its discretion. For starters, Terrell has not shown that either Gissendaner or Johnson were injected with precipitated pentobarbital, nor that it has been used on any of the six prisoners (Gissendaner, Terrell, Marcus Wellons, Andrew Brannon, Robert Wayne Holsey, and Warren Lee Hill) who have been executed since Georgia began using compounded pentobarbital in its lethal injection protocol. Rather, the record extant

> indicates that when the State realized that a batch of the solution was cloudy -- as it did prior to Gissendaner's originally scheduled execution date -- it immediately postponed the execution and sent both batches that it had in its possession for testing. As for Dr. Jay's observation that a batch could be contaminated without being cloudy or otherwise noticeable to the naked eye, Terrell offers no indication of whether this has ever occurred or whether any such occurrence is likely, much less that a non-cloudy contaminated batch has ever been used in an execution. This evidential foundation falls far short of suggesting that Georgia's lethal injection protocol poses a "substantial," "sure[,] or very likely" risk of "serious harm."
>
> Terrell also points out that it took 19 minutes longer for Johnson to die than for Gissendaner to die, even though Gissendaner's total body weight was significantly greater than Johnson's. Terrell suggests that this calls into serious question what is actually being injected by the Department of Corrections for the purpose of execution. The essential problem with this argument too is that Terrell's experts go no further. They do not say Terrell would receive or even likely be given contaminated pentobarbital, or that he would suffer or is even likely to suffer serious harm. Indeed, the very timelines Terrell relies on to calculate the timing of death reveal that from the first injection of the drug into Johnson until his vital signs had ceased, he remained "calm," "quiet," and "still," and appeared "to be asleep." And the timeline concerning Gissendaner's execution likewise establish that she appeared "to be asleep" and was "still," "quiet," and "calm." There is no indication that either Gissendaner or Johnson were exposed to a demonstrated risk of severe pain, let alone that Terrell himself would likely be exposed to a substantial or sure risk of needless suffering. Terrell has simply failed to make a showing sufficient to satisfy this prong of the Supreme Court's test.

*Terrell v. Comm'r, Ga. Dep't of Corr.*, Case No. 15-CV-04236, pp. 6-10. (Marcus, J. concurring).

Most importantly, Petitioner has failed to show the district court abused its discretion in dismissing her claim as he failed to identify "an alternative that is

feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2727. This has been long-standing precedent since *Baze*. As stated by Judge Marcus in the concurring opinion:

> As we've said in binding precedent, "a readily available alternative" showing is required in all challenges to lethal injection protocols. See Gissendaner v. Comm'r, Georgia Dep't of Corr., 803 F.3d 565, 569 (11th Cir. 2015) (Gissendaner II). In support of this requirement, Terrell has offered only one sentence in his complaint, and it reads this way: "As to alternatives, it would be reasonable to obtain drugs from a compounding pharmacist who does not have such a history of mixing defective drugs -- particularly given the evidence that the two executions carried out with his drugs suggest that the properties of the substances that he mixes vary greatly from one batch to another." He offers nothing more; and, indeed, his experts say nothing about "feasible, readily implemented" alternatives, let alone alternatives that would significantly reduce a substantial risk of severe pain. Nor does Terrell establish whether it would be "feasible" to obtain lethal injection drugs from another compounding pharmacy, whether using another pharmacy would be

*Terrell v. Comm'r, Ga. Dep't of Corr.*, Case No. 15-CV-04236, pp. 10-11.

Without this showing, his challenge to Georgia's method of execution is insufficient and the Eleventh Circuit's affirmance of the district court's dismissal of his complaint is clearly in accord with this Court's precedent.

The Eleventh Circuit properly applied this Court's precedent and this petition presents nothing worthy of this Court's certiorari review.

## II. GEORGIA'S CONFIDENTIALITY STATUTE DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner argues that he is entitled as a matter of law to information about the drugs the GDC will use to carry out executions and O.C.G.A. § 42-5-36(d) is unconstitutional. What Petitioner actually asserts is that he is entitled to know the identity of the pharmacy from which the pentobarbital came.

The identity of the pharmacy is excepted from disclosure pursuant to state law, O.C.G.A. § 42-5-36(d). That statute provides:

> (d) (1) As used in this subsection, the term "identifying information" means any records or information that reveals a name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications.
>
> (2) The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 [the Georgia Open Records Act, O.C.G.A. §§ 15-18-70, *et seq*] or under judicial process. Such information shall be classified as a confidential state secret.

O.C.G.A. § 42-5-36(d)(1), (2).

The constitutionality of this statute has been upheld by the Georgia Supreme Court and Eleventh Circuit Court of Appeals. *See Wellons v. Comm'r, Ga. Dep't of*

*Corr.*, 754 F.3d 1260 (11th Cir. 2014), *cert. denied Wellons v. Owens*, 134 S. Ct. 2838 (2014); *Owens v. Hill*, 295 Ga. 302 (2014), *cert. denied Hill v. Owens*, 135 S. Ct. 449 (2014). As discussed above, Petitioner does not set out a plausible Eighth Amendment claim, and as a matter of law, the information he seeks cannot ultimately aid his suit. Petitioner's claims would fail even if he received the confidential information he requests.

As Petitioner's speculations cannot substitute for evidence that the use of the pentobarbital or GDC's protocol is sure or very likely to cause him serious illness and needless suffering, this Court should deny his request for a stay. Petitioner has no chance of succeeding on an Eighth Amendment claim where he would be executed with pentobarbital under procedures fully designed to minimize any pain and suffering. The lower courts correctly denied his challenge and requests for relief, and this Court should decline review. Petitioner has failed to show this was not in accord with this Court's precedent.

## CONCLUSION

For the reasons stated, Respondent requests that this deny Petitioner's request for certiorari review and a stay of execution.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading, prior to filing the same, by emailing, properly addressed upon:

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This 8th day of December, 2015.

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