NO. 15-7928 and 15A800

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON ASTOR JONES

Petitioner,

v.

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

Respondents.

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

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, February 2, 2016.

QUESTION PRESENTED

Petitioner, Brandon Astor Jones, who is scheduled for execution today, February 2, 2016, sought a declaratory judgment and stay of execution in connection with claims attacking the method of execution. Georgia will use compounded pentobarbital; Georgia has used compounded pentobarbital as the single drug in its lethal injection protocol in the past seven executions since June 17, 2014.

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 the Eleventh Circuit's decision denying Petitioner's constitutional challenges to O.C.G.A. § 42-5-36(d), which is in accord with this Court's precedent, worthy of this Court's certiorari review and a stay of execution?

STATEMENT OF THE CASE

Thirty-seven years after Petitioner was convicted and sentenced to death, and nearly twenty years after Petitioner was resentenced to death, on December 22, 2015, Petitioner filed his first 42 U.S.C § 1983 complaint challenging the constitutionality of Georgia's method of execution. The district court granted Respondents' motion to dismiss the complaint on January 21, 2016. Subsequently, Petitioner filed a petition for initial hearing *en banc* and motion for stay of execution in the Eleventh Circuit Court of appeals on January 25, 2016. The Eleventh Circuit denied the motion for stay of execution on February 1, 2016 and the petition for initial hearing *en banc* on February 2, 2016.

SUMMARY OF THE ARGUMENT

Petitioner alleges Georgia's statute, O.C.G.A. § 42-5-36(d), protecting the identity of individuals who participate in the execution process is in violation of his due process rights. This challenge has been brought to this Court in four previous petitions for writ of certiorari and this Court has denied each without dissent. *See Terrell v. Bryson*, __ U.S. __, __S. Ct. __, 193 L. Ed. 2d 494 (2015); *Gissendaner v. Bryson*, 135 S. Ct. 1580 (2015); *Wellons v. Owens*, 134 S. Ct. 2838 (2014); *Hill v. Owens*, 135 S. Ct. 449 (2014). Indeed, the facts and arguments are nearly identical to those presented to this Court in *Terrell* a few weeks ago. In a nutshell, Petitioner is arguing that the precipitation of Respondents' pentobarbital supply

nearly a year ago, which was never used, shows that Georgia's confidentiality statute is unconstitutional. A majority of the entire Eleventh Circuit court disagreed with Petitioner. Petitioner has failed to show this decision was not in accord with this Court's precedent.

In denying Petitioner's request for initial hearing *en banc* in Petitioner's case, the Eleventh Circuit recognized, inter alia, that Petitioner's claim challenging O.C.G.A. § 42-5-36(d) was in reality a request for a "newly created federal due process right to pre-litigation discovery." *Jones v. Comm'r, Ga. Dep't of Corr.*, Case No. 16-CV-04445, p. 4. But to demonstrate a right to this discovery required Petitioner to plead a plausible Eighth Amendment challenge to Georgia's method of execution, which Petitioner had clearly not done. In addition, the Court found he had abandoned his Eighth Amendment claim and was only challenging the statute under the Fifth and Fourteenth Amendments. The Court found this failed to state a constitutional claim as there was no constitutional right to "'discover grievances, and to litigate effectively once in court.'" *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 354 (1996)). The Court's majority holding is directly in accord with this Court's precedent.

Moreover, the theme of Petitioner's writ, relying upon the dissent that Respondents' execute those under lawful sentence of death in a "shroud" of secrecy woven by O.C.G.A. § 42-5-36(d) is a great exaggeration. Each

condemned knows when, where, why and how they are to be executed. Respondents turned over their results of their investigation of the precipitated pentobarbital.[1] As the responses to Open Records Act requests attached to Petitioner's complaint in the district court show, much information is turned over by the Department of Corrections regarding each execution. (ECF No. 1-4 and 1-5). Inmates and media have received pursuant to ORA requests and the continual litigation of Georgia's method of execution, the protocol providing a detailed account of how the execution is to be carried out, the inventory logs showing when each batch of pentobarbital is compounded, transported and destroyed, the newly created observation log of the drugs, and a near minute-by-minute accounting of each past execution. *See* (ECF No. 1-5 at 15-25 and 28-39; ECF No. 1-13; ECF No. 1-23 and 1-24; ECF No. 8 at 61-89). In addition, there are many live witnesses to each execution, including the press. There is also a member of the press that witnesses the establishment of the intravenous lines. Based upon this information and the witnesses, Petitioner knows one more very important piece of information: in the past seven executions, which have used compounded pentobarbital, there has been no account by any witness or any evidence from the

[1] Given the page limitation of this brief, Respondents will not again recount for this Court its investigation and results as this can be found in Respondents' motion to dismiss filed in the district court. *See* (ECF No. 8 at 23-29).

timeline log of each execution that any of the condemned felt *any* pain following the injection of the compounded pentobarbital.

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. Which has clearly occurred in the past seven executions.

I. 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 Respondents will use to carry out executions and O.C.G.A. § 42-5-36(d)[2] is unconstitutional. But, as correctly held by the majority of the Eleventh

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[2] O.C.G.A. § 42-5-36(d)(1), (2):

(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.

Circuit, the precedent of this Court provides no such requirement. Moreover, other than citing to the dissent, Petitioner fails to explain how this case is different from the four other cases in which this Court has unanimously denied certiorari review of this same issue. Accordingly, Petitioner has failed to present a question worthy of this Court's certiorari review.

A. Petitioner's Claim is Really a Request for Discovery Which the Eleventh Circuit Correctly Found Did Not Establish a Constitutional Claim.

What Petitioner really wants is, as found by the Eleventh Circuit, the opportunity to go on a fishing expedition with federal discovery. But the constitution does not require Respondents to allow death row inmates to oversee every step or be given every piece of information regarding the method of execution to be used. And Petitioner's request for such information must be attached to a plausible Eighth Amendment claim. As correctly found by the Eleventh Circuit, Petitioner has failed to present a plausible Eighth Amendment challenge to Georgia's method of execution. He has made neither required showing under *Baze v. Rees*, 553 U.S. 35, 51, 52 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015) to establish a plausible Eighth Amendment claim challenging Georgia's method of execution.

O.C.G.A. § 42-5-36(d)(1), (2).

Petitioner has not presented any evidence of a medical or scientific consensus that improperly compounded pentobarbital given in an enormous 5,000 mg dosage will cause unnecessary pain and suffering rising to the level of cruel and unusual punishment. Petitioner's expert's allegations, albeit through a different expert, that potency and sterility could possibly be affected if the pentobarbital is not properly compounded causing possible side effects were presented to the Georgia Supreme Court in *Owens v. Hill*. The Georgia Supreme Court went into detail explaining why this argument fails. And the argument did not turn on the fact that the inmate could not present enough evidence because of the confidentiality law, but instead it turned largely on the fact that due to the enormous overdose of pentobarbital, "unconsciousness will set in almost instantaneously" and the harms complained of were irrelevant. *See Hill*, 295 Ga. at 310-312 (e.g., "the fact remains that **sterility is simply a meaningless issue in an execution where, as the record showed, unconsciousness will set in almost instantaneously** from a massive overdose of an anesthetic, death will follow shortly afterward before consciousness is regained, and the prisoner will never have an opportunity to suffer the negative medical effects from infection or allergic reactions from a possibly non-sterile drug"). *See also West v. Schofield*, 460 S.W.3d 113, 125-127 (finding, inter alia, that knowing the source of Tennessee's drugs would not assist the Petitioner in proving his Eighth Amendment claim).

Additionally, Petitioner must plead and prove a feasible alternative, and as held by the Eleventh Circuit, O.C.G.A. § 42-5-36(d) does not deprive "Jones of the ability to locate an alternative source." *Jones v. Comm'r, Ga. Dep't of Corr.*, Case No. 16-CV-04445, p. 12. As held by the Eleventh Circuit, Petitioner failed to make this showing as his "complaint ignore[d] the second element." *Id.* at 9.

Therefore, to the extent Petitioner's claim indicates an Eighth Amendment challenge to Georgia's method of execution, he has failed to show the Eleventh Circuit's decision on this issue is not in accord with this Court's precedent.

B. The Eleventh Circuit Correctly Found, in Accordance with this Court's Precedent, that Petitioner Does Not Have a Constitutional Right to the Information He Requests.

As held by the Eleventh Circuit in *Wellons*, and relied upon by the majority opinion in Petitioner's case, this Court held nearly twenty years ago in Lewis v. Casey, that the constitution does not guarantee the right to "'discover grievances, and to litigate effectively once in court.'" *Jones v. Comm'r, Ga. Dep't of Corr.*, Case No. 16-CV-04445, p. 8 (quoting *Lewis v. Casey*, 518 U.S. 343, 354). All of the precedent Petitioner relies upon, which was used by the dissent in his case, pre-dates *Lewis* and does not create the constitutional rights Petitioner is attempting extrapolate from them.

Additionally, as pointed out by the majority of the Eleventh Circuit, nearly identical challenges have been made to nearly identical confidentiality statutes in other circuits, and none have found the statutes to be unconstitutional:

> Moreover, no other circuit court has ever recognized the kind of due process right-of-access claim that Jones now asserts, and the two other circuit courts of appeal that have faced similar challenges to this kind of state secrecy law have each squarely rejected the claim twice. *See Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015), *cert. denied*, 135 S. Ct. 2941 (2015) ("We agree with the Eleventh and Fifth Circuits that the Constitution does not require such disclosure. A prisoner's 'assertion of necessity -- that [the State] must disclose its protocol so he can challenge its conformity with the Eighth Amendment -- does not substitute for the identification of a cognizable liberty interest.'" (citations omitted)); *Trottie v. Livingston,* 766 F.3d 450, 452 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 41 (2014) ("A due process right to disclosure requires an inmate to show a cognizable liberty interest in obtaining information about execution protocols. Trottie speculates that there are unknowns regarding the drug to be used which may add an unacceptable risk of pain and suffering. However, we have held that an uncertainty as to the method of execution is not a cognizable liberty interest."); *Sepulvado v. Jindal*, 729F.3d 413, 420 (5th Cir. 2013) ("There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol."); *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011) (holding that the prisoners, who argued that the Arkansas Method of Execution Act violated the due process clause because its secrecy denied them "an opportunity to litigate" their claim that the execution protocol violated the Eighth Amendment, failed to state a plausible due process access-to-the-courts claim).

Jones v. Comm'r, Ga. Dep't of Corr., Case No. 16-CV-04445, pp. 6-7. Also, the Tennessee Supreme Court rejected a constitutional challenge to Tennessee's similar confidentiality statute in *West v. Schofield*, 460 S.W.3d 113, 124-125

(2015).

The constitution does not require Respondents to allow death row inmates to oversee every step or be given every piece of information regarding the method of execution to be used. Especially when those same Respondents have carried out every execution in a constitutional manner. The Eleventh Circuit properly applied this Court's precedent and this petition presents nothing worthy of this Court's certiorari review.

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 2nd day of February, 2015.

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