

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD BERT SMITH,
Petitioner,
v.

WARDEN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeals for the Eleventh Circuit

APPLICATION FOR STAY OF EXECUTION
SCHEDULED FOR DECEMBER 8, 2016

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December 8, 2016

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

Petitioner, Ronald Bert Smith, respectfully requests a stay of his execution, which is scheduled for December 8, 2016.

Petitioner asks this court to stay his execution in order to permit him to file and for this Court to consider a Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit. Mr. Smith was not anticipating filing certiorari on his lethal injection lawsuit. However, given this Court's previously granted courtesy vote by Chief Justice Roberts to Thomas Arthur in *Arthur v. Dunn et al.* No. 16-602, its refusal to do so in this case would deny Due Process and Equal Protection to deny Mr. Smith the same courtesy. Pursuant to Supreme Court Rules 23.1, 23.2, and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted.

In the forthcoming Petition for Writ of Certiorari, Mr. Smith asks this Court to review the Eleventh Circuit's decision affirming the District Court's dismissal of his challenge to Alabama's method of execution. The Eleventh Circuit and the District Court have misread this Court's opinion in *Glossip v. Gross* to the point where no method of execution challenges can be brought in the states of the Eleventh Circuit, all of which are states which have the death penalty. Mr. Smith's constitutional claim will become moot if he is executed as scheduled using a method of execution that violates the Eighth Amendment.¹

¹ See *Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Mem.) (Powell, J. concurring).

Principles of equity favor staying Mr. Smith’s execution. He has made no “last-minute attempt to manipulate the judicial process.”² Mr. Smith filed his complaint challenging Alabama’s method of execution on April 15, 2016, less than three months after Christopher Brooks’ execution, which provided many of the facts in Mr. Smith’s complaint. The District Court set out a scheduling order, and on November 18, 2018, the District Court, without an evidentiary hearing, dismissed Mr. Smith’s complaint.

Mr. Smith filed his notice of appeal to the Court of Appeals that day, and the court set an expedited briefing schedule. On December 5, 2016, without hearing oral argument, the Court of Appeals affirmed the District Court.

This Court should grant a stay if Mr. Smith shows that there is a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari.³ If that threshold is met, then the stay should be granted if, upon granting *certiorari* and resolving the constitutional issues presented, five Justices are likely to conclude that the case was erroneously decided below.⁴

Mr. Smith meets those standards. The Eleventh Circuit’s interpretation of *Glossip* is contrary to every intent of this Court in its opinion and prohibits anyone in the Eleventh Circuit from filing a method of execution challenge.

² *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)).

³ *See, e.g., Multimedia Holdings Corp. v. Cir. Ct. of Fla.*, 544 U.S. 1301 (2005) (Kennedy, J.).

⁴ *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 895- 96 (1983).

Further, supporting his request for a stay, this Court just more than one month ago, stayed Thomas Arthur's execution to allow four members of this Court to consider his petition for writ of certiorari from the Eleventh Circuit Court of Appeals ruling affirming the District Court's dismissal of his case. For a fifth courtesy vote to be permitted to grant Mr. Arthur a stay of execution but for this Court to fail to do so on Mr. Smith's behalf is arbitrary action that violates the Due Process Clause and the Equal Protection Clause. There is no rational basis for the Court to take such action.

Mr. Smith respectfully requests that this Court grant him a stay of execution to be permitted to file a petition for writ of certiorari challenging the Eleventh Circuit's opinion affirming dismissal of his method of execution challenge.

Respectfully submitted,

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