*****THIS IS A CAPITAL CASE*****
******EXECUTION SCHEDULED FOR TODAY AT 8:00 P.M. EDT******

No. ________________________________

In the Supreme Court of the United States

MARCEL WAYNE WILLIAMS

Petitioner

v.

WENDY KELLEY, Director, Arkansas Department of Correction,
RORY GRIFFIN, Deputy Director, Arkansas Department of Correction, and
DALE REED, Chief Deputy Director, Arkansas Department of Correction,

Respondents

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

1. In an "as-applied" challenge to a lethal-injection protocol, must the plaintiff propose an alternative execution method?
2. Must a plaintiff show an alternative execution method with "a track record of successful use" to satisfy *Glossip v. Gross*, 135 S. Ct. 2726 (2015)?
3. Does a plaintiff's evidence that he will suffer respiratory distress, choking, and lung collapse during an execution establish a substantial risk of serious harm under *Glossip*?
4. Under *Hill v. McDonough*, 547 U.S. 573 (2006), must a federal court dismiss an "as applied" challenge to a lethal-injection protocol if the plaintiff brought it after bringing a facial challenge to the same protocol and thirteen days before his execution date?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marcel Williams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is included as Appendix A (App. 1a–6a). The district court's opinion is included as Appendix B (App. 7a–14a).

JURISDICTION

The Eighth Circuit entered judgment on April 24, 2017. App. 1a. The Petition is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A death-row inmate may challenge a lethal-injection protocol in one of two ways. He may challenge it as unconstitutional "on its face," meaning that the protocol cannot be constitutional as applied to anyone. For such a claim, Plaintiffs must show both a "substantial risk of severe harm" and 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, 2737 (2015). He may also challenge the

protocol "as applied" to him alone given his specific health conditions. This case raises several questions about such as-applied challenges.

On February 27, 2017, the Governor of Arkansas set Petitioner's execution date for April 24, 2017. The Governor simultaneously scheduled seven other men to be executed within a week of Petitioner's execution. On March 27, 2017, all the men scheduled for execution plus one other brought a facial challenge to the State's midazolam protocol. The district court granted a preliminary injunction on this claim. Order, ECF No. 54, *McGehee v. Hutchinson*, No. 17-179 (E.D. Ark. Apr. 15, 2017). The Eighth Circuit vacated the preliminary injunction two days later. Order, *McGehee v. Hutchinson*, No. 17-1804 (8th Cir. Apr. 17, 2017). Three days after that, this Court denied a stay of execution pending certiorari by a 5-4 vote. Order, No. 16A1003 (U.S. Apr. 20, 2017).

On March 23, 2017, Dr. Joel Zivot examined Petitioner. On April 11, 2017, Petitioner brought an as-applied challenge on behalf of himself alone. In the complaint, Petitioner alleged that his particular health conditions—extreme obesity, diabetes, neuropathy, obstructive sleep apnea, and potassium deficiency—will prevent the State from carrying out the lethal-injection protocol without causing him extreme suffering. The complaint attached a declaration from Dr. Zivot attesting to Petitioner's medical conditions and the likely effect of the lethal-injection protocol on Petitioner given these conditions. On April 16, 2017, Petitioner amended the complaint to allege sevoflurane gas as an alternative method of execution.

At a preliminary injunction hearing held on April 21, 2017, Dr. Zivot testified as follows about Petitioner's health conditions and how they will affect administration of the lethal-injection protocol:

- Petitioner has a Body Mass Index of 50, which makes him morbidly obese. Tr. 19. Because of his obesity, it will be difficult to place peripheral IV lines and "it wouldn't be possible" to place a central line. Tr. 20. IV-access difficulties make it more likely that the catheter will end up in tissue or an artery rather than a vein while trying to place a central line. Tr. 22. If the catheter enters the artery and the drugs flow, there will be "tremendous burning an damage." *Id.* If the catheter enters an artery while attempting to establish a central line in the chest, Petitioner will experience pneumothorax—a collapsed lung—which would be "exceedingly painful." Tr. 23.
- Respondent Kelley confirmed in her testimony that upon examination she could locate only one "good vein" in Petitioner's arm, Tr. at 77, though she testified in earlier proceedings that the department intends to proceed with two lines, *McGehee* Tr. at 1175. The execution would thus require a central line, which "wouldn't be possible." Tr. 20.
- Because of his size, just by lying flat on the gurney, as is required by the execution protocol, Petitioner will enter into respiratory distress. Tr. 21.
- In combination with Petitioner's obstructive sleep apnea, the midazolam will cause him to choke, struggle, and possibly vomit. Tr. 28. "[I]t's *very likely* that as he becomes less responsive it will be in a very different form . . . he

will choke . . . he will struggle . . . it will be very painful and difficult for him . . . he may cough . . . he may vomit." *Id.* (emphasis added).

- Petitioner's diabetes causes him to suffer from neuropathy, which "adversely affects the functioning of the[] nerves." Tr. 14. This condition will make the consciousness check ineffective because "it's *very likely* that his neuropathy will make it difficult for him to know that he is being pinched or touched." Tr. at 29 (emphasis added).
- Because Petitioner has low potassium levels, "the amount of potassium chloride given to [Petitioner] may not raise the potassium level to the point where his heart should stop." Tr. 30.

Besides the evidence presented at the hearing, the Court considered the record established in *McGehee*. Respondents' medical evidence at the hearing was limited to affidavits from witnesses who have never examined Petitioner (though Respondents had a doctor examine Petitioner the day before Dr. Zivot).

On April 21, 2017, the district court denied Petitioner's motion for a preliminary injunction. The court concluded that the evidence discussed above did not demonstrate a significant possibility that Petitioner could meet *Glossip*'s first prong. App. 13–14a. The district court also found that *Glossip*'s second prong applies to as-applied challenges and that Petitioner had not presented evidence of alternatives besides that which the Eighth Circuit already rejected in *McGehee*. App. 12a–13a. Finally, the district court assumed that the as-applied challenge accrued when the Governor set Petitioner's execution date but found that Petitioner

was dilatory because he presented his claim fifteen days after *McGehee* was filed. App. 10a–11a.

On April 21, 2017, the Eighth Circuit denied Petitioner's motion to stay his execution pending appeal. On *Glossip*'s first prong, the state compared Dr. Zivot's opinion "that the execution protocol is more likely to maim than kill Williams" with the States "testimony"[1] that the protocol "will succeed despite Williams's health conditions." It repeated its pronouncement from *McGehee* that the evidence was "equivocal" and "lacks scientific consensus" so cannot satisfy *Glossip*. App. 5a. Next, the court held that plaintiffs are required to state an alternative in an as-applied challenge and could not rely on alternatives already presented in *McGehee*. App. 5a. Finally, the court rejected a stay because Petitioner failed to join the claim to *McGehee* and failed to bring the claim when the protocol was adopted in 2015. App. 5a–6a.

REASONS FOR GRANTING THE PETITION

This case raises important questions about a State's ability to execute someone with serious physical debilitations. For the reasons below, the Court should grant certiorari to consider how *Glossip* applies when a plaintiff challenges a lethal-injection protocol as it applies to him specifically.

[1] In fact, the State produced no testimony about the protocol's likely effect on Petitioner. Instead, it produced supplemental affidavits from its facial-challenge experts, who never examined Petitioner and whose credibility the district court called into doubt in *McGehee*. Notably, the State had a doctor examine Petitioner the day before Dr. Zivot's examination. Supp. Exh. 4 at 19. It chose not to have this doctor testify at the hearing.

A. *Glossip* does not speak to as-applied challenges.

Facial challenges to a method of execution attack the method as categorically incapable of rendering punishment in a constitutional manner. The Court has recognized that facial challenges must have limits. The Eighth Amendment does not require "elimination of essentially all risk of pain" because such a requirement "would effectively outlaw the death penalty altogether." *Glossip*, 135 S. Ct. at 2726. Because capital punishment is constitutional *de jure*, plaintiffs cannot prohibit it *de facto* by summoning a broad attack on prevalent methods of execution. To ensure the State's continued interest in performing capital punishment, plaintiffs seeking to prohibit a particular execution method must show that there is an alternative method that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008)) (alteration in original).

As-applied challenges to a given lethal-injection protocol do not have the same broad implications. A prisoner with an as-applied claim is not seeking to invalidate a method of execution in general; rather, he is seeking to protect his own individual right, as defined by his personal medical conditions, to be free from a painful execution. The concerns that drive the *Glossip* rule do not apply where a plaintiff has shown that a lethal-injection protocol is likely to cause *him* extreme pain *in a discrete execution* because of his medical conditions. Success on such a claim may make it difficult to execute a specific plaintiff, but it does not implicate *Glossip*'s concern for preserving a State's right to carry out capital punishment.

A State's inability to execute a specific person is hardly an attack on capital punishment itself. Indeed, it is well-established that the State may not execute persons with certain *mental* attributes that would render capital punishment unconstitutional as applied to them. *See Ford v. Wainwright*, 447 U.S. 399, 409–10 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) ("[P]ersons with intellectual disability may not be executed."). There is no logical reason that a similar categorical bar should not apply if a prisoner's *physical* attributes would prevent execution without a significantly high risk of pain. Just as it "offends humanity" to execute a person whose individual characteristics prevent him from comprehending the reason for his execution, *Ford*, 447 U.S. at 409, so too does it offend humanity to execute a person whose individual characteristics will cause him to experience excessive suffering—beyond what a healthy person would experience—during the execution.

Judges have divided on whether as-applied challenges require plaintiffs to show an alternative execution method in addition to a substantial risk of suffering. *Compare Gissendaner v. Comm'r*, 803 F.3d 565, 569 (11th Cir. 2015) *with id.* at 581 (Jordan, J. dissenting); *Bucklew v. Lombardi*, 783 F.3d 1120, 1128 (8th Cir. 2015) *with id.* at 1129–30 (Bye, J., dissenting). Notably, after these cases were decided, this Court entered a stay of execution in an as-applied challenge after the Eighth Circuit refused to provide one. In that case, the Court of Appeals rejected the stay because it found the evidence of suffering not substantial enough and also because

the plaintiff "has not identified another execution method that satisfies the Eighth Amendment standard." *Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015). In granting a stay, this Court ordered the Eighth Circuit to consider the plaintiff's evidence of his medical condition. It did not mention the absence of any alternative—although, on the Eighth Circuit's view, that should have been an independently sufficient reason to deny relief. *Johnson v. Lombardi*, 136 S. Ct. 443 (2015). This Court's stay order in *Johnson* suggests that proof of an alternative execution method is inessential to an as-applied lethal-injection challenge.

In sum, the Court should grant certiorari to determine whether *Glossip*'s requirement to prove an alternative execution method applies when the plaintiff has shown that his unique physical conditions will cause the State's current protocol to cause him excessive suffering.

B. *Glossip* contains no "track record" requirement.

After holding that plaintiffs must propose alternatives in as-applied challenges, the Eighth Circuit also rejected Petitioner's alternative execution methods, including execution by sevoflurane gas. At the *McGehee* hearing, Petitioner and his fellow plaintiffs presented evidence that sevoflurane is available from a specific supplier and that this gas would substantially reduce suffering because it works like a barbiturate, which the parties agree would be a preferable execution method. In *McGehee v. Hutchinson*, No. 17-1804 (8th Cir. Apr. 17, 2017), the Eighth Circuit rejected sevoflurane because it has "no track record": "With no track record of successful use, [this] method[] [is] not likely to emerge as more than a 'slightly or

marginally safer alternative.'" *Id.* at 6 (quoting *Glossip*, 135 S. Ct. at 2737).[2] The Eighth Circuit repeated that holding in its opinion denying a stay in this case, finding that Petitioner had simply repeated plaintiffs' alternatives from *McGehee*. App 5a.

Besides ignoring Petitioner's expert evidence that sevoflurane indeed *will* significantly reduce the suffering attendant to the midazolam protocol, the Eighth Circuit committed legal error: it adopted a view of alternatives that *Glossip* explicitly rejected. As *Glossip* explained, the law should not "hamper the adoption of new and more humane methods of execution." *Glossip*, 135 S. Ct. at 2746. Lethal injection had "no track record" before the 1980s; if a better lethal-injection method is discovered decades later, its novelty should not exclude its adoption. The Court should reject the Eighth Circuit's anti-progressive approach. *Glossip*'s alternative-methods requirement was meant to encourage more humane execution methods, not to squelch them. This Court's fundamental requirement is that a State adopt an alternative method that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Baze*, 553 U.S at 52. That requirement

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[2] At the same time, the opinion condemned the firing squad because it has not been regularly used since the 1920s. *Id.* at 7.

is not limited by the method's "track record" in executions.[3] If it were, science could never develop more humane methods of capital punishment.

The importance of settling this question cannot be overstated. The success of a plaintiff's as-applied challenge should not hinge on whether the alternative he proposes has been used before. If the protocol will cause him a substantial risk of harm due to his medical conditions, he should be allowed to propose and develop evidence about a protocol that will meet his medical needs, even if no State has used that protocol before.

C. Plaintiff's evidence shows a "substantial risk of serious harm."

The Eighth Circuit summarily concluded that Petitioner's evidence of substantial harm "lacks scientific consensus." App. 5a. The court's requirement of "scientific consensus" in an as-applied challenge is unintelligible. A plaintiff can show a substantial likelihood of harm without ruling out every opposing opinion in the scientific community. Petitioner presented expert testimony that the midazolam protocol is likely to cause him substantial harm because of his medical conditions.

[3] Contrary to Respondents' previous arguments, *Baze* does not include an absolute "track record" requirement. An alternative's track record is "probative but not conclusive." *Baze,* 553 U.S. at 53. *Baze* rejected the use of the "untried and untested alternatives" proposed there—namely, a one-drug protocol consisting of a barbiturate. *Id.* at 41, 53. But as it turns out, this is now the most common protocol in States that successfully carry out capital punishment. Clearly, a particular protocol need not have been used before to be an acceptable execution method.

That is all that is required at this stage to show a likelihood of success of on *Glossip*'s first prong.

Dr. Zivot explained in no uncertain terms that establishing a central line "wouldn't be possible" given Petitioner's condition—though the executioners will only be able to establish one peripheral line, at most, and a central line will be necessary for the execution to proceed. Tr. 20, 77. Dr. Zivot explained that an attempt at central-line placement in Petitioner risks "tremendous burning and damage," plus lung collapse if the executioners attempt to place the line in the chest. Tr. 22. Besides that Petitioner's condition assures respiratory distress during the execution. Tr. 21. According to Dr. Zivot, it is it "very likely" that, because of Petitioner's particular condition, "he will choke," "he will struggle," and "it will be very painful and difficult for him." Tr. 28.

This evidence meets *Glossip*'s "substantial risk of serious harm" requirement. Insofar as the Eighth Circuit's opinion suggests a higher standard, the Court should grant the petition to clarify this important question.

D. *Hill* does not preclude a stay of execution for an as-applied challenge.

The Court of Appeals additionally found that Petitioner had waited too long to bring his claim and should be barred from a stay under *Hill*. In doing so, it failed to realize that the substantial differences between facial and as-applied challenges to execution methods change the calculus under *Hill*. The Court should clarify the dilatoriness analysis under *Hill* for as-applied challenges—an issue of great importance to sick men who are awaiting execution.

Facial challenges attack an execution protocol as *per se* unconstitutional. As such, they become ripe the day the protocol comes into effect. On the other hand, as-applied challenges depend on a plaintiff's specific physical status. Because physical condition is mutable, and because proper evaluation requires examination close in time to execution, the claim does not ripen until an execution date is set. *Cf. Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) (incompetency-to-be-executed claim unripe until date is set). Then, once the claim ripens, the plaintiff must perform a significant amount of work to investigate and present the claim. He must receive an examination from a medical doctor; the doctor must review medical records and render an opinion; and the plaintiff must prepare his claim. Typically this cannot be done within a day or two of the execution date. Recognizing this reality, this Court has previously granted stays of execution where, as here, the plaintiff filed an as-applied challenge two weeks before the execution date and well after the date was set. *See Johnson v. Lombardi*, 136 S. Ct. 443 (2015); *Bucklew v. Lombardi*, 134 S. Ct. 2333 (2014).

If Respondent's view of *Hill* is correct, it would be next to impossible for plaintiffs to effectively present as-applied challenges before their executions moot their claims. The Court should grant cert and clarify the timing rules for as-applied challenges.

CONCLUSION

The Court should grant the petition for writ of certiorari.

APRIL 24, 2017

Respectfully submitted,

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