Nos. 18-8766 and 18A1044

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE,
Petitioner,
v.
JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

Is a death-sentenced inmate entitled to a to a last-minute stay of execution where (1) the District Court found and the Court of Appeals agreed that the inmate failed to show how the State could readily implement a feasible alternative method of execution, (2) the inmate does not argue to this Court that he could make that showing, and (3) the inmate failed to present evidence showing that his chosen alternative is significantly safer than the State's current method of execution?

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INTRODUCTION

This is the second of Christopher Price's petitions for writ of certiorari to come before this Court arising from the denial of relief in a 42 U.S.C. § 1983 method-of-execution challenge. In his first § 1983 litigation, initiated in 2014, Price named pentobarbital as an alternative to the Alabama Department of Corrections' (ADOC) three-drug lethal injection protocol. As pentobarbital is not available to the ADOC, the district court denied relief, and the Eleventh Circuit Court of Appeals affirmed. Price filed a petition for a writ of certiorari, which was docketed on March 26, 2019, but he has not filed a motion for stay in that proceeding.[1]

Instead, Price is seeking a second bite at the apple. In March 2018, while Price's first § 1983 was before the Eleventh Circuit, Alabama enacted a change to its capital statutes through Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution. From June 1–30, 2018, all inmates whose death sentences were final prior to the effective date of the new law were permitted to make a one-time election of nitrogen hypoxia in lieu of lethal injection.[2] This election period was similar to that employed after Alabama

1. The matter is currently before the Court in Price v. Dunn, No. 18-1249.
2. ALA. CODE § 15-18-82.1(b)(2) (1975). Inmates whose sentences were not final as of June 1 are given a thirty-day election period once their sentences are final. *Id.*

adopted lethal injection as its primary method of execution in 2002, when death-sentenced inmates had thirty days to elect that they still wished to be executed by electrocution.[3]

In June, all death-row inmates at Holman Correctional Facility—including Price—were given a form identifying the Act and were told that if they wished to elect nitrogen hypoxia, they needed to sign and date the form and return it to the warden. Forty-eight inmates made a timely election. Price did not. Had Price elected nitrogen hypoxia, he would have mooted out his pending challenge to Alabama's lethal injection protocol. But then the State of Alabama moved the Alabama Supreme Court to set Price's execution date in January 2019. Two weeks later, Price attempted to make an election, which was rejected as untimely.

Price then filed his second § 1983 complaint before the court that had denied relief in his first § 1983. This time, he named a different alternative method of execution—nitrogen hypoxia. But besides listing those two words, he provided no details, no protocol, and no facts showing that his version of hypoxia was readily available to the ADOC. Moreover, the only evidence he presented as to the question of whether his alternative was substantially safer than the ADOC's lethal injection protocol was a 2016 expert declaration that

3. *Id.* § 15-18-82.1(b)(1).

made no mention of hypoxia and a draft report—one that specifically stated, "Do Not Cite"—that did not compare the relative safety of hypoxia and lethal injection. After the district court denied Price's motion for summary judgment and motion to stay his execution, he moved for rehearing, including in his motion a protocol drafted by counsel, allegedly adapted from two right-to-die books. This protocol was not only submitted ***six days*** before Price's scheduled execution but also included such necessary components as an "exit bag,"[4] which is not commercially available.

While the Alabama Code lists "nitrogen hypoxia" alongside "lethal injection" and "electrocution" as statutorily authorized methods of execution,[5] as of this writing, the ADOC does not have a hypoxia protocol. Like other states that have added hypoxia to their statutorily approved methods of execution, such as Oklahoma, Alabama has not yet attempted to carry out an execution by hypoxia. Moreover, Alabama has no interest in carrying out such an execution with a protocol that is not constitutional and safe for all parties involved.

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4. An exit bag, also known as a suicide bag, is a large plastic bag placed over the head and tightened around the neck by drawstring, strap, or other method. A tube connects the bag to a tank containing a gas such as nitrogen or helium, which the person committing suicide breathes until he succumbs.
5. ALA. CODE § 15-18-82.1(a).

Bucklew v. Precythe[6] controls here, as Price's proffered protocol, even the late-breaking extended version, is not readily available to the ADOC, nor has he proven that it significantly reduces a substantial risk of severe pain. Indeed, the ADOC's challenged lethal injection protocol is virtually identical to the protocol that was before the Court in *Glossip v. Gross*.[7] As Price has failed to meet his burden under *Baze v. Rees*,[8] *Glossip*, and *Bucklew*, and he has not even argued otherwise to this Court, he has not shown the substantial likelihood of success on the merits necessary to obtain a stay of execution. Thus, Price's petition and motion for stay should be denied.

6. 139 S. Ct. 1112 (2019).
7. 135 S. Ct. 2726 (2015).
8. 553 U.S. 35 (2008).

STATEMENT OF THE CASE

A. Price's capital conviction and conventional appeals

On the evening of December 22, 1991, minister Bill Lynn and his wife, Bessie, were at their home in Fayette County, Alabama. While Bill was assembling Christmas presents for their grandchildren, the power went out. Seeing that their neighbors still had electricity, Bill went outside to investigate. He was attacked by Price and an accomplice, who wielded a sword and a knife. The men fatally stabbed Bill, injured Bessie, and robbed the Lynns. Ultimately, Price confessed to his participation in the crime.[9]

On February 5, 1993, Price was convicted of robbery-murder, a capital offense. The jury recommended that he be sentenced to death, and the trial court accepted that recommendation,[10] explaining that the murder was particularly heinous, atrocious, or cruel:

> At the trial of this case a sword and dagger were introduced into evidence as being the instruments that were used in the killing. There were a total of thirty-eight (38) cuts, lacerations and stab wounds. Some of the stab wounds were a depth of three (3) or four (4) inches. Other wounds to the body and head indicated that the victim was repeatedly struck in a hacking or chopping motion. One of his arms was almost severed and his head was lined with numerous wounds three (3) to four (4) inches in length. His scalp was detached from the skull of his head in places. The victim died a slow, lingering and painful death probably from the loss of blood. He was still alive when an ambulance attendant got to him

9. *Price v. State*, 725 So. 2d 1003, 1011–12 (Ala. Crim. App. 1997).
10. *Id.* at 1011.

> probably thirty (30) minutes to an hour after the initial attack began.[11]

The Alabama Court of Criminal Appeals affirmed, noting that the murder was "unnecessarily torturous, pitiless, conscienceless, extremely wicked, and shockingly evil."[12] The Alabama Supreme Court affirmed as well,[13] and this Court denied certiorari in 1999.[14]

Price then pursued state postconviction relief. In 2003, the Court of Criminal Appeals affirmed the circuit court's denial of his petition,[15] and the Alabama Supreme Court denied certiorari in 2006.[16]

Having failed to obtain relief, Price turned to the federal courts. The District Court for the Northern District of Alabama denied and dismissed his third amended habeas petition, and the Eleventh Circuit Court of Appeals ultimately affirmed.[17] As before, this Court denied certiorari.[18]

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11. The sentencing order is found in the habeas record in Price v. Allen, 6:03-cv-01912-LSC-JEO (N.D. Ala.), at Vol. 1, Tab #R-1, at C. 213–19.
12. *Price*, 725 So. 2d at 1062.
13. *Ex parte Price*, 725 So. 2d 1063 (Ala. 1998).
14. *Price v. Alabama*, 526 U.S. 1133 (1999) (mem.).
15. *Price v. State*, CR-01-1578 (Ala. Crim. App. May 30, 2003).
16. *Ex parte Price*, No. 1021742 (Ala. June 23, 2006).
17. *Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012), *vacated and superseded on reh'g*, 679 F.3d 1315 (11th Cir. 2012).
18. *Price v. Thomas*, 133 S. Ct. 1493 (2013) (mem.).

B. Price's first 42 U.S.C. § 1983 litigation

On September 11, 2014, the State moved the Alabama Supreme Court to set an execution date for Price. The next month, Price (like many death row inmates) filed a 42 U.S.C. § 1983 complaint in the Southern District of Alabama alleging that Alabama's three-drug protocol, which had been recently amended to allow midazolam instead of pentobarbital as the first drug in the cocktail, was unconstitutionally cruel and unusual.[19]

In March 2015, the State asked the Alabama Supreme Court to hold the execution motion in abeyance pending the resolution of *Glossip v. Gross*, a challenge to a three-drug midazolam protocol functionally identical to Alabama's. The court granted the motion on March 27. Three months later, this Court found that the inmate petitioners in *Glossip* had failed to establish a substantial risk of harm in the midazolam protocol when compared to a known and available alternative method of execution.

Following *Glossip*, Price named compounded pentobarbital as an alternative to the ADOC's midazolam protocol. In 2017, the district court entered judgment in favor of the State, finding that Price failed to prove the existence of a substantially safer alternative available to the ADOC, and the

19. Petition, Price v. Dunn, 1:14-cv-00472 (S.D. Ala. Oct. 10, 2014), Doc. 1.

Eleventh Circuit affirmed in 2018.[20] On March 26, 2019, Price petitioned this Court for certiorari.[21]

C. Price's second § 1983 litigation

On March 22, 2018—while Price's first § 1983 appeal was pending in the Eleventh Circuit—Governor Kay Ivey signed Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama.[22] Pursuant to section 15-18-82.1(b)(2) of the Code of Alabama (1975), as modified by Act 2018-353, an inmate whose conviction was final prior to June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia. Inmates sentenced after the enactment of the law would have a thirty-day election period from the date that their death sentence became final.

The law—like most state and federal laws—did not include any provision requiring that any particular individual be given special notice of its enactment, nor did it specify how an inmate should make an election. The State of Alabama thus did not create a standardized election form for this purpose. On June 22, 2018, an attorney for the Federal Defenders for the Middle District

20. *Price v. Comm'r, Ala. Dep't of Corrs.*, 752 F. App'x 701 (11th Cir. 2018).
21. *See* Price v. Dunn, No. 18-1249.
22. *See* 2018 Ala. Laws Act 2018-353.

of Alabama drafted an election form, which was given to death-row inmates represented by that organization, allegedly on June 26.[23] Respondent Cynthia Stewart, Warden of Holman Correctional Facility, obtained a copy of the form, then directed Captain Jeff Emberton to give every death-row inmate at Holman a copy of this form and an envelope in which he could return it to the warden, should he decide to make the election.[24] Captain Emberton did as instructed before the end of June. The form stated that the inmate's election was made pursuant to Act 2018-353, and its date blank read, "Done this ___ day of June, 2018."[25] Forty-eight Alabama inmates ultimately elected nitrogen hypoxia, including inmates not represented by the Federal Defenders. While Price, along with every other death-row inmate, was given an election form, he was not among the inmates who made the election.

On January 11, 2019, the State moved the Alabama Supreme Court to set Price's execution date. Price alleges that his counsel first learned on January 12 that some inmates had elected nitrogen hypoxia.[26] Critically, however, Price never alleges that he was not given the option to make the same election. And his counsel clearly was on notice of the passage of Act 2018-353

23. Doc. 29-3 at 2. Unless otherwise specified, document numbers refer to the documents filed in this matter in the district court.
24. Doc. 19-1.
25. Doc. 29-3, Ex. A.
26. Doc. 1 ¶ 32.

before January 2019. Indeed, the Eleventh Circuit's September 2018 opinion in Price's first § 1983 *expressly addressed the Act*, holding that Price's challenge to the lethal injection protocol was not rendered moot by the Act.[27] Had Price elected hypoxia, his challenge would have been moot, but because he did not, he was able to petition for rehearing in the Eleventh Circuit.[28] That court denied his petition on December 26, 2018.

Only then did Price send a letter to Warden Stewart on January 27, 2019—more than two weeks after the State moved for an execution date—

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27. As the Eleventh Circuit held:

> However, effective June 1, 2018, a person sentenced to death in Alabama had the opportunity to elect that his death sentence be executed by electrocution or nitrogen hypoxia. The statute provides that election of death by nitrogen hypoxia is waived unless it is personally made by the inmate in writing and delivered to the warden within 30 days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death. If a judgment was issued before June 1, 2018, the election must have been made and delivered to the warden within 30 days of June 1, 2018. *See* ALA. CODE § 15-18-82.1(b)(2). We have not been advised by either party that Price opted for death by nitrogen hypoxia, so his § 1983 claim is not moot.

Price, 752 F. App'x at 703 n.3; *see Price v. Comm'r, Ala. Dep't of Corrs.*, No. 19-11268, 2019 WL 1550234, at *4 (11th Cir. Apr. 10, 2019) ("[T]he record here shows that Price and his counsel plainly had reason to know of the change in Alabama's law before January 2019 because we specifically described that change when we issued our decision in Price's first § 1983 action appeal.").

28. Pet. Reh'g, Price v. Comm'r, Ala. Dep't of Corrs., No. 17-11396 (11th Cir. Oct. 10, 2018).

attempting to elect nitrogen hypoxia; the belated request was denied.[29] Price's counsel then contacted counsel for the State on February 4, asking to elect nitrogen "on the same terms that I understand you offered to John Palombi's clients in the civil rights lawsuit before Judge Watkins."[30] This was a misconception: the litigation referenced in the e-mail was a consolidated § 1983 action brought by several death-row inmates alleging that the ADOC's lethal injection protocol is unconstitutional,[31] just as Price alleged before the Southern District. In that matter, the State did not offer terms to John Palombi, counsel for the plaintiffs. Rather, on July 10, 2018, the parties jointly moved to dismiss the litigation as moot because the plaintiffs had made a timely election of nitrogen hypoxia,[32] and the motion was granted.[33] Counsel for the State explained to Price's counsel that there was no offer made to those plaintiffs and that the thirty-day election period had expired.[34]

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29. *See* Doc. 19-3.
30. *See* Doc. 19-4. John Palombi is an attorney with the Federal Defenders for the Middle District of Alabama. Judge W. Keith Watkins was then Chief Judge of the United States District Court of the Middle District of Alabama.
31. *In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 11, 2018).
32. Joint Motion to Dismiss, In re: Alabama Lethal Injection Protocol Litigation, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 10, 2018), Doc. 427.
33. Order, In re: Alabama Lethal Injection Protocol Litigation, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 11, 2018), Doc. 429.
34. Doc. 19-4.

Price's present § 1983 complaint was filed four days later, nearly one month after the State moved for an execution date. On March 1, 2019, the Alabama Supreme Court set Price's execution for April 11, 2019.[35]

At the district court's direction,[36] the State moved for summary judgment on March 4,[37] and Price filed a response, cross-motion for summary judgment, and motion for stay of execution on March 29.[38] On April 1, this Court announced its decision in *Bucklew v. Precythe*,[39] another method-of-execution challenge in which an inmate, like Price, named nitrogen hypoxia as his alternative without proving its ready availability. The district court heard arguments on April 4 and denied Price's motions the next day.[40] Price moved for reconsideration later that afternoon and renewed his motion for stay of execution the following day,[41] but the district court denied both on April 6.[42]

Price appealed that decision and again moved for a stay of execution in the Eleventh Circuit. That court affirmed on April 10 and denied the motion

35. Doc. 19-5.
36. *See* Doc. 18.
37. Doc. 19.
38. Docs. 28, 29, 29-1.
39. 139 S. Ct. 1112 (2019).
40. Doc. 32.
41. Docs. 33, 34.
42. Doc. 35.

for stay of execution,[43] though it affirmed the district court's denial of summary judgment as to Price's Eighth Amendment claim on different grounds. The court "agree[d] that Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate propose a new method of execution."[44] But the court found an exception to *Bucklew*, holding that because the Code of Alabama listed "nitrogen hypoxia" as a possible method, identifying a feasible, readily implemented alternative procedure was no longer "Price's burden to bear."[45] The Eleventh Circuit nevertheless affirmed the district court's ruling on the ground that Price had failed to satisfy his burden of establishing that hypoxia was significantly safer than lethal injection.[46]

The present petition for writ of certiorari followed.

43. *Price v. Comm'r, Ala. Dep't of Corrs.*, No. 19-11268, 2019 WL 1550234 (11th Cir. Apr. 10, 2019).
44. *Id.* at 20.
45. *Id.*
46. *Id.* at 13–25.

REASONS THE PETITION SHOULD BE DENIED

The issue here is same on that was before the lower courts, namely, whether Price is likely to prevail on his claim that he identified "an alternative that is 'feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.'" [47] The Eleventh Circuit Court of Appeals was correct to affirm the district court's denial of summary judgment and stay of execution, even if on different grounds. As the district court found, the State has a rational basis for limiting the time in which an inmate may elect nitrogen hypoxia, and Price failed to meet his burden under *Baze*, *Glossip*, and *Bucklew* of naming a readily available alternative.

Critically, Price ***never argues otherwise to this Court***. That is tantamount to a concession that he is unlikely to prevail on the merits of his *Glossip* claim. The lower courts "agree[d] that Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement,"[48] and apparently Price agrees as well, as he has not argued otherwise to this Court.

Price is also unlikely to succeed on the merits because, as the Eleventh Circuit found, he failed to meet his burden of establishing that nitrogen hypoxia is significantly safer than lethal injection because the "evidence" he

47. *Bucklew*, 139 S. Ct. at 1121 (quoting *Glossip*, 135 S. Ct. at 2737).
48. *Price*, 2019 WL 1550234, at *8.

provided the district court was either irrelevant to the question or, at best, "problematic." While Price's petition challenges this ruling, there could hardly be a worse vehicle than Price's belatedly-filed case for addressing the issues presented here, which in any event, are not case-dispositive. Price's petition and last-minute stay request should be denied.

I. Price's petition is due to be denied because he failed to meet his burden under *Baze*, *Glossip*, and *Bucklew*.[49]

As to Price's Eighth Amendment claim, both the district court and the Eleventh Circuit concluded that Price failed to make the required showing under *Baze*, *Glossip*, and now *Bucklew* of a feasible, readily available alternative method of execution that "significantly reduce[s] a substantial risk of severe pain."[50] While the courts did so for different reasons, either of their rationales supports a denial of certiorari.

A. The district court correctly found that Price failed to show that nitrogen hypoxia is readily available to the ADOC.

The district court found that Price failed to make the required showing as to the availability of nitrogen hypoxia. In so doing, the court correctly looked

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49. Price has abandoned the claim that his equal protection rights were violated, and for good reason. Price failed to demonstrate that there is a genuine dispute of a material fact suggesting that he was treated any differently from the other Holman death-row inmates and failed to show a substantial likelihood of success on the merits.
50. *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52)).

to *Bucklew*, which made clear that under *Baze* and *Glossip*, simply naming an alternative, without more, is insufficient to satisfy an inmate's burden. As this Court explained:

> *First*, an inmate must show that his proposed alternative method is not just theoretically "'feasible'" but also "'readily implemented.'" *Glossip*, 135 S. Ct., at 2737–38. This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out "relatively easily and reasonably quickly." *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017); *Arthur*, 840 F.3d at 1300. Mr. Bucklew's bare-bones proposal falls well short of that standard. He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks. Instead of presenting the State with a readily implemented alternative method, Mr. Bucklew (and the principal dissent) point to reports from correctional authorities in other States indicating that additional study is needed to develop a protocol for execution by nitrogen hypoxia. . . . That is a proposal for more research, not the readily implemented alternative that *Baze* and *Glossip* require.[51]

This was precisely Price's failing. His complaint named merely "a properly administered execution protocol utilizing nitrogen"[52] and claimed, "Properly administered gas hypoxia is among the most widely promoted forms of assisted suicide by right-to-die advocates."[53] That is insufficient to satisfy

51. *Bucklew*, 139 S. Ct. at 1129 (citations edited).
52. Doc. 1 ¶ 53.
53. *Id.* ¶ 55.

Bucklew. Price did not offer a more detailed protocol in his motion for summary judgment. Instead, he pointed to a draft report from East Central University on hypoxia[54] and showed that counsel's associate was able to purchase a tank of nitrogen in Massachusetts.[55] Not until his motion for reconsideration did Price offer a protocol of sorts, one purportedly based on two books published by right-to-die organizations.[56] Aside from the fact that this proposed protocol was offered only **six days** before Price's scheduled execution, Price still failed to show that it was available to the ADOC. His claim that the necessary components "can be purchased from commercial sources, no questions asked (including from sources such as Amazon.com)"[57] is belied by the fact that he failed to identify a commercial source willing to sell the ADOC a so-called "exit bag,"[58] a key component of his protocol.

Moreover, the State has a legitimate reason for declining to switch from its tested, constitutionally sound lethal injection protocol to Price's untested nitrogen hypoxia protocol less than a week before his execution: Price failed to

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54. Doc. 29-2, Ex. A. As the Eleventh Circuit noted, Price's reliance on the report is "problematic," as "the report is a preliminary draft report that is stamped with the words 'Do Not Cite.'" *Price*, 2019 WL 1550234, at *10.
55. Doc. 29-4.
56. Doc. 33 at 4 & n.2.
57. *Id.* at 5.
58. For example, Sharlotte Hydorn, who sold "GLADD" exit bags by mail, was raided by the FBI in 2011 and died in 2013. Faye Girsh, *Charlotte Hydorn of GLADD Exit Bags Dies at 94*, ASSISTED-DYING BLOG (Dec. 13, 2013), https://bit.ly/2IhYeYK.

show that any other state currently formulating a hypoxia protocol is planning to use a protocol like his or that his protocol is safe and effective. No other state has executed an inmate by this method, and the ADOC has no interest in attempting an execution via an untested method offered as an alternative six days before Price's scheduled execution date.

Here, the district court followed this Court's clear holding in *Bucklew* and correctly held that nitrogen hypoxia is not readily available:

> *Bucklew* instructs that Price's execution proposal "must be sufficiently detailed to permit a finding that the State court carry it out 'relatively easily and reasonably quickly.'" *Bucklew*, 2019 WL 1428884 at *11. But as Price pointed out at oral argument, this requirement in *Bucklew* appears to have been imposed on plaintiffs who were seeking to have their State implement an execution method that had not been approved by the State. However, it is still Price's burden to show that the State could "readily implement" execution by nitrogen hypoxia. Price proposes, without evidence, that the State merely has to purchase readily available nitrogen, a hose and a mask to implement execution by nitrogen.
>
> The Court agrees with the State that it is not that simple. The Court has little evidence as to how nitrogen gas would be administered or how the State might ensure the safety of the execution team and witnesses. Accordingly, the Court cannot find, based on the current record, that execution by nitrogen hypoxia may be readily implemented by the State.
>
> [. . .]
>
> Similar to *Bucklew*, 2019 WL 1428884, *11, regarding the proposed method, Alabama has not yet used nitrogen hypoxia to carry out an execution and so has no track record of successful use: "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." However, distinct from *Bucklew*, Alabama chose the proposed (new) method of nitrogen hypoxia via passage of Alabama Code § 15-18-82.1(b)(2) in 2018, and has already "switched" execution methods for those

> death row inmates who timely elected for execution by nitrogen hypoxia.
>
> However, as discussed *supra* in relation to Price's equal protection claim, the State has a legitimate reason for denying Price his belatedly chosen method of execution. Accordingly, Price cannot prevail on this factor.[59]

Even after Price submitted his proposal in his motion for reconsideration, the district court was correctly unpersuaded:

> First, relative to his Eighth Amendment claim, Price argues that in the event *Bucklew v. Precythe*, __ S. Ct. ___, 2019 WL 1428884, *11–12 (Apr. 1, 2019) now requires a death row inmate to submit a "sufficiently detailed" execution protocol proposal in a method of execution challenge case (which he disputes, arguing *Bucklew* is distinguishable), he has now submitted such proposal (submitting same with his motion) at least to the level of satisfaction for a stay/preliminary injunction (substantial likelihood of success on the merits). Additionally, Price contends that *Bucklew* held that a state's own statutory scheme cannot control the outcome of an Eighth Amendment challenge, such that the Court's ruling—that his failure to timely elect nitrogen hypoxia by June 30, 2018 constitutes a legitimate penological justification—lacks merit. Although Price presents a protocol/proposal with his motion, he still fails to show that it may be readily implemented by the State and that the State does not have legitimate reason for refusing his untimely request to be executed by nitrogen hypoxia.[60]

As of today, the ADOC does not yet have a nitrogen hypoxia protocol or the equipment necessary to carry out a safe, constitutional execution with nitrogen. The ADOC will not have a protocol or equipment available by Price's

59. Doc. 32 at 20.
60. *Id.* at 20–21.

execution tonight. Any such protocol is, by the State's best estimate, months away, if not longer.

The Eleventh Circuit disagreed with the district court on this ground, holding that nitrogen hypoxia was "available" to the ADOC simply because it is now contemplated by state statute.[61] That reasoning not only flouts this Court's repeated (and recent) decisions, it will also have perverse effects for both States and the condemned. The Eleventh Circuit concluded that "[i]f a State adopts a particular method of execution . . . it thereby concedes that the method of execution is available to its inmates."[62] But by that reasoning, *Glossip* should have come out the other way; after all, Oklahoma law clearly allowed the use of sodium thiopental or pentobarbital.[63] Even so, this Court affirmed the finding that "both sodium thiopental and pentobarbital are now unavailable to Oklahoma's Department of Corrections" where "the record show[ed] that Oklahoma ha[d] been unable to procure those drugs despite a good-faith effort to do so."[64] Similarly, if the ADOC were no longer able to acquire midazolam and decided that no other drug was constitutionally suitable for use in lethal injection, while "lethal injection" would still be

61. *Price*, 2019 WL 1550234, at *8.
62. *Id.* at 18.
63. *See Glossip*, 135 S. Ct. at 2733 ("In December 2010, Oklahoma became the first State to execute an inmate using pentobarbital.").
64. *Id.* at 2738.

expressly authorized by statute, it would not be "available" to the ADOC as a method of execution. Nor is Price's "proposed alternative method . . . 'readily implemented'" simply because the words "nitrogen hypoxia" appear in the Code of Alabama.[65] Rather, because the State to this point "has been unable to procure" the means for executing someone with nitrogen gas "despite a good-faith effort to do so," nitrogen hypoxia remains unavailable.[66]

The Eleventh Circuit's error is thus the mirror image of the one this Court rejected just a few days ago in *Bucklew*. This Court recognized that it would be erroneous to conclude that a method of execution was not readily available to a state only because it was not statutorily authorized.[67] Instead, a practical inquiry is required to see if the method, with a workable protocol, is readily available. Despite this Court's focus on a practical inquiry into availability, the Eleventh Circuit reverted to formalism, holding that whenever a state statute authorizes a method of execution, it is deemed available, even if has "never been used to carry out an execution and ha[s] no track record of successful use."[68]

The Eleventh Circuit further gutted *Baze*, *Glossip*, and *Bucklew* by holding that when a state statute authorizes a method of execution through

65. *Bucklew*, 139 S. Ct. at 1129 (quoting *Glossip*, 135 S. Ct. at 2737).
66. *Glossip*, 135 S. Ct. at 2738.
67. *Bucklew*, 139 S. Ct. at 1128.
68. *Id.* at 1130 (quotation marks omitted).

terms as vague as "nitrogen hypoxia"—and, presumably, terms like "lethal injection"—the state relieves an inmate of his burden to put forward a proposal that is "sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly."[69] The Eleventh Circuit "agree[]d that Price," like Bucklew, "did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate proposes a new method of execution."[70] No matter. Because "the State by law previously adopted nitrogen hypoxia as an official method of execution," that was no longer "Price's burden to bear."[71] Rather than satisfy *Bucklew*'s test, Price needed to merely "point[] to the executing state's official adoption of that method of execution."[72] But Glossip's ability to point to past executions using pentobarbital did not shift his burden to Oklahoma. *A fortiori*, Price cannot shed his burden by pointing to a method of execution that *no* state has ever used.

The Eleventh Circuit reasoned that its new exception to *Bucklew* made sense because "it would be bizarre to put the onus on Price to come up with a proposed protocol for the State to use when the State has already adopted the

69. *Id.* at 1129 (quotation marks omitted).
70. *Price*, 2019 WL 1550234, at *8.
71. *Id.*
72. *Id.*

particular method of execution and is required to develop a protocol for it, anyway."[73] If that sounds familiar, it is because it is the same argument that Russell Bucklew made to this Court this term.[74] The Court should again reject that argument.

In addition to lacking any basis in law, the Eleventh Circuit's decision will have unintended (but obvious) negative consequences for States and inmates. A new penalty will attach to any State that statutorily authorizes a new method of execution as part of its "search for less painful modes of execution."[75] In light of the decision below, Georgia and Florida would be foolish to even conditionally authorize new methods of execution, lest they subject themselves to the new *Price* standard and exempt inmates from their burdens under *Baze*, *Glossip*, and *Bucklew*. And States outside the Eleventh Circuit may also think twice before trying to find more humane ways to carry out the ultimate punishment.

The Court thus should not depart from its focus on actual, rather than theoretical, availability. Yes, "nitrogen hypoxia" is listed alongside "lethal

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73. *Id.*

74. *See* Brief for Petitioner at 52, Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (No. 17-8151) ("[T]here is no reason . . . to require an inmate to do more than prove that a State *has* other available options. *How* a State implements those other options—the detailed protocols and procedures it adopts—are ultimately up to the State.").

75. *Bucklew*, 139 S. Ct. at 1125.

injection" in section 15-18-82.1 of the Code of Alabama. But the ADOC is still working to develop a safe, constitutional protocol and find sources for its necessary components. In the realm of capital punishment, this is seldom a simple task. For instance, as this Court noted in *Bucklew*, Oklahoma has encountered difficulty in procuring the necessary supplies to carry out an execution by hypoxia:

> In March 2018, officials in Oklahoma announced that, due to the unavailability of lethal injection drugs, the State would use nitrogen gas for its executions going forward. *See* Williams, *Oklahoma Proposes To Use Nitrogen Gas for Executions by Asphyxiation*, N.Y. TIMES, Mar. 15, 2018, p. A22. But Oklahoma has so far been unable to find a manufacturer willing to sell it a gas delivery device for use in executions. *See* Clay, *State Not Ready for Executions*, THE OKLAHOMAN, Jan. 27, 2019, p. A1. To date, no one in this case has pointed us to an execution in this country using nitrogen gas.[76]

In sum, the district court applied the correct *Bucklew* analysis in finding that nitrogen hypoxia is not readily available, and this Court should deny certiorari, particularly where Price has failed to argue that he identified a feasible and readily available alternative method of execution.

76. *Bucklew*, 139 S. Ct. at *1130 n.1 (citations edited).

B. The Eleventh Circuit correctly held that Price failed to show an alternative method of execution that significantly reduced the risk of severe pain.

In the alternative, the Eleventh Circuit also correctly held that Price was not entitled to a stay of execution on his Eighth Amendment claim because he failed to show that nitrogen hypoxia would significantly reduce his risk of substantial pain. As that court explained, Price failed to introduce any reliable evidence on the matter. The district court had only two pieces of evidence before it: a 2016 expert declaration from Dr. David Lubarsky, Price's expert in his first § 1983, about the lethal injection protocol, and a draft report from East Central University on hypoxia. The Eleventh Circuit held that this evidence was insufficient; Dr. Lubarsky's declaration did not compare lethal injection to hypoxia, and the report—"a preliminary draft report that is stamped with the words 'Do Not Cite'"—was "problematic" as evidence.[77] Moreover, "the report itself also did not compare the two methods of execution," meaning that Price failed to "satisf[y] his burden to establish that nitrogen hypoxia would significantly reduce a substantial risk of severe pain."[78] The Eleventh Circuit's holding in this regard was correct and further supports a denial of certiorari.

Price makes much of the Eleventh Circuit's finding that the district court clearly erred in his petition for certiorari, but his argument is weak at best.

77. *Price*, 2019 WL 1550234, at *10.
78. *Id.* at 25.

The *only* evidence Price offered the district court as to the "significantly reduce[s] a substantial risk of severe pain" prong of his *Baze*/*Glossip* burden is an expert declaration that does not even address hypoxia and a *draft report not intended to be cited* that does not compare hypoxia to lethal injection. Again, the lethal injection protocol in question is the one that was before this Court in *Glossip*—a protocol that is safe and constitutional. The Eleventh Circuit was correct here because the "evidence" Price presented was no evidence at all.

The relevant inquiry in this matter is not whether Price is likely to succeed on the narrow question he presents this Court, but rather whether he is likely to succeed on his overall *Baze*/*Glossip* claim. As noted above, Price made no attempt to even brief the issue of whether he can satisfy his burden under those cases (and now *Bucklew*). Moreover, the Eleventh Circuit never addressed the question of whether the State had a legitimate penological interest in using lethal injection on inmates who declined to make a timely hypoxia election, which it plainly does. Indeed, the reason the State moved to set an execution date for Price was because he did not elect hypoxia.

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In sum, Price offered the district court no evidence suggesting that his unspecified and untested hypoxia protocol was readily available to the ADOC or significantly safer than the ADOC's lethal injection protocol. The district court correctly found that he failed on the "readily available" prong but erred

in finding that he had satisfied the "significantly safer" prong. The Eleventh Circuit erred in overreading *Bucklew* to find that hypoxia is available to the ADOC but correctly overruled the district court as to the "significantly safer" prong because Price presented no evidence to support his claim.

Price did not offer a sufficiently detailed alternative method of execution to satisfy his burden under *Baze*, *Glossip*, and *Bucklew*, and even his late, untested protocol—which, though purportedly "based on" two books, was designed by Price's counsel—offers nothing to show that it is readily available to the ADOC, or even that it is safer than lethal injection. Once again, Price has failed to satisfy his burden in a method-of-execution challenge. This Court should deny certiorari.

II. This case is a terrible vehicle for the questions Price raises in his petition.

The present matter—an eleventh-hour petition arising from a last-minute § 1983 method-of-execution challenge in which the petitioner has no demonstrated likelihood of success—is a poor vehicle for the questions Price presents to this Court. Instead of challenging the merits of the decisions below, Price instead raises an esoteric point of evidentiary law as reason for this Court to prohibit the State from carrying out his lawful execution. Essentially, *if* there is error below—which the State does not concede—then Price is

requesting relief on a technicality that arose because he forced the courts to consider his last-minute litigation.

Price has known for more than twenty-five years that he is subject to a death sentence. He was on notice at the *latest* in June 2018 that nitrogen hypoxia had been added to the Code of Alabama as a statutorily approved method of execution. Price neglected to make a timely election. His counsel purports to have neglected to keep up with legal developments concerning methods of execution in a state in which he was actively litigating a method-of-execution challenge, and as the Eleventh Circuit noted, he purports to have failed to read that court's opinion, which brought up the issue of hypoxia and his client's failure to elect it in September 2018. Instead of timely electing hypoxia or bringing his second § 1983 in anything close to a timely fashion, Price waited until a month after the State moved for his execution date to initiate this litigation. The timeline in this litigation was extremely compressed—for example, the State had only four days to respond to Price's cross-motion for summary judgment and motion for stay of execution, the district court rendered its order one day after oral argument (and one week before Price's scheduled execution), and the Eleventh Circuit gave the State approximately seven hours to file its response to Price's brief on appeal. Indeed, despite having had the Eleventh Circuit's opinion since 2:00 p.m. Eastern yesterday, Price waited until nearly 12:30 p.m. Eastern today to file his

petition for certiorari, a mere six and a half hours before his scheduled execution. Because of *Price's* dilatory tactics, the case was hastily briefed, and the opinions below were hastily written. There could hardly be a worse vehicle for this Court to consider the questions Price presents.

III. The Court should deny a stay of execution.

As this Court has repeatedly explained, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."[79] Therefore, "inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits."[80] Further, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'"[81]

Price cannot demonstrate a substantial likelihood of success on the merits. He has failed to meet his burden of naming a feasible, readily available, and significantly safer method of execution, especially because the challenged

79. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).
80. *Id.*
81. *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

method of execution is the three-drug protocol this Court approved in *Glossip*. Moreover, Price was *exceedingly* dilatory in pursuing his rights; he never stated that he did not know about the addition of nitrogen hypoxia to the Code of Alabama in June 2018, and his counsel was on notice by September 2018 of the statutory change, thanks to the Eleventh's Circuit opinion in Price's first § 1983. Further, Price misstates the Eleventh Circuit in claiming that the State will be able to execute him within three months. When pressed for information, the State informed the district court during the April 4 oral argument that the ADOC would not have a nitrogen hypoxia protocol before the end of the summer. This was a bare minimum date, and it may be considerably longer before a protocol is finalized—much less litigated in the inevitable § 1983 challenge that will arise as soon as the State attempts to carry out an execution via hypoxia.

As this Court has held, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence."[82] For this reason, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."[83] As the Court noted in *Bucklew*:

> Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas

82. *Id.*
83. *Id.*

> challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning.[84]

Here, the rights of the victims of Price's crime, the State, and the public interest at large heavily outweigh Price's request for a stay. Carrying out Price's lawful sentence pursuant to a state conviction "acquires an added moral dimension" because his postconviction proceedings have run their course.[85] Price has been on death row for more than twenty-five years for a crime he committed in 1993. His crime was particularly heinous, as the trial court explained in sentencing him.[86] His conviction is valid, and a competent state court with jurisdiction over his case properly set his execution date according to Alabama law. Price initiated his first § 1983 litigation one month after the State moved for his execution date in 2014 and the current § 1983 litigation two weeks after the State moved for a date in 2019. He has failed twice to state a claim sufficient to survive summary judgment, and his current federal litigation is nothing but a meritless delay tactic. This Court should strongly

84. *Bucklew*, 139 S. Ct. at *1133–34.
85. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).
86. C. 215; *see* Doc. 19 at 4 (quoting sentencing order).

consider Alabama's interest in enforcing its criminal judgment and deny Price's request.

CONCLUSION

This Court should deny certiorari and the motion for stay of execution.

Respectfully submitted,

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