No. 18-1249
CAPITAL CASE

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

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

(Restated)

Did the circuit court err in affirming the denial of Price's Eighth Amendment method-of-execution claim where Price failed to plead and prove a feasible, readily available alternative that in fact significantly reduces a substantial risk of pain, as was his burden under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015)?

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INTRODUCTION

The facts of this case may seem familiar to this Court, as they are markedly similar to those of *Arthur v. Dunn*.[1] As in *Arthur*, an Alabama death row inmate filed a 42 U.S.C. § 1983 complaint alleging that Alabama's three-drug lethal injection protocol was violative of his Eighth Amendment right to be free from cruel and unusual punishment. As in *Arthur*, the district court bifurcated the proceedings, asking Price to first prove the availability of a feasibly, readily available, and significantly safer alternative method of execution to the current protocol—his burden under *Baze v. Rees*[2] and *Glossip v. Gross*,[3] as this Court recently reiterated in *Bucklew v. Precythe*.[4] As in *Arthur*, Price named compounded pentobarbital, which is not available to the Alabama Department of Corrections (ADOC). Predictably, the district court found that Price failed to meet his burden,[5] and the Eleventh Circuit, noting that it was bound by its precedent in *Arthur*, affirmed.[6]

Price offers the Court nothing new. His petition for certiorari, like so many of Arthur's, is an eleventh-hour attempt to forestall his execution, scheduled for April 11, 2019. Just as in *Arthur*, this petition is not cert-worthy.

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1. 137 S. Ct. 725 (2017) (mem.).
2. 553 U.S. 35 (2008).
3. 135 S. Ct. 2726 (2015).
4. No. 17-8151, 2019 WL 1428884 (Apr. 1, 2019).
5. App. B.
6. App. A at 2a–3a.

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—in total, he suffered thirty-eight cuts, lacerations, and stab wounds—injured Bessie, and robbed the Lynns. Ultimately, Price confessed to his participation in the crime.[7]

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.[8] The Alabama Court of Criminal Appeals affirmed, noting that the murder was "unnecessarily torturous, pitiless, conscienceless, extremely wicked, and shockingly evil."[9]

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7. *Price v. State*, 725 So. 2d 1003, 1011–12 (Ala. Crim. App. 1997). The detailed 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.

8. *Price*, 725 So. 2d at 1011.

9. *Id.* at 1062.

The Alabama Supreme Court affirmed as well,[10] and this Court denied certiorari in 1999.[11]

Price then pursued state postconviction relief. In 2003, the Court of Criminal Appeals affirmed the circuit court's denial of his petition,[12] and the Alabama Supreme Court denied certiorari in 2006.[13]

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.[14] As before, this Court denied certiorari.[15]

B. 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 pentobarbi-

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10. *Ex parte Price*, 725 So. 2d 1063 (Ala. 1998).
11. *Price v. Alabama*, 526 U.S. 1133 (1999) (mem.).
12. *Price v. State*, CR-01-1578 (Ala. Crim. App. May 30, 2003).
13. *Ex parte Price*, No. 1021742 (Ala. June 23, 2006).
14. *Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012), *vacated and superseded on reh'g*, 679 F.3d 1315 (11th Cir. 2012).
15. *Price v. Thomas*, 133 S. Ct. 1493 (2013) (mem.).

tal as the first drug in the cocktail, was unconstitutionally cruel and unusual.[16]

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 the *Glossip* decision, the State moved to dismiss Price's § 1983 complaint.[17] Instead, the district court allowed Price to amend his complaint.[18] As an alternative to the midazolam protocol, Price proposed the use of compounded pentobarbital or sodium thiopental.[19] Neither drug is available to the ADOC.

The parties engaged in discovery over the next year, culminating in an evidentiary hearing in December 2016. On March 15, 2017, the district court entered judgment in favor of the State, finding that

16. Petition, Price v. Dunn, 1:14-cv-00472 (S.D. Ala. Oct. 10, 2014), Doc. 1. Unless otherwise specified, document numbers refer to this litigation.

17. Doc. 30.

18. Doc. 31.

19. Doc. 32 at 19–20.

Price failed to prove the existence of a substantially safer alternative available to the ADOC.[20]

Price appealed. After holding oral argument, the Eleventh Circuit affirmed, based on its decision in *Arthur v. Commissioner, Alabama Department of Corrections*.[21]

The present petition for writ of certiorari followed.

C. Other litigation

While Price's § 1983 litigation was pending, he filed a successive state postconviction petition challenging his death sentence after *Hurst v. Florida*,[22] The circuit court denied the petition in March 2017, the Court of Criminal Appeals affirmed,[23] and the Alabama Supreme Court denied certiorari,[24] having already settled the *Hurst* question in *Ex parte Bohannon*.[25]

The State again moved the Alabama Supreme Court to set Price's execution date in January 2019. While the motion was pending, Price initiated a second § 1983 action in the Southern District of Ala-

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20. App. B.

21. App. A (citing 840 F.3d 1268 (11th Cir. 2016)).

22. 136 S. Ct. 616 (2016).

23. *Price v. State*, CR-16-0785 (Ala. Crim. App. Aug. 4, 2017).

24. *Ex parte Price*, No. 1161153 (Ala. Nov. 17, 2017).

25. 222 So. 3d 525 (Ala. 2016).

bama.[26] The Alabama Supreme Court set Price's execution date on March 1 for the following April 11.[27]

On April 5, Price's motion for summary judgment and motion for stay of execution were denied in the Southern District of Alabama.[28] The matter is now before the Eleventh Circuit Court of Appeals.[29]

REASONS FOR DENYING THE PETITION

No issue in Price's petition is worthy of certiorari. The Eleventh Circuit Court of Appeals correctly affirmed the district court because Price failed to prove the existence of a feasibly, readily available, and significantly safer alternative method of execution, as was his burden. The "circuit split" that he identifies between the Sixth and Eleventh Circuits is nonexistent. For the reasons that follow, Price's petition is not cert-worthy.

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

Price's petition does not merit certiorari for the same reason that Arthur's petition did not merit certiorari: he failed to satisfy *Baze* and *Glossip*.

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26. Price v. Dunn, 1:19-cv-00057-KD-MU (S.D. Ala.).

27. Order, Ex parte Price, No. 1970372 (Ala. Mar. 1, 2019).

28. Order, Price v. Dunn, 1:19-cv-00057-KD-MU (S.D. Ala. Apr. 5, 2019), Doc. 32.

29. Price v. Comm'r, Ala. Dep't of Corrs., No. 19-11268 (11th Cir.)

An inmate challenging a lethal injection protocol must make a two-part showing. First, he must show a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'"[30] This Court has made clear that such a challenge cannot succeed unless the plaintiff establishes that the challenged method of execution presents a risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and [that] give[s] rise to 'sufficiently *imminent* dangers.'"[31] Second, the inmate must "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'"[32] This alternative cannot be merely "slightly or marginally safer."[33] Both showings must be made in order for an inmate to prevail.

Here, as Price admits, the alternative he named was compounded pentobarbital.[34] During the bifurcated trial before the district court, the State provided testimony from the ADOC showing that manufactured pentobarbital is unavailable for use in executions; that the departments of corrections of Georgia, Texas, Missouri, and Virginia are unwilling to provide compounded pentobarbital to the ADOC or dis-

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30. *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50).

31. *Id.* (quoting *Baze*, 553 U.S. at 50) (further quotation omitted).

32. *Id.* (quoting *Baze*, 553 U.S. at 52).

33. *Baze*, 553 U.S. at 51.

34. Pet. 3.

close their supplier; and that the ADOC contacted eighteen compounding pharmacies in Alabama but found none willing and able to provide pentobarbital.[35] Price presented testimony from an expert witness, Dr. Gaylen Zentner, who could not name a source for the ADOC but opined that compounding pentobarbital is not difficult for a pharmacist—if, that is, one can procure the ingredients.[36]

The district court correctly found that Price failed to meet his burden, and the Eleventh Circuit affirmed. In so doing, that court discussed the analysis it conducted in *Arthur*:

> Viewing the precedents together, we concluded that *Glossip* requires a petitioner to prove three things to meet the "known and available alternative" test
>
> (1) the State actually has access to the alternative;
>
> (2) the State is able to carry out the alternative method of execution relatively easily and reasonably quickly; and
>
> (3) the requested alternative would in fact significantly reduce [ ] a substantial risk of severe pain relative to the State's intended method of execution.
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> *Arthur*, 840 F.3d at 1300 (citing *Glossip*, 135 S. Ct. at 2737; *Brooks v. Warden*, 810

35. App. A at 10a–11a; App. B at 30a–31a, 36a.

36. App. A at 11a; App. B at 35a–36a.

F.3d 812, 819–23 (11th Cir. 2016)) (internal quotation marks omitted). . . .

[. . .]

After reviewing the evidence, we concluded that the district court's factual finding that pentobarbital was not available to the ADOC for use in executions was not clearly erroneous. *Id.* at 1301. We found substantial record evidence—including Dr. Zentner's inability to point to any source willing to compound pentobarbital for the ADOC, and [ADOC general counsel's] testimony that, despite contacting 29 potential sources, she was unable to procure any compounded pentobarbital for the ADOC's use in executions—supported the finding that pentobarbital was not available to the ADOC. *Id.* And we specifically rejected Arthur's invitation to hold that "if a drug is capable of being made and/or in use by other entities, then it is 'available' to the ADOC." *Id.* at 1301–02. To the contrary, we expressly held that "the evidentiary burden on [the § 1983 plaintiff] is to show that 'there is *now* a source for pentobarbital *that would sell it to the ADOC* for use in executions." *Id.* at 1302 (emphases in *Arthur*) (quotation omitted). And we concluded that "[a]n alternative drug that its manufacturer or compounding pharmacies refuse to supply for lethal injection 'is no drug at all for *Baze* purposes.'" *Id.* (quoting

> *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1275 (11th Cir. 2014) (Carnes, C.J., concurring)).
>
> We likewise rejected Arthur's argument that the ADOC was required to make a good-faith effort to obtain the alternative drug. *Id.* at 1302–03. Yet despite this, we found that even if *Glossip* somehow imposed a good-faith effort on the part of the State, "the ADOC made such an effort here by contacting 29 potential sources for the drug, including four other departments of correction and multiple compounding pharmacies." *Id.* at 1303. Under those facts, we affirmed the district court's conclusion that Arthur had failed to prove the availability of an alternative method of execution. *Id.*[37]

The court then considered Price's arguments and rejected them:

> While we understand Price's desire to alter the burden imposed on him in this method-of-execution case, that burden is already cemented by binding precedent. . . .
>
> But to clarify, contrary to Price's contention, our decision in *Arthur* does not require Price to "identify a specific suppli-

37. App. A at 14a–15a, 17a–18a (citations edited, footnotes omitted).

er that has already committed to selling pentobarbital to the ADOC." Nor does it require Price to engage in contractual negotiations on behalf of the ADOC. Rather, Price must identify a source for compounded pentobarbital and prove that the ADOC "actually has access" to compounded pentobarbital.

Here, though, the evidence Price offered on this point did not differ in any material way from that offered by the petitioner in *Arthur*. Indeed, Price even relied on the same expert witness—Dr. Zentner—who said essentially the same things as he did in *Arthur*[.] . . .

As for Price's contention that "simple and obvious steps" were available to the ADOC to obtain pentobarbital—such as asking other state departments of corrections to "pass along" information to their suppliers—our binding precedent does not place the onus on the State to locate pentobarbital. Instead, *Arthur* squarely placed the burden on Price to identify likely sources and determine whether any pharmacy would be willing to make pentobarbital available to the ADOC for use in executions. Here, Price presented no such evidence other than what was already presented in *Arthur* and found to be inadequate.

> We likewise cannot adopt Price's proposed burden-shifting scheme. Our case law precludes the conclusion that, with respect to the second prong of *Glossip*, the State (*i.e.*, the ADOC) must prove that it cannot acquire the desired drug. And even if we were to adopt Price's proposed burden-shifting scheme, his claim would still fail. Again, on a materially factually indistinguishable record in *Arthur*, we found that even if *Glossip* somehow imposed a good-faith effort on the State, the ADOC made such an effort by contacting various potential sources for the compounded pentobarbital, including "four other departments of correction and multiple compounding pharmacies." [ADOC general counsel] testified to the same efforts in this case.[38]

Just as this Court denied certiorari in *Arthur*, so too should the Court deny certiorari in Price's remarkably similar case. Price offers nothing that was not before the Court in *Arthur*. Lethal injection with a three-drug midazolam protocol is constitutional and safe, and Price's claim is meritless.

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38. App. A at 20a–23a (citations omitted).

II. Price's petition is due to be denied because there is no circuit split.

In an attempt to justify certiorari in a case that, for practical purposes, has already been rejected by the Court, Price claims that there is a split between the Eleventh Circuit and the Sixth as to what an inmate must show regarding availability of the alternative.[39] This allegation is baseless.

As set forth above, the Eleventh Circuit held in *Arthur* and in Price's case that an inmate must (1) identify a source for the alternative and (2) prove that the ADOC is able to acquire the alternative from that source—or, for present purposes, name a supplier willing and able to supply compounded pentobarbital to the ADOC for use in an execution. In 2017, the Sixth Circuit considered a similar challenge in which the district court had determined that compounded pentobarbital was "available" to the Ohio Department of Corrections because there was a possibility that Ohio could obtain its ingredients and have it compounded. The Sixth Circuit disagreed:

> The district court was seriously mistaken as to what "available" and "readily implemented" mean. . . . To obtain pentobarbital or its active ingredient, Ohio would need to receive an import license from the Drug Enforcement Administration. Ohio's application for that license has been pending, without apparent action by the DEA, for more than four months. Ohio does not

39. Pet. 5.

know whether the DEA will approve its application, or even when that decision might be made. And even if that application is approved, Ohio might not be able to locate a willing supplier or manufacturer, for reasons the Supreme Court explained at some length in *Glossip*. As the district court acknowledged, even the plaintiffs' expert, Dr. Stevens, "was unable to identify any manufacturers or suppliers of thiopental and/or pentobarbital who were willing to sell those drugs, or even those drugs' active pharmaceutical ingredients, to Ohio for the purposes of conducting lethal injection executions." The plaintiffs, for their part, rely on Dr. Buffington's testimony about an affidavit he filed in a prior Alabama case, in which he stated that he believed "there are pharmacists in the United States that are able to compound pentobarbital for use in lethal injections because other states have been reported to have obtained compounded pentobarbital for use in executions." But that is quite different from saying that any given state can actually locate those pharmacies and readily obtain the drugs. And Dr. Buffington testified that he personally contacted 15 pharmacies to that end without success. Indeed, in the very case in which Dr. Buffington submitted his affidavit, the Eleventh Circuit rejected the claim that pentobarbital was available to

> Alabama. Meanwhile, Ohio itself contacted the departments of correction in Texas, Missouri, Georgia, Virginia, Alabama, Arizona, and Florida to ask whether they would be willing to share their supplies of pentobarbital. All refused. Granted, for the one-drug protocol to be "available" and "readily implemented," Ohio need not already have the drugs on hand. But for that standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot. The reality is that the barbiturate-only method is no more available to Ohio than it was to Oklahoma two years ago in *Glossip*, for precisely the same reasons.[40]

While Price latches on to the phrase "ordinary transactional effort," the courts reached virtually the same conclusion: if the inmate cannot prove that the department of corrections can procure a drug, then the drug is not an available alternative method of execution for *Baze* and *Glossip* purposes. There is no circuit split for this Court to resolve, and this claim is not cert-worthy.

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40. *In re: Ohio Execution Protocol*, 860 F.3d 881, 890–91 (6th Cir. 2017).

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request this Court deny certiorari review.

Respectfully submitted,

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