No. ____

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE, PETITIONER,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE: EXECUTION SCHEDULED FOR APRIL 11, 2019

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11268
Non-Argument Calendar

D.C. Docket No. 1:19-cv-00057-KD-MU

CHRISTOPHER LEE PRICE,

Plaintiff - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(April 10, 2019)

Before TJOFLAT, WILSON, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Christopher Lee Price, an Alabama prisoner sentenced to death for killing a man during the commission of a robbery, has moved this Court for an emergency stay of his execution, which is scheduled to take place on April 11, 2019, at 6:00 p.m. Central Standard Time at the Holman Correctional Facility ("Holman"). Price also appeals the district court's order denying his motion for preliminary injunction and its order denying his renewed motion for preliminary injunction. Included within those orders is the district court's denial of Price's Cross-Motion for Summary Judgment.[1] After careful consideration, we affirm the district court's denial of Price's Cross-Motion for Summary Judgment as well as its denial of Price's original and renewed motions for preliminary injunction. We also deny Price's motion for a stay of execution because he cannot show a substantial likelihood of success on his petition.

I. Background

Price was convicted of capital murder for killing William Lynn during the commission of a robbery, and Price was subsequently sentenced to death. *See Price v. State*, 725 So. 2d 1003, 1011 (Ala. Crim. App. 1997), *aff'd sub nom. Ex parte Price*, 725 So. 2d 1063 (Ala. 1998). Price filed a direct appeal of both his conviction and death sentence, but both were affirmed. *See Price*, 725 So. 2d at 1062, *aff'd*,

[1] Price's Notice of Appeal makes clear that he appeals from "any and all adverse rulings incorporated in, antecedent to, or ancillary to" those orders.

725 So. 2d 1063 (Ala. 1998). Price's conviction and sentence became final in May 1999 after the Supreme Court denied his petition for writ of certiorari. *See Price v. Alabama*, 526 U.S. 1133 (1999).

Price then filed a state post-conviction Rule 32 petition, but the petition was denied, and the Court of Criminal Appeals of Alabama affirmed. *See Price v. State*, 880 So. 2d 502 (Ala. Crim. App. 2003). The Alabama Supreme Court denied certiorari review. *Ex parte Price*, 976 So. 2d 1057 (Ala. 2003).

Later, Price filed a petition for writ of habeas corpus in the Northern District of Alabama. The district court issued an opinion denying the petition with prejudice and entering judgment against Price. We affirmed that judgment. *See Price v. Allen*, 679 F.3d 1315, 1319-20 (11th Cir. 2012) (per curiam). The Supreme Court also denied Price's petition for writ of certiorari. *Price v. Thomas*, 568 U.S. 1212 (2013).

Price filed a successive state post-conviction Rule 32 petition in 2017, arguing that his death sentence was unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016). That petition was also denied, and the Court of Criminal Appeals of Alabama affirmed. *Price v. State*, No. CR-16-0785, 2017 WL 10923867 (Ala. Crim. App. Aug. 4, 2017), *reh'g denied* (Sept. 8, 2017). The Alabama Supreme Court denied certiorari.

Following his direct criminal appeals and after the State moved the Alabama Supreme Court to set an execution date, Price brought a civil lawsuit under 42 U.S.C.

§ 1983 alleging that the Alabama Department of Corrections's ("ADOC") use of midazolam in its three-drug lethal-injection protocol violates the Eighth Amendment's ban on cruel and unusual punishment because it is not effective in rendering an inmate insensate during execution (the "first § 1983 action"). The district court held a bench trial on Price's § 1983 claim. But the district court bifurcated the trial, addressing only whether Price could meet his burden of showing that his chosen alternative drug—pentobarbital—was available to the ADOC. The district court found in favor of the ADOC and against Price. It concluded that Price had failed to meet his burden of showing that pentobarbital was a feasible and available drug for use by the ADOC.

Price appealed and, on September 18, 2018, we affirmed. *Price v. Comm'r, Ala. Dep't of Corr.*, 752 F. App'x 701 (11th Cir. 2018). Price recently filed a petition for writ of certiorari with the Supreme Court of the United States. That petition is currently pending.

II. Facts Relevant to this Appeal

While the appeal of Price's first § 1983 action was pending before this Court, the Alabama legislature amended the State's execution statute to add nitrogen hypoxia as an approved method of execution. The amendment became effective on June 1, 2018. *See* Ala. Code § 15-18-82.1. The statute reads, in relevant part, "A death sentence shall be executed by lethal injection, unless the person sentenced to

death affirmatively elects to be executed by electrocution or nitrogen hypoxia." Ala. Code § 15-18-82.1(a). The statute also provides that the election of death by nitrogen hypoxia is waived unless it is personally made by the inmate in writing and delivered to the warden within thirty days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death. Ala. Code § 15-18-82.1(b)(2). If a judgment was issued before June 1, 2018, as was the case with Price, the election must have been made and delivered to the warden within thirty days of June 1, 2018. *See Id.*

On January 11, 2019, the State moved the Alabama Supreme Court to set an execution date for Price. The Alabama Supreme Court granted the motion on March 1, 2019, ordering that Price be executed on April 11, 2019, by lethal injection.

In the meantime, on January 27, 2019, Price wrote a letter to the warden of Holman asking that he be executed by nitrogen hypoxia.[2] The warden responded by notifying Price that his request was past the thirty-day deadline set forth in the statute. Nevertheless, she further noted that she did not have the authority to grant, deny, or reject the request, and she indicated that any further consideration of the

[2] Price suggests that he was unaware of the ability to elect nitrogen hypoxia as a means of execution until his pro bono counsel, Aaron Katz, called Federal Public Defender John Palombi on January 12, 2019. According to Price, during that phone conversation, Palombi "informed Attorney Katz about the Alabama legislature's March 2018 amendments to the State's execution protocol." However, as we note later in this opinion, our opinion in Price's first § 1983 action, which we issued in September 2018, specifically referenced the fact that Alabama had adopted nitrogen hypoxia as a means of execution. We further noted that Price apparently had not elected this option.

matter needed to go through Price's attorney to the Attorney General's Office. Price's attorney then reached out to the Attorney General's Office and reiterated Price's desire to "opt in to the nitrogen hypoxia protocol." Assistant Attorney General Henry Johnson denied the request, citing the thirty-day period to opt into the protocol.

On February 8, 2019, (approximately one month after the State sought an execution date), Price filed a civil complaint against the Commissioner of the ADOC and others. The new complaint set forth a § 1983 claim in which Price realleged many of the claims raised in his previous § 1983 action concerning the three-drug lethal-injection protocol (the "second § 1983 action"). For example, Price claims that the use of midazolam as the first drug in its three-drug lethal-injection protocol violates the Eighth Amendment's ban on cruel and unusual punishment. The complaint in the second § 1983 action also alleges that the State violated Price's Fourteenth Amendment right to equal protection by refusing to allow him to elect nitrogen hypoxia as his method of execution. With respect to that claim, Price contended that the State entered into "secret agreements" with many death row inmates allowing them to elect nitrogen hypoxia but would not allow him to do so outside of the 30-day opt-in period.[3]

[3] The complaint in the second § 1983 action further alleges that the State failed to take steps to prevent material deviations from its lethal-injection procedures in future executions, but Price abandoned that claim, as he did not argue it to the district court below, and it is not part of

III. Discussion

We review *de novo* an order on summary judgment. *Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017). As for the district court's denial of Price's motion for stay of execution, we review that for abuse of discretion. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). With respect to the district court's factual findings, we review those for clear error. *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). Under this standard, we may not reverse "simply because we are convinced that we would have decided the case differently." *Id.* (cleaned up).

Finally, we may grant Price's motion for stay of execution filed in this Court only if Price establishes that "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; *and* (4) if issued, the injunction would not be adverse to the public interest." *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1321 (11th Cir. 2016) (quoting *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (emphases in original)), *abrogated on other grounds by Bucklew v. Precythe*, No. 17-8151, 2019 WL 1428884, at *10 (U.S. Apr. 1, 2019). The "first and most important question" regarding a stay of execution is whether the petitioner

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the present appeal. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) (claims or arguments not briefed before an appellate court are deemed abandoned and will not be addressed).

is substantially likely to succeed on the merits of his claims. *Jones v. Comm'r. Ga. Dep't of Corr.*, 811 F.3d 1288, 1292 (11th Cir. 2016).

After careful consideration, we conclude that the district court did not err when it denied Price's Cross-Motion for Summary Judgment, although our basis for affirmance differs from the grounds set forth by the district court. We further find that the district court did not abuse its discretion when it denied Price's initial and renewed motions for preliminary injunction in which he sought a stay of execution. Finally, we deny Price's motion for stay of execution because he has not satisfied the requirements for such a stay.

We now examine each of Price's claims in turn.

A. Fourteenth Amendment Equal Protection Claim

Price contends that the State violated his Fourteenth Amendment right to equal protection by not permitting him to elect nitrogen hypoxia as a method of execution. To prevail on his equal-protection claim, Price must first show that "the State will treat him disparately from other similarly situated persons." *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (quoting *DeYoung v. Owens*, 646 F.3d 1319, 1327 (11th Cir. 2011)). Second, "[i]f a law treats individuals differently on the basis of . . . [a] suspect classification, or if the law impinges on a fundamental right, it is subject to strict scrutiny." *Id.* (quoting *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009)). Otherwise, Price "must

show that the disparate treatment is not rationally related to a legitimate government interest." *Id.* (quoting *DeYoung*, 646 F.3d at 1327–28).

The district court did not err in denying Price's equal-protection claim. Importantly, Price has not demonstrated that he was or will be treated differently than similarly situated inmates. Although Price appeared to initially contend that the State made "secret agreements" with other death-row inmates—suggesting that these inmates elected to opt in to the nitrogen hypoxia protocol outside of the thirty-day window—he seems to now concede that these other inmates made their election within the thirty-day window.

The record reveals that Price had the same opportunity as every other inmate to elect nitrogen hypoxia as his method of execution. When the State added nitrogen hypoxia as a statutorily viable method of execution in June 2018, all inmates whose death sentences were final as of June 1, 2018, received a thirty-day period to elect nitrogen hypoxia. *See* Ala. Code § 15-18-82.1(b)(2). Significantly, Price was represented by counsel when the State added nitrogen hypoxia as a method of execution.

According to the State, all death-row inmates at Holman, including Price, were provided with a copy of an election form, and forty-eight of those inmates timely elected nitrogen hypoxia. Price did not. The record contains the affidavit of Captain Jeff Emberton, who attested to the fact that, in mid-June 2018, after the State

authorized nitrogen hypoxia as a method of execution, the warden of Holman directed him to provide every death-row inmate an election form and an envelope. According to Emberton, he delivered the form to every death-row inmate at Homan as instructed. The form identified Act 2018-353 (which amended Ala. Code. § 15-18-82.1 to include nitrogen hypoxia) and allowed for the inmate to state that he was making the election of nitrogen hypoxia as the means of execution.[4] Price did not contend that he did not receive the form or that he was not given the option to make the same election.

In sharp contrast to other inmates who opted for the protocol by the July 1, 2018, deadline, Price waited until late January 2019 to seek to elect nitrogen hypoxia for his execution. Price appears to argue that the ADOC's provision of the election form was insufficient. But Price was represented by counsel, so any doubts Price

[4] The form stated as follows:

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia.

Dated this _____ day of June, 2018.

_____ _____

Name/Inmate Number Signature

ECF No. 19-2. The State admits though that it did not create the election form. Rather, it claims the Federal Public Defender's Office created the form and gave a copy of it to the warden of Holman. But inmates not represented by the Federal Public Defender's Office were among those who timely completed the form.

had about the form could have been resolved by consulting with his attorney. Plus, several other inmates were able to make the timely election based on the provision of the form by the State. Price takes issue with the fact that most of the inmates that timely elected nitrogen hypoxia were represented by the Federal Public Defender's Office and that they were given an explanation of their rights by that office before receiving the form. But as we have noted, Price was also represented by counsel, and he could have asked for an explanation of the form. Nor does Price make any Sixth Amendment claim, in any event. Finally, the interactions between other inmates and the Federal Public Defender's Office do not support any unequal treatment by *the State* of similarly situated individuals.

Further, to the extent Price claims that he did not become aware of the change in law until January 2019, he has not asserted that the State treated Price differently than other death-row inmates with respect to this information. Moreover, the 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. *See Price*, 752 F. App'x at 703 n.3.

Because Price did not timely elect the new protocol, he is not similarly situated in all material respects to the inmates who did make such an election within the thirty-day timeframe. And because Price has not shown that he is similarly situated

to those inmates, he cannot demonstrate any equal-protection violation due to the State's denial of execution by nitrogen hypoxia. But even if Price were similarly situated to the other death-row inmates, he cannot establish an equal-protection violation because he was treated exactly the same as the other inmates. Every inmate was given thirty days within which to elect nitrogen hypoxia as their method of execution. Ironically, if the State *did* allow Price to make the belated election he seeks, it would be treating him differently than other death-row inmates who were not afforded the same benefit.

In the end, it appears that Price takes issue with the thirty-day election period itself, arguing that it is arbitrary. But even considering Price's claim as a challenge to the statute itself—that it treats similarly situated death-row inmates differently based on a criterion (a thirty-day election) that does not rationally further any legitimate state interest—the claim fails. As noted by the district court, a statute is presumed constitutional, and a classification not involving fundamental rights nor proceeding along suspect lines "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (citations omitted). Here, a rational basis exists for the thirty-day rule—the efficient and orderly use of state resources in planning and preparing for executions. And Price

has not negated this rational basis for the thirty-day election requirement.[5] *See id.* (noting "[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it").

B. Eighth Amendment Claim

The Supreme Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015), sets forth the relevant two-pronged standard a plaintiff must meet to succeed on an Eighth Amendment method-of-execution claim.

Prisoners cannot succeed on a method-of-execution claim unless they can establish that the method challenged presents a risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and gives rise to 'sufficiently *imminent* dangers.'" *Id.* (emphasis in original) (quoting *Baze*, 553 U.S. at 50 (plurality opinion) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). The Supreme Court further elaborated in *Baze*, "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual" punishment prohibited by the Eighth Amendment. *Baze*, 553

[5] On appeal, Price claims that the district court committed error in refusing to apply strict scrutiny to the State's alleged differential treatment of him. He argues that once the district court concluded he was substantially likely to prevail on his allegation that the State's lethal-injection protocol will cause him severe pain and needless suffering, it should have applied strict scrutiny to his equal-protection claim, since the right to be free from cruel and unusual punishment is a fundamental right. We do not evaluate this argument of Price's, as we conclude that binding precedent requires us to find on this record that Price is not substantially likely to prevail on his allegation that the State's lethal-injection protocol will cause him severe pain.

U.S. at 50. So to prevail on a method-of-execution claim, an inmate 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.'" *Glossip*, 135 S.Ct. at 2737 (quoting *Baze*, 553 U.S. at 50 (plurality opinion) (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, and n. 9 (1994)).

The inmate must also "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 52). Where a prisoner claims a safer alternative to the State's lethal-injection protocol, he cannot make a successful challenge by showing a "slightly or marginally safer alternative." *Id.* (quoting *Baze,* 553 U.S. at 51). Death-row inmates face a heavy burden.

The Supreme Court recently reiterated an inmate's burden in an Eighth Amendment method-of-execution challenge in *Bucklew v. Precythe*, No. 17-8151, 2019 WL 1428884, at *8 (U.S. Apr. 1, 2019). As summarized by the Court, a prisoner "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.*

In reaffirming this standard, however, the Supreme Court recognized the burden an inmate has under the *Baze-Glossip* test can be "overstated." *Id.* at *10. It

clarified that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Id.* So a petitioner can identify a "well-established protocol in another State as a potentially viable option." *Id.* Justice Kavanaugh noted that all nine Justices agreed on this point. *Id.* at *16 (Kavanaugh, J., concurring) (citing *Arthur v. Dunn*, 580 U.S. __, 137 S. Ct. 725, 733-34 (2017) (Sotomayor, J. dissenting from denial of certiorari)).

For this reason, a portion of our decision in *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), has been abrogated by *Bucklew*. In particular, in *Arthur*, we determined that a proposed method of execution (death by firing squad) was not an available alternative because the state in which the inmate would be executed did not authorize it. *Id.* at 1317-18. We made this determination despite the fact that another state authorized the particular method of execution proposed by the inmate. *Id.* But *Bucklew* demonstrates our conclusion in *Arthur* was incorrect. Having clarified the applicable law, we turn to the *Baze-Glossip* test in reverse order, tackling the availability issue first.

1. Price has shown that nitrogen hypoxia is an available alternative method of execution that is feasible and readily implemented

Price claims that nitrogen hypoxia is an available method of execution for him because the Alabama legislature has authorized it. In proposing nitrogen hypoxia as an alternative to the State's midazolam lethal-injection protocol, Price emphasizes

that he is merely seeking to be executed by a method of execution that the Alabama legislature, "after considerable thought, has expressly authorized." He also argues that nitrogen hypoxia is feasible and readily implemented because pure nitrogen gas is easily purchased. No supply concerns exist for nitrogen, and counsel for Price notes that he was recently able to easily purchase a tank of 99.9% pure compressed nitrogen gas.

The State retorts that nitrogen hypoxia is not an available method of execution to Price as a matter of state law because he failed to make a timely election under the applicable statute. It also claims nitrogen hypoxia is neither feasible nor readily implemented at this date, since the ADOC has not yet finalized a nitrogen hypoxia protocol, and it is not likely that one will be in place by April 11, 2019. Finally, the State asserts Price did not meet his burden to prove a known and available alternative method of execution because he did not provide sufficient details of how the State could induce nitrogen hypoxia.

To resolve this issue, we turn to *Bucklew* for guidance. *Bucklew* sheds some light on the "availability" prong of the *Baze-Glossip* test, and it specifically addresses an inmate's proposal of nitrogen hypoxia as an alternative method of execution.

In *Bucklew*, the Supreme Court determined that the inmate had not presented a triable question on the viability of nitrogen hypoxia as an alternative to lethal

injection for two reasons. First, the Court noted, to establish that a proposed alternative method is available, an inmate must do more than show that it is theoretically "feasible"; he must also show that it is "readily implemented." *Bucklew*, 2019 WL 1428884, at *11 (citing *Glossip*, 135 S. Ct. at 2737-38). To meet this burden, the inmate's proposed alternative must be "sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" *Id.* (quoting *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017); *Arthur*, 840 F.3d at 1300).

The Court in *Bucklew* found that the inmate had failed to meet this burden because he presented no evidence on details such as how nitrogen gas would be administered, in what concentration, and for how long the gas would be administered. *Id.* The inmate also did not suggest how the State could ensure the safety of the execution team. *Id.* Instead, the inmate pointed only to reports from correctional institutions in other states revealing that additional study was needed to put in place a protocol for execution by nitrogen hypoxia. *Id.*

Second, the Court in *Bucklew* determined that the State had a legitimate reason for not switching its current lethal-injection protocol: nitrogen hypoxia was an "entirely new method—one that had 'never been used to carry out an execution' and had 'no track record of successful use.'" *Id.* (quoting *McGehee*, 854 F.3d at 493). The Court concluded by stating that the Eighth Amendment "does not compel a State

to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution." *Id.* (quoting *Baze*, 553 U.S. at 41).[6]

Here, the State argues that although the Code of Alabama now contemplates nitrogen hypoxia as a means of execution, it is not "available" because the ADOC is still developing a protocol, and the process will not be complete in time for Price's April 11, 2019, execution. We are not persuaded. If a State adopts a particular method of execution—as the State of Alabama did in March 2018—it thereby concedes that the method of execution is available to its inmates. Unlike in *Bucklew*, where the inmate proposed the adoption of a new method, here, the State of Alabama chose, on its own, and after careful consideration, to offer nitrogen hypoxia as a method of execution for its death-row inmates. So unlike the inmate in *Bucklew*, Price is not attempting to "compel" the State to adopt a different and new method of execution at all. The method was already adopted well before Price's Eighth Amendment challenge—and more than a year before Price's scheduled execution date.

A State may not simultaneously offer a particular method of execution and deny it as "unavailable." Rather, because the State voluntarily included nitrogen

[6] The Supreme Court did note, however, while the case was pending, a "few" states had authorized nitrogen hypoxia as a method of execution. *Bucklew*, 2019 WL 1428884, at *11 n.1. But, it emphasized, "[t]o date, no one in this case has pointed us to an execution in this country using nitrogen gas." *Id.*

hypoxia in its statute, we reject the State's argument that nitrogen hypoxia is not "available" to Price simply because the State has not yet developed a protocol to administer this method of execution. If we were to find otherwise, it would lead to an absurd result. States could adopt a method of execution, take no action at all to implement a protocol to effectuate it, and then defeat an inmate's Eighth Amendment challenge by simply claiming the method is not "available" due to a lack of protocol.

Roughly two years ago, the Alabama legislature introduced a bill that would make nitrogen hypoxia a statutorily authorized method of execution in Alabama. The bill was also passed and enacted into law more than a year ago, and inmates have been electing nitrogen hypoxia since June 2018. Under these circumstances, we cannot agree that nitrogen hypoxia is not available in the State of Alabama. Indeed, Alabama's official legislature-enacted policy is that nitrogen hypoxia is an available method of execution in the State.

We also reject the State's suggestion that nitrogen hypoxia is not available to Price only because he missed the 30-day election period. If nitrogen hypoxia is otherwise "available" to inmates under *Bucklew*, that the State chooses to offer the chance to opt for it for a period of only 30 days does not somehow render it "unavailable" by *Bucklew*'s criteria. To the contrary, for the same reason that *Bucklew* abrogates *Arthur*'s requirement that a state offer a method of execution for

it to be "available," *Bucklew* renders a state's time limit on a given execution option of no moment to whether that option is "available."

The closer question is whether Price's alleged lack of detail with respect to *how* the State would implement his execution by nitrogen hypoxia defeats his Eighth Amendment claim. We agree 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 proposes a new method of execution. But under the particular circumstances here—where the State by law previously adopted nitrogen hypoxia as an official method of execution—we do not believe that was Price's burden to bear. Rather, an inmate may satisfy his burden to demonstrate that the method of execution is feasible and readily implemented by pointing to the executing state's official adoption of that method of execution.

True, in *Bucklew*, the Supreme Court discussed how Bucklew had failed to set forth evidence of essential questions like how the nitrogen gas would be administered, and it used this as a basis to defeat the Eighth Amendment claim. But as we have noted, a key distinction between *Bucklew* and our case is present. Again, in *Bucklew*, the *inmate* was *proposing* a new alternative method of execution that had not yet been approved by the state. And in addressing whether the suggested alternative method was "feasible" and "readily implemented," the Supreme Court

explained that the *inmate's proposal* must be sufficiently detailed. *Bucklew*, 2019 WL 1428884, at *11.

Here, Price did not "propose" a new method of execution; he pointed to one that the State already made available. The State, on its own, had already adopted nitrogen hypoxia as an alternative to lethal injection. Under these circumstances, the State bears the responsibility to formulate a protocol detailing how to effectuate execution by nitrogen hypoxia. Indeed, 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 particular method of execution and is required to develop a protocol for it, anyway. For these reasons, we conclude that Price's lack of detail as to how the State would implement death by nitrogen hypoxia does not prevent him from establishing that this method of execution is available to him.

Finally, we acknowledge the potential for abuse in delaying execution that a state's decision to make multiple methods of execution available could present. Under *Bucklew*, 2019 WL 1428884, at *14 (citation and quotation marks omitted), "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." So to the extent that a particular available method of death reasonably requires a certain period for the state to prepare for execution, a prisoner may not successfully seek execution by an alternative method inside that window of time. But this is not that case.

Here, Price sought execution by nitrogen hypoxia in January 2019, and his execution is not scheduled to occur until April 11, 2019. While the State has not yet developed a protocol for execution by nitrogen hypoxia, it has submitted no evidence to suggest that once it has satisfied its burden to develop its execution-by-nitrogen-hypoxia protocol, preparing to carry out execution by nitrogen hypoxia will reasonably require more than two-and-one-half months.

2. Price has not established a substantial likelihood that he would be able to show that nitrogen hypoxia significantly reduces a substantial risk of pain when compared to the three-drug protocol

Nevertheless, Price cannot succeed on his Eighth Amendment challenge because he has not shown that nitrogen hypoxia will "significantly reduce a substantial risk of severe pain." *Bucklew*, 2019 WL 1428884, at *12. As the Supreme Court in *Bucklew* recently indicated, a minor reduction in risk is not enough; "the difference must be clear and considerable." *Id.* at *12. Here, Price has failed to meet that standard.

As an initial matter, we reject Price's contention that, by not moving for summary judgment on this issue, the State has somehow conceded that a genuine issue of material fact exists with respect to whether its lethal-injection protocol carries a substantial risk of causing severe pain. At this stage, where Price seeks a stay of execution, he bears the burden to show that a substantial likelihood of success on the merits exists. And, during the hearing before the district court, the State

contended that its three-drug lethal-injection protocol using midazolam was a safe and effective constitutional method of execution.

In the district court, Price pointed to two things to support his motion: (1) the declaration of his expert Dr. David Lubarsky, which he also presented during his appeal on the first § 1983 action; and (2) a decision by a district court in the Southern District of Ohio—*In re Ohio Execution Protocol Litigation*, No. 11-cv-1016, 2019 WL 244488, at *70 (S.D. Ohio Jan. 14, 2019). Dr. Lubarsky's declaration contains his opinion that midazolam will not provide adequate analgesic effects during Price's execution. And Price relies on the Southern District of Ohio's opinion because the court there found Ohio's lethal injection protocol—which uses midazolam—"will certainly or very likely cause [an inmate] severe pain and needless suffering."

The State submitted nothing on the record in response to contest Dr. Lubarsky's assertions. Rather, it relied on the evidence it submitted in Price's first § 1983 action. But the district court never reached this question in the first § 1983 action, and the State failed to file its evidence on this issue in the pending matter. As a result, the record contains only Dr. Lubarsky's uncontested assertions that the State's use of midazolam in the three-drug protocol presents a substantial risk of severe pain to Price. So the district court's conclusion that Price satisfied his burden

to establish that lethal injection carries a substantial risk of severe pain cannot be clearly erroneous, since the only evidence of record supports that conclusion.

Nevertheless, the district court did clearly err in concluding that Price had met his burden to show that execution by nitrogen hypoxia presented an alternative that would significantly reduce the risk of substantial pain to Price. The district court based its finding in this regard on Dr. Lubarsky's declaration in the first § 1983 action appeal and on a report from East Central University. But Dr. Lubarsky's declaration did not compare the effectiveness of the current three-drug protocol to the proposed use of nitrogen hypoxia.[7]

And Price's reliance on the East Central University report entitled "Nitrogen Induced Hypoxia as a Form of Capital Punishment," in which the authors studied nitrogen hypoxia, is also problematic. Importantly, the report is a preliminary draft report that is stamped with the words "Do Not Cite." So we cannot conclude that Price's reliance on this report alone could satisfy his burden to show that execution by nitrogen hypoxia would significantly reduce the risk of substantial pain to Price. And in the absence of the East Central University report, the district court was left without any evidence supporting a conclusion that nitrogen is not likely to result in any substantial physical discomfort during executions. Consequently, we find that

[7] The district court likewise recognized that Dr. Lubarsky offered no opinion regarding the comparison between the pain incurred with the lethal-injection protocol and that incurred with the administration of nitrogen hypoxia.

the district court clearly erred when it found that Price satisfied his burden to establish that nitrogen would likely not result in substantial physical discomfort to Price. The district court simply had no reliable evidence upon which to make this determination.

We further note that the report itself also did not compare the two methods of execution, and to the extent Price claims he would feel like he was suffocating if executed by lethal injection, the petitioner in *Bucklew* admitted that feelings of suffocation could also occur with nitrogen gas. *Bucklew*, 2019 WL 1428884, at *13. Likewise, the record in *Bucklew* supported the conclusion that the petitioner could be capable of feeling pain for 20 to 30 seconds when nitrogen is used for an execution. *Id.* The Court also recognized expert testimony that suggested the effects of nitrogen could vary depending on how it was administered. *Id*. In short, the district court clearly erred when it concluded Price had satisfied his burden to establish that nitrogen hypoxia would significantly reduce a substantial risk of severe pain. For these reasons, Price has failed to show a substantial likelihood of success on the merits of his claim.

IV. Conclusion

For the foregoing reasons, we affirm the district court's denial of Price's Cross-Motion for Summary Judgment as well as its denial of Price's original and renewed motions for preliminary injunction. And because Price has not satisfied his

burden to show a substantial likelihood of success on the merits with respect to either his Fourteenth Amendment equal-protection claim or his Eighth Amendment method-of-execution claim, we deny his emergency motion to stay his execution.

AFFIRMED and MOTION FOR STAY DENIED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CHRISTOPHER LEE PRICE, **Plaintiff,**	)	
v.	)	**CIVIL ACTION: 1:19-00057-KD-MU**
JEFFERSON S. DUNN, *et al.*, **Defendants.**	)	

ORDER

This matter is before the Court on Plaintiff's Fed.R.Civ.P. 60(b)(6) "Motion for Relief from Judgment and for Reconsideration," seeking relief from the Court's April 5, 2019 Order denying his cross-motion for summary judgment and emergency motion to stay his April 11, 2019 execution (Docs. 32, 33) and Plaintiff's renewed motion for preliminary injunction (Doc. 34).

Under Rule 60(b), "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed.R.Civ.P. Rule 60(b). Thus, Rule 60(b)(6) is the "catch-all" provision, providing for relief from judgment for "any other reason that justifies relief." However, to satisfy Rule 60(b)(6), Price "must demonstrate 'that the

circumstances are sufficiently extraordinary to warrant relief. Even then, whether to grant the requested relief is ... a matter for the district court's sound discretion.'" Grant v. Pottinger-Gibson, 2018 WL 834895, *3 (11th Cir. Feb. 13, 2018) (quoting Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1317 (11th Cir. 2000) (omission in original) (internal quotation marks omitted)).

Upon consideration, the motion is due to be denied. 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.

Second, concerning his Equal Protection claim under the Fourteenth Amendment, Price asserts that because the Court concluded that the midazolam based lethal injection protocol is likely to cause him severe pain when compared to execution by nitrogen hypoxia, a strict scrutiny review is required (versus rational basis). From this, Price argues that once the

heightened level of scrutiny is applied, Alabama's "arbitrary" thirty-day election period for nitrogen hypoxia fails the test. However, the Court did not find that the 3-drug midazolam based protocol is a cruel and unusual punishment. As such, the heightened standard of strict scrutiny does not apply to his claim.

Based on the foregoing, it is **ORDERED** that the Plaintiff's Rule 60(b)(6) motion is **DENIED.** Plaintiff's renewed motion for preliminary injunction is also **DENIED**.

DONE and **ORDERED** this the **6th** day of **April 2019.**

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CHRISTOPHER LEE PRICE,	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION: 1:19-00057-KD-MU**
	)	
JEFFERSON S. DUNN, *et al.*,	)	
Defendants.	)	

ORDER

This matter came before the Court on April 4, 2019 for a hearing regarding Plaintiff's Emergency Motion for Preliminary Injunction seeking a Stay of Execution (Doc. 28); Defendants' Motion for Summary Judgment (Doc. 19), Plaintiff's Response/Cross-Motion for Summary Judgment (Doc. 29) and Defendants' Reply (Doc. 31). The Court addresses the Motion to Stay by reviewing the merits of the parties' cross motions for summary judgment and the evidence submitted in support. Upon consideration, the Court finds that Price's motion for summary judgment and his motion to stay are **DENIED**.

I. Background and Undisputed Facts

This case concerns the execution protocol for a State of Alabama death row inmate at the Holman Correctional Facility (Holman). Specifically, inmate Plaintiff Christopher Lee Price (Price)'s execution date is set for April 11, 2019. (Doc. 19-5). Price is presently scheduled to be executed via the three (3) drug midazolam hydrochloride based lethal injection protocol. Price seeks execution via a nitrogen hypoxia protocol instead. Price alleges that by refusing to execute him via nitrogen, the State of Alabama is violating his rights under the Eighth Amendment and the equal protection clause of the Fourteenth Amendment.

A. Background

Price has been on death row at Holman since 1993, following a capital murder conviction for the 1991 murder of William Lynn. As summarized by the Eleventh Circuit:

> Price was indicted for intentionally causing Bill Lynn's death during a robbery in the first degree. *See Price v. State,* 725 So.2d 1003, 1062 (Ala. Crim. App. 1997), *aff'd sub nom*. *Ex parte Price*, 725 So.2d 1063 (Ala. 1998). Following a jury trial, Price was convicted and sentenced to death for Lynn's murder. *Id*. at 1011. Though Price filed a direct appeal of his conviction and death sentence, both were affirmed. *See id.* at 1062, *aff'd*, 725 So.2d 1063 (Ala. 1998). Price's conviction and sentence became final in May 1999 after the Supreme Court denied his petition for writ of certiorari to the Supreme Court of Alabama. *See Price v. Alabama*, 526 U.S. 1133…(1999).
>
> Price then filed a state post-conviction Rule 32 petition, but the petition was denied, and the Court of Criminal Appeals of Alabama affirmed the dismissal. *See Price v. State*, 880 So.2d 502 (Ala. Crim. App. 2003). The Alabama Supreme Court denied certiorari review. *Ex parte Price*, 976 So.2d 1057 (Ala. 2006).
>
> Later, Price filed a petition for writ of habeas corpus in the Northern District of Alabama. The district court issued an opinion denying the petition with prejudice and entering judgment against Price. This Court affirmed that judgment. *See Price v. Allen*, 679 F.3d 1315, 1319–20, 1327 (11th Cir. 2012) (per curiam). The Supreme Court also denied Price's petition for writ of certiorari. *Price v. Thomas*, 568 U.S. 1212…(2013).

Price v. Commissioner, Ala. Dept. of Corr., 752 Fed. Appx. 701, 703 (11th Cir. 2018).

In 1995, Alabama executed inmates by electrocution. That changed on July 1, 2002, when the Alabama legislature adopted lethal injection as the state's preferred form of execution. Arthur v. Commissioner, Ala. Dept. of Corr., 840 F.3d 1268, 1274 (11th Cir. 2016); Brooks v. Warden, 810 F.3d 812, 823 (11th Cir. 2016). At that time, the Alabama Department of Corrections ("ADOC") began using a three (3) drug lethal injection protocol as its default method of execution (instead of electrocution, as death row inmates from that point forward had to affirmatively elect electrocution). Id. From 2002-April 2011, the first drug was sodium thiopental, but from April 2011 through September 10, 2014, Alabama changed the protocol to

use penobarbital as the first drug. Id. However, due to pentobarbital's increasing unavailability, starting on September 11, 2014, and continuing to the present, the ADOC substituted midazolam hydrochloride for pentobarbital as the first drug. Id.

On September 11, 2014, the State of Alabama moved for the Alabama Supreme Court to set an execution date for Price. This prompted Price's October 8, 2014 action in this Court -- his first Section 1983 case -- Price v. Thomas et al., CV 1:14-00472-KD-C (S.D. Ala.), challenging the constitutionality of the ADOC's three (3) drug lethal injection protocol as unconstitutionally cruel and unusual. See also Price v. Dunn, 2017 WL 1013302 (S.D. Ala. Mar. 15, 2017). In March 2015, the State asked the Alabama Supreme Court to hold the execution motion in abeyance pending resolution of Glossip v. Gross, 135 S.Ct. 2726 (2015), a challenge to a three (3) drug midazolam protocol functionally identical to Alabama's. The court granted the motion.

Later in 2015, the Supreme Court held in part that the inmate petitioners in Glossip had failed to establish an Eighth Amendment violation because they failed to identify an available alternative method of execution that entailed a lesser risk of pain. Following Glossip, the State moved to dismiss Price's Section 1983 complaint, but the Court allowed Price to amend his complaint. As an alternative to the midazolam protocol, Price proposed the use of compounded pentobarbital or sodium thiopental. The parties engaged in discovery, culminating in a non-jury trial in December 2016 on the sole issue of the availability of an alternative method of execution to the State's midazolam included execution protocol On March 15, 2017, this 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. (Doc. 107 -- CV 1:14-00472-KD-C).

On September 19, 2018, after holding oral argument, the Eleventh Circuit affirmed this

Court's decision and denied rehearing on December 26, 2018. The Eleventh Circuit's mandate issued January 3, 2019. Price is now pursuing *certiorari* review before the Supreme Court.

On March 22, 2018, the ADOC's injection protocol changed again. Through Act 2018-353, nitrogen hypoxia became a statutorily approved method of execution in the State of Alabama (death row inmates could elect for this protocol, as specified by the statute, instead of execution via the midazolam three (3) drug protocol).

On February 8, 2019, Price filed *this* Section 1983 claim to enjoin the State from executing him via the midazolam three (3) drug protocol. (Doc. 1). Price alleges three (3) causes of action against the Defendants (the State): 1) violation of the Eighth Amendment's ban on cruel and unusual punishment (first cause of action); 2) violation of his Fourteenth Amendment equal protection rights for failure to consistently comply with execution protocol (second cause of action)[1]; and 3) violation of his Fourteenth Amendment equal protection rights due to the State's refusal to allow him to elect nitrogen hypoxia (third cause of action). (Id.) As relief, Price seeks that this Court:

> ….Enjoin Defendants from executing Mr. Price using the lethal injection protocol that the State asserts that it adopted on September 10, 2014, as well as the inadequate anesthesia and execution procedures that violate Mr. Price's right to equal protection under the Fourteenth Amendment and his right to be free from cruel and usual punishment under the Eighth Amendment.
>
> ….Order Defendants to disclose to Mr. Price and his counsel the precise lethal injection protocol that will be used during Mr. Price's execution at least 90 days in advance of such execution, including a detailed description of the "consciousness checks" that will be utilized and the qualifications and training of the personnel designated to carry out such checks.
>
> …Enter a declaratory judgment that Defendants' proposed execution protocol, inadequate

[1] This cause of action has not been pursued in the current motions.

> anesthesia, and execution procedures violate Mr. Price's right to equal protection pursuant to the Fourteenth Amendment and….right to be free from cruel and unusual punishment pursuant to the Eighth Amendment….

(Id. at 31-32). On March 1, 2019, the Alabama Supreme Court scheduled Price's execution for April 11, 2019. (Doc. 19-5).

B. Alabama Code § 15-18-82.1(b)(2)

The nitrogen hypoxia execution protocol became a statutorily approved method of execution in the State of Alabama in March 2018, with an effective date of June 1, 2018. The applicable statute, Section 15-18-82.1(b)(2) Ala. Code, provides, in relevant part, that an inmate whose conviction was final prior to June 1, 2018, had thirty (30) 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 the nitrogen hypoxia method. In other words, an inmate such as Price had until **June 30** within which to so elect.

"The State of Alabama did not create a standardized election form for this purpose." (Doc. 19 at 11). Instead, on June 22, 2018, an election form was drafted by Spencer Hahn, Federal Defender with the office of the Federal Defenders (MDALA). (Doc. 29-3 at 2, 5 (Aff. Palombi)). On June 26, 2018, Hahn and John Palombi, Assistant Federal Defender (MDALA), met with eight (8) death row inmate clients at Holman -- which did not include Price -- and provided the form to them, explaining the details of same in the attorney-client context. (Doc. 29-3 at 2-3 (Aff. Palombi)). Following the Federal Defenders' visit, the Warden distributed blank reproductions of the form to death row inmates.

Specifically, per the State:

> ….all inmates sentenced to death prior to the adoption of nitrogen hypoxia as a method of

> execution were given a one-time thirty-day period in which to elect this method of execution immediately following the enactment of Alabama Act 2018-353. As the act was enacted on June 1, 2018 inmates had until June 30, 2018, to make this election. [ ] Every death-row inmate at Holman…including Price, was given an election form on the order of Warden Stewart…Defendants deny that they made any attempt to keep these election forms secret or that they entered into secret agreements…
>
> ***
>
> … inmates…had a thirty-day period from the enactment in which to elect nitrogen hypoxia. This period lasted from June 1–30, 2018….
>
> ***
>
> …All such inmates, including Price, were given the same thirty-day election period and an election form…

(Doc. 12 at 2-3, 6, 11 (footnotes omitted)). According to ADOC Captain Jeff Emberton (Emberton), the Warden directed him to give every death row inmate at Holman a copy of the form and an envelope, to complete and return to the Warden, if the inmate decided to make the election. Emberton attests as follows:

> In mid-June 2018, after Alabama introduced nitrogen asphyxiation as a method of execution, Warden Cynthia Stewart tasked me with giving every death row inmate an election form and an envelope. If an inmate wished to be executed by nitrogen asphyxiation, he was to sign and date the form and put it in the envelope, which would be delivered to Warden Stewart.
>
> … The form I handed out stated:
>
> ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA
>
> Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.
>
> This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.
>
> Dated this_____ day of June, 2018.
>
> …I delivered a form and an envelope to every death row inmate at Holman as instructed….

(Doc. 19-1 at 2-3 (Aff. Pemberton); Doc. 19-2 at 2. While Emberton states it was mid-June when the form was disbursed, it is not contested that the form used by the Warden was the one drafted on June 22, 2018 and given by the Federal Defender to his clients on June 26, 2018. Accordingly, Price could not have received the election form prior to June 22, 2018.

On summary judgment, the State produced nitrogen hypoxia election forms for three (3) prisoners, signed on June 26 or 27, 2018, which had been timely submitted to the Warden. (Doc. 19-6). Overall, 48 Alabama inmates elected nitrogen hypoxia. (Doc. 19 at 12). Price did not submit a nitrogen hypoxia election form to the Warden between June 1-30, 2018.

On January 11, 2019, the State asked the Alabama Supreme Court to set Price's execution date. According to Price, on January 12, 2019 his counsel first learned about inmates being able to elect to use nitrogen hypoxia. On January 27, 2019, counsel wrote a letter to the Warden attempting to elect nitrogen hypoxia for Price. In response, the Warden stated the request was "past the deadline of June 2018[,]" adding she did not "possess the authority to grant, deny or reject your request." (Doc. 19-3 (undated letter)). On February 4, 2019, Price's counsel contacted counsel for the State via e-mail asking to elect nitrogen hypoxia. (Doc. 29-2). Price's request was denied because the statutory thirty (30) day election period had expired. (Id.)

On February 8, 2019, Price initiated this litigation claiming that the State is violating his constitutional rights by refusing to allow him to elect nitrogen hypoxia for his execution. On March 1, 2019, the Alabama Supreme Court set Price's execution for April 11, 2019. (Doc. 19-5).

II. Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Rule 56(c) provides as follows:

> ***(c) Procedures***
> ***(1) Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> **(A)** citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> **(B)** showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
>
> ***(2) Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
>
> ***(3) Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.
>
> ***(4) Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

FED.R.CIV.P. Rule 56(c).

The party seeking summary judgment bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the nonmoving party fails to make "a sufficient showing on an

essential element of her case with respect to which she has the burden of proof," the moving party is entitled to summary judgment. Celotex, 477 U.S. at 323. "In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998-999 (11th Cir. 1992).

The applicable Rule 56 standard is not affected by the filing of cross-motions for summary judgment. See, e.g., Am. Bankers Ins. Group v. United States, 408 F.3d 1328, 1331 (11th Cir. 2005); Gerling Global Reins. Corp. of Am. v. Gallagher, 267 F.3d 1228, 1233 (11th Cir. 2001). "Cross-motions….will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed…." United States v. Oakley, 744 F.2d 1553, 1555 (11th Cir. 1984) (citation omitted). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." Muzzy Prods., Corp. v. Sullivan Indus., Inc., 194 F.Supp.2d 1360, 1378 (N.D. Ga. 2002). The Court has reviewed the facts and made its own examination of the record.

III. Discussion

At issue is Price's execution method -- the three (3) drug lethal injection protocol. Price contends that he should be able to elect the nitrogen hypoxia protocol instead.

A. Fourteenth Amendment -- Equal Protection

Price contends that the State has violated his equal protection rights under the Fourteenth Amendment by refusing to allow him to elect execution by nitrogen hypoxia.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1989). To state an equal protection claim, Price must show the State will treat him disparately from other similarly situated persons, and that such treatment interferes with a fundamental right, discriminates against a suspect class, or is not rationally related to a legitimate government interest. Arthur v. Thomas, 674 F.3d 1257, 1262 (11th Cir. 2012) (internal citations omitted) ("…Arthur first has to 'show that the State will treat him disparately from other similarly situated persons,'….Second, '[i]f a law treats individuals differently on the basis of...[a] suspect classification, or if the law impinges on a fundamental right, it is subject to strict scrutiny.'…Otherwise, Arthur must 'must show that the disparate treatment is not rationally related to a legitimate government interest.'…[]").

Alabama Code Section 15-18-82.1 provides in relevant part: "[t]he election for death by nitrogen hypoxia is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility within 30 days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death. *If a certificate of judgment is issued before June 1, 2018, the election must be made and delivered to the warden within 30 days of that date."* Ala. Code § 15-18-82.1(b)(2) (emphasis added). As expressed in Price, 752 Fed. Appx. at 703-704 at note 3:

> …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...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….. We have not been advised by either party that Price opted for death by nitrogen hypoxia, so his § 1983 claim is not moot.

The evidence reveals the existence of election forms submitted by death row inmates to the Warden at Holman. All death row inmates were given the same election form. Price does not allege that he was *not* given the form, or that he was *not* given the option to make the same election.

Price argues that his right to equal protection has been violated because he is being treated differently than similarly situated death row inmates "whom the State has agreed to execute using nitrogen hypoxia." And, although he did not timely elect execution by nitrogen hypoxia, Price contends that the State has no rational basis for refusing to let him join the class of inmates who did so elect.

Price points to three (3) actions by the State that violate his right to equal protection. First, Price contends that the State law is unconstitutional because it treats similarly situated people differently based on criteria (whether the inmate submitted a nitrogen hypoxia "election" form by June 30, 2018) that does not rationally further any legitimate state interest.

As stated, Price has to "show that the State will treat him disparately from other similarly situated persons." Price contends that for purposes of classifying inmates with respect to method of execution, an inmate's satisfaction of the June 30, 2018 deadline is not a "*'relevant'* difference between inmates that are otherwise identical." (Doc. 29-1 at 15). Price argues the deadline is "completely arbitrary" such that that State has no rational basis to use an inmate's timely election as the criterion for determining an inmate's execution protocol.

In analyzing whether there is a rational basis for the challenged legislative action, the Supreme Court has explained:

We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 2100–2101, 124 L.Ed.2d 211 (1993). See also, *e.g., Dandridge v. Williams,* 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) *(per curiam).* For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. See, *e.g., Beach Communications, supra,* 508 U.S., at 314–315, 113 S.Ct., at 2096; *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462, 108 S.Ct. 2481, 2489, 101 L.Ed.2d 399 (1988); *Hodel v. Indiana,* 452 U.S. 314, 331–332, 101 S.Ct. 2376, 2386–2387, 69 L.Ed.2d 40 (1981); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976) *(per curiam).* Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. See, *e.g., Nordlinger v. Hahn,* 505 U.S. 1, 11, 112 S.Ct. 2326, 2331–2332, 120 L.Ed.2d 1 (1992); *Dukes, supra,* 427 U.S., at 303, 96 S.Ct., at 2516. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger, supra,* 505 U.S., at 15, 112 S.Ct., at 2334. See also, *e.g., United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980); *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L.Ed.2d 480 (1959). Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, supra,* 508 U.S., at 313, 113 S.Ct., at 2101. See also, *e.g., Nordlinger, supra,* 505 U.S., at 11, 112 S.Ct., at 2334; *Sullivan v. Stroop,* 496 U.S. 478, 485, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Fritz, supra,* 449 U.S., at 174–179, 101 S.Ct., at 459–461; *Vance v. Bradley,* 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979); *Dandridge v. Williams, supra,* 397 U.S., at 484–485, 90 S.Ct., at 1161–1162.

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications, supra,* 508 U.S., at 315, 113 S.Ct. at 2098. See also, *e.g., Vance v. Bradley, supra,* 440 U.S., at 111, 99 S.Ct., at 949; *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 812, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976); *Locomotive Firemen v. Chicago, R.I. & P.R. Co.,* 393 U.S. 129, 139, 89 S.Ct. 323, 328, 21 L.Ed.2d 289 (1968). A statute is presumed

> constitutional, see *supra,* at 2642, and "[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams, supra,* 397 U.S., at 485, 90 S.Ct., at 1161, quoting *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69–70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913). See also, *e.g., Burlington Northern R. Co. v. Ford,* 504 U.S. 648, 651, 112 S.Ct. 2184, 2187, 119 L.Ed.2d 432 (1992); *Vance v. Bradley, supra,* 440 U.S., at 108, and n. 26, 99 S.Ct., at 948 and n. 26; *New Orleans v. Dukes, supra,* 427 U.S., at 303, 96 S.Ct., at 2516; *Schweiker v. Wilson,* 450 U.S. 221, 234, 101 S.Ct. 1074, 1082, 67 L.Ed.2d 186 (1981)…..

Heller v. Doe by Doe, 509 U.S. 312, 319–21, 113 S.Ct. 2637, 2642–43, 125 L.Ed.2d 257 (1993).

Accordingly, it is Price's burden to negate every conceivable basis which might support the requirement that he had to elect nitrogen hypoxia before June 30, 2018 or face execution by lethal injection. Price has failed to do so.

The State contends that it has a legitimate interest in effecting, as efficiently as possible, death sentences. The State contends that a deadline was necessary so that the State could proceed expeditiously with the execution of prisoners whose conviction and sentence were final. The State explains that before an execution goes forward, an execution date must be set by the Alabama Supreme Court. The State signals that it is prepared to go forward with the execution by filing a motion to set an execution date in the Alabama Supreme Court. When the request is made, the State represents to the Alabama Supreme Court that the prisoner's conviction and sentence are final.

It is rational for the State of Alabama to give a deadline to inmates for electing nitrogen hypoxia, whereas to further the State's interest in to providing the State officials the opportunity to plan for the execution of eligible inmates. Price has not negated this rational basis for the thirty day requirement.

Price also asserts that as applied to him, the thirty day deadline line violates his right to equal protection. In support, Price points to the fact that eight death row inmates who had an Eighth Amendment challenge to the lethal injection protocol pending in June 2018 (see In re: Alabama Lethal Injection Protocol Litigation, 2:12-CV-00316-WKW (M.D. Ala.)), settled their claim as follows: in return for a timely election of nitrogen hypoxia the inmates were given an assurance from the state that ALDOC would not execute the inmates by lethal injection. (Doc. 29-3 at 4 (Aff. Palombi)). From this fact, Price claims that he has received unequal treatment from the State because the State will not make the same offer to him, although he has a pending challenge. The problem with this argument is that Price is not similarly situated to these eight inmates. These inmates, who were given the assurance in settlement of their challenge to lethal injection that they would not be executed by lethal injection, made a timely election(i.e., by June 30). Price did not make a timely election of nitrogen hypoxia.

A slight variation of the preceding argument is that Price was not treated the same as the inmates who had a pending challenge to the lethal injection protocol because he was not offered a timely settlement by the State. The argument is once the State decided to settle the challenge in the M.D. Ala. action 2:12-CV-00316-WKW, the State was obligated to reach out to Price's counsel in a timely manner with the same settlement offer to his 2014 challenge that was pending

at that time. While this would seem to have been a prudent action by the State, the question is whether the State violated Price's right to equal protection by failing to do so.

Unfortunately, Price fails to cite any specific authority to support the proposition that the State must, pursuant to the equal protection clause, settle all pending challenges to the lethal injection protocol in the same manner. But as with any equal protection claim, the Court's analysis starts with whether Price was similarly situated to the eight inmates whose challenge to the lethal injection was mooted by settlement. The most glaring difference between Price and those inmates is the stage of the litigation. The M.D. Ala. inmates were offered a settlement near their trial date. Price, on the other hand, had not prevailed in this Court and was on appeal to the Eleventh Circuit. Briefs had been filed, oral argument had been held, and the parties were awaiting a decision. Accordingly, the State's interest in settling the claims of the pre-trial inmates, where uncertainty was greater, was markedly different than settling Price's challenge. Accordingly, the Court cannot find that Price was similarly situated to the eight inmates.

Last, Price asserts that the Alabama Code § 15-18-82.1(b)(2) presupposes that any waiver of execution by nitrogen hypoxia is only valid if he received adequate notice from the State regarding his right to elect nitrogen hypoxia. Price contends that the notice to him was wholly inadequate because the State failed to adequately apprise him of his right.

The State asserts that Price cannot prevail on this claim because he cannot show that he was treated differently by the State from his fellow Holman death row inmates. The State points out that the State gave Price the same notice and opportunity to elect nitrogen hypoxia as was given to the other Holman death row inmates.

Price does not dispute this assertion as it relates to fact that all inmates were given the same form. Instead, Price takes issue with the fact that most of the inmates that timely elected were represented by the Federal Defender's Office and that these inmates were given a full explanation of their rights by the Federal Defender before being given the form. The court is unable to ascertain how this fact supports unequal treatment **by the State** of similarly situated inmates. Rather, this appears to be disparity in treatment by Price's counsel compared to the Federal Defenders' treatment of their clients. Such is not a cognizable equal protection claim. Price fails to state an equal protection claim based on the assertion that he did not receive an adequate explanation of his rights in conjunction with receiving the waiver form.

Price also asserts that he has not validly waived his right to elect execution by nitrogen because he was not adequately aware of the rights he waived by inaction. Price cites in support of this statement two Alabama cases: a case regarding waiver of contractual rights (Ex parte Spencer, 111 So.3d 713 (Ala. 2012)) and a case regarding waiver of a spouse's statutory right to an elective share of an estate (Garrard v. Lang, 514 So.2d 933 (Ala. 1987). The Court fails to see how either of these cases supports an equal protection claim, or any other constitutional claim.

Accordingly, Price's cross-motion for summary judgment on this claim is **DENIED**.

B. Eighth Amendment -- Alternative Method of Execution

Death row inmates seeking to challenge a state's method of execution must satisfy a "heavy burden." Baze v. Rees, 553 S.Ct. 1520, 1533 (2008). The question on summary judgment is whether Price has satisfied his burden under Baze, *supra*, and Glossip v. Gross, 135 S.Ct. 2726 (2015). The Supreme Court recently addressed this burden, specifying precisely *when* and *how* the Eighth Amendment "comes into play:"

…the Eighth Amendment does not guarantee a prisoner a painless death….*Glossip*, 576 U.S., at —, 135 S.Ct., at 2732–2733[.]…[but] forbid[s]….long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) "'superadd[ition]'" of "'terror, pain, or disgrace.'" *Baze*, 553 U.S. at 48, 128 S.Ct. 1520; *accord, id.,* at 96, 128 S.Ct. 1520 (THOMAS, J., concurring in judgment).

This Court has yet to hold that a State's method of execution qualifies as cruel and unusual, and perhaps understandably so. Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite….

….how can a court determine when a State has crossed the line? THE CHIEF JUSTICE's opinion in *Baze*, which a majority of the Court held to be controlling in *Glossip*, supplies critical guidance. It teaches that where (as here) the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. *See Glossip*, 576 U.S., at —— – ——, 135 S.Ct., 2732–2738; *Baze*, 553 U.S. at 52, 128 S.Ct. 1520. *Glossip* left no doubt that this standard governs "all Eighth Amendment method-of-execution claims." 576 U.S., at ——, 135 S.Ct., at 2731.

… *Baze* and *Glossip* recognized that the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. at 47, 128 S.Ct. 1520. To the contrary, the Constitution affords a "measure of deference to a State's choice of execution procedures" and does not authorize courts to serve as "boards of inquiry charged with determining 'best practices' for executions." *Id*., at 51–52, and nn. 2–3, 128 S.Ct. 1520. The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is "substantial when compared to a known and available alternative." *Glossip*, 576 U.S., at ——, 135 S.Ct., at 2738; *see Baze*, 553 U.S. at 61, 128 S.Ct. 1520. Nor do *Baze* and *Glossip* suggest that traditionally accepted methods of execution….are necessarily rendered unconstitutional as soon as an arguably more humane method…becomes available. There are, the Court recognized, many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution. *See, e.g., Glossip*, 576 U.S., at —— – ——, 135 S.Ct., at 2737–2738 (a State can't be faulted for failing to use lethal injection drugs that it's unable to procure through good-faith efforts); *Baze*, 553 U.S. at 57, 128 S.Ct. 1520 (a State has a legitimate interest in selecting a method it regards as "preserving the dignity of the procedure"); *id*., at 66, 128 S.Ct. 1520 (ALITO, J., concurring) (a State isn't required to modify its protocol in ways that would require the involvement of "persons whose professional ethics rules or traditions impede their participation").

***

> ….Having (re)confirmed that anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test, we can now turn to the question whether…[the inmate] is able to satisfy that test. Has he identified a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain?...
>
> ***
>
> ***First***, an inmate must show that his proposed alternative method is not just theoretically "'feasible'" but also "'readily implemented.'" *Glossip*, 576 U.S., at ——— – ———, 135 S.Ct., at 2737–2738. 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 (CA8 2017); *Arthur v. Commissioner, Ala. Dept. of Corrections,* 840 F.3d 1268, 1300 (CA11 2016)….
>
> ***
>
> ***Second***, and relatedly, the State had a "legitimate" reason for declining to switch from its current method of execution as a matter of law. *Baze*, 553 U.S. at 52, 128 S.Ct. 1520….
>
> ***
>
> …**[Third/And]** [e]ven if a prisoner can carry his burden of showing a readily available alternative, he must still show that it would significantly reduce a substantial risk of severe pain. *Glossip*, 576 U.S., at ———, 135 S.Ct., at 2737–2738; *Baze*, 553 U.S. at 52, 128 S.Ct. 1520. A minor reduction in risk is insufficient; the difference must be clear and considerable….

Buckley v. Precythe, __S.Ct._, 2019 WL 1428884, *7-8, 11-12 (Apr. 1, 2019) (emphasis in original (italics) and emphasis added (bold)).

1. Availability: Feasible & Readily Implemented

For the first factor, Price must show that execution by nitrogen hypoxia is available, meaning it is feasible and readily implemented for the State to carry out. Price, 752 Fed. Appx. at 708 (stating that the inmate must show "the State actually has access to the alternative" and "is able to carry out the alternative method of execution relatively easily and reasonably quickly[]"); Boyd v. Warden, Holman Corr. Fac., 856 F.3d 853, 868 (11th Cir. 2017) ("'[f]easible' means 'capable of being done, executed, or effected[,]'…[a]nd 'readily' means 'with fairly quick

efficiency,' 'without needless loss of time,' 'reasonably fast,' or 'with a fair degree of ease[]'…for the state seeking to carry out the execution[]").

Price identified an alternative method of execution -- nitrogen hypoxia – that is an approved method of execution in the State of Alabama. Price has submitted evidence that nitrogen hypoxia is readily available for purchase. (Doc. 29-4 (Aff. Kennedy and Ex. A thereto)).

According to the State, Price cannot satisfy this factor because he failed to timely elect nitrogen hypoxia, and so "as a matter of law, nitrogen hypoxia will not be available to Price unless both lethal injection and electrocution are held to be unconstitutional by the Alabama Supreme Court or the United States Supreme Court." (Doc. 19 at 21). The Court cannot agree. Availability "to or for the state" -- not "available for him" -- is the measuring stick. See e.g., Boyd, 856 F.3d at 868 (discussing availability as available "*for the state* seeking to carry out the execution[]" (emphasis added); In re Ohio Execution Protocol, 860 F.3d 881, 890 (6th Cir. 2017) (discussing availability in terms of alternatives available *to the state* of Ohio). Alabama specifically made execution by nitrogen hypoxia execution available, as a matter of statutory law, on June 1, 2018.

Next, the court considers whether execution by nitrogen hypoxia can be "readily implemented" by the State. The State asserts that the ADOC has yet to finalize a nitrogen hypoxia protocol. At oral argument, the State was reluctant to give a status regarding the development of the nitrogen hypoxia protocol**,** other than to say that execution by nitrogen hypoxia would likely not be available until at least the end of summer 2019.

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[2], 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.

2. Legitimate Reason

To establish this factor, Price must show that the State lacks a "legitimate" reason for declining to switch from lethal injection to nitrogen hypoxia, for his April 11, 2019 execution. Bucklew, *supra*.

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

[2] Price presented evidence of the availability of nitrogen.

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.

3. Significant Reduction of a Substantial Risk of Severe Pain

The final factor of an Eighth Amendment execution method challenge focuses on substantial harm or pain to the inmate. Specifically, Price must show that execution by nitrogen hypoxia would significantly reduce a **substantial** risk of severe pain to him. Notably, "a minor reduction in risk is insufficient; the difference must be clear and considerable." Bucklew, 2019 WL 1428884, *12. See also Price 752 Fed. Appx. at 705 (an inmate cannot make a successful challenge by showing a "'slightly or marginally safer alternative.'" *Id*. (quoting *Baze*, 553 U.S. at 51…)."). Price must demonstrate "that the [lethal injection] method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." Glossip, 135 S.Ct. at 2737 (quoting Baze, 553 U.S. at 50) (italics and internal quotation marks omitted).

Price has submitted an affidavit from Dr. David Lubarsky to support his claim that Alabama's three (3) drug lethal injection protocol is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers. Dr. Lubarsky avers:

- The midazolam protocol proposed by the state is an unsuitable method of execution for three reasons.
- First, it has a ceiling effect and cannot at any dose guarantee a person will be unconscious and insensate to the painful effects of the second and third drugs.

- Second, it has no analgesic properties and is not suitable for use as a stand-alone anesthetic -- if it does produce unconsciousness at the 500mg dose, the noxious stimuli of the second and third drugs will likely overcome any anesthetic effect.
- Third, it has an increased risk of paradoxical reactions in vulnerable populations, to which Price belongs, which would render the drug useless for deep anesthesia.
- Additionally, the protocol lacks appropriate safeguards to assess unconsciousness, lacks safeguards to assure viability of the intravenous access, and lacks specification of drug concentrations, appropriate timing, and specific method of drug administration, leading to an increased risk of erroneous administration.
- Using midazolam in the manner intended by Alabama creates a substantial risk of serious harm to Price.

(Doc. 28-1 (Aff. Lubarsky)).

Price must also show that nitrogen hypoxia will significantly reduce this **substantial** risk of severe pain. Dr. Lubarsky provides no opinion regarding the comparison between the pain incurred with the three (3) drug lethal injection protocol and that incurred with the administration of nitrogen hypoxia. Instead, Price submitted an academic study from East Central University entitled Nitrogen Induced Hypoxia as a Form of Capital Punishment, wherein the authors conclude that "[t]here is no evidence to indicate any substantial physical discomfort during" execution by nitrogen hypoxia. (Doc. 29-2 at 23).[3] The study also concluded that: 1) execution via nitrogen hypoxia would be a humane method to carry out a death sentence; 2) such protocol would not require the assistance of licensed medical professionals; 3) such protocol would be simple to administer; 4) nitrogen is readily available for purchase and sourcing would not pose a difficulty; and 5) such protocol would not depend upon the cooperation of the offender being executed. Id.

[3] Price notes that Oklahoma relied on this study in approving nitrogen hypoxia as an execution method.

In this proceeding, the State presented no evidence to rebut Price's contention that the current lethal injection protocol would cause him serious harm and needless suffering.[4] Nor did the State challenge Price's evidence that execution by nitrogen would likely not result in substantial physical discomfort. Based on the evidence presented by Price, the Court finds that Price is likely to prevail on the issue of whether execution by nitrogen (which Price's evidence shows is not likely to result in any substantial physical discomfort) would provide a significant reduction in the substantial risk of severe pain Price would incur if he were executed using the three (3) drug lethal injection method.

However, because Price fails to show that execution by nitrogen is readily implemented, his claim must fail and his motion for summary judgment **DENIED.**

D. Preliminary Injunction/Motion for Stay of Execution[5]

"Injunctive relief, including a stay of execution, is an equitable remedy that is not available as a matter of right. *Brooks v. Warden*, 810 F.3d 812, 824….(11th Cir. Jan. 19, 2016)…As the Supreme Court has recognized, 'equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts.' *Hill*, 547 U.S. at 584…" Jones v. Commissioner, Ga. Dept. of Corr., 812 F.3d 923, 932 (11th Cir. 2016). Indeed, "[a] preliminary injunction is an extraordinary and drastic remedy not to be

[4] At oral argument the State referenced, without any detail, that they had submitted evidence in the 2014 proceeding. While the 2014 proceeding was the undersigned's case, the court never reached the issue of whether Price had established that he would suffer severe pain because Price was unable to point to an available alternative.

[5] Grayson v. Warden, Comm'r, Ala. DOC, 869 F.3d 1204, 1239 at note 90 (11th Cir. 2017) ("[t]he same four-part test applies when a party seeks a preliminary injunction" and a stay of execution).

granted unless the movant clearly establishes the burden of persuasion as to the four requisites." Am. Civil Liberties Union of Fla., Inc. v. Miami–Dade Cty. Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009). "[I]ts grant is the exception rather than the rule[.]" Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000).

> Recently, concerning motions to stay executions, the Supreme Court held:
>
> … The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay." *Hill*, 547 U.S., at 584 (internal quotation marks omitted)….

Bucklew, 2019 WL 1428884, *14.

"It is by now hornbook law that a court may grant a stay of execution *only* if the moving party establishes that: '(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest.' *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011) (emphasis added))." Brooks, 810 F.3d at 818. But where the plaintiff is a death row inmate who has brought a constitutional challenge to his execution, the plaintiff's entitlement to a preliminary injunction staying his execution "turns on whether [he can]….establish a likelihood of success on the merits." Glossip, 135 S.Ct. at 2737. Specifically:

> …capital prisoners seeking a stay of execution must show "a likelihood that they can establish both that [the state's] lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives." *Id.; see also id.* ("A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner...show[s] that the risk is substantial

> when compared to the known and available alternatives." (quotation omitted and emphasis added))….

Brooks, 810 F.3d at 819 (citing Baze, 553 U.S. at 61).

Even so, "[a] stay of execution does not require an inmate to prove his case once and for all. But the standards require more than the mere existence of an evidentiary toss-up. A district court must make some findings that tilt the scales in the inmate's favor." Hamm v. Commissioner Ala. Dep't of Corr., 2018 WL 2171185, *4 (11th Cir. Feb. 13, 2018).

Based on the analysis of Price's claims, the court is unable to find that Price has a substantial likelihood of success on the merits. Accordingly, his motion to stay is **DENIED**.

IV. Conclusion

Based on the foregoing, it is **ORDERED** that the Plaintiff's motion for summary judgment (Doc. 19) and Plaintiff's motion for a preliminary injunction/stay of execution (Doc. 28) are **DENIED**.

DONE and **ORDERED** this the **5th** day of **April 2019.**

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

CHRISTOPHER LEE PRICE, PLAINTIFF, VS. JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections; CYNTHIA STEWART, Warden, Holman Correctional Facility, DEFENDANTS.	CIVIL NO. CV19-00057 COURTROOM 4B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA APRIL 04, 2019

ORAL ARGUMENTS ON MOTION TO STAY

BEFORE THE HONORABLE KRISTI K. DuBOSE
CHIEF UNITED STATES DISTRICT COURT JUDGE

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[April 04, 2019, 9:03 a.m. in open court.]

THE CLERK: We are on the record in Civil Action 19-57, Christopher Lee Price, the plaintiff, versus the State of Alabama, Jefferson S. Dunn, and Cynthia Stewart.

Would counsel please identify yourself for the record.

MR. KATZ: Good morning, Your Honor. Aaron Katz, Ropes & Gray, for Mr. Price.

MS. SIMPSON: Good morning, Your Honor. Lauren Simpson for the State of Alabama.

MS. HUGHES: And Beth Hughes for the State of Alabama.

THE COURT: Okay. Before we get in the arguments, if the State would maybe advise me about a few things. Go through the process for me as to how you go about getting an execution date.

MS. SIMPSON: Your Honor, the State looks at inmates who have exhausted their regular appeals all the way through federal habeas and decides typically who has been there and who is a good candidate.

THE COURT: And the "State" being the Attorney General's Office?

MS. SIMPSON: Yes, Your Honor, in consultation with

the Department of Corrections.

Also looks, in this particular case, who did and did not elect nitrogen hypoxia. Mr. Price and Dominique Ray were two of the inmates who had exhausted their appeals, had been on death row since the '90s, but had not elected nitrogen hypoxia.

THE COURT: So after you chose these two inmates, then what happens?

MS. SIMPSON: Then the State of Alabama files a motion with the Alabama Supreme Court asking for an execution date to be set, setting out the procedural history of the case, explaining what litigation is ongoing, what has happened, and then waits.

And the Alabama Supreme Court decides to set an execution date. It has to be at least 30 days out from the date of their order.

THE COURT: Okay. So when you submit that, do you also indicate which method of execution they've chosen?

MS. SIMPSON: No, Your Honor. We have not done that in the past.

THE COURT: Okay. Okay. So the motion just basically is they've exhausted everything and so we can go forward with their execution? That's pretty much what that motion says?

MS. SIMPSON: Yes, Your Honor. They've exhausted their conventional appeals, and we would like to move forward

with the date is the gist of it.

THE COURT: And what is it that the Supreme Court is looking at to decide whether to grant your motion?

MS. SIMPSON: My understanding, Your Honor, is they simply verify whether the appeals have, in fact, been exhausted and whether there's any outstanding challenge that would prevent the Court from setting an execution date or make it imprudent.

THE COURT: Okay. So there's no other factors they consider or anything like that in determining an execution date?

MS. SIMPSON: They do allow the inmate to respond. He can file a motion or an objection to the State's motion, but as far as the internal workings of the Alabama Supreme Court and the deliberations, I can't say, Your Honor.

THE COURT: And, in this case, did the defendant -- I mean, did Mr. Price file an objection to the motion to set an execution date?

MS. SIMPSON: He did, yes, Your Honor.

THE COURT: And what was set forth in the motion? Do you know?

MR. KATZ: I can handle that, if you would like, Judge.

THE COURT: Okay.

MR. KATZ: As you know, I've been on a very lengthy

federal criminal trial. We are on Week 12. The Government is actually closing today.

When the notice of execution was put in, I was in jury selection. I asked the State for some period of time to respond. They gave me, I think, an additional two weeks. We put in this lawsuit, I think, a couple weeks after, after the notice of execution went in, and the objection essentially recited the claims in this lawsuit.

And we asked the Alabama Supreme Court to simply withhold deciding the execution date motion so Your Honor had the opportunity to decide this case. Obviously, the Alabama Supreme Court declined to accept my argument, and so here we are.

THE COURT: Okay. And, next, if the State would explain the status of developing the protocol on the nitrogen hypoxia and obtaining equipment and things of that nature.

MS. SIMPSON: Your Honor, that is being handled by the Department of Corrections. I do know that there's deliberation being done. They are examining options. They are speaking to some experts to make sure that the protocol is safe and constitutional.

But, as far as the actual purchasing orders, the Attorney General's Office is not part of those deliberations either. That is a matter that is being handled just by the department's legal counsel.

THE COURT: Right, but you represent the State.

MS. SIMPSON: We do represent them. So there's a separate legal counsel for the Department of Corrections handling the actual purchasing --

THE COURT: And you have corresponded with that person?

MS. SIMPSON: We have corresponded with them. All we know at this point is it's in progress. They are talking with some experts, but they are sort of keeping us a little bit out of the loop from this point.

THE COURT: Okay. Well --

MS. SIMPSON: I know at least, Your Honor --

THE COURT: The Attorney General is the Attorney General, and you are here based on the Attorney General. So I need you to tell me what, you know, the State, including -- I know -- I understand the difference between the counsel, but they are still Assistant Attorney Generals.

MS. SIMPSON: Yes, Your Honor.

THE COURT: And so you are here on behalf of the Attorney General. So can you tell me what the status is of them purchasing the equipment that will administer the nitrogen hypoxia?

MS. SIMPSON: Your Honor, there is no purchase order yet for that. I believe they are talking with a couple of people and trying to find a source for it, but they do not have

any sort of purchase order in place yet.

They are talking with a couple of experts in designing an appropriate, safe protocol, but they have not made those final determinations yet.

I do know that we will not have a protocol in place by April, certainly not by next week. I would assume probably not at least until the end of the summer, if not some time thereafter.

But I do not know the name of the experts they are speaking to at this point. I just do know that conversations are taking place.

THE COURT: Do you know if they have actually obtained the nitrogen hypoxia -- have they obtained the gas?

MS. SIMPSON: No, Your Honor, they have not purchased the gas.

THE COURT: All right. Let's turn to Mr. Price's counsel, and we are going to let Mr. Katz argue -- and I want to start with the Eighth Amendment claim. And I'm sure we are all aware of the Bucklew case that came down this week, and they seem to have set out -- Justice Gorsuch seems to have set out three factors.

The first -- let me get to my page here. The first was the one we are used to, is that it has to be available and readily implemented.

The second being that there has to be a legitimate

reason for declining to switch from the three-drug lethal injection to the hypoxia, nitrogen hypoxia.

And third was the one that we know from Glossip, that you must show that it significantly reduces a substantial risk of severe pain as compared to the nitrogen hypoxia.

If you'll go through what you believe is your evidence that meets your burden on each of those.

MR. KATZ: Sure. Just at the outset, Judge, I want to make clear, I am also troubled on the equal protection issue, maybe even more troubled than I am on the Eighth Amendment, where I am very troubled as well.

So I will start by answering Your Honor's questions, but I do not want to suggest that I think that the Equal Protection Clause is our second claim.

THE COURT: I understand that, but we'll come back to that because we are going to get into more depth on that one.

MR. KATZ: I understand, Your Honor.

So I will say on availability, Bucklew completely resolves the question about whether nitrogen hypoxia is an available method of execution for Mr. Price. The Supreme Court was very clear that whether a method of execution is even authorized by the legislature is not determinative of whether it's available.

Here, of course, the legislature has specifically authorized nitrogen hypoxia as a method of execution in this

state. Essentially what the State has done in response --

THE COURT: Well, I'll tell you I'll have to agree with you on the first point, that just because it's not available to Mr. Price doesn't mean it's not available under the terms of Glossip.

MR. KATZ: Okay.

THE COURT: Okay. So --

MR. KATZ: Right. So I think that's a two-second point. It is clearly available within the meaning of whether you call it Glossip or Bucklew.

In terms of ready implementation, I think the key point in Bucklew was that the inmate there was asking the state to switch to a method of execution, one, that has never been used on anyone in the United States, but, two -- and this is critically important -- the state legislature had not authorized it as an available method of execution.

And I think we would be in a fundamentally different place in this case if what Mr. Price were asking was for the State to actually adopt a method of execution but the state legislature had been resisting.

Now, there was some sort of, you know, savings provision in the Missouri statute that essentially gives the Missouri Department of Corrections carte blanche to adopt new methods of execution in the event that their current methods are held unconstitutional or unavailable, but neither the

Department of Corrections nor the Missouri legislature had said we are willing to use nitrogen hypoxia.

And I think it is fair for a state to say, in response to an inmate coming in and saying I have a method that no one in the state has authorized, I think the State does have a legitimate penological justification for saying we are not going to use that method because it's never been tried on anyone before.

But, again, here, the Alabama legislature, after presumably some amount of research and deliberation, specifically chose to adopt nitrogen hypoxia as an enumerated method of execution in the state.

And the senator who introduced the bill, I think it was Senator Pittman, specifically said it is because it's going to be a very humane way to execute people.

Also, in Missouri, Missouri, unlike in Alabama, which claims it cannot get pentobarbital, which, of course, is what we have been asking for since 2014 -- and if they had pentobarbital, I'd say use it. And we still have a pending Supreme Court petition on that very issue right now.

But Missouri had pentobarbital. And so the inmate was challenging their method of execution that he was not even willing to bring a facial challenge to. We would not bring a facial challenge to a pentobarbital three-drug protocol.

The inmate there was saying if you inject me with

pentobarbital and you don't -- and you don't put me upright or at a 45-degree angle, I may drown in my blood. And the Supreme Court said you have absolutely no basis for saying they are going to leave you in a prone position.

THE COURT: What about Bucklew's burden that they have now placed on you that you must show -- execution proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly.

You, of course, have not submitted an execution protocol.

MR. KATZ: So I have a couple of responses to that. First, Bucklew came out on Monday.

THE COURT: I know.

MR. KATZ: And as the dissent pointed out, there had been no cases that said I had to come forward with some sort of five-step protocol. If Your Honor wants us to do that, I'm sure we can have it for Your Honor.

THE COURT: Well, it's not me that wants you to do that. It's the Supreme Court of the United States that says you have to do that. Okay?

MR. KATZ: Correct.

So our motion for a stay proposes that we have a substantial likelihood of success in the merits. I would propose to this Court that we have a substantial likelihood of

being able to come in here in a couple of days with a detailed protocol. This is not going to be difficult to come in --

THE COURT: But that's not the standard for a stay. You have to -- I know this is an -- the burden that's been placed on you and kind of incredible at this point, but you have to -- in order for me to stay this case, which is an extraordinary remedy, you have to show me that your protocol is likely to prevail.

MR. KATZ: Well, on the question of whether -- if Bucklew is breaking this down into very small constituent parts on readily implemented, one of the constituent parts being we have to actually come forward with some sort of, I'll call it, recipe. Right? My mom bakes a cake. She would give me a recipe.

THE COURT: And the absurdity is not lost on me that the defendant -- I mean, that the person to be executed now has to propose how he's going to be executed. But that's what is required here. Okay?

MR. KATZ: So, Your Honor, I think it's critically important to keep in mind that in Bucklew, the petitioner was coming forward with a method of execution that neither the legislature nor the department of corrections had authorized. So he was essentially coming forward as a deputized department of corrections --

THE COURT: Okay. I see where you are going with

this. Because it had not been approved by the state, you are saying that's why the justices required that he come -- well, tell them how they are going to do it.

MR. KATZ: I think that's right, Your Honor.

THE COURT: Because you are saying once the State has approved it, they've already gone through that. They've already decided that it's -- it's -- it's a feasible execution.

MR. KATZ: Correct. And Ms. Simpson says, you know, it's not the Attorney General that's developing the protocol; it's the Department of Corrections. The reason is because the Alabama legislature, when they pass a statute like they did, under just standard administrative principles, the agency that is delegated what the State has told them to do, which is develop a protocol --

THE COURT: So are you arguing, then, that you are not required to come up with a protocol since the State is already, by statute, an alternative --

MR. KATZ: I think that's exactly right. I think the Supreme Court would agree with me on that. I think it would be presumptuous for me to come in here and interfere with the Department of Corrections' own -- I mean, Ms. Simpson says they have been studying it. They have been talking to experts. They have been talking to suppliers.

I have a good supplier, if they need someone. There's a paper, you know, right here talking about it would be

so simple to administer. I think it would be presumptuous in those circumstances for a petitioner or a plaintiff to come in and preempt the Department of Corrections' own process.

That being said, if the Court feels that that is what Bucklew requires, even in these circumstances, the question of whether we have a substantial likelihood of being able to come in here and show at trial a methodology for killing Mr. Price with nitrogen hypoxia, I would submit is very easy for us to prevail on.

We could come in here next week with the exact protocol that right-to-die organizations have already developed with nitrogen hypoxia.

I mean, it is -- these authors from East Central University, they weren't just making up that it is simple to administer, that there are actually no risks to prison personnel from gas leakage issues. This is a matter of putting a mask on and hooking up a tube to a tank that we already have. This is beyond simple, and the idea that they have to take, you know, a year to develop a protocol, I think it's just preposterous, Judge.

Now, on the third element, the significantly less likely to cause pain. We have an expert, Dr. Lubarsky, who I think Your Honor is aware, is going to come in here and testify and has given an affidavit talking about how the midazolam three-drug execution --

THE COURT: Is he here today?

MR. KATZ: He's not here today. He's not here today.

THE COURT: Well, let's just assume for a minute that you've created an issue of fact as to whether your client would experience severe pain. Okay?

The law requires that, in comparison, the selected method of -- the alternative would have to significantly reduce that. So what is your evidence there because I didn't see where Dr. Lubarsky made any kind of comparison to nitrogen hypoxia.

MR. KATZ: So on nitrogen hypoxia, I think the comparison, just for purposes of summary judgment, is -- you know, it's largely this report by East Central University, but this is not -- I mean, as a scientific matter -- and the East Central University report goes through it. The body, when you suffocate, it feels pain. All pain is from the brain. Right?

The brain senses that carbon dioxide has built up in the system, and that's what's causes the feeling of asphyxiation or suffocation.

Nitrogen hypoxia is fundamentally different. The body expels the carbon dioxide, and, yet, the oxygen is being replaced with nitrogen. It's sort of like the old frog, right, where you put it on the frying pan, and it doesn't understand that the frying pan is heated up. It's the same concept. So this is -- as a matter of science, this is not a debatable

point. This is just how the body works.

Dr. Lubarsky points out that the midazolam -- because that is our comparison for the Eighth Amendment. Right? We have to show, I agree, that the midazolam does have a substantial likelihood of causing significant pain.

Dr. Lubarsky speaks very cogently on that issue, which, again, we think is a matter of science. I actually think it's very interesting that the State in its motion for summary judgment did not even bother to refer to the prior expert opinion that it came forward with in the Price 1 litigation where we were in front of Your Honor on a bench trial, and we didn't make it to that phase.

I don't know if the State has disclaimed their prior expert's opinion that the midazolam three-drug protocol has no capacity to cause pain, but I find it interesting.

Now, in Bucklew -- and I think this is really important to remember -- the method of execution that Missouri was going to use was the pentobarbital method of execution, the three-drug protocol using pentobarbital, a well-established surgical-grade analgesic as the first drug.

If that were the protocol that they were going to use on Mr. Price, we would not be here today. The reason we filed our lawsuit in 2014 is because they had changed the method of execution from pentobarbital to midazolam. Mr. Price had never challenged the pentobarbital protocol. I had no intention of

challenging the pentobarbital protocol. And if the State were able to get pentobarbital, again, we would not be here today.

So on the significant -- significant reduction of pain, Bucklew does not help the State at all because what nitrogen hypoxia there was being compared to was a method of execution that everyone agrees is painless and easily administered and quick if you have the drugs.

Mr. Bucklew's claim essentially was, if I'm laying down in a completely prone position, I'll suffocate in my own blood. And the Court points out numerous times in the opinion that you have nothing but speculation. The State won't tilt your gurney at a 45-degree angle. And in that respect, it was a fairly weak claim.

That's not what we have here. We have midazolam, where Dr. Lubarsky points out exactly why a sedative, a hypnotic-like midazolam, will not protect the inmate from the pain of the second and third drugs.

Ohio, by the way, they have completely abandoned midazolam for just this reason.

Oklahoma, there's a reason why they have adopted nitrogen hypoxia as an authorized protocol in that state as well.

It is absolutely known that this midazolam protocol has serious issues with it. I don't know why -- I don't know why the State didn't come forward with expert evidence on the

midazolam protocol here, but maybe that's the reason. Maybe they don't feel as comfortable with it as they did four years ago. But nitrogen hypoxia is a matter of science. It is painless. It is absolutely painless.

THE COURT: Okay. All right. Well, I'm going to let them respond, and then we'll go to your equal protection argument.

MS. SIMPSON: Thank you, Your Honor.

Mr. Katz is sort of putting words in our mouth. The State of Alabama does not at all contend that midazolam is not a safe and effective constitutional method of execution. We didn't present any evidence on our midazolam protocol this time because this Court has already seen all the evidence.

Dr. Lubarsky's expert declaration is the same one that was presented to this Court during Price 1 back in 2014 or 2015 -- I think that was a 2016 declaration.

THE COURT: But we didn't get to that part of the case; right?

MS. SIMPSON: We did not, Your Honor, but it's the same evidence. And the State absolutely contends that midazolam is safe and effective. Dominique Ray was just executed with the midazolam protocol back in February without incident.

Bucklew controls this case. Bucklew is an application of Glossip and Baze. And Bucklew is very clear

that it is the inmate's burden to prove an alternative that is significantly safer, feasible, and readily available.

And, as the Supreme Court noted, even in footnote 1 of the opinion, Oklahoma does not have a readily available -- excuse me -- nitrogen hypoxia protocol because it can't get the drugs. It can't get the equipment.

The Oklahoma Department of Corrections as early -- as late as January was dealing with several suppliers and remarking that they could not get anyone willing to sell them the equipment needed for an execution. It's not as simple as put a mask on and hook it up to a tank of nitrogen.

THE COURT: Has Alabama experienced the problem of somebody not being able to obtain the equipment?

MS. SIMPSON: We have not reached that point yet, Your Honor. I know that Alabama is dealing with several people and asking questions and making inquiries.

If the Department of Corrections has received a firm no, they have not told the Attorney General's Office on that yet.

But Oklahoma was the forerunner in this. Just as in the midazolam adoption, Oklahoma has been the forerunner in pursuing a nitrogen hypoxia protocol. They had theirs on the books before we did. And Oklahoma, as late as January, was having problems trying to get someone who is willing to sell them equipment for use in execution.

It's the same sort of problem states have had with lethal injection. As Your Honor is aware, sodium thiopental was completely taken off the market. Pentobarbital now has a drop shipment or states that are able to compound it, not the State of Alabama. And midazolam suppliers are coming through now and stringently objecting to the State's use of their drugs in lethal injection.

Now, Oklahoma is talking about suppliers for the equipment they need to make their protocol work and how the suppliers are saying they don't want to deal with an execution and execution equipment. It's not available in Oklahoma for that reason.

The Supreme Court didn't set out in Bucklew any sort of differentiation between protocols that are on the books and protocols that are not on the books in terms of availability.

What we can tell Your Honor right now is that this Alabama Department of Corrections does not yet have a nitrogen protocol. It will not have one by next Thursday, when the execution for Mr. Price is set. This particular litigation wasn't even filed until after the State of Alabama moved for Price's execution, just like his last 1983 wasn't filed until after the State of Alabama moved for his execution.

We do not have a readily available protocol. He has not named one. The fact that counsel can send an associate out into Dorchester to buy a tank of nitrogen does not prove that

it's available to the Alabama Department of Corrections for use in a safe and constitutional lethal injection protocol.

As I said, it is not simply as easy, from what I've been given to understand from conversations with the Department of Corrections, as get a tank and strap on a mask. We have to make sure that the execution team members are safe. We have to make sure that the witnesses are safe. And we want to make sure, of course, that the inmate does not suffer unconstitutionally.

Your Honor may be aware of the voluminous quantity of OSHA reports of workers in industrial sites who walk into rooms with nitrogen leaks and drop dead. And then someone comes in and goes after and drops dead. We don't want that sort of situation to happen. We need to take precautions to make sure there's no such risk to the people actually participating in the execution.

An execution is not a simple matter of everybody shows up at Holman one night and executes an inmate. It takes training. It takes preparation. We want to make sure that when the State of Alabama does do a nitrogen hypoxia execution, it goes off without a hitch, it goes off in a constitutional fashion, and it's safe for everyone involved.

So that's what we would say as far as his Eighth Amendment claim goes. He hasn't met his burden under Baze, Glossip, and, now, Bucklew because just providing a tank of

nitrogen is not proof that a protocol is readily available to the State of Alabama for use in an execution.

THE COURT: Okay. Well, let's hop over to his equal protection claim.

MR. KATZ: Judge, can I respond to one thing that she said, please? I'm actually going to respond to two things. I want to make sure the record is clear.

We are surrounded by nitrogen right now. The idea of a nitrogen leak out of a tank of -- SCUBA diving tank of nitrogen gas could pose any risk to the execution team that's not inhaling it through a mask is preposterous. It's preposterous. And the East Central report says that, that there's no risk to the execution team.

The second thing is I find it very ironic that in Price 1, the State saying we have to go out and call the pharmacies and get pentobarbital, find them a source, bring it. I think they actually said in their brief bring the pentobarbital to us and we'll execute him tomorrow.

And then in this litigation, we go out and buy a tank of nitrogen, and they say it's not -- it's not actually for the inmate to come get the nitrogen and the supplies. I mean, it's frankly offensive. It's completely two-faced. They wanted us to come get the supplies in Price 1, and, now, in Price 2, we have the supplies and they say, well, you didn't tell them it's going to be used in an execution. That's just not -- I mean,

it is an absurdity.

In Bucklew, they say, the Supreme Court says, the availability and readily implemented prong can be overstated. They say it should not be that difficult to propose an alternative method of execution. That's exactly what we have done. And everything that the State is saying would make it virtually an impossibility. It would make it secretly controlled by the State.

If the Department of Corrections comes in here and I can examine them on the stand, I'm going to ask them why can't you send one of your associates out, like I sent mine out, to go get a tank of nitrogen gas. They will have no answer.

THE COURT: All right. We are going to move to the equal protection claim now.

MS. SIMPSON: May I briefly respond?

THE COURT: Well, if you do, then he's going -- we've got to have some order to this. Okay? So let's -- he gets the last word on each claim.

So I'm going to move to the equal protection claim, and let you talk about what is the rationally related reason why the State -- and I wanted to, first of all, correct you on one thing. He's making one argument and you are responding to a somewhat different argument.

What ALDOC did in June of 2018 is not what's being challenged here. Whether, you know, y'all gave it to all the

inmates or didn't give it to all the inmates -- I mean, it looks like you did give it to all the inmates, but that's not what's being challenged, not how you treated Mr. Price in June of 2018.

What's being challenged here is how the law has divided similarly situated people into two groups, one group that elects by June 30th and one group who doesn't elect by June the 30th.

So the question is, does the law, the classification within the law, have a rationally related reason. And I'll let you address that.

MS. SIMPSON: Yes, your Honor, it does.

THE COURT: Okay.

MS. SIMPSON: The State of Alabama has a rational basis interest in finality and in being able to plan for execution. As I said, this is not something that the State enters into lightly.

Mr. Price, and Mr. Ray before him, were both selected for execution motions because they had not chosen nitrogen, and we have drugs on hand that are ready to be used.

Just allowing an inmate to choose at any point along the way, even until the moment he's entering the chamber, I don't want lethal injection, I want nitrogen hypoxia or I want electrocution, that's not workable.

THE COURT: Okay. That's not what the State did.

The State, instead of saying you have to -- because I went and I looked at all the other states and what they do. I couldn't find a state that required just the 30 -- you know, the 30 days right after the law was passed. Most are 30 days from when you are -- you know, another point. Maybe 45 days before the execution. There are points that are closer to the execution than just 30 days from when the law was passed.

MS. SIMPSON: Your Honor, the reason the State did this was to make it as fair to inmates who are now being sentenced as it is to inmates who are currently on death row.

At this point, according to the law, once an inmate is sentenced to death and his death sentence is made final by the Alabama Supreme Court, he will have 30 days. And, during that period, he can elect electrocution, if he desires that, or he can elect nitrogen hypoxia if he desires that.

If he doesn't, then after that it will be lethal injection, and if that's made constitutional, then nitrogen hypoxia.

But that is the 30-day window that is given to every inmate since the passage of the law back in 2018. For everyone else, the State of Alabama gave a 30-day period of sort of like a retroactive moment to go in and make the election, just as the State did back in 2002 when it made lethal injection the primary method of execution.

THE COURT: Well, that's a bit different. I don't

think that's a good comparison because I can see the rationally related reason there as, you know, you are wanting to do away, you didn't want to maintain the machine and everything for that and so you needed to know, you know, the number of inmates that were going to be selecting that because that was something you were trying to phase out.

This is something that's forward-thinking that you are going to be doing. So to limit it to 30 days is what I'm trying to understand what rational reasons the State would have to do that, and what I've heard so far is that you needed to know which inmates going forward that you could go ahead and petition the Supreme Court for an execution date.

MS. SIMPSON: Yes, Your Honor.

THE COURT: All right. So that's one reason. Are there others?

MS. SIMPSON: Just in the orderly carrying out of a DOC's duties and the expenditure of funds. For instance, if an inmate were to -- if the State were to prepare for a nitrogen hypoxia execution on an inmate and the inmate turned around and tried to elect lethal injection at the last minute, well, that means they have to go out and find drugs and make new preparations. Certainly finding drugs for an execution is not an inexpensive undertaking.

In this case, the State of Alabama has certain resources and wants to use them wisely. We do have lethal

injection drugs. And so the State of Alabama has an interest in knowing which inmates are going to make this one-time election, which inmates of the 48, and which inmates have not so that while the Department of Corrections is developing its hypoxia protocol, the State can go ahead and carry out the constitutional sentences on these inmates who have been sitting on death row since the '80s and '90s.

Mr. Price has been sitting on -- has been sentenced for more than 25 years. His execution is certainly overdue by this point. We have -- he did not make a timely election of nitrogen hypoxia, though he was given the same opportunity as every other inmate.

The State of Alabama moved for an execution because he had not made that election, just as it did with Dominique Ray. And, now, several weeks after we moved the election, he starts this new attempt to make a seven-month-late election of nitrogen hypoxia.

The State of Alabama has an interest in using its resources wisely. It has an interest in knowing which inmates are going to opt for which method of execution as soon as possible. And, as I said, going forward, this election must be made within 30 days of the sentence becoming final.

It's fair for the Department of Corrections to know how an inmate desires to die, which, again, is not an option given to any of these people's victims, but it's fair for the

Department of Corrections to have some idea of knowing, for planning purposes, who desires which method of execution and to know that as soon as possible.

THE COURT: Okay. All right. Mr. Katz.

MR. KATZ: Judge, I apologize if I get a little bit heated today. I apologize. I apologize to the State. I know you have a job to do. I know you are representing a party.

I want to make clear that when my client asked me is the lethal injection going to hurt, my answer is yes. My answer is our expert is saying it is.

That's why I am passionate about this issue. It is not about delay. It is not about playing games. I do not want my client, in his last 5, 10, 15, sometimes 30 minutes that these midazolam executions take to actually kill the prisoner, to feel excruciating pain. That's exactly what's going to happen.

Nothing I heard from Ms. Simpson remotely satisfies legitimate penological justification. That entire row right there, you could sit the 48 inmates that have elected nitrogen hypoxia. You could sit them right here. Okay? And the State is agreeing, well, you elected on June 26th or June 28, so we are going to put you in that row. And we are going to set -- we are going to restrict the method of execution to nitrogen hypoxia. We are going to make lethal injection totally unavailable to you if you are sitting down there.

And my client is just asking can I sit in that seat, please, because I've been challenging this midazolam protocol for four years now, four years, and no court has said that this is a constitutional method of execution, I think it's going to cause pain, and I want the same terms of execution as you are giving those other 48 people. And the State is saying no.

And the State is saying because you didn't sign this piece of paper that was slipped in your cell by a prison guard while your midazolam challenge was on appeal in the Eleventh Circuit, you didn't read this and think to yourself, oh, you know what? I have two more days or three more days to sign this in order to be eligible to sit in those seats.

I mean, I don't even think there's -- I don't think they even have an answer why this is a legitimate penological justification. Their justification is simply we want to kill Mr. Price now. We are not going to be ready by April 11th.

Well, those other 48 inmates, they are not going to be ready by April 11th for those people, and they are exactly situated to Mr. Price. They are identical. They are out of habeas. They've been on death row for 20, 25 years, 30 years. Their crimes were no less heinous than my client's; in some cases, they are far more heinous.

It's random. You might as well have a race. Take all the inmates out to the yard and see if you can beat a certain time in a 100-yard dash. It is as random as that.

If the State wanted to go about this proper the way, they should have done what courts do when they advise inmates that they have the right to an attorney, that they have the right to remain silent. No court would bring in an inmate or a defendant, not tell them that they have a right to a lawyer, and proceed to trial, let them go pro se, and say, you know, you didn't elect to have a lawyer, I'm sorry. You are advised of your rights.

The State made absolutely no attempt to do that here. This doesn't advise a death row inmate of his rights under the law. This thing wasn't even written -- and they admit this thing was copied wholesale --

THE COURT: Wait. Now you are jumping back over to the argument that they did address, and that's how he was treated in June of 2018.

But when I read your -- the only case law you cited to me has to do with challenging the law, the classification of the law, what you first said, you know, by June 30th, you sit on this side of the court and after June the 30th, you sit on that side of the court. Which one are you challenging?

MR. KATZ: I'm challenging now that they don't have a legitimate penological justification for declining the request now.

THE COURT: Well, they have to follow the law, "they" being the Attorney General, and ALDOC has to follow the law.

So is it the law that you say treats your client unequally under the Constitution?

MR. KATZ: The Supremacy Clause says that the federal constitution trumps state law. The equal protection --

THE COURT: I know that, but listen to my question again.

MR. KATZ: I'm listening.

THE COURT: Maybe I didn't make it very clear. Are you arguing that they are being treated unequally under Alabama law, or are you arguing that they have been treated unequally by ALDOC in June of 2018 in some way?

MR. KATZ: I am arguing that when the Alabama Department of Corrections or the Attorney General, whichever it was, declined Mr. Price's election in January of 2019, which was made before he had an execution date -- so this is not a situation where he is making the election either when an execution date is set or when he's going into the chamber. That's a straw-man argument that we don't want to --

THE COURT: Okay. Wait. Keep going. So January of 2019 is the behavior that you are challenging?

MR. KATZ: Correct. And what they are saying is the legitimate penological justification that we have, okay, for not allowing you to move from that side of the courtroom to this side of the courtroom with these other 48 inmates is that you didn't sign this piece of paper before June 30th.

So they are relying on a state law, which itself is arbitrary. That state law may exist, but the existence of that state law and them saying we are just following that state law does not satisfy the rational basis test in this circumstance.

The State cannot, I submit, create two classes of death row inmates in the state, one that's going to be executed with method A and another one that's going to be executed with method B simply by pointing to some arbitrary random 30-day election period that the state legislature imposed when the State made no effort to actually make sure people had notice.

I think this would be a different case, Judge. I'm not going to concede anything --

THE COURT: I think we have to -- I think we are still talking over each other here. I think you are still saying that the law is unconstitutional because it classifies irrationally two groups of death row inmates.

MR. KATZ: No. I think what I'm saying, Judge, is that when the State makes a decision, right, to classify inmates in January of 2019 and as the rational basis, they point to this law and this 30-day election period, it would be a fundamentally different case if they were able to show, look, the legislature passed this law and we gave every inmate a reading of their rights under the law and we said you have 30 days.

Okay. You've now been read your rights, you know

what the consequences of electing in is, you know what the consequences of not electing in, I think that would be a fundamentally different case. I think the State may have a decent argument in that circumstance that, you know, once you are apprised of your rights, clearly, you know, you have 30 days.

There's another problem here. And that is that if you were just to read this statute -- I mean, I don't know if Your Honor has gone through the entire section, 15-18-82.1, but 82.1(i) -- and I want to emphasize this -- it says in election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections.

THE COURT: Let's go back to -- you keep saying this waiver-of-rights argument, and then you were putting it under equal protection.

But you agree or you haven't contested that every inmate was treated the same. They were each given the waiver of rights at the same time.

MR. KATZ: Well -- so I actually don't think that's right, Your Honor. And here's the reason. It's not like this was just slipped into the cell of all these people. There was a set of inmates -- and this is why I point out 15-18-82.1(i).

The Federal Defenders were actually -- unlike Mr. Price, we were in front of Your Honor, and we were in the

court of appeals. Our appeal was pending at the time that this litigation with Judge Watkins concluded. What happened -- and Mr. Palombi can come in and testify.

THE COURT: I read his affidavit. He knew about the law.

MR. KATZ: But then they had discussions, right? The State had discussions. And, you know, to the extent this 82.1(i) provision makes it ambiguous about whether an election --

THE COURT: But the State didn't treat any of those people differently. It's that some of them, their attorney, was more up on the law than you were.

MR. KATZ: No. I disagree with that, Your Honor.

THE COURT: Okay.

MR. KATZ: And the reason is because if you read 82.1(i), the way I would read it, just on its face, is that you can make an election, but if the State decides that, you know, they want to execute you with lethal injection anyways because it's going to take them too long to get the nitrogen hypoxia protocol up and running, they can do that.

So it's an election for a choice of method of execution made by a convict shall at no time, at no time, supersede the means of execution available to the Department of Corrections.

Now, what happened in the case in front of Judge

Watkins is that an off-the-record conversation, ex parte conversations, with the judge acting as essentially a settlement mediator, the State said, despite 82.1(i), we are going to make a deal with you. We are going to say if you sign this piece of paper, okay, we will not -- we will not execute you with lethal injection. You will be executed with nitrogen hypoxia.

And Ms. Simpson seems to have conceded --

THE COURT: Let him finish.

MR. KATZ: Ms. Simpson seems to have conceded that these other 48 people, those elections are durable. It doesn't matter if the Department of Corrections takes two years to develop their nitrogen hypoxia method. That's what they are going to be executed with.

They did not inform any other inmate that they were cutting that deal with these other 48, and that is unequal treatment, Your Honor. That's not giving everyone the same opportunity.

THE COURT: Wait. So the fact that they agreed that they would not go ahead and execute them by lethal injection is how they were treated unequally is what you are saying?

MR. KATZ: If they made that deal with these Federal Defender clients without letting the other -- without letting anyone else on death row know that that is the deal that had been cut -- I mean, that's fundamentally what they did.

THE COURT: But that deal, when was it made?

MR. KATZ: You'd have to ask Mr. Palombi, but it was in -- it was in June, and they put in the motion to dismiss on July 11th, 2018.

So even if you were trolling dockets, even if you were trolling dockets, okay, which I don't think there's any obligation of a death row inmate to do, but if you were trolling the Judge Watkins dockets, you would have seen on July 11th, so 11 days past the supposed deadline that they were arguing, that the State had represented to Judge Watkins if you sign this election that you not only may be executed by nitrogen hypoxia or electing to do it so we can do it if we choose to, we will do it. We will do it.

That is fundamentally unequal. That is not a high burden here. Every inmate should be allowed the same opportunity to elect into a method of execution, and where the State denies the election, they have to point to a rational basis. They have to point to a legitimate penological justification.

And, at a minimum, if you make the election before the Alabama Supreme Court even sets your execution date, I don't think the State has a legitimate penological reason for refusing your election. That's all the Court has to hold. The Court does not have to delve in these hypotheticals about what someone would do if one elected into a new method of execution

one day before their execution or 12 days before their execution, which was, I think, when Mr. Bucklew first raised the nitrogen hypoxia method.

This was raised within days of the method of execution -- the notice of execution going in. Mr. Price wrote to the warden within days.

The State has no legitimate penological reason for saying, oh, well, we were already planning for your lethal injection execution. Their only argument is we want to execute you now, but that's an argument that they have relinquished with the others.

THE COURT: You are assuming that they have some kind of discretion under the law to give him a reprieve on this. What discretion under the law does ALDOC have to give him a reprieve?

MR. KATZ: Well, that's why I came in here filing an equal protection challenge. I mean, they can say they're following the law.

THE COURT: Right. So, now, we go back. You are challenging the law.

MR. KATZ: So what I'm challenging is when your rational basis points back to a law that is -- that itself creates the potential for arbitrary classification, sets a -- I mean, what if the law said, you know, we will give -- you know, we will give each inmate an opportunity to do 50 push-ups. I

mean, technically every inmate might have the capacity to do 50 push-ups, but the law would be arbitrary. I mean, no judge would take seriously --

THE COURT: But that's not what it says.

MR. KATZ: But it is as arbitrary. So when you impose a 30-day deadline and you don't let people know that there is a new law, that there is a deadline, and what the consequences of not meeting the deadline are, it is as arbitrary as a push-up test.

That's why I think the analogy holds perfectly. A defendant comes in here to court, and the Court makes sure that the defendant knows he has a right to remain silent --

THE COURT: I'm going to try this again. Let's assume that the law is not arbitrary because I keep saying are you challenging the law or are you challenging what they did in January or are you challenging what they did in June. And I'm still yet to get a clear answer. Right.

MR. KATZ: Because I think it's both because I think it's very difficult to separate the two, Your Honor.

THE COURT: Well, no, it's not difficult because if the law is not unconstitutional, then ALDOC was following the law; they treated everybody the same.

So I think your only argument is that the law is unconstitutional because it irrationally classifies people.

MR. KATZ: But the law is unconstitutional in the

sense that if that is the basis for the classification that, you know, you met the 30 days and you didn't, if that's the basis for the classification, that doesn't -- you're basically pointing to a law that creates an arbitrary classification.

THE COURT: Right. But, now -- then you get into something else about the unequal treatment because one group was given assurance that they would not receive lethal injection despite 82-1(i). I'm still trying to understand that argument. Okay?

MR. KATZ: Well, I think the State's position is that if, you know, Mr. Price had been, you know, following the actions of the Alabama legislature, right, he could have gone into the prison library or whatever and looked at this new statute and he would have known that if he elected nitrogen hypoxia, he would be killed with nitrogen hypoxia.

And my answer to that is, he would not have. You can't just read the face of the statute and know that you are going to get the treatment that the State ended up agreeing to give these 48.

You would actually have to go to the July 11th, 2018, filing in Judge Watkins' case where they say if you elect, you will be killed with nitrogen hypoxia and sort of deduce from that the State is reading 82.1(i) as essentially, you know -- I mean, I don't even know how they are reading it anymore.

THE COURT: Well, it seems like 82.1(i) gives them some discretion about what happens even though you have selected the method of nitrogen.

MR. KATZ: Right. The way I would have read it is if you select nitrogen --

THE COURT: And so it would seem like if your client had been one of those who had timely elected nitrogen and then they went and made this, quote, secret deal with 40 of them and not your client, then you would have an equal protection issue.

MR. KATZ: Well --

THE COURT: But your client didn't make a timely election.

MR. KATZ: And that's where the law itself -- because it's so -- because an election period is in and of itself arbitrary, if you don't actually apprise the inmate of his rights under that law, that there's a law that exists that creates a certain right that creates a deadline for exercising that right, the law itself is arbitrary. The law itself invites and causes arbitrary classifications. Right?

So if Your Honor -- if the Department of Corrections could have come in here -- okay? Let's say they would have come in here and said, look, on May 31st, 2018, we actually provided, you know, a one-page -- you know, a one- or two-page explanation. There's a new law. Here's what it says. Here's when you have to elect by. Here's what it means to elect in.

And here's what it means if you don't elect in by 30 days.

THE COURT: You want them to give them legal advice to a represented prisoner?

MR. KATZ: Well, what's this? I mean, what is this?

THE COURT: Answer my question. You think that they should give legal advice to a represented prisoner?

MR. KATZ: Oh, I don't think that's legal advice, Your Honor.

THE COURT: Oh, okay.

MR. KATZ: If they are saying a prison guard can slip this sheet of paper in that says nothing about -- I don't know if Your Honor has read this, but I want to read it into the record. This is verbatim from the Federal Defender. They apparently copied this from the Federal Defenders without the Federal Defenders knowing, by the way.

Election to be executed by nitrogen hypoxia. Pursuant to Act 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection. The election is not intended to affect the status of any challenges, current or future, my convictions or sentences nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

That's what it says. It doesn't say where it comes from. That doesn't say what it's about. It doesn't say the

consequences of signing it. It doesn't say when you have to sign it by. It says nothing.

If the Department of Corrections had, instead, slipped a frequently asked questions, Q and A, or even just a summary description of what the statute says, I don't think that would be giving legal advice to the prisoner, and I think it would make my equal protection argument, you know -- I'm not sure my equal protection argument would be all that good anymore.

I'm not going to concede anything, but I think we would be in a fundamentally different scenario than one where they say, well, you didn't elect by June 30, and they can't point to anything showing that he was ever apprised that he had a right to do so.

I mean, there's a reason why when the courts have a signed waiver, it's a relinquishment of a known right. You can't waive something that you don't know you have. The statute itself uses the term "waiver." The statute itself, in my opinion, presupposed that inmates would be apprised of the existence of the statute, what they had to do by when, and what it would mean if they did that. And --

THE COURT: Do you have any case law where that's -- where that would help you out on the waiver issue?

MR. KATZ: What's that?

THE COURT: Do you have any case law you would like

to cite me to on your argument that it was inadequate notice --

MR. KATZ: Well, I think in our --

THE COURT: -- to constitute a waiver? Well, what you just cited me to was what constitutes a waiver, but I'm talking about in a situation where you are arguing an equal protection argument.

MR. KATZ: Judge, we are in uncharted territory.

THE COURT: Okay. So I don't need to go spend time trying to find something to support what you are saying? It's definitely not out there?

MR. KATZ: I mean, we are in uncharted territory because no state has done what Alabama has done here, which is take one -- essentially one-third of their inmates, and they are saying it doesn't matter how long it takes us to get the nitrogen hypoxia protocol up and running, we are going to execute you with that. We will not execute you with the midazolam lethal injection.

And if the State is trying to retract that that is the deal that they made in front of Judge Watkins, I'll call Judge Watkins as a witness because he clearly thought the case was mooted when they signed the nitrogen hypoxia. The State represented to him that if you sign this, you will be executed by nitrogen hypoxia and your lethal injection challenge is moot.

So they have created this 48 inmate class where they

are saying lethal injection is totally unavailable to you. We are going to pretend it doesn't exist. You guys over here, even if you had been challenging the midazolam protocol for years, even if you have a current challenge to the midazolam protocol in the Eleventh Circuit, even if you have a cert petition that's pending challenging the midazolam protocol -- which, by the way, that's us. Our case that was in front of Your Honor is still pending in federal court. They are saying, I'm sorry, you are not going to be allowed to move to that other side of the courtroom because you made your election on January 27th, instead of June 27th.

You know, I would submit that that is just arbitrary. That is absolutely an arbitrary classification, and it doesn't matter that they can go -- you know, point to an arbitrary law, a law that is creating the arbitrariness and saying, well, we are just following that arbitrary law. So, yes, the law, as applied here, becomes unconstitutional.

Would it have been possible for them to implement this 30 days in a way that satisfied rational basis tests? Possibly. But that's a hypothetical that I don't need to answer. That's not the case in front of this court.

THE COURT: Okay. Response.

MS. SIMPSON: Thank you, Your Honor.

Unlike Mr. Price's counsel, I was of counsel in the midazolam litigation. I was present in that mediation with

Judge Watkins. It took place -- I apologize. It isn't on my calendar. But it was the end of May or the first part of June 2018. We were getting ready to set a date for trial.

So counsel from both sides, including Mr. Palombi and Spencer Hahn from the Federal Defenders from the Middle District, was there. Judge Watkins was there, as was his clerk.

And when we got in there, our side and the Federal Defenders looked at each other and discussed the fact that this nitrogen hypoxia bill had become law. And so we told Judge Watkins jointly, yes, we believe we don't need to go forward with trial. We believe this is moot because Mr. Palombi at that point was sure that all of his clients, of the eight or nine of them who were part of the midazolam litigation who were still alive by that point, would be electing nitrogen hypoxia.

And so we waited until the end of the hypoxia election period and then jointly filed the motion to moot the case because everyone, as Mr. Palombi had assumed, had elected hypoxia. Of the 48 inmates who elected hypoxia, not all of them are Federal Defender inmates, not all of them have exhausted their typical course of appeals yet either.

These are not 48 people who are just like Mr. Price and have exhausted everything and are ready to go. Some of them are just getting started. But there is no secret deal with John Palombi in the Federal Defender.

THE COURT: Well, what is he speaking of when he says that this group, despite 82.1(i), that you have to execute them by hypoxia, nitrogen hypoxia?

MS. SIMPSON: 82.1(i) is mostly there in case -- for instance, before nitrogen hypoxia, if lethal injection had somehow been made unconstitutional --

THE COURT: Right. I understand that. But is it true that if for some reason y'all could never get nitrogen hypoxia as the, you know -- maybe you just never get it, that these people can never be executed?

MS. SIMPSON: I would not say that, Your Honor. I think that if -- again, I have not had discussions with the Department of Corrections on this matter, but I would assume that if the U.S. Supreme Court were to find that nitrogen hypoxia is unconstitutional or if there's absolutely no way to carry out a constitutional nitrogen hypoxia election in Alabama or any state, then we would move to a different method of execution.

THE COURT: All right. But he says you have some kind of agreement where you can't do that.

MS. SIMPSON: The only agreement made was that all of the inmates had elected, and, therefore, their midazolam litigation was moot because they had all elected nitrogen. The State would not be going to 82.1(i) unless nitrogen hypoxia were absolutely not available ever under any circumstances.

It's the fail-safe in case all of the other methods of execution are made unconstitutional. The State can use another method of execution as a backup. That's what that statute provision is there for.

THE COURT: So if y'all reinstituted the three-drug lethal injection, including what was being challenged, he would be allowed to go back with his lawsuit -- this eight or nine would go back, their lawsuit would no longer be moot?

MS. SIMPSON: No, Your Honor. The provisions of the -- of the final order in that case is that if the State were to refuse to honor the nitrogen waiver, then the inmates would be allowed to restart their litigation.

But, as it is, they all made a timely election of nitrogen hypoxia, and the Department of Corrections intends to honor that. That's the --

THE COURT: Okay. I'm just trying to find out if something happened where they couldn't be executed by nitrogen, then they could reinstitute their lawsuit.

MS. SIMPSON: Yes, Your Honor. If nitrogen hypoxia were taken off the books entirely or made unconstitutional, were made completely unavailable to them under any circumstances henceforth and we were to go back to say your only options are lethal injection with a midazolam protocol, actually none of them are eligible for execution -- electrocution because they didn't make that election either,

then, yes, pursuant to Judge Watkins' order, they would be allowed to restart that 1983 and go back into litigating the constitutionality of the midazolam.

THE COURT: So for people who weren't part of that, those eight or nine people, the other -- my math is not good -- the other 39 people don't have that agreement?

MS. SIMPSON: They were not part of that litigation, Your Honor.

THE COURT: Right.

MS. SIMPSON: But if the State of Alabama, I'm sure, were to take nitrogen hypoxia off the books, then any one of those inmates could start his own 1983 challenge to midazolam or to any three-drug protocol, just as Mr. Price did back in 2014, just as the midazolam litigation plaintiffs did, I think, starting as far back as 2012 with Carey Dale Grayson. I think it was consolidated by the end. Just as Tommy Arthur did several times. Method of execution --

THE COURT: So what you mean -- so the State defines 82.1(i) the means of execution available, "available" meaning what is potentially available on what you have on the books is -- in other words, if it's not been declared unconstitutional, it's available.

MS. SIMPSON: I am not sure if that's quite what we are saying. All we are saying is 82.1 is the catchall in case everything else is taken away and only one method of execution

remains. Even if it's not the method of execution elected, the State of Alabama has a fallback and isn't just henceforth prohibited from executing an inmate.

THE COURT: Well, I guess what I'm asking is, was what was decided for these eight or nine any different than what the standard would be under "i"?

MS. SIMPSON: No, I don't believe so, Your Honor. As I said with these eight or nine inmates and the other 39 or 40 of them, the State intends to honor their election and will honor their election unless nitrogen hypoxia is made completely unavailable or ruled unconstitutional.

As I said, the Department of Corrections is actively engaged in researching and planning a hypoxia protocol, and we do intend to execute these 48 inmates via nitrogen hypoxia. We just can't do it today, but that's not to say that we can't come back in a year and say, well, one of these inmates has elected it, it's not ready yet, and, therefore, we are going to go ahead with lethal injection with him. That's not what we are saying at all.

THE COURT: Is Mr. Price the only person that didn't elect and y'all have set an execution for?

MS. SIMPSON: No, Your Honor. Dominique Ray, he tried to make a late election too, about the same time Mr. Price did. We actually have Michael Samra. We have asked for an execution date in his case as well. Even though --

THE COURT: Say the last name again.

MS. SIMPSON: Samra, S-A-M-R-A.

THE COURT: And where is Ray and Samra?

MS. SIMPSON: Ray is deceased, Your Honor. He was executed back in February.

Samra, I believe, is still on death row.

THE COURT: I mean, when I say "where," I'm sorry, where would their case be?

MS. SIMPSON: Dominique Ray has been executed.

Michael Samra, he has finished his conventional appeals. He has filed a second successive state post-conviction petition challenging Roper.

THE COURT: Middle District? Northern District?

MS. SIMPSON: Alabama, Your Honor. He's in state court.

THE COURT: Oh, okay.

MS. SIMPSON: He has filed a new state petition. We just filed our motion for setting an execution date in that case, and he does not have pending federal litigation.

MS. HUGHES: That's correct.

Judge, Dominique Ray did have a habeas. He did file -- and he did file a 1983 and did allege that he didn't have -- he did have a challenge to not electing, but they dropped it.

MR. KATZ: So --

THE COURT: Wait. No, it's their turn.

MR. KATZ: It's --

THE COURT: I'm sorry. Wait. Stop. Sit down. Sit down.

MR. KATZ: Just --

THE COURT: Sit down. We are going to do this orderly.

Finish what you are saying.

MS. HUGHES: So he did -- so he did not elect, and he did end his 1983 -- have a --

THE COURT: Where was this litigation held?

MS. SIMPSON: I'm sorry. That was in the Middle District.

THE COURT: Okay.

MS. HUGHES: And then when we went to the Eleventh Circuit, I mean, the district court denied any relief on his challenge to not electing, went to the Eleventh Circuit on a completely different ground, and just dropped the fact that he had not elected.

THE COURT: Okay. Well, was this a Judge Watkins case also?

MS. SIMPSON: Yes.

MS. HUGHES: Yes.

THE COURT: The Ray case?

MS. SIMPSON: Yes.

THE COURT: All right. Finish what you have to say, and then you'll get a chance.

MR. KATZ: I just had a question. I'm sorry, Your Honor.

THE COURT: Wait, wait, wait. Go ahead.

MS. SIMPSON: The point I wanted to make, Your Honor, is that this is not a case like Miranda. There is no free-floating constitutional obligation for a state legislature, having passed a law, to go to every single person potentially affected by that law and give them particularized individual notice.

In this case, Warden Stewart took it upon herself to pass out a form -- or to have a form passed out to every single inmate on death row. According to Captain Emberton, whose affidavit is on the record, was told to pass out a form and an envelope, and inform the inmate that if they wish to make the election, put it in the envelope, and give it back to the warden. That is what they did. That is sufficient notice.

Mr. Price had an ongoing 1983 litigation method-of-execution challenge. It was then in the Eleventh Circuit with counsel. If he had a question, he could have called his counsel.

THE COURT: Let's talk about the argument that Price makes that implicit in the statute -- because it says if you don't elect, you waive. So implicit with them using -- here it

is. Shall waive election. Implicit in them using the word "waive" is that it has to be a well-informed or an informed waiver.

MS. SIMPSON: I don't believe that was the intent of the statute. It was simply just to tell the inmates you have a 30-day period, make your election if you want one.

In this case, they were informed. They were given a form telling them the name of the statute, the fact that it identified nitrogen hypoxia, they were given a date range, blank day of June 2018. Every inmate was given the same notice. And --

THE COURT: Well, if you get into that, then you may have some problems because, I mean, it was, what, five days before they had to elect when they were given this.

MS. SIMPSON: That's still well within the range, Your Honor. And we don't actually know the actual date they were given this. I know most of the elections occurred at the end of June. But Captain Emberton could not remember a particular date. He knew in the second half of June when he passed those forms out. I believe Mr. Palombi may have a different recollection of that. But they were given a -- this notice form.

THE COURT: So you are saying we weren't required to give them anything, but if we are going to talk about fairness, we gave them something.

MS. SIMPSON: Yes, Your Honor. Exactly.

Moreover, Mr. Price, just like Mr. Palombi's clients, was involved in a 1983 method-of-execution challenge at the time. Mr. Palombi was very well aware of this, and he dealt with all of his clients. If Mr. Price had a question on his form, he certainly could have called counsel.

THE COURT: And so the eight or nine of those that Mr. Palombi represented but apparently 39 others elected?

MS. SIMPSON: Yes, Your Honor.

THE COURT: How did that happen?

MS. SIMPSON: They filled out a form and turned it in.

THE COURT: Was it the form that y'all gave out?

MS. SIMPSON: Yes, Your Honor, it was that form.

Many of these inmates -- excuse me. I don't want to misspeak. I don't know the actual numbers on how many of the ones who elected are Federal Defenders client. But I do know some of them are not. I know we listed a few in the paper -- in our pleadings off the top -- just going through a cursory examination, I think we named three just off the bat.

But not all of these inmates are Federal Defenders. Most of them were not involved in the midazolam litigation, but they made timely elections.

Mr. Price did not. Mr. Price was on notice at the very latest in September of -- September of 2018 when the

Eleventh Circuit affirmed this court in his first 1983, and they mentioned in a footnote, we see that Mr. Price has not made a nitrogen hypoxia election, so that claim is not moot.

He didn't try to make an election until after the State moved the Supreme Court to set an execution date. True, we had not set a date yet by that point, but he had his notice in June, the same as every other inmate, and he waited seven months to attempt to do it.

THE COURT: Okay. All right. Anything else you want to say because he gets the last word?

MS. SIMPSON: No, Your Honor. Thank you.

THE COURT: Say whatever you want to say.

MR. KATZ: So -- I was not meaning to interrupt. I actually just had a question of Ms. Hughes. So I apologize.

But my understanding is -- I actually looked at the Dominique Ray document. I did not see a nitrogen hypoxia election. I saw that he was challenging the imam thing.

THE COURT: No. It was buried in there. I remember this now.

MR. KATZ: Right. And so I think, at best, I think, by just me, again, trolling around the docket in preparation for this argument, correct me if I'm wrong, but I don't think if he made a nitrogen hypoxia election, it would have been, I think, within a few days of his actual execution; is that correct?

THE COURT: No, she's right. In fact, I read this opinion. Now I remember who Mr. Ray is. It is buried in there because, obviously, what made the news and stuff was about his religious issue. But it's also buried in there, but, you know, he didn't make an election and you had to do so by the -- within 30 days. But there was no equal protection claim.

MR. KATZ: Correct.

THE COURT: There was nothing addressed like that. Judge Watkins was merely reciting the statute.

MR. KATZ: Correct. So I didn't know if Ms. Hughes had knowledge that he actually tried to make an election essentially, you know, after he had gone around the corner already, but I understood the same as Your Honor, he had not elected but he never then tried to elect in, and he certainly didn't, you know, raise a legal challenge.

THE COURT: Oh, no. I think he did try to elect in because Judge Watkins makes reference that you didn't do it by the statute, but he didn't make any -- he didn't make any analysis that, you know, that -- you know, about anything about the statute violating equal protection.

MR. KATZ: Right, right.

THE COURT: Anything else you want to say?

MR. KATZ: So yes. So, first of all, if Mr. Price would have elected on, you know, October 1st of 2018, they would be making the same exact argument here, he didn't elect

in by June 30th.

I also think that, you know, you have to look at the circumstances of what happened here. Mr. Palombi, you know, as -- I guess it's 48. So there were eight in front of Judge Watkins. That leaves 39 or 40 others. My understanding is Mr. Palombi and the Federal Defenders represent almost all of those people.

My understanding from Mr. Palombi -- and if you want to supplement the affidavit, I'm happy to get it from him -- is that he actually met with all of those clients at the same time. There was apparently an exception made to the rule that inmates meet one by one. They went into the, you know, cafeteria area. I call it the cafeteria. I don't know what you call it at Holman. But they have a vending machine in there and tables and chairs. It's where the lawyers meet with their clients.

THE COURT: I've been there before.

MR. KATZ: I have another client there, Courtney Lockhart. And Mr. Palombi met with the entire group, gave them this form, but explained to them what the form was. I'm actually not surprised. If Captain Emberton, on June 26 or 27 or 28 -- because we know it can't be sooner than June 26th, unless Captain Emberton has ESP with Mr. Palombi. I'm not surprised if he actually did hand this out to 150 other inmates, or 120 other inmates at Holman, that a couple people

signed them. Right? I mean, it's not surprising that some small portion of people saw this and said, you know, I guess I'll sign this. That's just life.

But this does not constitute notice. This does not constitute, Mr. Price, you relinquished your right.

And I think, Your Honor, you should keep in mind that there is no state that has set up a classification system like this where one-third of their death row inmates are going to get executed using -- again, East Central report -- the most humane way to execute someone and the other 120 are going to be relegated to this midazolam lethal injection protocol that has been challenged, is under challenge right now because scientifically it is clear, in my opinion and my expert's opinion, it will cause substantial pain and suffering. No state has set up a classification system like this.

And they are asking Your Honor on the basis of a remarkably thin rational basis explanation, one that, in my opinion, doesn't even come close to meeting that bar to endorse this situation.

I mean, his execution is going to take place in a week. If this execution goes forward, this court will be setting precedent that this is okay, it's okay to create a classification about how a state is going to execute prisoners based on total arbitrariness.

I submit Your Honor should issue the stay. We have

satisfied the equal protection standard. I think we are entitled to summary judgment. I certainly think we are entitled to a stay.

And if you think we need to put on more facts to establish a lack of a rational basis here, we are happy to do that. We'll do that at trial. But we think we are entitled to summary judgment now. But, at a minimum, the Court should issue the stay, and we can litigate this up through the courts of appeal and through the Supreme Court, if necessary, in an orderly fashion.

I mean, Mr. Price has been on death row for 25 years. That's absolutely true. That's not a reason to execute him next week while this critical constitutional issue is hanging out there.

It's proof that they can wait. They can have an orderly adjudication of this claim, just like Mr. Bucklew had an orderly adjudication of his Eighth Amendment claim. And that claim took a couple years to resolve. The Supreme Court got to decide that on a fully developed record, and that's what we would be asking the Court for here. Thank you.

THE COURT: All right. I'm going to take this under advisement. My plan is to have an opinion out no later than Monday. I want to say I appreciate what each of you have done in short notice on all of this. I appreciate your passion for your client. I do. But we do have to proceed orderly.

MR. KATZ: I understand, Your Honor. I understand.

THE COURT: Because my brain can only hear one thing at one time. And I appreciate the State's, you know, advocacy on behalf of the State. And I will -- like I said, my plan is to have an opinion out no later than Monday and -- hopefully before then. Thank you.

MS. SIMPSON: Thank you, Your Honor.

[Recess.]

STATE OF ALABAMA)
:
COUNTY OF MOBILE)

CHRISTOPHER LEE PRICE
VS.
JEFFERSON S. DUNN, ET AL.,
CASE NO. CV19-00057

I, Melanie Wilkins, do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision using computer-aided transcription, and that the foregoing represents a true and correct transcript of the proceedings upon said hearing.

I further certify that I am neither counsel nor related to the parties to the action, nor am I in anywise interested in the result of said cause.

Pages 1 to 61, inclusive.
Dated: April 06, 2019.

Melanie Wilkins

Digitally signed by Melanie Wilkins
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, in his official capacity, CYNTHIA STEWART, Warden, Holman Correctional Facility, in her official capacity, and OTHER UNKNOWN EMPLOYEES AND AGENTS, Alabama Department of Corrections, in their official capacities, Defendants.	)	No. 1:19-cv-00057-KD-MU

DEFENDANTS' REPLY TO PRICE'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OPPOSITION TO PRICE'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO PRICE'S MOTION FOR STAY OF EXECUTION

In accordance with this Court's scheduling order,[1] Defendants offer a brief reply addressing Price's opposition to Defendants' motion for summary judgment,[2]

1. Doc. 18.
2. Doc. 29-1.

his cross-motion for summary judgment,[3] and his emergency motion for a preliminary injunction staying his execution.[4] For the reasons that follow, Price's cross-motion and motion for stay of execution are due to be denied, and Defendants are entitled to summary judgment in this matter.

I. Price has not shown a genuine issue as to any material fact regarding his equal protection claim.

To prevail on an equal protection claim, Price must show (1) that Defendants will treat him disparately from other similarly situated persons, and (2) that the disparate treatment burdens a fundamental right, targets a suspect class, or is not rationally related to a legitimate government interest.[5] He cannot make this showing, and nothing in his pleadings provides evidence to support his case.[6]

By Price's admission, the State treated Price exactly like it treated every other death-row inmate at Holman Correctional Facility.[7] At Warden Stewart's direction, each inmate in Price's class received a form discussing nitrogen election and was told to sign and return it to the warden if he wished to make the election.[8] The form identified Act 2018-353, stated that the inmate was making an election, and offered

3. Docs. 29, 29-1.
4. Doc. 28.
5. *DeYoung v. Owens*, 646 F.3d 1319, 1327–28 (11th Cir. 2011).
6. *See Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115–16 (11th Cir. 1993).
7. Doc. 29-1 at 7.
8. Doc. 19-1 at 2.

a date blank reading, "___ day of June, 2018."[9] Whether the person who drafted the form intended that it be distributed to every death-row inmate[10] is irrelevant to the question of whether the State treated Price the same way it treated similarly situated inmates.

Moreover, Price was represented by counsel during the election period. Indeed, in June 2018, Price's counsel was awaiting a decision from the Eleventh Circuit in Price's first 42 U.S.C. § 1983 action, having argued the case in February.[11] If Price had a question about Act 2018-353 or what the nitrogen election meant to him, then he had the same opportunity as any other inmate to contact his counsel. That counsel failed to keep abreast of relevant developments in a state in which he was actively engaged in litigation concerning a death-sentenced inmate[12] has no bearing on the question of whether the State treated Price differently from other inmates. *Price* had timely notice, *Price* could have asked counsel if he wanted a legal consultation, and yet *Price* sat on his hands for seven months until the State moved

9. *Id.*; *see* Doc. 29-3 at 2 (reproduced).
10. *See* Doc. 29-3 at 3.
11. That opinion affirming this Court issued in September 2018. *Price v. Comm'r, Ala. Dep't of Corrs.*, No. 17-11396 (11th Cir. Sept. 19, 2018); *reh'g denied*, No. 17-11396-P (Dec. 26, 2018). Price's six-page petition for writ of certiorari was filed on March 26, 2019, eighty-two days after the Eleventh Circuit mandate issued. *See* Price v. Dunn, 18-1249 (2019).
12. Doc. 29-1 at 5.

to set his execution date.[13] As noted in Defendants' motion for summary judgment, inmates like Price who were not represented by the Federal Defenders still managed to make a timely election.[14]

Price asserts that the State has no rational basis for classifying inmates based on whether they provided timely notice of election of nitrogen hypoxia.[15] But the thirty-day window for election provided in section 15-18-82.1(b)(2) of the Code of Alabama (1975) has an obvious rational basis: the efficient use of State resources in planning and preparing for executions, which is hardly a "non sequitur."[16] The State of Alabama has a constitutional method of execution—lethal injection. It is under no obligation to offer inmates a menu of alternative means of execution from which they may select at any time.[17] Because the State does currently offer two alternatives, however, all inmates are given a thirty-day window from the time the Alabama Supreme Court issues a certificate of judgment in which to elect electrocution or

13. This case is distinguishable from that of Corey Maples and the so-called "mailroom of death," in which the Supreme Court granted relief because Maples's pro bono counsel abandoned him and Maples thereby missed a filing deadline. *Maples v. Thomas*, 565 U.S. 266 (2012). Unlike Maples, Price had notice of the election opportunity and had access to counsel.
14. *See* Doc. 19 at 14–15.
15. Doc. 29-1 at 14.
16. *See id.* at 16.
17. Indeed, it bears repeating that the innocent man Price murdered had thirty-eight cuts, lacerations, and stab wounds, and one of his arms was almost severed. C. 215 (sentencing order).

nitrogen hypoxia if they so desire.[18] To give inmates whose direct appeal concluded prior to the introduction of the alternatives the same opportunity as newly sentenced inmates, a thirty-day election period was included by statute after the introduction of lethal injection (if the inmate wanted electrocution) and nitrogen hypoxia (if the inmate wanted nitrogen hypoxia).[19] There is nothing irrational about the State setting a time limit for an inmate to choose how he would prefer to be executed. Requesting an execution date is not a matter the State takes lightly, and the Alabama Department of Corrections must ensure that its equipment and training are up to standard before an execution is carried out. Price offers *no* time limit in his pleading,[20] and taking his view to the logical end, an inmate could change his mind as to his method of execution up until the moment he entered the death chamber. In other words, conceivably, the ADOC could prepare for a lethal injection but be blindsided by an eleventh-hour nitrogen election.

Price has no right to demand that he be treated better than other death-row inmates. The election provision did not vest in him or any other inmate a right to receive special notice of the law. Even so, the State gave Price the same notice and opportunity to elect that it gave every other death-row inmate, and Price had the same opportunity as any other inmate to confer with his counsel if he had questions.

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18. ALA. CODE § 15-18-82.1(b) (1975).
19. *Id.*
20. *See* Doc. 29-1 at 14–19.

To allow Price to make an untimely election would be giving him preferential treatment denied to other inmates, such as Domineque Ray, who was constitutionally executed by lethal injection without incident on February 7, 2019.[21] As nothing in Price's pleadings provides evidence to support his equal protection claim, Defendants are entitled to summary judgment.

II. Price has not met his *Glossip*/*Baze* burden of naming an available alternative method of execution.

Price's Eighth Amendment claim[22] raises the same allegations concerning lethal injection that he raised before this Court in his previous § 1983 litigation. Indeed, he offers this Court the same expert declaration from Dr. David Lubarsky that he provided to Defendants in April 2016.[23] As before, under *Baze v. Rees*[24] and *Glossip v. Gross*,[25] Price bears the burden of naming a "known and available alternative method of execution that would entail a significantly less severe risk" than the ADOC's lethal injection protocol—an alternative that is "feasible, readily

21. *See Ray v. Dunn*, No. 2:19-cv-00088-WKW, 2019 WL 418105, at *2 (M.D. Ala. Feb. 1, 2019) ("[T]o be executed by nitrogen hypoxia, Ray had to request it in writing by July 1, 2018. *See id.* § 15-18-82.1(b)(2). He did not elect nitrogen hypoxia until January 29, 2019. Because Ray made his election several months too late, the State denied his request." (citation omitted)).
22. *See* Doc. 29-1 at 7–13.
23. Doc. 28-1; *see* Plaintiff's Memorandum in Opposition to Defendants' motion for Summary Judgment of Price's Eighth Amendment Claim, Exhibit A, Price v. Thomas, 1:14-cv-00472-KD-C (S.D. Ala. Aug. 19, 2016), Doc. 78-1.
24. 553 U.S. 35 (2008).
25. 135 S. Ct. 2726 (2015).

implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[26] This time, the question of whether he has done so hinges in part[27] on the availability of nitrogen hypoxia.

Defendants do not contend that nitrogen gas is not commercially available. The problem for Price is that nitrogen hypoxia is not *legally* available to him because of his failure to make a timely election, just as electrocution would not be legally available to him if he were to attempt to elect it now.[28] That a thing exists in the world does not make it an available method of execution. That Price's counsel could send an associate to buy a tank of nitrogen[29] does not make nitrogen hypoxia a legally available method of execution for Price, just as it would make no difference

26. *Id.* at 2737 (cleaned up).
27. The ADOC does not concede that lethal injection is unsafe, nor that nitrogen hypoxia is substantially safer. Indeed, as the Supreme Court noted on April 1, "This Court has yet to hold that a State's method of execution qualifies as cruel and unusual, and perhaps understandably so." *Bucklew v. Precythe*, No. 17-815, 2019 WL 1428884, at *7 (Apr. 1, 2019).
28. In *Bucklew*, the Supreme Court wrote, "An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Id.* at *10. However, the Court also noted that in that case, Missouri had a "legitimate" reason to decline using nitrogen hypoxia, the inmate's alternative method, because no other state had yet carried out an execution by hypoxia. *Id.* at *11. Here, the State of Alabama has a legitimate reason not to use nitrogen hypoxia in Price's case: Alabama does not yet have a hypoxia protocol or the necessary equipment to carry out a constitutional execution by hypoxia, and Price did not even attempt to elect nitrogen hypoxia until January 27, 2019, more than two weeks after the State moved for his election date to be set.
29. *See* Doc. 29-4.

if counsel asked his associates to build an electric chair or buy rope or bullets.[30] Under Alabama law, Price will not be executed by nitrogen hypoxia unless lethal injection is held to be unconstitutional or the ADOC determines that it is unavailable.[31] Price had a chance to elect nitrogen hypoxia—indeed, he was challenging lethal injection at the time of the election period. That he failed to do so is no one's fault but his own.

Moreover, Price has not met his "burden . . . to plead and prove . . . a known and available alternative method of execution. . . ."[32] Price's complaint refers generally to "nitrogen hypoxia," which "can be induced when an individual inhales an asphyxiant gas" until that "gas displaces the normal levels of oxygen found in the air, thus depriving a person of the necessary levels of oxygen."[33] But Price has not pleaded in any detail how the State could induce nitrogen hypoxia or provided the slightest indication of how the method would take shape.[34] Neither Alabama nor any

30. Moreover, even if Defendants were to purchase a tank of nitrogen in this fashion, Price has not purchased the other equipment necessary to carry out a safe execution by hypoxia, nor has he explained in his pleadings how a single tank, without more, is sufficient to carry out an execution that would satisfy him. Indeed, Defendants assume that if they were to agree to execute Price by nitrogen hypoxia on April 11, Price would then immediately initiate another § 1983 action challenging the constitutionality of the hypoxia protocol.
31. ALA. CODE § 15-18-82(a) (1975).
32. *Arthur v. Commr, Ala. Dep't of Corrs.*, 840 F.3d 1268, 1303 (11th Cir. 2016).
33. Doc. 1 ¶¶ 50–51.
34. While counsel for Price proffers a preliminary draft of a document entitled "Nitrogen Induced Hypoxia as a Form of Capital Punishment," which was produced for an Oklahoma state representative, *see* Doc. 29-2, Ex. A, the

other state has ever carried out an execution "by" nitrogen hypoxia.[35] And Price "does not say," much less prove, "that any ADOC employee would have the first idea about how to carry out an execution by this method, and, undeniably, doing so would require a lot more than merely buying some new supplies for the ADOC to begin carrying out executions by this new method."[36] As the Supreme Court noted only yesterday, *Baze* and *Glossip*'s mandate "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.'"[37]

Accordingly, the fact that Price's attorney could buy a canister of nitrogen does not prove that nitrogen hypoxia is a known and available alternative method of execution. Nitrogen, by itself, is not a "method."[38] No state has yet executed an inmate with nitrogen, and those states that have included a provision for nitrogen hypoxia in their capital statutes have not yet produced fully realized execution protocols or found the necessary equipment and supplies—indeed, one state has

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document offers only vague suggestions as to how an execution by hypoxia can or should be carried out. Price's assertion in yesterday's notice of supplemental authority that this document distinguishes this matter from *Bucklew*, Doc. 30 at 2, is simply wrong.

35. *Arthur*, 840 F.3d at 1318.
36. *Id.*
37. *Bucklew*, 2019 WL 1428884, at *11.
38. On a similar note, most lawyers can presumably purchase bullets, yet the Eleventh Circuit has held that "the firing squad is not an alternative method of execution that is available, feasible, or readily implemented by the ADOC." *Arthur*, 840 F.3d at 1320.

already found that suppliers refuse to sell products for use in execution.[39] Simply proving the unquestioned fact that nitrogen gas is commercially available does not mean that Price has met his burden of showing how nitrogen hypoxia is available, much less that it is safer than lethal injection. As the Supreme Court explained yesterday in finding that another inmate failed to meet his *Baze*/*Glossip* burden:

> 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. *See* App. 697 (Oklahoma grand jury report recommending that the State "retain experts" and conduct "further research" to "determine how to carry out the sentence of death by this method"); *id.*, at 736 (report of Louisiana Dept. of Public Safety & Corrections stating that "[r]esearch . . . is ongoing" to develop a nitrogen hypoxia protocol).

39. As of January 2019, Oklahoma could not find a manufacturer of a gas delivery system willing to sell it to the Department of Corrections. According to the department director, "[The manufacturers are] all concerned and afraid of the same thing—every one of them—retribution, losing their business, protests. . . . They're concerned for their employees, the threats that come." Nolan Clay, *Executions by Gas Stalled Indefinitely While State Seeks Willing Seller of Device*, THE OKLAHOMAN (Jan. 27, 2019), https://bit.ly/2KaFz3Z. Again, the fact that an attorney could purchase a tank of nitrogen does not make nitrogen hypoxia an available method of execution, nor is a tank of nitrogen all that is required to perform a constitutional execution. *See Bucklew*, 2019 WL 1428884, at *11 n.1 (citing Clay, *supra*).

> That is a proposal for more research, not the readily implemented alternative that *Baze* and *Glossip* require.[40]

As Price has failed once again to meet his burden under *Glossip*, *Arthur*, and now *Bucklew* as well, Defendants are entitled to summary judgment.

III. Price is not entitled to a stay of execution.

"[A] court may grant a stay of execution *only* if the moving party establishes that: '(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; *and* (4) if issued, the injunction would not be adverse to the public interest.'"[41] Price's stay request should be denied because it does not meet the requirements for a stay to issue.

First, Price cannot demonstrate a substantial likelihood of success on the merits. His equal protection claim is meritless, he has failed to meet his burden of naming a known and available alternative method of execution, and as for the other prong of his Eighth Amendment claim, "the very three-drug protocol approved by the Supreme Court in *Glossip* is the same one Alabama will use here."[42]

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40. *Bucklew*, No. 17-8151, slip op. at 21.
41. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (citations omitted).
42. *Id.* at 823.

Second, the other factors counsel against granting a stay. The Supreme Court has held that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence."[43] 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."[44] As the Supreme Court noted in *Bucklew*:

> Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas 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.[45]

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.[46] Price has been on death row for more than twenty-five years for a crime he committed

43. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).
44. *Id.*
45. *Bucklew*, 2019 WL 1428884, at *14.
46. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

in 1993. His crime was particularly heinous, as the trial court explained in sentencing him.[47] 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 consider Alabama's interest in enforcing its criminal judgment and deny Price's request.

47. C. 215; *see* Doc. 19 at 4 (quoting sentencing order).

CONCLUSION

For the reasons discussed above and in Defendants' motion for summary judgment, the Court should grant summary judgment to Defendants and deny Price's cross-motion and motion for stay of execution.

Respectfully submitted on this the 2nd day of April 2019.

STEVE MARSHALL
ATTORNEY GENERAL OF ALABAMA
BY—

/s/ Lauren A. Simpson
Lauren A. Simpson
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Alabama Assistant Attorneys General
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on April 2, 2019, I served a copy of the foregoing upon counsel for the Plaintiff by filing the same via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to: **Aaron M. Katz** and **Jonathan R. Ference-Burke**.

/s/ Lauren A. Simpson
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APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, in his official capacity, et al., Defendants	Case No. 19-cv-57

CHRISTOPHER PRICE'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a), Plaintiff Christopher Lee Price, through undersigned counsel, cross-moves for summary judgment on his claims. Specifically, Mr. Price respectfully submits that he is entitled to judgment as a matter of law on the following: (1) whether, for purposes of the Eighth Amendment, nitrogen hypoxia is an "available" and "readily implemented" alternative to the State's lethal injection protocol; and (2) whether the State's refusal to agree to execute Mr. Price using nitrogen hypoxia violates the Equal Protection Clause. In support of this motion, Plaintiff Christopher Lee Price respectfully refers the Court to the attached memorandum.

Respectfully submitted,

ROPES & GRAY LLP

By: /s/ Aaron M. Katz

Dated: March 29, 2019

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, in his official capacity, et al., Defendants.	Case No. 19-cv-57

CHRISTOPHER PRICE'S OPPOSITION TO THE STATE'S MOTION FOR SUMMARY JUDGMENT, AND MEMORANDUM IN SUPPORT OF HIS CROSS-MOTION FOR SUMMARY JUDGMENT

Mr. Price's complaint alleges that, under both the Eighth Amendment and the Fourteenth Amendment's Equal Protection Clause, he is entitled to be executed with nitrogen hypoxia rather than with the State's current lethal injection protocol, which relies on the problematic drug midazolam hydrochloride. His Eighth Amendment and Equal Protection Clause claims, however, stand independent of one another. Mr. Price's Eighth Amendment claim requires him to prove that (1) the State's lethal injection protocol carries a substantial risk of causing him severe pain, a scientific question on which the State has not moved for summary judgment, and (2) nitrogen hypoxia is an "available alternative" within the meaning of *Glossip v. Gross*, 135 S. Ct. 2726 (2015).[1] Mr. Price's Equal Protection Clause claim requires him to show that (1) he is "similarly situated" to death row inmates whom the State has agreed to execute using nitrogen hypoxia, and

[1] Mr. Price agrees that, if appropriately implemented, death by nitrogen hypoxia would carry very little risk of causing any significant physical pain.

(2) the State's asserted basis for refusing to extend him the same terms of execution does not rationally further a legitimate state interest.

The State's motion for summary judgment misconstrues the plain language of the Alabama execution statute's nitrogen hypoxia provisions, misunderstands what it means for a method of execution to be "available" for purposes of an Eighth Amendment claim, and misstates what Christopher Price must show to prevail on his Equal Protection Clause claim. Not only should the Court deny the State's motion for summary judgment in full, but it should grant Mr. Price summary judgment in part on his Eighth Amendment claim and in full on his Equal Protection Clause claim. This would put a halt to the State's constitutionally offensive plan to execute Mr. Price using a gruesome lethal injection protocol that the State has agreed to abandon with respect to dozens of death row inmates that are otherwise identical to Mr. Price.

STANDARD OF REVIEW

A moving party is entitled to summary judgment if he "shows that there is no genuine dispute as to any material fact and [he] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Manu v. United States*, 323 F. Supp. 3d 1346, 1350 (S.D. Ala. 2018) (DuBose, J.) (quoting *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991)). "In deciding whether [the moving party] has met this initial burden, the Court must review the record and draw all reasonable inferences therefrom in a light most favorable to . . . the non-moving party." *Id.* (citation omitted).

RELEVANT FACTS[2]

The relevant facts, all of which Mr. Price can prove by admissible evidence, are as follows.

1. Mr. Price's death sentence

Mr. Price resides on Alabama's death row at Holman Correctional. Mr. Price has been on death row since 1993, and he has been out of legal challenges to his sentence since October 7, 2013, when the United States Supreme Court denied his petition for certiorari with respect to his habeas corpus challenge to his conviction and sentence.

In September 2014, the Alabama Department of Corrections announced that it had amended its lethal injection protocol, replacing pentobarbital with midazolam hydrochloride as the first drug in the three-drug sequence. On September 11, 2014, the State filed a motion with the Alabama Supreme Court seeking an execution date for Mr. Price, though the court apparently never acted on the motion. A month later, Mr. Price filed a federal civil rights lawsuit challenging the State's lethal injection protocol, alleging that midazolam would not render him insensate to the excruciating pain of the second and third drugs in the sequence. That lawsuit proceeded to a bench trial before this Court, with the Court reaching only the question of whether the Alabama Department of Corrections is presently able to purchase pentobarbital from a pharmaceutical manufacturer or compounding pharmacy (which the Court answered in the negative). This Court entered judgment in favor of the State, the Eleventh Circuit affirmed, and Mr. Price filed a petition for certiorari on March 26, 2019. Accordingly, the civil rights lawsuit that Mr. Price filed in October 2014, based on his fear that the State's midazolam lethal injection protocol will cause him severe pain, currently remains pending in federal court.

[2] To the extent the facts discussed herein are a matter of public record, we have omitted citations for ease of reading.

On January 11, 2019, the State filed another motion with the Alabama Supreme Court seeking an execution date for Mr. Price. The Alabama Supreme Court acted on that motion on March 1, 2019, ordering that Mr. Price be executed on April 11, 2019 by lethal injection.

2. Mr. Price's written request that he be executed by nitrogen hypoxia

In March 2018, the Alabama legislature amended the State's execution statute to add nitrogen hypoxia as a method of execution. The amendment became effective on June 1, 2018. As amended, § 15-18-82(a) reads in relevant part, "Where the sentence of death is pronounced against a convict, the sentence shall be executed . . . by lethal injection unless the convict elects execution by . . . nitrogen hypoxia as provided by law." As amended, § 15-18-82.1(b)(2) reads in relevant part,

> The election for death by nitrogen hypoxia is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility within 30 days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death. If a certificate of judgment is issued before June 1, 2018, the election must be made and delivered to the warden within 30 days of that date.

A "waiver" is "the voluntary surrender of a known right." *Ex parte Spencer*, 111 So. 3d 713, 718 (Ala. 2012) (internal citations and quotation marks omitted). "By definition, waiver requires that the right relinquished be a known right." *Garrard v. Lang*, 514 So. 2d 933, 935 (Ala. 1987). The Alabama legislature, however, did not require the State to provide death row inmates any notice regarding the nitrogen hypoxia amendments to the execution statute. Not surprisingly, the State in fact did not provide inmates any actual notice that (1) the Alabama legislature had added nitrogen hypoxia as a method of execution, (2) an inmate needed to make an "election" in writing if he wished to be executed by nitrogen hypoxia rather than lethal injection, (3) that such "election" needed to be submitted to the warden, (4) that such "election" needed to make the

election by June 30, 2018, or (5) that an inmate would "waive" his right to be executed by nitrogen hypoxia if they did not satisfy that June 30, 2018 deadline.

On January 12, 2019, Mr. Price's pro bono counsel Aaron Katz, who is based in Boston, Massachusetts, called Federal Defender John Palombi to ask him questions about the Alabama Supreme Court's procedures for adjudicating a motion to set an execution date. *See* Palombi Affidavit, ¶¶ 7-8. During that phone call, Attorney Katz also discussed his concerns that the State's lethal injection protocol would cause Mr. Price to experience severe pain during his final moments. *Id.*, ¶ 8. Attorney Palombi responded by telling Attorney Katz that the State had agreed to execute a number of his clients by nitrogen hypoxia and to forego lethal injection. *Id.*, ¶ 9. Attorney Palombi informed Attorney Katz about the Alabama legislature's March 2018 amendments to the State's execution protocol. *Id.* Attorney Palombi also directed Attorney Katz to the joint motion to dismiss that he and the Alabama Attorney General's Office made on July 11, 2018 in Case No. 2:12-cv-316-WKW (M.D. Ala.), a civil rights action that did not include Mr. Price, in which several death row inmates represented by Attorney Palombi challenged the State's midazolam lethal injection protocol. *Id.* In that submission, the Attorney General's Office represented to Chief Judge Watkins that because "Plaintiffs have elected to be executed by nitrogen hypoxia, rather than lethal injection, pursuant to Section 15-18-82.1, Plaintiffs' claims and causes of action [challenging the State's lethal injection protocol] are not moot because their executions will be carried out at the appropriate time by nitrogen hypoxia." *Id.*, Exh. B, ¶ 5.

On January 27, 2019, on Attorney Katz's advice, Mr. Price wrote a letter to the warden of Holman Correction asking that he be executed by nitrogen hypoxia. *See* Katz Affidavit, Exh. C. The warden issued Mr. Price a written response that stated in relevant part, "I received your request on January 28, 2019. This request is past the deadline of June 2018. However, I do not possess

the authority to grant, deny, or reject your request. Any further consideration in this matter needs to go through your attorney to the Attorney General's office." *Id.* After learning of the warden's response, Attorney Katz wrote an email to Assistant Attorney General Henry Johnson. That email stated in relevant part, "My client Christopher Price last week wrote a letter to the Holman Warden asking to opt into the nitrogen hypoxia protocol, on the same terms that I understand you offered to John Palombi's clients in the civil rights lawsuit before Judge Watkins. . . . Mr. Price has authorized me to inform you of his desire to opt in to the nitrogen hypoxia protocol, again on the same terms that I understand you offered to John Palombi's clients." *Id.* Attorney Johnson responded that the "Attorney General's Office did not make any offer to John Palombi's clients" and that "it is too late now for Price to make [a nitrogen hypoxia] election." *Id.*

3. Warden Cynthia Hall's unapproved use of Attorney Palombi's work product

On June 26, 2018, Attorney Palombi visited several of his death row clients at Holman Correctional.[3] Palombi Affidavit, ¶ 3. The purpose of that visit was to discuss the inmates' civil rights lawsuit pending before Chief Judge Watkins.[4] *Id.* In advance of that visit, Attorney Palombi prepared a form that the Federal Defenders Office had created, which his clients could sign to indicate their "election" to be executed by nitrogen hypoxia. *Id.*, ¶ 4. During his visit, Attorney Palombi orally explained to his clients why he was presenting them with the form and recommending that they each sign it. *Id.*, ¶ 5. The form itself, however, did not, and was not intended to, explain an inmate's rights or obligations under § 15-18-82.1(b)(2) of the Alabama Code. *Id.* The form does not explain what nitrogen hypoxia is. It makes no mention of the fact that the Alabama legislature had authorized nitrogen hypoxia as a method of execution. It does

[3] During this visit, Attorney Palombi also visited the remainder of the Federal Defenders Office's death row clients.
[4] Mr. Price was not part of that lawsuit, and Mr. Price has never been a client of Attorney Palombi. Palombi Affidavit, ¶ 3. Attorney Palombi has never met or spoken with Mr. Price about legal issues, and he would be prohibited from doing so under the applicable rules of professional conduct. *Id.*

not provide any information about what, if anything, an inmate must do to "elect" into nitrogen hypoxia, when such an "election" must be made, and the consequences of not making an "election" in time. The form does not make any reference to the fact that it was created by Attorney Palombi and the Federal Defenders Office. *Id.*, ¶¶ 4-5.

Neither Attorney Palombi nor any other member of the Federal Defenders Office authorized Warden Cynthia Hall or any other staff member at Holman Correctional to make a copy or reproduction of the form that he had prepared for and presented to his clients. *Id.*, ¶ 6. Attorney Palombi was completely unaware that, after he left Holman Correction on June 26, 2018, a prison guard acting at the direction of Warden Hall began distributing blank reproductions of the form to all of the other death row inmates at Holman Correctional. *Id.*, ¶ 10. Attorney Palombi learned of this fact on February 26, 2019, when Attorney Katz informed him of paragraph 7 of the answer that the State filed that day to Mr. Price's civil rights complaint. *Id.*

4. Mr. Price's counsel purchases 99.9% pure compressed nitrogen hypoxia

On March 27, 2019, Mr. Price's counsel from Ropes & Gray sought to confirm that pure compressed nitrogen hypoxia, sufficient to cause a humane death if properly administered, is available for purchase, no questions asked. In the course of an hour, Ropes & Gray was able to locate, purchase with a credit card for under $300, and carry away a tank of 99.9% pure compressed nitrogen. *See* Kennedy Affidavit, ¶¶ 3-8.

ARGUMENT

I. The Court Should Deny the State's Motion for Summary Judgment and Should Grant Mr. Price Summary Judgment on the Question of Whether Nitrogen Hypoxia Is an "Available" and "Readily Implemented" Alternative to Lethal Injection.

With respect to Mr. Price's Eighth Amendment claim, the State's sole asserted ground for summary judgment is that nitrogen hypoxia is not an "available" and "readily implemented" method of execution for Mr. Price. The State is wrong. Nitrogen hypoxia is an "available" method

of execution for Mr. Price, both as a matter of Alabama statutory law and for federal constitutional purposes because the Alabama legislature has specifically authorized it as a legal method of execution. Moreover, nitrogen hypoxia is "readily implemented" because, as Mr. Price demonstrates in the attached attorney affidavit, pure nitrogen gas is easily purchased, no questions asked. *See* Kennedy Affidavit, ¶¶ 3-8.

A. Alabama's Execution Statute Provides That Nitrogen Hypoxia Is the Inmate's Method of Execution in the Event the State's Lethal Injection Protocol Is Found to Be Substantially Likely to Cause Severe Pain.

The State argues that nitrogen hypoxia is not a statutorily "available" method of execution for Mr. Price because he did not submit a nitrogen hypoxia "election" by § 15-18-82.1(b)(2)'s arbitrary June 30, 2018 deadline. The State's argument flies in the face of the Alabama execution statute itself.

The final sentence of § 15-18-82(a) of the Alabama Code provides: "If lethal injection is held unconstitutional or otherwise becomes unavailable, the method of execution shall be by nitrogen hypoxia." This statutory language clearly presupposes a scenario where the State prefers to execute the inmate using lethal injection but is unable to do so, either because a court determines that method of execution to be unconstitutional for whatever reason or because the State cannot obtain the lethal injection drugs.

Nothing in § 15-18-82(a) provides, or even suggests, that its final sentence applies only if the inmate had "elected" nitrogen hypoxia by § 15-18-82.1(b)(2)'s arbitrary June 30, 2018 deadline. And reading such a requirement into § 15-18-82(a)'s final sentence would violate at least two basic canons of statutory construction. First, it would render the final sentence completely superfluous, violating the rule that a court must seek to "give effect to each part of the statute." *Sheffield v. State*, 708 So. 2d 899, 909 (Ala. Crim. App. Ct. 1997). As the State has

represented in prior litigation, if an inmate has "elected to be executed by nitrogen hypoxia," the inmate's execution "*will be* . . . by nitrogen hypoxia." Palombi Affidavit, Exh. B, ¶ 5 (emphasis added). Thus, if the final sentence of § 15-18-82(a) were to apply only where the inmate has made a nitrogen hypoxia election, the sentence would serve no function in the statutory scheme whatsoever. Second, it would lead to the absurd result that, if lethal injection were to become an "unavailable" method of execution (either for legal reasons or due to drug supply issues), the State would lack any legally authorized method of executing the approximately 120 death row inmates who, like Mr. Price, did not send in a nitrogen hypoxia "election" letter by § 15-18-82.1(b)(2)'s arbitrary June 30, 2018 deadline. *See, e.g. Ex parte Meeks*, 682 So. 2d 423, 428 (Ala. 1996) (holding that courts must avoid construing a statute in a manner that "result[s] in absurd consequences" (citation omitted)).

The most coherent reading of § 15-18-82(a)'s final sentence—one that is faithful to its plain language, gives it actual purpose and effect, and does not result in absurd consequences—is that nitrogen hypoxia will be the method of executing an inmate, regardless of whether the inmate had affirmatively "elected" it, in the event that (i) a court finds that the State's lethal injection protocol is unconstitutional because it poses too great a risk of severe pain,[5] or (ii) the State is unable to obtain lethal injection drugs. On this reading of § 15-18-82(a), nitrogen hypoxia is an available method of execution for Mr. Price if he shows that the State's lethal injection protocol

[5] In *Arthur v. Commissioner*, 840 F.3d 1268, 1319 (11th Cir. 2016), the Eleventh Circuit stated that "if a state's sole method of execution is deemed unconstitutional, while other methods remain constitutional (even if they are not authorized by state statute), our inquiry into whether those other options are feasible and readily implemented would be a different one." The Alabama legislature enacted the current version of § 15-18-82(a) against the backdrop of *Arthur*, and it seems to have drafted the final sentence of § 15-18-82(a) with this passage from *Arthur* specifically in mind.

carries a substantial risk of causing severe pain, a scientific question on which the State did not move for summary judgment.

B. Regardless of How the Court Construes § 15-18-82(a), Nitrogen Hypoxia Is an "Available" and "Readily Implemented" Alternative to Lethal Injection Under *Glossip* and *Arthur*.

Against the backdrop of legal concerns regarding its use of midazolam in executions, the State of Oklahoma in 2015 began looking into nitrogen hypoxia as a more humane, more easily implemented method of execution than lethal injection utilizing midazolam. Oklahoma legislator Mike Christian arranged for scholars at East Central University to study the issue. The scholars' study "was conducted by reviewing the scientific, technical, and safety literature related to nitrogen inhalation." Katz Affidavit, Exh. A, at p. 2. The scholars concluded that "induced hypoxia via nitrogen inhalation would be a humane method to carry out a death sentence" and that "[n]itrogen is readily available for purchase and sourcing would not pose a difficulty." *Id*. On the basis of the scholars' report, the Oklahoma legislature passed a bill adding nitrogen hypoxia as an available method of execution.

Following Oklahoma's lead, the Alabama legislature in April 2017 introduced a bill that would make nitrogen hypoxia a statutorily authorized method of execution in Alabama. The sponsor of the bill, Senator Trip Pittman, explained that "nitrogen hypoxia is a very humane way to implement that sentence." Katz Affidavit, Exh. B. The billed passed in March 2018 and became effective on June 1, 2018. The State has reached agreement with several dozen death row inmates that nitrogen hypoxia, and not lethal injection utilizing midazolam, will be their method of execution. *See* Palombi Affidavit, Exh. B.

Accordingly, in proposing nitrogen hypoxia as an alternative to the State's midazolam lethal injection protocol, Mr. Price is not asking this Court to force the Alabama Department of

Corrections to adopt and employ a "method of execution that is not legal in Alabama." *Arthur*, 840 F.3d at 1320. To the contrary, Mr. Price is proposing that he be executed with a method of execution that the Alabama legislature, after considerable thought, has expressly authorized. For purposes of the Eighth Amendment, nitrogen hypoxia cannot suddenly be deemed "unavailable" for Eighth Amendment purposes *as to Mr. Price* simply because he missed some arbitrary "election" deadline imposed by an Alabama state statute. The Eleventh Circuit's decision in *Arthur* is conclusive on this point. In *Arthur*, neither side claimed that the inmate had elected death by electrocution specified by the deadline specified in § 15-18-82.1(b)(1). Yet, the Eleventh Circuit repeatedly referenced "death by electrocution" as a method of execution that the Alabama Department of Corrections was statutorily authorized to use, and therefore was "available" for Eighth Amendment purposes, if a court were to find that the State's lethal injection protocol poses a substantial risk of severe pain. *See, e.g.*, *Arthur*, 840 F.3d at 1316 ("Arthur does not challenge the constitutionality of death by electrocution, or allege any facts establishing that electrocution involves a substantial risk of severe pain.").

Nor can the State colorably argue that nitrogen hypoxia is not "feasible" or "readily implemented" merely because the Alabama Department of Corrections has failed to finalize a nitrogen hypoxia protocol in the year that has passed since the Alabama legislature passed Senator Pittman's nitrogen hypoxia bill. Both the Supreme Court in *Glossip* and the Eleventh Circuit in *Arthur*, in addressing whether the inmate had shown sodium thiopental and pentobarbital are "available" and "readily implemented" alternatives to midazolam, focused entirely on whether a State's department of corrections was able to purchase the drugs. *See Glossip*, 135 S. Ct. at 2738 ("Oklahoma has been unable to procure those drugs despite a good-faith effort to do so."); *Arthur*, 840 F.3d at 1300 ("[S]odium thiopental and pentobarbital were unavailable to Oklahoma by 2014

for use in executions where the state was unable to procure those drugs due to supplier problems."). As the East Central University study concluded, there are no such supply concerns for nitrogen. In fact, counsel for Mr. Price was able to purchase on March 27, 2019 a tank of 99.9% pure compressed nitrogen gas using his credit card, no questions asked. *See* Kennedy Affidavit, ¶¶ 3-8.

The Eleventh Circuit's analysis in *Arthur* regarding whether the "firing squad" is an "available" and "readily implemented" method of execution in Alabama is also instructive. The Eleventh Circuit concluded that it is not, pointing principally to two facts: (1) firing squad "is not a currently valid or lawful method of execution in Alabama" and is "beyond the [Alabama Department of Corrections'] statutory authority," 840 F.3d at 1316, 1320; and (2) implementing the firing squad would involve more than "merely buying some new supplies," *id.* at 1318-1319. Nitrogen hypoxia, by contrast, is a method of execution that the Alabama legislator has expressly authorized, and implementing that method of execution is principally a matter of purchasing supplies that are widely available.

In its summary judgment brief, the State complains that it will not be in a position to execute Mr. Price on April 11, 2019 using nitrogen hypoxia. That is totally irrelevant to the constitutional question that is presented to this Court. As the Eighth Circuit has held, *Glossip* does not require that the "alternative method must be . . . ready to use immediately," but rather requires only that the State be able to "carry out the alternative method . . . reasonably quickly." *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) (citing *Arthur*, 840 F.3d at 1300). It is implausible for the State to suggest that the Alabama Department of Corrections cannot figure out "reasonably quickly" how to humanely execute an inmate using nitrogen hypoxia. *Cf. Johnson v. Precythe*, 901 F.3d 973, 979 (8th Cir. 2018) (concluding that inmate had adequately alleged that

Missouri "could feasibly implement [nitrogen hypoxia] without undue delay," and noting the East Central University report's "ultimate conclusion . . . that execution by nitrogen-induced hypoxia would be 'simple to administer'"). In finalizing a nitrogen hypoxia protocol, the Alabama Department of Corrections is exempt from the State's Administrative Procedure Act, meaning it is free from the ordinary bureaucratic requirements that can slow down an agency's rulemaking process. *See* Ala. Code § 15-18-82.1(g).

It has been two years since the Alabama legislature proposed the nitrogen hypoxia bill, more than a year since the bill was passed and enacted into law, almost nine months since death row inmates first began making nitrogen hypoxia "elections," and over two months since Mr. Price sent his nitrogen hypoxia request to the State. The State cannot now complain that, during all this time, the Alabama Department of Corrections has been effectively neglecting its administrative responsibility to do what Alabama's statutory law requires it to do. If the Alabama Department of Corrections' own inaction could control whether a method of execution is available and readily implemented for Eighth Amendment purposes, the Supremacy Clause and judicial review would be completely negated in this critical area of constitutional law.[6]

For all these reasons, the Court should conclude that nitrogen hypoxia is an "available" and "readily implemented" method of execution for Mr. Price and schedule a bench trial on the question of whether the State's midazolam lethal injection method carries a substantial risk of causing Mr. Price severe pain.

[6] The Department of Corrections' agency inaction appears to be entirely driven by its desire that Oklahoma be the first State to actually execute an inmate using nitrogen hypoxia, so that Alabama cannot be accused in the media of human experimentation. Nothing in *Glossip* or *Arthur* remotely suggests that a more humane method of execution is not "available" or "readily implemented" merely because the State's department of corrections, though legislatively authorized to utilize that method of execution, is reluctant to use it for political and public relations reasons.

II. Mr. Price Is Entitled to Judgment as a Matter of Law on His Equal Protection Clause Claim Because the State Has No Rational Basis for Refusing to Allow Him to Join the Class of Inmates Who Will Be Executed by Nitrogen Hypoxia.

With respect to method of execution, the State plainly has classified death row inmates into two distinct classes: (1) those whom it will execute using nitrogen hypoxia, which the Alabama legislature has described as "more humane" than lethal injection, and (2) those whom it refuses to execute using nitrogen hypoxia. The gist of Mr. Price's Equal Protection Clause claim is that, in determining an inmate's method-of-execution classification, the State has chosen a criterion—namely, whether the inmate sent in a nitrogen hypoxia "election" letter by June 30, 2018—that does not rationally further any legitimate state interest.[7] *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (explaining that a classification that does not involve fundamental rights or target suspect groups nevertheless violates the Equal Protection Clause if there is not "a rational relationship between the disparity of treatment and some legitimate governmental purpose"); *Estrada v. Becker*, __F. 3d __, __ (11th Cir. 2019) (same).

A. Mr. Price Is "Similarly Situated" to the Death Row Inmates That the State Has Placed Into the Nitrogen Hypoxia Class.

As an initial matter, the State's summary judgment brief misapprehends how Mr. Price's Equal Protection Clause claim must be analyzed. According to the State, Mr. Price's claim fails because he is not "similarly situated" to the inmates whom the State has agreed to execute using nitrogen hypoxia. In urging that Mr. Price is not similarly situated to those inmates, the State points out that those inmates returned nitrogen hypoxia "election" forms by June 30, 2018, whereas Mr. Price did not. The State's argument, however, fundamentally misunderstands how Mr. Price's

[7] Mr. Price's Equal Protection Clause claim stands independent from his Eighth Amendment claim, in that he can prevail on the former without the need to show that the State's midazolam lethal injection protocol carries a substantial risk of causing him severe pain.

Equal Protection Clause must be analyzed and completely elides the question that Mr. Price's Equal Protection Clause claim presents.

"To be 'similarly situated,' the [plaintiff and his proposed] comparators must be 'prima facie identical in all relevant respects.'" *Grider v. City of Auburn*, 618 F.3d 1240, 1263-1264 (11th Cir. 2010) (emphasis omitted) (quoting *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007)). "The crucial word in this formulation is 'relevant.' The word captures only differences that would be relevant to an objectively reasonable decisionmaker." *Grider v. City of Auburn*, 628 F. Supp. 2d 1322, 1337-1338 (M.D. Ala. 2009) (Thompson, J.)), *reversed on other grounds*, *Grider*, 618 F.3d at 1240. In other words, a distinction between the plaintiff and his proposed comparators is not "relevant," for purposes of the Equal Protection Clause, if the distinction could not survive the applicable level of scrutiny (here, rational basis review).

The question of law that Mr. Price's Equal Protection Clause claim presents is whether, for purposes of classifying inmates with respect to method of execution, satisfaction of § 15-18-82.1(b)(2)'s June 30, 2018 deadline is a "relevant" difference between inmates that are otherwise identical. Put another way, the gravamen of Mr. Price's Equal Protection Clause claim is that § 15-18-82.1(b)(2)'s June 30, 2018 deadline is a completely arbitrary one—and that, therefore, the State has no rational basis to use an inmate's satisfaction of that deadline as the criterion for determining whether it will execute the inmate with nitrogen hypoxia or lethal injection. Accordingly, in making the threshold determination of whether Mr. Price is "similarly situated" to inmates whom the State has agreed to execute by nitrogen hypoxia, the Court must look at whether there is *any other* difference that could justify the State's differential treatment (*i.e.*, differences *other* than satisfaction of § 15-18-82.1(b)(2)'s June 30, 2018 deadline). There is none.

As just one example, compare Mr. Price to Gregory Hunt, who is one of the inmates that the State has agreed to execute using nitrogen hypoxia rather than lethal injection. Hunt was sentenced to death in July 1990—nearly three years before Mr. Price was sentenced to death. Hunt has been out of habeas corpus since April 2015—just as Mr. Price has been out of habeas corpus since October 2013. The State first moved for an execution date for Hunt on September 11, 2014—the exact same day the State first moved for an execution date for Mr. Price. Finally, on October 3, 2014, Hunt filed civil rights lawsuit in the Middle District of Alabama seeking to prevent the State from executing him with its midazolam lethal injection protocol—five days before Mr. Price filed an identical lawsuit in the Southern District of Alabama. Why has the State agreed to execute Hunt using the more humane method of nitrogen hypoxia, relegating Mr. Price to the problematic midazolam lethal injection protocol? The *only* basis is that Hunt submitted a nitrogen hypoxia "election" letter in June 2018, whereas Mr. Price submitted his in January 2019.

B. The State's Sole Asserted Basis for Treating Mr. Price Differently From Death Row Inmates Like Hunt Fails Rational Basis Scrutiny.

The State's summary judgment brief makes no real effort to defend the rationality of classifying inmates to different methods of execution depending upon whether they returned a nitrogen hypoxia "election" letter by June 30, 2018. Instead, the State in its brief offers the following *non sequitur*: "[I]t is entirely reasonable for Alabama to set time limits as to when an inmate may elect a method of execution so as to ensure the efficient use of State resources in planning and preparing for executions." ECF No. 19, at p. 18. Whether it is reasonable, in some general and generic way, for Alabama to "set time limits" for an inmate to decide whether he wants to be executed with nitrogen hypoxia, so that the State can "plan and prepare" for the inmate's execution, is not the question here. Instead, the question is whether § 15-18-82.1(b)(2)'s arbitrary June 30, 2018 deadline furthers that legitimate interest in any rational way. It does not.

First, if an inmate has no knowledge of his right to elect nitrogen hypoxia as his execution method or the consequences of not making an election by a particular arbitrary deadline, the deadline itself has no rational basis. Indeed, although § 15-18-82.1(b)(2) provides that an inmate "waive[s]" his right to elect nitrogen hypoxia if he does not elect that method of execution by June 30, 2018, Alabama law is clear that a person cannot be deemed to have "waived" a right that he did not know he had. *See Ex parte Spencer*, 111 So. 3d 713, 718 (Ala. 2012) (holding that "waiver" is "the voluntary surrender of a known right." (internal quotation marks omitted)); *Garrard v. Lang*, 514 So. 2d 933, 935 (Ala. 1987) ("By definition, waiver requires that the right relinquished be a known right."). Here, the State concedes that it did not provide any *actual notice* whatsoever to Mr. Price that (1) he needed to submit a nitrogen hypoxia "election" letter to the prison warden in order to be part of the nitrogen hypoxia class, (2) he needed to submit that letter by June 30, 2018 for the "election" to be considered, or (3) he would be guaranteed a nitrogen hypoxia execution if they submitted the "election" letter by June 30, 2018. Instead, the State left it completely to chance that an inmate would learn all of these things—and would learn them sufficiently in advance of June 30, 2018 that he could make a considered decision about what to do. As to the issue of notice and knowledge, all the State can muster is that a prison guard recalls slipping into Mr. Price's prison cell in "mid-June" 2018 a form that, on its face, provided *absolutely no information* about (1) who authored the form; (2) why Mr. Price was being provided the form; (3) the deadline, if any, for returning the form; (4) to whom, if anyone, the form needed to be returned; (5) the consequences of signing the form; or (6) the consequences of not signing the form.[8]

[8] That 48 of the 171 death row inmates in Alabama signed the form proves absolutely nothing about whether Mr. Price had actual notice of § 15-18-82.1(b)(2) terms.

Second, if the State's concern is ensuring that the Alabama Department of Corrections has time to "plan and prepare" for an inmate's execution, § 15-18-82.1(b)(2)'s arbitrary June 30, 2018 deadline does not further that interest in any way whatsoever. The State cannot seriously argue that, for it to have adequate opportunity to "plan and prepare" to execute Mr. Price by nitrogen hypoxia, it needed Mr. Price to return a nitrogen hypoxia "election" letter by June 30, 2018. After all, by the State's own admission, the Department of Corrections has not even bothered to finalize the nitrogen hypoxia protocol. The Department of Corrections' own agency inaction in this regard is not plausibly attributable to the fact that Mr. Price was not among the 48 inmates who submitted a nitrogen hypoxia "election" letter in June 2018.

Third, it is irrelevant that the Alabama legislature imposed an "election" deadline in 2002 with respect to the electric chair when it amended the State's execution statute to add lethal injection as a method of execution but allowed an inmate thirty days to "elect" to stick with electrocution if he desired. Indeed, the stark differences between the 2002 and the 2018 "election" provisions prove the irrationality of the latter. Before 2002, the electric chair was the only available method of execution in Alabama. The 2002 amendment added lethal injection as a new and more humane method of execution, made lethal injection the default method for every inmate, and allowed inmates thirty days to elect into the retrograde "Yellow Mama."[9] The 2018 amendment works exactly the opposite—it adds nitrogen hypoxia as the newest and most humane method of execution but, rather than make it the default for every inmate, purports to require the inmate to "elect" into it by June 30, 2018.

In sum, without any rational basis to deny Mr. Price's request, first made in January 2019, that he be executed with nitrogen hypoxia—the method of execution that the State has agreed to

[9] The electric chair kills in such a horrific manner that, not surprisingly, no Alabama inmate has ever chosen to elect into it.

use on at least 48 other death row inmates—the State's treatment of Mr. Price violates the Equal Protection Clause. The Court should thus grant Mr. Price summary judgment on his Equal Protection Clause claim.

CONCLUSION

For the foregoing reasons, the Court should deny the State's Motion for Summary Judgment in full, grant summary judgment in favor of Mr. Price on the question of whether nitrogen hypoxia is an "available" and "readily implemented" alternative to lethal injection, and grant summary judgment in favor of Mr. Price in full on his Equal Protection Clause claim.

Respectfully submitted,

ROPES & GRAY LLP

By: /s/ Aaron M. Katz

Dated: March 29, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the all counsel of record.

Dated: March 29, 2019 /s/ Aaron M. Katz

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, in his official capacity, CYNTHIA STEWART, WARDEN, HOLMAN CORRECTIONAL FACILITY, in her official capacity, and OTHER UNKNOWN EMPLOYEES AND AGENTS, ALABAMA DEPARTMENT OF CORRECTIONS, in their official capacities, Defendants.	Case No. 19-57

AFFIDAVIT OF AARON M. KATZ

I, Aaron M. Katz, swear or affirm under penalty of perjury that the following facts are true and correct to the best of my knowledge:

1. I am a member in good standing of the bar of the Supreme Judicial Court of Massachusetts.

2. I am an attorney and partner in the Boston office of Ropes & Gray LLP. Ropes & Gray has represented Christopher Lee Price since 1999. I have worked on Mr. Price's case since 2006 and became Mr. Price's lead counsel in or around 2009.

3. Attached hereto as **Exhibit A** is a true and correct copy of the draft report prepared by scholars at East Central University regarding execution by nitrogen hypoxia.

4. Attached hereto as **Exhibit B** is a true and correct copy of a newspaper article quoting Alabama Senator Pittman regarding his legislation making nitrogen hypoxia a statutorily authorized method of execution in Alabama.

5. Attached hereto as **Exhibit C** are true and correct copies of emails between me and the Alabama Attorney General's Office regarding Christopher Price's nitrogen hypoxia election.

Sworn to this day of March 27, 2019.

Aaron M. Katz, Esq.

EXHIBIT A

Nitrogen Induced Hypoxia as a Form of Capital Punishment

Michael P. Copeland, J.D.

Thom Parr, M.S.

Christine Papas, J.D., Ph.D.

East Central University

Executive Summary

At the request of Oklahoma State Representative Mike Christian, the authors of this study researched the question of whether hypoxia induced by nitrogen gas inhalation could serve as a viable alternative to the current methods of capital punishment authorized under Oklahoma law. As per the above, this study does not express an opinion on the wider question of whether Oklahoma should continue to administer capital punishment in general. The scope of this study is limited to the assumption that capital punishment will continue to be administered in Oklahoma, and given that assumption, analyzing whether hypoxia via nitrogen gas inhalation would be an effective and humane alternative to the current methods of capital punishment practiced in Oklahoma law.

This study was conducted by reviewing the scientific, technical, and safety literature related to nitrogen inhalation.

The study found that:

1. An execution protocol that induced hypoxia via nitrogen inhalation would be a humane method to carry out a death sentence.
2. Death sentence protocols carried out using nitrogen inhalation would not require the assistance of licensed medical professionals.
3. Death sentences carried out by nitrogen inhalation would be simple to administer.
4. Nitrogen is readily available for purchase and sourcing would not pose a difficulty.
5. Death sentences carried out by nitrogen inhalation would not depend upon the cooperation of the offender being executed.

Accordingly, it is the recommendation of this study that hypoxia induced by the inhalation of nitrogen be offered as an alternative method of administering capital punishment in the State of Oklahoma.

The views expressed in this study are solely those of its authors and do not necessarily reflect those of the university at which we are affiliated.

Introduction

Nitrogen is an inert gas that at room temperature is colorless, odorless, and tasteless. It is the most common gas in the earth's atmosphere, comprising 78.09% of the air that humans breathe on a regular basis.

When combined with the normal 20.95% oxygen found in the atmosphere, nitrogen is completely safe for humans to inhale. However, an environment overly enriched in nitrogen will lack the appropriate level of oxygen necessary for human survival and will thus lead to hypoxia and rapid death. (U.S. Chemical Safety and Hazard Investigation Board, 2003, p.1).

Nitrogen hypoxia has been suggested as a means of administering capital punishment in the popular media on previous occasions. For example, in1995 the National Review featured an article by Stuart Creque titled *Killing With Kindness: Capital Punishment by Nitrogen Asphyxiation (1995)*. Creque`s article was written in response to a 9th Circuit U.S. District Court decision that California's gas chamber was an unconstitutionally cruel and unusual punishment. The article suggested nitrogen could provide a simple and painless alternative to the gas chamber that would require no elaborate medical procedures to administer.

The idea of administering capital punishment via nitrogen hypoxia resurfaced more recently in a Tom McNichol Slate magazine article titled *Death by Nitrogen (2014)*. The article was inspired by the stay of execution issued by the U.S. Supreme Court for a Missouri man facing execution via lethal injection. Again, the author suggested nitrogen induced hypoxia as a painless alternative to traditional methods of execution, adding that it offered the additional benefits of requiring no medical training to administer and lacked any of the supply issues that exist with lethal injection.

The capital punishment protocols cited that utilize nitrogen to administer a death sentence do not actually rely on the nitrogen itself to bring about death. Nitrogen simply displaces the oxygen normally found in air and it is the resulting lack of oxygen which causes death. Without oxygen present, inhalation of only 1-2 breaths of pure nitrogen will cause a sudden loss of consciousness and, if no oxygen is provided, eventually death. (European Industrial Gases Association, 2009, p. 3).

Since nitrogen has not previously been used for capital punishment there is a lack scientific literature that specifically addresses its performance for that purpose. However, there have been medical experiments which involved human subjects breathing pure nitrogen until they became unconscious. Beyond those experiments, most of the data related to nitrogen induced hypoxia comes from documented suicides in humans and research in high altitude pilot training.

Author's Note: in some cases the lay press will inadvertently refer to hypoxia as asphyxiation. This is technically inaccurate in this context, as asphyxia is the inability to breathe in oxygen ***and*** *the inability to exhale carbon dioxide. Hypoxia is the pathology related to the inability to intake oxygen even though one may still be able to exhale carbon dioxide. As will be seen later, the ability to exhale carbon dioxide is critical to the proposed method of execution, as it prevents the acidosis normally associated with asphyxiation.*

Medical Literature

The adult brain uses about 15 per cent of the heart's output of oxygenated blood (Graham, 1977, p.170). Hypoxia is the condition of having a lower-than-normal amount of oxygen in the blood. Anoxia is an extreme form of hypoxia in which there is a complete absence of oxygen in the blood (Brierley, 1977 p.181). If the supply of oxygen in the blood is reduced

below a critical level it will result in a rapid loss of consciousness and eventually irreversible brain damage will occur (Graham, 1977, p.170).

A complete immediate global loss of oxygen to the brain, (a scenario in which no residual oxygen in the lungs or blood is delivered to the brain), will result in a loss of consciousness in eight to ten seconds, and a loss of any electrical output by the brain will occur a few seconds later. The heart may continue to beat for a few minutes even after the brain no longer functions (Brierley, 1977 p.182).

Ernsting (1961) performed a study on human volunteers that hyperventilated on pure nitrogen gas. The subjects performed the test multiple times, varying the length of time they inhaled the nitrogen. When the subjects inhaled nitrogen for eight-to-ten seconds they reported a dimming of vision. When the period was expanded to fifteen-to-sixteen seconds, the subjects reported some clouding of consciousness and impairment of vision. When the tests were expanded to seventeen-to-twenty seconds, the subjects lost consciousness. There was no reported physical discomfort associated with inhaling the pure nitrogen. (p. 295)

Unlike asphyxiation, hypoxia via the inhalation of nitrogen allows the body to expel the carbon dioxide buildup that is normally associated with the respiratory cycle. This helps prevent a condition known as hypercapnia - an accumulation of carbon dioxide in the blood. The result of this buildup of carbon dioxide is respiratory acidosis - a shifting of the ph levels in the blood to become more acidic. This is the pathology many people associate with suffocating. Some of the symptoms of respiratory acidosis are expected to be present in cases of asphyxiation, but not expected to be present under pure hypoxia are anxiety and headaches, (Merrick Manuel, 2013).

Suicide Data

Perhaps one of the greatest testaments to both the humanity of nitrogen induced hypoxia as well as the ease of administration is its rapidly gaining popularity as a self-selected means of suicide. Suicide by hypoxia using an inert gas is the most widely promoted method of human euthanasia by right-to-die advocates (Howard, M.O. et. al., 2011, P. 61).

The trend toward using an "exit bag" filled with an inert gas such as nitrogen or helium likely started with a publication of *Final Exit: The Practicalities of Self Deliverance and Assisted Suicide for the Dying*. The authors of the publication sought to identify methods of death that were swift, simple, painless, failure-proof, inexpensive, non-disfiguring and did not require a physician`s assistance or prescription (Howard, M.O. et. al., 2011. p 61).

This method of suicide is indeed simple. It involves a clear plastic bag fitted over the head, two tanks filling the bag with helium via vinyl tubing, and an elastic band at the bottom of the bag to prevent the bag from slipping off the head. The parts needed to create the bag are inexpensive and available locally without prescription (Howard, M.O. et. al., 2011. p 61-62).

Reports of deaths observed via this method suggest that it is painless. Jim Chastain, Ph.D. President of the Final Exit Network of Florida described the process this way:

> In the several events I have observed the person breathes the odorless, tasteless helium deeply about three or four times and then is unconscious. no gagging or gasping. Death follows in 4-5 minutes. A peaceful process.

Derek Humphrey, current chair of the Final Exit advisory board is quoted as saying:

> In the approximate 300 cases which have been reported to me there has never been mention of choking or gagging. When I witnessed the helium death of a friend of mine it could not have been more peaceful (Final Exit, 2010).

However, it should be noted that deviations from the above protocols have not always been as successful. When masks were placed over the face (instead of using bags of helium over

the head) it has been reported some problems have occurred. This is typically a result of the mask not sealing tightly to the face, resulting in a small amount of oxygen being inhaled by the individual. This extends the time to become unconscious and extends the time to death. This may result in purposeless movements by the decedent (Ogden et al, 2010. p 174-179).

Research on High Altitude Pilot Training

A great deal of research on the effects of hypoxia on human beings comes from aerospace medicine. Pilots that fly at high altitudes are subject to becoming hypoxic if their cabins lose air pressure. Altitude hypoxia has similar effects as the hypoxia one gets from breathing inert gases although it is caused by the inability of the lungs to absorb the oxygen in the air rather than a lack of oxygen in the air.

The Federal Aviation Administration (2003, p. 11) states:

> Hypoxia is a lack of sufficient oxygen in the body cells or tissues caused by an inadequate supply of oxygen, inadequate transportation of oxygen, or inability of the body tissues to use oxygen. A common misconception among many pilots who are inexperienced in high-altitude flight operations and who have not be exposed to physiological training is that it is possible to recognize the symptoms of hypoxia and to take corrective actions before becoming seriously impaired. While this concept may be appealing in theory, it is both misleading and dangerous for an untrained crew member. Symptoms of hypoxia vary from pilot to pilot, but one of the earliest effects of hypoxia is impairment of judgment. Other symptoms can include one or more of the following:
> (1) Behavioral Changes (e.g. a sense of euphoria).
> (2) Poor coordination.
> (3) Discoloration in the fingernails (cyanosis).
> (4) Sweating.
> (5) Increased breathing rate, headache, sleepiness, or fatigue
> (6) Loss or deterioration of vision
> (7) Light-headedness or dizzy sensations and listlessness.
> (8) Tingling or warm sensations.

Indeed, hypoxia has caused several airline accidents which are often fatal. The onset of hypoxia is typically so subtle that it is unnoticeable to the subject. The effects of hypoxia are often difficult to recognize. (Federal Aviation Administration, 2014, Ch. 8-1-2 (A) 5)

Attempts to train pilots to notice hypoxia are conducted using a hyperbaric chamber to simulate high altitudes. Often a trainee will be asked to remove his or her mask and perform simple tasks. At low levels of hypoxia, trainees typically feel little more than euphoria and a sense of confidence. At higher levels of hypoxia, trainees will quickly become unconscious. Time of useful consciousness at altitudes above 43,000 is 5 seconds (Federal Aviation Administration, 2003, p. 13).

Findings

Based on the review of the literature related to hypoxia induced by inert gases, this study makes the following findings:

1. An execution protocol that induced hypoxia via nitrogen inhalation would be a humane method to carry out a death sentence.
2. Death sentence protocols carried out using nitrogen inhalation would not require the assistance of licensed medical professionals.
3. Death sentences carried out by nitrogen inhalation would be simple to administer.
4. Nitrogen is readily available for purchase and sourcing would not pose a difficulty.
5. Death sentences carried out by nitrogen inhalation would not depend upon the cooperation of the offender being executed.
6. Use of nitrogen as a method of execution can assure a quick and painless death of the offender

Finding 1. An execution protocol that induced hypoxia via nitrogen inhalation would be a humane method to carry out a death sentence.

Rationale:

As an inert gas, nitrogen is odorless, colorless, tasteless and undetectable to human beings. It is 78% of the air we breathe on a daily basis, and thus there is little chance that any subject would have an unusual or allergic reaction to the gas itself.

Because the subject is able to expel carbon dioxide, the anxiety normally associated with acidosis in asphyxiation would not be present.

The literature indicates after breathing pure nitrogen, subjects will experience the following: within eight-to-ten seconds the subjects will experience a dimming of vision, at fifteen-to-sixteen seconds they will experience a clouding of consciousness, and at seventeen-to-twenty seconds they will lose consciousness. There is no evidence to indicate any substantial physical discomfort during this process.

There is a possibility that subjects will feel euphoria prior to losing consciousness and a slight possibility they will feel a tingling or warm sensation. After the subjects are unconscious, it should be expected some of the subjects will convulse. Most electrochemical brain activity should cease shortly after loss of consciousness, and the heart rate will begin to increase to varying degrees until it stops beating 3 to 4 minutes later. Observed suicides involving inert gas hypoxia are described as peaceful, so long as caution is taken to eliminate the possibility of the subject inadvertently receiving supplemental oxygen during the process. Inert gas hypoxia is considered such a humane and dignified process to achieve death that it is recommended as a preferred method by right-to-die groups.

Finding 2. Death sentence protocols carried out using nitrogen inhalation would not require the assistance of licensed medical professionals.

Rationale:

The administration of a death sentence via nitrogen hypoxia does not require the use of a complex medical procedure or pharmaceutical products. The process itself, as demonstrated by those who seek euthanasia, requires little more than a hood sufficiently attached to the subject's head and a tank of inert gas to create a hypoxic atmosphere.

While a state execution would likely have a more elaborate mechanism to create hypoxia, nothing in the process would require specialized medical knowledge or the use of regulated pharmaceutical products. Accordingly, except for the pronouncement of death, the assistance of licensed medical professionals would not be required to execute this protocol.

Finding 3. Death sentences carried out by nitrogen inhalation would be simple to administer.

Rationale:

When considering a substitute method of capital punishment it is important to consider more than just what happens if everything goes according to protocol. The likelihood of mishaps must also be considered, as well as the consequences that would flow if those mishaps should occur.

Because the protocol involved in nitrogen induced hypoxia is so simple, mistakes are unlikely to occur. Oxygen and nitrogen monitors may be placed inside the contained environment to insure the proper mixes of gas are being expelled into the bag and inhaled by the subject.

However, the protocol should be careful to prevent the possibility of oxygen entering into the hood, as that can prolong time to unconsciousness and death, as well as increase the possibility of involuntary movements by the subject.

The risks to witnesses are minimal, as any potential leak of the nitrogen would not be harmful in a normally ventilated environment.

Finding 4. Nitrogen is readily available for purchase and sourcing would not pose a difficulty.

Rationale:

Nitrogen is utilized harmlessly in many fields within United States industries. Nitrogen is used in welding, hospital and medical facilities, cooking, and used in the preparation of liquid nitrogen cocktails. Nitrogen is used as a process to extend the life of food products such as potato chips. Nitrogen is used in doctor's offices to remove skin tags as well as other procedures. Accordingly, sources of nitrogen to be used for administering a death sentence should be easy to find and readily available for purchase for such purpose.

Finding 5. Death sentences carried out by nitrogen inhalation would not depend upon the cooperation of the offender being executed.

Rationale:

Some forms of capital punishment require the offender to submit or comply to some degree in order to assure an efficient and humane method of execution. With proper protocol and utilizing such devices as a restraint chair, nitrogen inhalation can be administered despite the presence of a non-compliant offender. The use of nitrogen can be used by non-medical personnel and a delivery system can be designed to ensure the execution is carried out without issue.

Conclusion

As per the above, it is the recommendation of this study that hypoxia induced by the inhalation of nitrogen be offered as an alternative method of administering capital punishment in the State of Oklahoma.

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EXHIBIT B

RELATED TOPICS

Bills
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Alabama
U.S. News

Alabama Senate votes to allow execution by nitrogen gas

By KIM CHANDLER April 19, 2017

MONTGOMERY, Ala. (AP) — Alabama could become the third state to allow death row inmates to be executed by nitrogen gas — an execution method that has so far never been used— under a bill approved Tuesday by the Alabama Senate.

AP NEWS

The Alabama Senate voted 25-8 to add nitrogen gas to lethal injection and the electric chair as allowable methods of execution in the state. The bill now moves to the Alabama House.

"No state has carried out an execution using nitrogen hypoxia," said Robert Dunham of the Death Penalty Information Center. He said Mississippi and Oklahoma also allow execution by nitrogen gas but have not used it.

The pace of executions has slowed in Alabama, partly because of ongoing legal challenges to lethal injection methods.

Sen. Trip Pittman, the Republican bill sponsor, said Alabama needs another execution method as lethal injection faces court challenges. Pittman had originally proposed a firing squad as an execution method, but the bill was changed in committee.

"It's an important to have another option," said Pittman, R-Montrose. "I think nitrogen hypoxia is a very humane way to implement that sentence."

Under the bill, an inmate could choose to be put to death with nitrogen gas instead of lethal injection. It would also allow the state corrections commissioner to choose another constitutional execution method if electrocution, lethal injection and nitrogen gas are all found unconstitutional.

The legislation met with pushback from some lawmakers who called it experimentation.

"It has never been tried before," said Sen. Vivian Davis Figures, D-Mobile.

Alabama senators also approved legislation aimed at shortening the time of that death penalty appeals take. The legislation, which now moves to the Alabama House, would require inmates to raise claims of ineffective counsel and the same time as the inmate's direct appeal claiming trial

errors. The legislation is based on Texas' process which was recently upheld by the courts, said Sen. Cam Ward, a Republican from Alabaster.

EXHIBIT C

State of Alabama
Alabama Department of Corrections
W. C. Holman Correctional Facility
Holman 3700
Atmore, AL 36503

KAY IVEY
GOVERNOR

Jefferson S. Dunn
COMMISSIONER

Cynthia D. Stewart
Warden III

Phillip Mitchell
Warden I

Terry Raybon
Warden II

Christopher Lee Price
AIS #Z-546 / N-14
Holman Unit 3700
Holman, AL 36503-3700

To Mr. Price:

This letter is in response to your request to be executed by Nitrogen Hypoxia rather than by Lethal Injection dated January 27, 2019

I received your request on January 28, 2019; This request is past the deadline of June 2018. However, I do not possess the authority to grant, deny or reject your request.

Any further consideration in this matter needs to go through your attorney to the Attorney General's office.

Sincerely,

C Stewart

Cynthia D. Stewart, Warden III
Holman Correctional Facility

Dolan, Patrick

From: Katz, Aaron
Sent: Monday, February 04, 2019 2:38 PM
To: Johnson, Henry
Cc: Coriell, David; Hughes, Beth; Simpson, Lauren
Subject: RE: Christopher Price [EXTERNAL]

Henry,

Thank you for responding so quickly. Are you representing that the Attorney General's Office did not in fact enter into an agreement with John Palombi's clients that if they opted into the nitrogen hypoxia protocol (1) the State would not seek to execute them with the midazolam-based three drug cocktail, and (2) they would retain the right to bring an as-applied challenge the nitrogen hypoxia protocol once finalized?

Aaron

From: Johnson, Henry <HJohnson@ago.state.al.us>
Sent: Monday, February 04, 2019 2:34 PM
To: Katz, Aaron <Aaron.Katz@ropesgray.com>
Cc: Coriell, David <David.Coriell@ropesgray.com>; Hughes, Beth <BHughes@ago.state.al.us>; Simpson, Lauren <lsimpson@ago.state.al.us>
Subject: RE: Christopher Price [EXTERNAL]

Aaron,

The Attorney General's Office did not make any offer to John Palombi's clients. The statute provided a thirty (30) day opt-in procedure for nitrogen hypoxia, and it is too late now for Price to make that election.

Thanks,
Henry

Henry M. Johnson
Assistant Attorney General

Office of the Attorney General
State of Alabama
Capital Litigation Division
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130
334.353.9095 Office
334.353.3637 Fax

From: Katz, Aaron <Aaron.Katz@ropesgray.com>
Sent: Monday, February 04, 2019 1:12 PM
To: Johnson, Henry <HJohnson@ago.state.al.us>
Cc: Coriell, David <David.Coriell@ropesgray.com>
Subject: Christopher Price

Henry,

My client Christopher Price last week wrote a letter to the Holman Warden asking to opt into the nitrogen hypoxia protocol, on the same terms that I understand you offered to John Palombi's clients in the civil rights lawsuit before Judge Watkins. Mr. Price received this letter in response, and so I am following up to you. Mr. Price has authorized me to inform you of his desire to opt in to the nitrogen hypoxia protocol, again on the same terms that I understand you offered to John Palombi's clients.

Please let me know the Attorney General's position on this matter.

Thank you,
Aaron

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, in his official capacity, CYNTHIA STEWART, WARDEN, HOLMAN CORRECTIONAL FACILITY, in her official capacity, and OTHER UNKNOWN EMPLOYEES AND AGENTS, ALABAMA DEPARTMENT OF CORRECTIONS, in their official capacities, Defendants.	Case No. 19-cv-57

AFFIDAVIT OF JOHN A. PALOMBI

I, John A. Palombi, swear under penalty of perjury that the following facts are true and correct to the best of my knowledge:

1. I am an Assistant Federal Defender in the Middle District of Alabama. I have worked for the Federal Defenders Office since 2008.

2. I was counsel of record for the eight consolidated plaintiffs in No. 2:12-cv-00316-WKW (M.D. Ala.), otherwise known as *In re: Alabama Lethal Injection Protocol Litigation*. That litigation involved an Eighth Amendment challenge to Alabama's current lethal injection protocol, which uses midazolam hydrochloride as the

first drug in a three-drug sequence. On June 5, 2018, Chief Judge Watkins ordered the matter to proceed to a bench trial on September 4, 2018. Between June 5, 2018 and June 25, 2018, I had discussions with the Alabama Attorney General's Office about how the litigation could be resolved short of trial.

3. On June 26, 2018, Federal Defender Spencer Hahn and I traveled to Holman Correctional to meet with the consolidated plaintiffs that we represented in the litigation before Chief Judge Watkins, as well as several other death row inmates who we were then representing in other litigation (*e.g.*, habeas corpus challenges to their sentences). Christopher Lee Price was not among the inmates that we met with. The Federal Defenders Office has never represented Mr. Price. I was also generally aware that Mr. Price was represented by other counsel, and so the Alabama Rules of Professional Conduct would have prohibited me from making any attempt to speak with him during our June 26, 2018 visit to Holman.

4. During the June 26, 2018 meeting referred to above, Mr. Hahn and I presented a form to the clients with whom we met. Mr. Hahn had drafted the form on June 22, 2018. The form, which is attached hereto as **Exhibit A**, read in full as follows:

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this ___ day of June, 2018.

Name / Inmate Number _____ Signature _____

5. The form that Mr. Hahn drafted was not intended to, and did not on its face, provide our clients with any explanation of their rights under Act No. 2018-353 as we understood them, the consequences of signing the form, or the potential consequences of not signing the form. The form on its face did not indicate that it was drafted by the Federal Defenders Office for the benefit of our clients. When we presented our clients with the form, we explained all of these details to them in a discussion protected by the attorney-client privilege. I did not direct or encourage any of our clients to convey any of our attorney-client privileged communications to inmates not represented by the Federal Defenders Office, and I believe it would have violated the Alabama Rules of Professional Conduct for me to have done so.

6. Neither I nor Mr. Hahn, nor any other member of the Federal Defenders Office, authorized any member of the Holman Correctional staff or the Attorney General's Office to copy or recreate the form that Mr. Hahn created in order to disseminate blank forms to inmates not represented by the Federal Defenders Office. Nobody from the Holman Correctional staff or the Attorney General's Office notified me, Mr. Hahn, or the Federal Defenders Office that such dissemination had occurred.

7. On Saturday, January 12, 2019, I received a phone call from Aaron Katz, an attorney for the law firm of Ropes & Gray in Boston, Massachusetts. Mr. Katz advised me that he has been representing Mr. Price since 2006. I recall that, in 2016, I exchanged emails with a Ropes & Gray associate named Kevin Daly regarding the United States Supreme Court's decision in *Hurst v. Florida*, and how that might impact Alabama's judicial override law. I do not recall whether I had ever previously spoken with Mr. Katz. I am certain, however, that I had never previously spoken with Mr. Katz

about the topic of nitrogen hypoxia, and I have no record or memory of communicating with Mr. Katz by phone or email at any time, on any topic, between in 2017 or 2018.

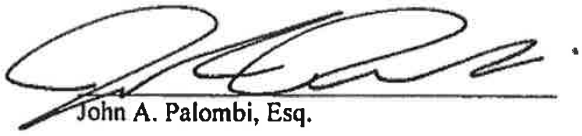
8. During my January 12, 2019 phone call with Mr. Katz, Mr. Katz informed me that, on January 11, 2019, the Attorney General's Office had filed with the Alabama Supreme Court a motion for an execution date for Mr. Price. Mr. Katz asked me questions about the Alabama Supreme Court's procedures for setting an execution date for a death-row inmate. Mr. Katz also expressed his and Mr. Price's fear that the State's lethal injection protocol would cause Mr. Price to suffer an excruciating death.

9. In response to Mr. Katz's concerns about the pain that Mr. Price might suffer from lethal injection, I alerted Mr. Katz to the fact that the Alabama legislature had amended the Alabama execution statute to add nitrogen hypoxia as a method of execution that an inmate could elect. I explained to Mr. Katz that in June 2018, during a settlement discussion mediated by Chief Judge Watkins in *In re: Alabama Lethal Injection Protocol Litigation*, lawyers for the Alabama Attorney General's Office agreed that, if our clients made a written election to be executed by nitrogen hypoxia, the Alabama Department of Corrections would agree not to execute our clients by lethal injection. Those settlement discussions occurred off the record. I explained to Mr. Katz that these settlement discussions prompted me to visit Holman Correctional on June 26, 2018 to encourage my clients to accept the Attorney General's proposed deal and to sign the election form that Mr. Hahn drafted. I also informed Mr. Katz of the joint motion to dismiss for mootness that was submitted on July 11, 2018 in the litigation before Chief Judge Watkins, which is attached hereto as **Exhibit B.**

10. On February 26, 2019, Mr. Katz called me again by phone. During this call, he summarized paragraphs 7-9 of the State's answer to Mr. Price's complaint. This

was the first time that I ever became aware that Holman Correction staff members distributed to inmates not represented by the Federal Defenders Office the form that Mr. Hahn had drafted on June 22, 2018 and that Mr. Hahn and I had provided to our clients on June 26, 2018.

Sworn to this day of March 29, 2019.



John A. Palombi, Esq.

EXHIBIT A

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this ____ day of June, 2018.

_____ _____

Name / Inmate Number Signature

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

In re: Alabama Execution Protocol Litigation	)	Case No: 2:12-cv-316-WKW

JOINT MOTION TO DISMISS

Come now all Plaintiffs and all Defendants in this action and respectfully request that this Honorable Court dismiss this lawsuit without prejudice because the causes of action asserted in the consolidated amended complaint have been rendered moot. As grounds, the parties provide the following:

1. On November 29, 2017, Plaintiffs filed a consolidated amended complaint, pursuant to 42 U.S.C. § 1983, in which they alleged that Defendants would violate their constitutional rights by carrying out their executions under Defendants' current lethal-injection protocol. Doc. 348. Specifically, Plaintiffs alleged that Defendants' lethal-injection protocol violated their rights under the First, Eighth, and Fourteenth Amendments. *Id.* at 1-3.

2. On March 22, 2018, Alabama Governor Kay Ivey signed Senate Bill 272 (enrolled as 2018 Alabama Laws Act 2018-353), which amended Section 15-18-82.1 of the Code of Alabama to introduce nitrogen hypoxia as a statutorily

approved method of execution in Alabama. Under the amended statute, lethal injection remains the primary method of execution in Alabama, but inmates sentenced to death are provided one opportunity to elect to be executed by nitrogen hypoxia. *See* Ala. Code § 15-18-82.1. For inmates whose death sentences became final prior to the effective date of the act, such as the Plaintiffs, the election must be made in writing and delivered to the warden of their correctional facility within thirty days of the effective date of the act adding this language to Section 15-18-82.1. *Id.* According to the terms of the legislation, Act 2018-353 became effective on June 1, 2018. Thus, the Plaintiffs had until June 30, 2018, to make the necessary election of nitrogen hypoxia, or that alternative method of execution was waived under Alabama law.

3. Prior to June 30, 2018, each surviving Plaintiff (Carey Dale Grayson, Demetrius Frazier, David Lee Roberts, Robin Dion Myers, Gregory Hunt, Geoffrey Todd West, Charles Lee Burton, and David Wilson), submitted paperwork to the Warden of Holman Correctional Facility, in which each elected to be executed by nitrogen hypoxia. *See* Exhibit A.

4. Because of Plaintiffs' elections, all claims in Plaintiffs' current consolidated amended complaint are moot because all claims relate to Defendants' current lethal-injection protocol. *Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) ("If events that occur subsequent to the filing of a lawsuit or an appeal deprive

the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed."); *Thompson v. Alabama*, 293 F. Supp.3d 1313, 1328 (M.D. Ala. 2017) ("When a claim is moot, the court lacks subject-matter jurisdiction to adjudicate the claim.").

5. Here, Plaintiffs' consolidated amended complaint seeks to enjoin Defendants from carrying out their executions through Defendants' current three-drug midazolam lethal-injection protocol. Because Plaintiffs have elected to be executed by nitrogen hypoxia, rather than lethal injection, pursuant to Section 15-18-82.1, Plaintiffs' claims and causes of action are now moot because their executions will be carried out at the appropriate time by nitrogen hypoxia.

WHEREFORE the premises considered, the parties jointly request that this Court dismiss all claims in Plaintiffs' consolidated amended complaint without prejudice.[1]

Respectfully submitted,

/s/John A. Palombi
John A. Palombi
Federal Defenders
Middle District of Alabama
817 South Court Street
Montgomery, AL 36104
Telephone: (334) 834-2099
Counsel for Plaintiffs

/s/ Thomas R. Govan, Jr.
Thomas R. Govan, Jr.
Deputy Attorney General
Office of Attorney General
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Montgomery, AL 36130
Telephone: (334) 242-7455
Counsel for Defendants

[1] Plaintiff Jeffery Borden should likewise be dismissed as a plaintiff in this action. Borden died on June 3, 2018, which abated his causes of action for declaratory and injunctive relief. Thus, Borden should also be dismissed from this action.

CERTIFICATE OF SERVICE

I certify that on July 10, 2018, I served a copy of this motion upon counsel for Plaintiffs by filing the same via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to: **John A. Palombi and Spencer J. Hahn.**

/s/ Thomas R. Govan, Jr.
Thomas R. Govan, Jr.
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State of Alabama

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, in his official capacity, CYNTHIA STEWART, WARDEN, HOLMAN CORRECTIONAL FACILITY, in her official capacity, and OTHER UNKNOWN EMPLOYEES AND AGENTS, ALABAMA DEPARTMENT OF CORRECTIONS, in their official capacities, Defendants.	Case No. 19-57

AFFIDAVIT OF SEAN B. KENNEDY

I, Sean B. Kennedy, swear or affirm under penalty of perjury that the following facts are true and correct to the best of my knowledge:

1. I am a member in good standing of the bar of the Supreme Judicial Court of Massachusetts.

2. I am currently employed as an associate attorney in the Boston office of Ropes & Gray LLP.

3. On the morning of Wednesday, March 27, 2019, Ropes & Gray partner Aaron M. Katz asked me to locate and purchase a tank of compressed nitrogen gas, with

a purity of at least 99.9%, that could be administered to a person through a mask. Mr. Katz had never previously made such a request of me.

4. After searching the internet for less than 30 minutes, I had identified several retailers in the Boston, Massachusetts metropolitan area that offer tanks of nitrogen gas. One such retailer was Airgas USA, LLC, which has a location in Dorchester, Massachusetts.

5. According to its website, Airgas USA, LLC "is the nation's leading single-source supplier of gases," including nitrogen gas. According to the website, there are more than 950 Airgas retail branches across the country, including branches in Montgomery, Theodore, and Brewton, Alabama.

6. I then drove from my office at Ropes & Gray to Airgas. I informed an Airgas employee that I wished to purchase a tank of nitrogen gas. The employee did not ask me what the purpose of my purchase was.

7. Using a Visa credit card, I purchased an 80 cubic foot tank of industrial-grade nitrogen gas for $260.46, excluding state sales tax. The specification sheet for the product states that it has a purity of 100%. The tank is about the size of a standard scuba diving tank, and I had no problem transporting it from my car back to the office. The receipt for this purchase is attached to this affidavit as Exhibit A. The entire transaction, from the time I entered the store to the time I walked out, took about fifteen minutes.

Sworn to this day of March 29, 2019.

Sean B. Kennedy, Esq.

EXHIBIT A

Airgas
an Air Liquide company

DELIVERY ORDER

FOR LOCATION NEAREST YOU
VISIT **WWW.AIRGAS.COM**

SHIPPER:
AIRGAS USA, LLC
79 CLAPP ST
DORCHESTER, MA 02125-1620
617-825-3230

SOLD BY:
AIRGAS USA, LLC
79 CLAPP ST
DORCHESTER, MA 02125-1620
617-825-3230

DELIVERY ORDER # 8085818630
PAGE 1 **OF** 1
ORDER DATE: 03/27/2019
SCH SHIP DATE: 03/27/2019
PRINTED: 11:32 03/27/2019
SALES ORDER: 1078284232

SHIP TO: 3334811
LOCAL UNION MEMBERS
79 CLAPP ST
DORCHESTER, MA 02125-1620
617-825-3230

SOLD TO: 3334811
LOCAL UNION MEMBERS
79 CLAPP ST
DORCHESTER, MA 02125-1620

CUST PO #
RELEASE #
ORD BY Sean Kennedy 617-951-7282
ENT BY PAULJOHANS

Order Type	Payment Terms	Incoterm	Route	Sales Office	Plant	Sales Org	Total Containers Ship	Return
Cash Front Counter	CASH/ CHECK/ CREDIT CARD	Customer Pick up Airgas	Customer Pick Up	N326	N326	NO00	1	0

Qty Ship	UOM Type	HM	Description & Hazard Class	Qty Order	Containers Ship	Containers Ret	Vol /Wt	Unit Price	Extend Price
1	CL	X	UN1066 NITROGEN, COMPRESSED 2.2						
			Line# 10 Material# NI 80 Stor. Loc. F001	1	1	0	79 SCF	0.00	0.00
			NITROGEN INDUSTRIAL SIZE 80 CGA 580				52.222 LB		
1	CL		UN1066 NITROGEN, COMPRESSED 2.2						
			Line# 20 Material# CY-NI 80 Stor. Loc. F001	1	0	0		260.46	260.46
							47.000 LB	/CL	
			S/N:_____						
								Subtotal	260.46
								State Tax	16.28
								Total Sales	276.74
			PAYMENT INFORMATION:						
			VISA XXXXXXXXXXXX0806						

EMERGENCY CONTACT:1-866-734-3438
PURCHASER AGREES TO OBTAIN SAFETY DATA SHEETS (SDS) FROM ONE OF THEFOLLOWING SOURCES ; POINT OF PURCHASE, AIRGAS WEB SITE AT <WWW.AIRGAS.COM> OR BY CALLING THE ABOVE LISTED EMERGENCY CONTACT PHONE NUMBER AND SELECTING OPTION #3

THIS IS TO CERTIFY THAT THE ABOVE NAMED MATERIALS ARE PROPERLY CLASSIFIED, DESCRIBED, PACKAGED, MARKED AND LABELED AND ARE IN PROPER CONDITION FOR TRANSPORTATION ACCORDING TO THE APPLICABLE REGULATIONS OF THE DEPARTMENT OF TRANSPORTATION

3/27/19 | 1132

AIRGAS PERSONNEL | DATE | T.O.D.

PLACARDS OFFERED
☐ ACCEPT ☐ REJECT
CUSTOMER MUST INITIAL CHOICE

THIS AGREEMENT IS SUBJECT TO AIRGAS' STANDARD TERMS AND CONDITIONS SEE REVERSE SIDE FOR IMPORTANT SAFETY INFORMATION.

ACCEPTED FOR THE ABOVE CUSTOMER X _____

NAME PLEASE PRINT Sean B. Kennedy

INTERNAL USE ONLY

Filled By	Staging Area	Total PKGS	Tracking / Pro Number	Freight Charges	Total Weight*
					99 LB

*Total weight for materials with weight displayed only

Delivery # 8085818630

AIRGAS TERMS AND CONDITIONS OF SALE

WARNING: TRANSPORT AND USE OF COMPRESSED GASES MAY BE EXTREMELY DANGEROUS. DO NOT TRANSPORT WITHOUT PROTECTIVE CAPS, IN CONFINED SPACES OR IN ANY OTHER IMPROPER MANNER. ALWAYS TRANSPORT CYLINDERS IN A SECURED UPRIGHT POSITION. SAFETY DATA SHEETS ("SDS") ARE AVAILABLE AT AIRGAS.COM.

EACH SALE OF PRODUCTS BY AIRGAS USA, LLC, OR ONE OF ITS AFFILIATES ("SELLER"), SHALL BE GOVERNED BY THE TERMS AND CONDITIONS BELOW AND THE TERMS OF SALE FOUND AT HTTP://WWW.AIRGAS.COM/TERMS-OF-SALE (COLLECTIVELY, THE "TERMS"). IF YOU DO NOT HAVE ACCESS TO THE INTERNET, YOU MAY REQUEST A COPY OF THE TERMS OF SALE FROM YOUR AIRGAS CUSTOMER SERVICE REPRESENTATIVE. "BUYER" REFERS TO THE PURCHASER OF PRODUCTS FROM SELLER. "PRODUCT(S)" REFERS TO ANY GOODS PROVIDED BY SELLER TO BUYER.

1. CYLINDERS: UNLESS OTHERWISE SPECIFIED, CYLINDERS, FITTINGS AND CAPS COVERED BY THESE TERMS ARE RENTED TO BUYER AT SELLER'S CURRENT DAILY RATES, BEGINNING WITH THE DATE OF DELIVERY. RENTAL CHARGES ARE ASSESSED AS OF THE LAST DAY OF EACH MONTH OR AT THE START OF EACH ANNUAL LEASE PERIOD, AS APPLICABLE. BUYER SHALL NOT PERMIT CYLINDERS OR OTHER STORAGE CONTAINERS FURNISHED HEREUNDER TO BE FILLED WITH ANY PRODUCT NOT FURNISHED BY SELLER OR ITS AUTHORIZED AGENT. BUYER SHALL RETURN, IN GOOD AND NON-CONTAMINATED CONDITION, ALL CYLINDERS, WITH VALVES CLOSED, COMPLETE WITH CAPS AND FITTINGS AND SHALL PAY SELLER THE REPLACEMENT VALUE OF ANY LOST OR DAMAGED CYLINDERS, CAPS OR FITTINGS AND FOR ANY LOSS OR DAMAGE CAUSED BY BUYER CONTAMINATION. UNLESS SUBJECT TO AN ANNUAL LEASE, ANY CYLINDER NOT RETURNED TO SELLER WITHIN THREE (3) MONTHS OF ITS SHIPMENT DATE WILL BE CONSIDERED LOST. PAYMENT BY THE BUYER OF CHARGES FOR DAMAGED, LOST OR DESTROYED CYLINDERS SHALL NOT GIVE ANY OWNERSHIP INTEREST IN THE CYLINDERS TO THE BUYER.

2. PAYMENT: UNLESS OTHERWISE SPECIFIED, BUYER SHALL MAKE PAYMENT IN FULL WITHIN THIRTY (30) DAYS AFTER THE DATE OF SELLER'S INVOICE. IF BUYER FAILS TO MAKE ANY PAYMENT WHEN AND AS DUE, SELLER MAY CHARGE BUYER INTEREST AT THE LESSER OF ONE-AND-ONE-HALF PERCENT (1.5%) PER MONTH (MINIMUM TWO DOLLARS ($2.00)) OR THE HIGHEST RATE PERMITTED BY LAW CALCULATED FROM AND EXCLUDING THE DUE DATE THEREOF TO AND INCLUDING THE DATE OF PAYMENT. IF BUYER REQUESTS PAYMENT TERMS OTHER THAN CASH OR CASH ON DELIVERY (COD), BUYER REPRESENTS THAT THE PURCHASES ARE MADE FOR BUSINESS, COMMERCIAL OR AGRICULTURAL PURPOSES AND NOT FOR PERSONAL, HOUSEHOLD, OR FAMILY USE. IF BUYER HAS RECEIVED CREDIT APPROVAL FROM SELLER, CONTINUED OPEN ACCOUNT CREDIT IS SUBJECT TO SELLER'S ASSESSMENT OF BUYER'S FINANCIAL CONDITION AND ABILITY TO PAY. IF SELLER EMPLOYS ANY COLLECTION AGENCY OR ATTORNEY TO COLLECT ANY AMOUNT DUE SELLER, AND/OR TO REPOSSESS ANY PRODUCTS, BUYER SHALL PAY ALL COLLECTION FEES, ATTORNEYS' FEES, AND COURT COSTS, IN ADDITION TO THE AMOUNT OTHERWISE UNPAID.

3. TAXES: TAXES IMPOSED BY FEDERAL, STATE OR LOCAL GOVERNMENTS ON THE SALE, USE OR POSESSION OF PRODUCTS SHALL BE PAID BY BUYER IN ADDITION TO THE PURCHASE PRICE.

4. RETURNS: NO PRODUCTS SHALL BE RETURNED WITHOUT SELLER'S WRITTEN AUTHORIZATION. BUYER SHALL PAY A FIFTEEN PERCENT (15%) RESTOCKING CHARGE ON ALL PRODUCTS RETURNED, EXCEPT FOR RETURNS MADE UNDER SECTION 7 HEREOF.

5. WARRANTY AND CLAIMS: SELLER WARRANTS THAT, AT THE TIME OF DELIVERY, ALL PRODUCTS FURNISHED HEREUNDER SHALL CONFORM TO THE MANUFACTURER'S OR SELLER'S SPECIFICATION FOR THE PERIOD OF TIME SET FORTH IN SUCH SPECIFICATION OR, IF NONE, FOR A PERIOD OF NINETY (90) DAYS. **SELLER SPECIFICALLY DISCLAIMS ANY OTHER EXPRESS OR IMPLIED STANDARDS, GUARANTEES, OR WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT AND ANY WARRANTIES THAT MAY BE ALLEGED TO ARISE AS A RESULT OF CUSTOM OR USAGE.** ALL CLAIMS BY BUYER HAVING ANYTHING TO DO WITH ANY PRODUCTS FURNISHED BY SELLER SHALL BE MADE IN WRITING WITHIN TEN (10) DAYS AFTER THE DELIVERY OF THE PRODUCTS AND FAILURE OF BUYER TO GIVE SUCH NOTICE SHALL CONSTITUTE A COMPLETE WAIVER BY BUYER OF ANY SUCH CLAIMS AND DEFENSE FOR SELLER AGAINST ANY SUCH CLAIMS.

6. LIMITATION OF LIABILITY: SELLER SHALL NOT BE LIABLE FOR ANY DIRECT (EXCEPT AS EXPRESSLY PROVIDED HEREIN), INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL AND/OR PUNITIVE DAMAGES, ARISING OR ALLEGED TO ARISE OUT OF OR IN CONNECTION WITH ANY PRODUCT OR EQUIPMENT SOLD OR LEASED HEREUNDER, WHETHER SUCH DAMAGE RESULTS FROM ANY NEGLIGENT ACT OR OMISSION OR IS RELATED TO STRICT LIABILITY, OR OTHERWISE.

7. REMEDY: BUYER'S EXCLUSIVE REMEDY FOR EACH UNEXCUSED FAILURE OF PRODUCT TO MEET SPECIFICATION SHALL BE, AT SELLER'S OPTION, TO RECEIVE A REFUND OF THE PRICE OF SUCH NON-CONFORMING PRODUCT OR REPLACEMENT THEREOF WITH PRODUCT THAT MEETS SUCH SPECIFICATION. BUYER'S EXCLUSIVE REMEDY FOR THE UNEXCUSED FAILURE, BY SELLER TO DELIVER PRODUCT AS SPECIFIED, REGARDLESS OF THE CAUSE OF SUCH FAILURE, INCLUDING NEGLIGENCE, SHALL BE TO RECOVER THE DIFFERENCE BETWEEN THE COST TO BUYER OF ANY SUBSTITUTE FOR PRODUCT NOT DELIVERED AND THE LESSER PRICE OF SUCH QUANTITY OF PRODUCT HEREUNDER.

8. COMPLIANCE/SDS: BUYER SHALL COMPLY WITH ALL APPLICABLE LAWS REGARDING THE SAFE HANDLING, TRANSPORTATION AND USE OF PRODUCTS. BUYER ACKNOWLEDGES AND AGREES THAT SELLER HAS PROVIDED RELEVANT SDS. SDS ARE AVAILABLE: (I) AT THE LOCAL AIRGAS BRANCH; (II) BY CALLING 919-368-8518; OR (III) AT AIRGAS.COM.

9. ITEMIZED CHARGES: THE TOTAL AMOUNT DUE FROM BUYER MAY INCLUDE VARIOUS ITEMIZED CHARGES, INCLUDING: CHARGES FOR THE HANDLING OF HAZARDOUS MATERIALS AND FOR COMPLIANCE WITH LAWS AND REGULATIONS CONCERNING HAZARDOUS MATERIALS; CHARGES FOR HANDLING, DELIVERY, AND SHIPPING; AND/OR CHARGES FOR ENERGY OR FUEL. NONE OF THE CHARGES REPRESENTS A TAX OR FEE PAID TO OR IMPOSED BY ANY GOVERNMENTAL AUTHORITY AND ALL OF THE CHARGES ARE RETAINED BY SELLER. SELLER HAS NOT SPECIFICALLY QUANTIFIED THE RELATIONSHIP BETWEEN THE CHARGES AND THE ACTUAL COSTS ASSOCIATED WITH THE CHARGES, WHICH CAN VARY BY PRODUCT, SERVICE, TIME AND PLACE, AMONG OTHER THINGS.

EMERGENCY RESPONSE INFORMATION

CALL *Emergency Response* Telephone Number on *Shipping Paper* first.

PROPANE METHANE HYDROGEN

POTENTIAL HAZARDS

FIRE OR EXPLOSION
- **EXTREMELY FLAMMABLE.**
- Will be easily ignited by heat, sparks, or flames
- Will form explosive mixtures with air.
- Vapors from liquefied gas are initially heavier than air, spread along ground and may travel to source of ignition and flash back.

CAUTION: Hydrogen (UN1049), Deuterium (UN1957), Hydrogen, refrigerated liquid (UN1966) and Methane (UN1971) are lighter than air and will rise. Hydrogen and Deuterium fires are difficult to detect since they burn with an invisible flame. Use an alternate method of detection (thermal camera, broom handle, etc.).

- Cylinders exposed to fire may vent and release flammable gas through pressure relief devices.
- Containers may explode when heated.
- Ruptured cylinders may rocket.

HEALTH
- Vapors may cause dizziness or asphyxiation without warning.
- Some may be irritating if inhaled at high concentrations.
- Contact with gas or liquefied gas may cause burns, severe injury and/or frostbite.
- Fire may produce irritating and/or toxic gases.

PUBLIC SAFETY

- Isolate spill or leak area immediately for at least 100 meters (330 feet) in all directions.
- **Keep unauthorized personnel away.**
- Stay upwind.
- Many gases are heavier than air and will spread along ground and collect in low or confined areas (sewers, basements, tanks).
- Keep out of low areas.

PROTECTIVE CLOTHING
- Wear positive pressure self-contained breathing apparatus (SCBA).
- Structural firefighters' protective clothing will only provide limited protection.
- Always wear thermal protective clothing when handling refrigerant/cryogenic liquids.

EVACUATION

Large Spill – Consider initial downwind evacuation for at least 800 meters (1/2 mile).

Fire – If tank, rail car or tank truck is involved in a fire, ISOLATE for 1600 meters (1 mile) in all directions; also, consider initial evacuation for 1600 meters (1 mile) in all directions.

EMERGENCY RESPONSE

FIRE – DO NOT EXTINGUISH A LEAKING GAS FIRE UNLESS LEAK CAN BE STOPPED.

CAUTION: Hydrogen (UN1049), Deuterium (UN1957) and Hydrogen, refrigerated liquid (UN1966) burn with an invisible flame. Hydrogen and Methane mixture, compressed (UN2034) may burn with an invisible flame.

Small Fires – Dry chemical or CO_2.

Large Fires
- Water spray or fog.
- Move containers from fire area if you can do it without risk.

Fire Involving Tanks
- Fight fire from maximum distance or use unmanned hose holders or monitor nozzles.
- Cool containers with flooding quantities of water until well after fire is out.
- Do not direct water at source of leak or safety devices; icing may occur.
- Withdraw immediately in case of rising sound from venting safety devices or discoloration of tank.
- ALWAYS stay away from the ends of the tank.
- For massive fire, use unmanned hose holders or monitor nozzles; if this is impossible, withdraw from area and let fire burn.

SPILL OR LEAK
- ELIMINATE all ignition sources (no smoking, flares, sparks or flames in immediate area).
- All equipment used when handling the product must be grounded.
- Do not touch or walk through spilled material.
- Stop leak if you can do it without risk and, if possible, turn leaking containers so that gas escapes rather than liquid.
- Use water spray to reduce vapors or divert vapor cloud drift. Avoid allowing water runoff to contact spilled material.
- Do not direct water at spill or source of leak.
- Prevent spreading of vapors through sewers, ventilation systems and confined areas.
- Isolate area until gas has dispersed.

CAUTION: When in contact with refrigerated/cryogenic liquids, many materials become brittle and are likely to break without warning.

FIRST AID
- Move victim to fresh air.
- Call 911 or emergency medical services.
- Give artificial respiration if victim is not breathing.
- Administer oxygen if breathing is difficult.
- Remove and isolate contaminated clothing and shoes.
- In case of contact with liquefied gas, thaw frosted parts with lukewarm water.
- In case of burns, immediately cool affected skin for as long as possible with cold water. Do not remove clothing if adhering to skin.
- Keep victim warm and quiet.
- Ensure that medical personnel are aware of the material(s) involved and take precautions to protect themselves.

ACETYLENE MAPP

POTENTIAL HAZARDS

FIRE OR EXPLOSION
- **EXTREMELY FLAMMABLE.**
- **Will be easily ignited by heat, sparks, or flames.**
- **Will form explosive mixtures with air.**
- Silane will ignite spontaneously in air.
- Those substances designated with a (P) may polymerize explosively when heated or involved in a fire.
- Vapors from liquefied gas are initially heavier than air, spread along ground and may travel to source of ignition and flash back.
- Cylinders exposed to fire may vent and release flammable gas through pressure relief devices.
- Containers may explode when heated.
- Ruptured cylinders may rocket.

HEALTH
- Vapors may cause dizziness or asphyxiation without warning.
- Some may be toxic if inhaled at high concentrations.
- Contact with gas or liquefied gas may cause burns, severe injury and/or frostbite.
- Fire may produce irritating and/or toxic gases.

PUBLIC SAFETY

- Isolate spill or leak area immediately for at least 100 meters (330 feet) in all directions.
- **Keep unauthorized personnel away.**
- Stay upwind.
- Many gases are heavier than air and will spread along ground and collect in low or confined areas (sewers, basements, tanks).
- Keep out of low areas.

PROTECTIVE CLOTHING
- Wear positive pressure self-contained breathing apparatus (SCBA).
- Structural firefighters' protective clothing will only provide limited protection.

EVACUATION

Large Spill – Consider initial downwind evacuation for at least 800 meters (1/2 mile).

Fire – If tank, rail car or tank truck is involved in a fire, ISOLATE for 1600 meters (1 mile) in all directions; also, consider initial evacuation for 1600 meters (1 mile) in all directions.

EMERGENCY RESPONSE

FIRE – DO NOT EXTINGUISH A LEAKING GAS FIRE UNLESS LEAK CAN BE STOPPED.

Small Fires – Dry chemical or CO_2.

Large Fires
- Water spray or fog.
- Move containers from fire area if you can do it without risk.

Fire Involving Tanks
- Fight fire from maximum distance or use unmanned hose holders or monitor nozzles.
- Cool containers with flooding quantities of water until well after fire is out.
- Do not direct water at source of leak or safety devices; icing may occur.
- Withdraw immediately in case of rising sound from venting safety devices or discoloration of tank.
- ALWAYS stay away from tanks engulfed in fire.
- For massive fire, use unmanned hose holders or monitor nozzles; if this is impossible, withdraw from area and let fire burn.

SPILL OR LEAK
- ELIMINATE all ignition sources (no smoking, flares, sparks or flames in immediate area).
- All equipment used when handling the product must be grounded.
- Stop leak if you can do it without risk and, if possible, turn leaking containers so that gas escapes rather than liquid.
- Do not touch or walk through spilled material.
- Do not direct water at spill or source of leak.
- Use water spray to reduce vapors or divert vapor cloud drift. Avoid allowing water runoff to contact spilled material.
- Prevent entry into waterways, sewers, basements or confined areas.
- Isolate area until gas has dispersed.

FIRST AID
- Move victim to fresh air.
- Call 911 or emergency medical services.
- Give artificial respiration if victim is not breathing.
- Administer oxygen if breathing is difficult.
- Remove and isolate contaminated clothing and shoes.
- In case of contact with liquefied gas, thaw frosted parts with lukewarm water.
- In case of burns, immediately cool affected skin for as long as possible with cold water. Do not remove clothing if adhering to skin.
- Keep victim warm and quiet.
- Ensure that medical personnel are aware of the material(s) involved and take precautions to protect themselves.

AIR NITROUS OXIDE OXYGEN LIQUID O_2

POTENTIAL HAZARDS

FIRE OR EXPLOSION
- Substance does not burn but will support combustion.
- Some may react explosively with fuels.
- May ignite combustibles (wood, paper, oil, clothing, etc.).
- Vapors from liquefied gas are initially heavier than air, spread along ground and may travel to source of ignition and flash back.
- Runoff may create fire or explosion hazard.
- Containers may explode when heated.
- Ruptured cylinders may rocket.

HEALTH
- Vapors may cause dizziness or asphyxiation without warning.
- Contact with gas or liquefied gas may cause burns, severe injury and/or frostbite.
- Fire may produce irritating and/or toxic gases.

PUBLIC SAFETY

- Isolate spill or leak area immediately for at least 100 meters (330 feet) in all directions.
- Keep unauthorized personnel away.
- Stay upwind.
- Many gases are heavier than air and will spread along ground and collect in low or confined areas (sewers, basements, tanks).
- Keep out of low areas.
- Ventilate closed spaces before entering.

PROTECTIVE CLOTHING
- Wear positive pressure self-contained breathing apparatus (SCBA).
- Wear chemical protective clothing which is specifically recommended by the manufacturer. It may provide little or no thermal protection.
- Structural firefighters' protective clothing is recommended for fire situations ONLY; it is not effective in spill situations where direct contact with the substance is possible.
- Always wear thermal protective clothing when handling refrigerant/cryogenic liquids.

EVACUATION

Large Spill – Consider initial downwind evacuation for at least 500 meters (1/3 mile).

Fire – If tank, rail car or tank truck is involved in a fire, ISOLATE for 800 meters (1/2 mile) in all directions; also, consider initial evacuation for 800 meters (1/2 mile) in all directions.

EMERGENCY RESPONSE

FIRE – Use extinguishing agent suitable for type of surrounding fire.

Small Fires – Dry chemical or CO_2.

Large Fires
- Water spray, fog or regular foam.
- Move containers from fire area if you can do it without risk.
- Damaged cylinders should be handled only by specialists.

Fire Involving Tanks
- Fight fire from maximum distance or use unmanned hose holders or monitor nozzles.
- Cool containers with flooding quantities of water until well after fire is out.
- Do not direct water at source of leak or safety devices; icing may occur.
- Withdraw immediately in case of rising sound from venting safety devices or discoloration of tank.
- ALWAYS stay away from tanks engulfed in fire.
- For massive fire, use unmanned hose holders or monitor nozzles; if this is impossible, withdraw from area and let fire burn.

SPILL OR LEAK
- Keep combustibles (wood, paper, oil, etc.) away from spilled material.
- Do not touch or walk through spilled material.
- Stop leak if you can do it without risk and, if possible, turn leaking containers so that gas escapes rather than liquid.
- Do not direct water at spill or source of leak.
- Use water spray to reduce vapors or divert vapor cloud drift. Avoid allowing water runoff to contact spilled material.
- Prevent entry into waterways, sewers, basements or confined areas.
- Allow substance to evaporate.
- Isolate area until gas has dispersed.

CAUTION: When in contact with refrigerated/cryogenic liquids, many materials become brittle and are likely to break without warning.

FIRST AID
- Move victim to fresh air.
- Call 911 or emergency medical services.
- Give artificial respiration if victim is not breathing.
- Administer oxygen if breathing is difficult.
- Remove and isolate contaminated clothing and shoes.
- Clothing frozen to the skin should be thawed before being removed.
- In case of contact with liquefied gas, thaw frosted parts with lukewarm water.
- Keep victim warm and quiet.
- Ensure that medical personnel are aware of the material(s) involved and take precautions to protect themselves.

CO_2 LIQUID CO_2 LIQUID ARGON LIQUID N_2

POTENTIAL HAZARDS

HEALTH
- Vapors may cause dizziness or asphyxiation without warning.
- Vapors from liquefied gas are initially heavier than air and spread along ground.
- Contact with gas or liquefied gas may cause burns, severe injury and/or frostbite.

FIRE OR EXPLOSION
- **Non-flammable gases.**
- Containers may explode when heated.
- Ruptured cylinders may rocket.

PUBLIC SAFETY

- Isolate spill or leak area immediately for at least 100 meters (330 feet) in all directions.
- Keep unauthorized personnel away.
- Stay upwind.
- Many gases are heavier than air and will spread along ground and collect in low or confined areas (sewers, basements, tanks).
- Keep out of low areas.
- Ventilate closed spaces before entering.

PROTECTIVE CLOTHING
- Wear positive pressure self-contained breathing apparatus (SCBA).
- Structural firefighters' protective clothing will only provide limited protection.
- Always wear thermal protective clothing when handling refrigerated/cryogenic liquids or solids.

EVACUATION

Large Spill – Consider initial downwind evacuation for at least 100 meters (330 feet).

Fire – If tank, rail car or tank truck is involved in a fire, ISOLATE for 800 meters (1/2 mile) in all directions; also, consider initial evacuation for 800 meters (1/2 mile) in all directions.

EMERGENCY RESPONSE

FIRE
- Use extinguishing agent suitable for type of surrounding fire.
- Move containers from fire area if you can do it without risk.
- Damaged cylinders should be handled only by specialists.

Fire Involving Tanks
- Fight fire from maximum distance or use unmanned hose holders or monitor nozzles.
- Cool containers with flooding quantities of water until well after fire is out.
- Do not direct water at source of leak or safety devices; icing may occur.
- Withdraw immediately in case of rising sound from venting safety devices or discoloration of tank.
- ALWAYS stay away from tanks engulfed in fire.

SPILL OR LEAK
- Do not touch or walk through spilled material.
- Stop leak if you can do it without risk and, if possible, turn leaking containers so that gas escapes rather than liquid.
- Use water spray to reduce vapors or divert vapor cloud drift. Avoid allowing water runoff to contact spilled material.
- Do not direct water at spill or source of leak.
- Prevent entry into waterways, sewers, basements or confined areas.
- Allow substance to evaporate.
- Ventilate the area.

CAUTION: When in contact with refrigerated/cryogenic liquids, many materials become brittle and are likely to break without warning.

FIRST AID
- Move victim to fresh air.
- Call 911 or emergency medical services.
- Give artificial respiration if victim is not breathing.
- Administer oxygen if breathing is difficult.
- Keep victim warm and quiet.
- Ensure that medical personnel are aware of the material(s) involved and take precautions to protect themselves.

ARGON NITROGEN HELIUM

POTENTIAL HAZARDS

HEALTH
- Vapors may cause dizziness or asphyxiation without warning.
- Vapors from liquefied gas are initially heavier than air and spread along ground.

FIRE OR EXPLOSION
- **Non-flammable gases.**
- Containers may explode when heated.
- Ruptured cylinders may rocket.

PUBLIC SAFETY

- Isolate spill or leak area immediately for at least 100 meters (330 feet) in all directions.
- Keep unauthorized personnel away.
- Stay upwind.
- Many gases are heavier than air and will spread along ground and collect in low or confined areas (sewers, basements, tanks).
- Keep out of low areas.
- Ventilate closed spaces before entering.

PROTECTIVE CLOTHING
- Wear positive pressure self-contained breathing apparatus (SCBA).
- Structural firefighters' protective clothing will only provide limited protection.

EVACUATION

Large Spill – Consider initial downwind evacuation for at least 100 meters (330 feet).

Fire – If tank, rail car or tank truck is involved in a fire, ISOLATE for 800 meters (1/2 mile) in all directions; also, consider initial evacuation for 800 meters (1/2 mile) in all directions.

EMERGENCY RESPONSE

FIRE
- Use extinguishing agent suitable for type of surrounding fire.
- Move containers from fire areas if you can do it without risk.
- Damaged cylinders should be handled only by specialists.

Fire Involving Tanks
- Fight fire from maximum distance or use unmanned hose holders or monitor nozzles.
- Cool containers with flooding quantities of water until well after fire is out.
- Do not direct water at source of leak or safety devices; icing may occur.
- Withdraw immediately in case of rising sound from venting safety devices or discoloration of tank.
- ALWAYS stay away from tanks engulfed in fire.

SPILL OR LEAK
- Do not touch or walk through spilled material.
- Stop leak if you can do it without risk and, if possible, turn leaking containers so that gas escapes rather than liquid.
- Use water spray to reduce vapors or divert vapor cloud drift. Avoid allowing water runoff to contact spilled material.
- Do not direct water at spill or source of leak.
- Prevent entry into waterways, sewers, basements or confined areas.
- Allow substance to evaporate.
- Ventilate the area.

FIRST AID
- Move victim to fresh air.
- Call 911 or emergency medical services.
- Give artificial respiration if victim is not breathing.
- Administer oxygen if breathing is difficult.
- Keep victim warm and quiet.
- Ensure that medical personnel are aware of the material(s) involved and take precautions to protect themselves.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, in his official capacity, et al., Defendants	Case No. 19-cv-57 **CAPITAL CASE** **SCHEDULED FOR EXECUTION ON APRIL 11, 2019**

EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

Christopher Lee Price is scheduled to be executed by lethal injection at 6 p.m. local time on April 11, 2019. In February, prior to the Alabama Supreme Court setting a date for his execution, Mr. Price filed this civil rights lawsuit alleging that (1) the State's proposed lethal injection protocol, which utilizes midazolam hydrochloride as the first drug in a three-drug sequence, violates the Eighth Amendment, and (2) the State's refusal to agree to execute him by nitrogen hypoxia violates the Equal Protection Clause.[1] If Mr. Price were to prevail on either one of these claims, the State would be constitutionally precluded from executing him using its proposed midazolam lethal injection protocol.

[1] In fact, Mr. Price has been challenging the State's midazolam lethal injection protocol as a violation of the Eighth Amendment since October 2014, filing his initial lawsuit only a month after the Alabama Department of Corrections announced that it would be discontinuing the use of pentobarbital and replacing that drug with midazolam. In the two years since this Court issued a final judgment on Mr. Price's October 2014 complaint, there has been a significant change in law in Alabama—specifically, the Alabama legislature in March 2018 added nitrogen hypoxia as a statutorily authorized method of execution in the State.

Mr. Price has moved for summary judgment in full on his Equal Protection Clause claim, and he respectfully submits that the Court should grant that summary judgment motion prior to 6 p.m. on April 11, 2019. In an abundance of caution, however, Mr. Price hereby requests that the Court enter a preliminary injunction staying his execution pending final judgment, on both Eighth and Fourteenth Amendment grounds.[2]

I. Mr. Price Meets the Standard for Granting a Stay of Execution.

A plaintiff is entitled to a preliminary injunction if he can show (1) a substantial likelihood of success on the merits of his claims; (2) that the requested action is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the stay would inflict upon the non-moving party; and (4) that the stay would serve the public interest. *See Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016), citing *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011). Where the plaintiff is a death row inmate who has brought a constitutional challenge to his execution, the plaintiff's entitlement to a preliminary injunction staying his execution "turns on whether [he can] establish a likelihood of success on the merits." *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). This is because the finality of death, along with the overriding interest that a citizen not be executed in a manner or with a means that offends the federal Constitution, are conclusive of the other three elements needed to justify a preliminary injunction. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (recognizing that death by execution constitutes irreparable injury); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

[2] On March 26, Mr. Price separately filed a petition for certiorari in his earlier civil rights lawsuit challenging Alabama's midazolam-based lethal injection protocol.

To establish a likelihood of success on the merits, an inmate is not required "to prove his case once and for all." *Hamm v. Comm'r, Ala. Dep't of Corr.*, No. 18-10473, 2018 WL 2171185, at *4 (11th Cir. Feb. 13, 2018). Rather, the district court must merely "make some findings that tilt the scales in the inmate's favor." *Id.* Mr. Price has come forward with enough to satisfy that standard.

A. Mr. Price Has a Substantial Likelihood of Success on the Merits of His Eighth Amendment Claim.

To prevail on the merits of his Eighth Amendment claim, Mr. Price must show that (1) the State's midazolam lethal injection protocol carries a substantial risk that he will feel severe pain during his execution, and (2) he has identified an "available" and "readily implemented" alternative that "entails a lesser risk of pain." *Glossip*, 135 S. Ct. at 2731. Mr. Price has a substantial likelihood of success on the merits on each of these two elements.

1. Substantial Risk of Severe Pain

By not moving for summary judgment, the State has conceded that there is at least a genuine dispute of material fact with respect to whether its midazolam lethal injection protocol carries a substantial risk of causing severe pain. This Court also held as much in 2016. *See* Order on Mtn. for S.J., Price v. Thomas et al, No. 14-cv-00472, ECF No. 81 (Sept. 16, 2016).

Mr. Price's evidence in 2016 that the State's midazolam lethal injection protocol carries a substantial risk of causing severe pain included the expert declaration and deposition transcript of Dr. David Lubarsky, the former chairman of the Department of Anesthesiology at the University of Miami School of Medicine. For the Court's benefit, we attach as Exhibit A to this motion the declaration that Dr. Lubarsky previously made, and we represent that Dr. Lubarsky will testify consistent with that declaration if called as a witness at trial in this proceeding. In his declaration, Dr. Lubarsky explains why the State's administration of midazolam, as a matter of basic

pharmacology, will not provide the analgesic effects necessary to protect Mr. Price from feeling the excruciating pain of the second and third drugs in the lethal injection protocol—a physical experience similar to being buried alive and burned at the stake at the same time. *See* Lubarsky Decl. ¶¶ 7-22.

Since 2016, the record has become even stronger that a three-drug lethal injection protocol utilizing midazolam as the first drug causes an inmate to die a gruesomely painful death. On January 14, 2019, after a four-day evidentiary hearing that included the most up-to-date science on the issue, Judge Michael Merz of the Southern District of Ohio found that the State of Ohio's lethal injection protocol—which utilizes midazolam and is identical in every material way to the one the Alabama Department of Corrections intends to use on Mr. Price—"will certainly or very likely cause [an inmate] severe pain and needless suffering." *In re Ohio Execution Protocol Litigation*, No. 11-cv-1016, 2019 WL 244488, at *70 (S.D. Ohio. Jan. 14, 2019). In the wake of Judge Merz's factual findings, the Governor of Ohio halted all executions in the state and ordered that the state's department of corrections find an alternative to midazolam. *See* "Governor Mike DeWine pauses executions in Ohio," CBS News (Feb. 20, 2019), https://www.cbsnews.com/news/governor-mike-dewine-pauses-executions-in-ohio/.

2. "Available" and "Readily Implemented" Alternative That "Entails a Lesser Risk of Pain"

As Mr. Price sets forth in his memorandum in opposition to the State's motion for summary judgment and in support of his cross-motion for summary judgment, nitrogen hypoxia is clearly an "available" and "readily implemented" alternative in Alabama and "entails a lesser risk of pain"

than the midazolam lethal injection protocol. *Glossip*, 135 S. Ct. at 2731. Mr. Price hereby incorporates that memorandum, including its accompanying affidavits, in full.[3]

B. Mr. Price Has a Substantial Likelihood of Success on the Merits of His Equal Protection Clause Claim.

Mr. Price's summary judgment memorandum similarly establishes the likelihood that he will ultimately prevail on his Equal Protection Clause claim. Again, he incorporates that memorandum and its accompanying affidavits in full for purposes of this motion.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Price's motion to stay his execution.

[3] The Affidavit of Aaron M. Katz, which accompanies Mr. Price's memorandum in opposition to the State's motion for summary judgment and in support of his cross-motion for summary judgment, includes as Exhibit A the East Central University report concluding that nitrogen hypoxia is a humane method of execution. The East Central University report points out on page 9 that "[i]nert gas hypoxia is considered such a humane and dignified process to achieve death that it is recommended as a preferred method by right-to-die groups." Attorney Katz's affidavit also references public statements made by Alabama Senator Pittman, the sponsor of the bill that added nitrogen hypoxia as a statutorily authorized method of execution in the State, that nitrogen hypoxia is a demonstrably humane way to put someone to death. The Court can take judicial notice of Senator Pittman's public statements. *See* Fed. R. Evid. 201. Mr. Price will call Senator Pittman as a witness in this matter if necessary.

Respectfully submitted,

ROPES & GRAY LLP

By: /s/ Aaron M. Katz

Dated: March 29, 2019

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CHRISTOPHER LEE PRICE

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the all counsel of record.

Dated: March 29, 2019

/s/ Aaron M. Katz

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EXHIBIT A

CONFIDENTIAL

EXPERT DECLARATION OF DR. DAVID LUBARSKY

1. My name is Dr. David Lubarsky. I hold an endowed honorary title as the Emanuel M. Papper Professor of Anesthesiology and have served for the last 14 years as the Chairman of the Department of Anesthesiology for the University of Miami Miller School of Medicine. The factual statements I make in this declaration are true and correct to the best of my knowledge and experience.

2. In addition to my current position, my experience as an anesthesiologist includes service as the Vice-Chair of the Department of Anesthesiology at Duke University Medical Center from July 1988 to November of 2001. I am licensed to practice medicine in Florida. I am Board Certified in Anesthesiology and certified in pain management by the Academy of Pain Management. I have conducted research and authored peer reviewed articles on the suitability of various drugs as anesthetics and how to adequately maintain anesthetic depth in a clinical setting. I have been a recurring author of the chapter on intravenous induction agents in my specialty's primary authoritative textbook (Miller's Anesthesia). A current copy of my complete CV is attached to this declaration as Exhibit 1.

CONFIDENTIAL

3. I have published peer reviewed articles on lethal injection, including the only scientific paper that evaluated available medical data,[1] and have served as an expert witness in lethal injection litigation in several states, including in Alabama in the case of *Arthur v. Thomas*, Case No. 2:11-cv-0438 (M.D. Ala.). I have also served as an expert witness in cases in Oklahoma, Ohio, Tennessee, and Florida. A list of the cases in which I have testified as an expert at trial or by deposition during the previous four years is attached to this declaration as Exhibit 2.

4. I have been asked by the Plaintiff to review the State of Alabama's "Execution Procedures" dated September 2014 (hereinafter "Midazolam Protocol") and to address the suitability of midazolam as an anesthetic in Alabama's current three-drug lethal injection protocol. I have been asked to opine whether the use of midazolam for this purpose creates a substantial risk of serious harm to Mr. Christopher Lee Price.

5. In formulating my opinion, I have reviewed:

   a. The Midazolam Protocol

[1] Koniaris LG, Zimmers TA, Lubarsky DA, Sheldon JP, *Evidence of Inadequate Anaesthesia in Lethal Injection for Execution*, The Lancet 2005, vol. 365: 9468, pp. 1412-1414.

b. Eyewitness press reports of the executions of William Happ,[2] Askari Abdullah Muhammad,[3] and Juan Carlos Chavez[4]

c. A letter from Hospira,[5] the manufacturer of midazolam, indicating the unsuitability of midazolam for use in a lethal injection

d. Execution logs and eyewitness reports from the Joseph Wood execution in Arizona[6]

e. Execution logs, autopsy report, and Department of Public Safety Report dated September 4, 2014 from the Clayton Lockett execution in Oklahoma[7]

6. I am being compensated for my study and testimony in this case at flat rate of $4,000 per day for deposition testimony, $6,000 per day for trial testimony, $2,000 per day for overnight stays, and $700 per hour for all other time spent on this matter outside the categories enumerated above.

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[2] *See Fla. Executes man for Illinois woman's 1986 murder*, Tampa Tribune (October 15, 2013) *available at* http://tbo.com/news/crime/happ-to-be-executed-today-for-1986-citrus-county-murder-20131015/.

[3] Monivette Cordeiro, *After Almost Four Decades on Death Row, Inmate Executed*, The Gainesville Sun (Jan. 7, 2014), http://www.gainesville.com/article/20140107/ARTICLES/140109785?template=printpicart.

[4] Jay Weaver and David Ovalle, *Juan Carlos Chavez Executed*, Tampa Bay Times (Feb. 12, 2014), http://www.tampabay.com/news/publicsafety/crime/man-who-raped-killed-jimmy-ryce-to-be-executed/2165256.

[5] Hospira Position on Use of Our Products in Lethal Injections (Feb. 2014), *available at* http://www.hospira.com/en/about_hospira/government_affairs/hospira_position_on_use_of_our_products.

[6] Arizona Department of Corrections, Execution Log of Joseph Wood (July 23, 2014); Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, The Republic (November 6, 2014), http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637.

[7] Southwestern Institute of Forensic Sciences at Dallas, Autopsy Report of Clayton D. Lockett, IFS-14-07742 (Aug. 28, 2014); Oklahoma Department of Public Safety, The Execution of Clayton D. Lockett, Case Number 14-0189SI; Oklahoma State Penitentiary, Clayton Lockett Execution Log (Feb. 12, 2014).

The Severe Pain Produced by Rocuronium Bromide and Potassium Chloride

7. Alabama's current lethal injection protocol utilizes three drugs administered successively. The first drug administered is a 100 mL dose of midazolam hydrochloride. The second drug administered is a 60 mL dose of rocuronium bromide. The third drug administered is a 120 mL dose of potassium chloride.

8. The third drug in the Midazolam Protocol is potassium chloride. Potassium chloride is a caustic chemical and would cause excruciating pain to Plaintiff upon injection if he is not placed into and maintained in a surgical plane of anesthesia from the midazolam for the duration of the execution.

9. Rocuronium bromide, the second drug in the protocol, is a neuromuscular blocking agent. The rocuronium bromide would paralyze Christopher Lee Price and render him unable to convey any pain or suffering. Unless placed into and maintained in a surgical plane of anesthesia from the midazolam for the duration of the execution, Christopher Lee Price would experience a sensation akin to being buried alive, but not be able to convey the feeling of pain or suffocation, and the paralysis would camouflage any voluntary movement that might result from an incomplete loss of consciousness.

10. Because of the risks associated with the administration of rocuronium bromide and similar neuromuscular blocking agents, even to trained professionals, the American Veterinary Medical Association (AVMA) prohibits the use of such agents for euthanasia of animals unless the animals are adequately anesthetized.

11. Moreover, rocuronium bromide masks the ability of any lay observer to discern whether the anesthetic drug has been properly delivered. The only purpose of the administration of the rocuronium bromide is to make the execution more aesthetically pleasing to observers in that it reduces the ability of the individual being executed to move or show any pain associated with the execution process.

Midazolam Hydrochloride

12. In a clinical setting, the purpose of anesthesia is to render a patient insensate to the effects of a proposed intervention. When a general anesthetic is utilized, induction and maintenance of unconsciousness and lack of responsiveness to noxious stimuli is the goal and expected outcome.

13. Midazolam belongs to a class of drugs called benzodiazepines. Benzodiazepines are primarily used for treating anxiety. They include drugs such as Valium, Ativan, and Xanax.

14. Midazolam is not intended for use as a stand-alone anesthetic. Known under the trade name Versed, it is the shortest acting benzodiazepine on the market. In clinical use, midazolam is typically administered in surgical settings prior to the induction of anesthesia to treat and sedate a patient.

15. While midazolam can be used to induce unconsciousness, it has no analgesic properties, and without pain relieving drugs is not suitable as an anesthetic.

16. Midazolam is not FDA-approved as the *sole drug* to produce anesthesia in minor surgical procedures. It is never used as a sole anesthetic for any procedure that involves any noxious stimuli as it has zero analgesic effect. J.G. Reves, Robert J. Fragen, H. Ronald Vinik, David J. Greenblatt, *Midazolam, Pharmacology and Uses*, Anesthesiology, 62:310-324 (1985). This differs from the barbiturate thiopental, which is approved as a sole anesthetic. Pentobarbital is not approved as a sole anesthetic but can produce electroenceophalographic (EEG) silence at high doses, and produce a coma. Midazolam in healthy individuals will not reliably produce EEG silence at any dose, and cannot induce a coma.

17. Midazolam binds to a receptor adjacent to the GABA (gamma-aminobutyric acid) receptor and increases effective binding of GABA to its

receptor to induce unconsciousness, but does not have any direct effect on sedation (the second mechanism of barbiturates) to produce deep anesthetic states. Also, once that receptor is saturated with midazolam, administration of more of the drug does not do anything to increase the level of unconsciousness. (This phenomenon is called a "ceiling effect"). There is a maximum effect short of EEG silence (Physiology and Pharmacology in Anesthetic Practice, Stoelting and Hillier, 4th edition) which is why it is not used to induce coma as barbiturates are.

18. Pentobarbital does not have a ceiling effect. Pentobarbital produces two different effects on the brain. It acts on the GABA receptor to promote binding that will induce unconsciousness, but also produces sedation directly in large doses, acting as a GABA substitute.

The Risk of Paradoxical Reaction to Midazolam

19. The State's use of midazolam to induce unconsciousness also ignores a substantial risk of paradoxical reactions in vulnerable populations, into which Christopher Lee Price, and arguably the entire death row population, belong.

20. A paradoxical reaction is when the drug does not work as it is intended. In the instant setting, it would mean that the inmate would not go to sleep and/or not stay asleep long enough for the execution to be over, and might induce anxiety, discoordinated movement, hyperactivity and/or aggression in lieu of sedation.

21. As noted above, these paradoxical reactions manifest in many ways such as hyperactivity and restlessness, but are not attended by the expected sedative effects, and are addressed by reversal of midazolam, not further administration. Midazolam can be reversed by administering the drug Romazicon (trade name Flumazenil).

22. Studies show that when midazolam is given to the elderly (over 65), to people with a history of aggression or impulsivity, a history of alcohol abuse, and other psychiatric disorders, there is a substantial risk of a paradoxical reaction. I have been advised by counsel that Plaintiff suffered psychological trauma in an abusive childhood and has a family history of mental illness.

Botched Executions Involving Midazolam Provide Further Evidence of the Substantial Risk of Severe Pain

23. While there is no scientific literature that has tested the effects of midazolam at the dosage anticipated by Defendants in their protocol, we now have amassed a wealth of information from previous executions involving midazolam.

24. There remains no scientific literature that has tested the use of midazolam as a humane manner to administer lethal injections in humans or in animal euthanasia. However, the available evidence to date strongly supports Christopher Lee Price's contention that the Midazolam Protocol is inhumane, creates a substantial risk of serious harm, and amounts to experimentation on human subjects and vulnerable populations.

25. The Clayton Lockett execution in Oklahoma and the Joseph Wood execution in Arizona provide objective scientific evidence that midazolam has a ceiling effect, and that no amount of midazolam is sufficient to guarantee Plaintiff will be insensate for the administration of the second and third drugs called for in Defendants' Protocol.

26. The Joseph Wood execution provides objective, scientific evidence of the unsuitability of midazolam to guarantee sufficient anesthetic depth to allow Plaintiff to withstand the noxious stimuli of the second and third drugs.

27. In the Joseph Wood execution, which took nearly two hours to complete, he was given 750 mg of midazolam, 250mg more than is called for in Defendants' protocol. The eyewitness reports reveal that during his execution, Wood gasped for air hundreds of times. This evidence establishes that the midazolam insufficiently anesthetized Wood's brain stem and did not produce a comatose state despite massive doses of the drug being administered. This execution demonstrates midazolam's ceiling effect and shows that a 750 mg dose of midazolam is insufficient to guarantee that a person will be insensate for the proposed intervention. (In an execution setting in Alabama, the proposed intervention would be the administration of the second and third drugs called for by the Midazolam Protocol.)

28. This experimental execution now offers definitive scientific proof in an execution setting that a 750 mg dosage will not rapidly or reliably produce unconsciousness and further supports the fact that there is a ceiling effect with midazolam and that higher doses of the drug do not equate to a deeper level of unconsciousness.

29. While I am not offering an opinion regarding the level of pain suffered by Joseph Wood in his execution using the two-drug protocol of midazolam

and hydromorphone, it is very likely that under Defendants' three-drug protocol, he would have experienced substantial pain. If the 500 mg of midazolam does not render Christopher Lee Price insensate, he will undoubtedly be in excruciating pain upon the administration of the second and third drugs, yet will be unable to express movement or pain because of the use of the paralytic.

30. The execution of Clayton Lockett in Oklahoma used an identical drug combination as Defendants intend to use, though Oklahoma's protocol calls for 100mg of midazolam instead of 500mg.

31. The internal report conducted by Oklahoma identified the inability to achieve and maintain venous access and the failure to have contingency plans in the event of a problem as two major contributing factors to the botched execution. However, the report specifically could not confirm the suitability of midazolam itself, because the IV failure complicated the ability to determine the effectiveness of the drugs.

32. Clayton Lockett writhed in pain despite administration of a large dose of midazolam. Even if the IV were not working, the administration of the midazolam should have been effective; it is approved for intramuscular injection with a relatively rapid onset. Just as in Joseph Wood however,

midazolam was insufficient to anesthetize the inmate. This was evident because the second drug (rocuronium, a paralytic) does not work quickly or well when not given intravenously, but is instead accidentally given, as was the case here, into the body tissue. Potassium chloride remains very painful. The inadequacy of midazolam was evident as Mr. Lockett reportedly writhed in agony as he slowly suffocated to death.

33. Several executions in Florida provide further evidence that midazolam produces insufficient anesthetic depth to ensure that inmates do not experience severe pain from the paralytic agent and potassium chloride. As evidenced by the eyewitness reports from Florida's William Happ execution, there was movement after the consciousness check, which indicates an insufficient anesthetic depth prior to the administration of the second and third drugs. The movement of Mr. Happ is absolute evidence of his not being adequately anesthetized. An individual does not make movements if he is totally unconsciousness and anesthetized. Therefore the protocol failed. It is my opinion that the worst possible death experience was delivered – the paralytic effectively burying the patient alive, whose agony at being aware but unable to draw a breath was only

brought to a horrendous end through the agonizing delivery of a caustic chemical surging through his body.

34. The executions of Muhammad and Chavez, where it was reported that Muhammad's eye opened and Chavez' feet moved after the administration of the midazolam, offer additional examples of fine motor movement indicating consciousness and further supports my opinion that midazolam in any dose is unable to render Plaintiff insensate for the administration of the second and third drugs.

35. Midazolam is an inappropriate drug for use in a lethal injection protocol and is likely to result in substantial harm to those undergoing execution using Alabama's Midazolam protocol. This statement of fact is based on the numerous reports of incomplete anesthesia in botched executions despite large doses of midazolam and is also entirely consistent with the known scientific literature, inclusive of extrapolations from animal studies and what is conclusively known about midazolam receptor pharmacokinetics in the brain (the ceiling effect).

Alabama's Protocol Lacks Important Safeguards to Ensure Proper Administration of the Execution Drugs

36. Without an adequate determination of the depth of unconsciousness, if given an injection of rocuronium followed by potassium chloride, there is a substantial risk that Plaintiff might awaken from the noxious and painful stimuli of severe air hunger following the paralysis induced by rocuronium or in response to the extremely painful injection of potassium chloride. While a heavily sedated patient might not respond to name calling or a subtle pinch, that is a very different level of stimulus than being starved for air once paralyzed, or having a caustic chemical injected intravenously. As an analogy, a patient asleep might not awaken to the stroke of a feather on the leg but would certainly awaken to a blowtorch applied to the same area.

37. There is insufficient detail regarding the consciousness check described in the redacted Midazolam Protocol provided to me. Regardless, as written, it is not sufficient to guarantee unconsciousness.

38. In order to appropriately determine consciousness after the administration of midazolam as described in the Midazolam Protocol, Defendants would need to conduct an adequate consciousness check, which is not detailed in the protocol, and even if it were, correctional personnel are not trained to do it correctly. Correctional personnel cannot be adequately trained

without the formal repetitive anesthesia experience one obtains over a four-year residency in anesthesia after a four-year course of medical school and a four-year pre-medical preparation in college.

39. Determining whether someone is truly insensate takes repetitive training and experience, because the signs that someone is not insensate can be very subtle. In a clinical setting, you would typically see subtle fine motor movements such as a moving of the feet or hands. This is not something that a lay person will necessarily observe or notice.

40. In addition to initially assessing unconsciousness, unconsciousness must be continually monitored throughout the remainder of the execution. It is not possible for any lay person to evaluate whether someone is unconscious without the assistance of neurophysiologic monitoring assessed by a trained technician or being a trained medical professional with formal anesthesia training.

41. In Alabama's current lethal injection protocol, there are no safeguards to guarantee the intravenous line is functioning, the intravenous setup is working appropriately, or that the drugs have been drawn up in the expected concentrations. The protocol is specifically lacking any direct

statement of concentration of the drugs being used, all of which come in multiple different concentrations.

42. In the redacted Midazolam protocol, there is no timing detailed for expected effect, nor instructions as to rate or force of injections. There is no time sequence detailed for a graded and appropriate consciousness check.

43. These deficiencies expose Christopher Lee Price to a substantial risk of serious harm.

Conclusion

44. In summary, the midazolam protocol proposed by the state is an unsuitable method of execution. The choice of midazolam as the first drug in a three drug protocol is inappropriate for three reasons. First, it has a ceiling effect and cannot at any dose guarantee a person will be unconscious and insensate to the painful effects of the second and third drugs. Second, it has no analgesic properties and therefore is not suitable for use as a stand-alone anesthetic; therefore, even if it does produce unconsciousness at the 500mg dose, the noxious stimuli of the second and third drugs will likely overcome any anesthetic effect. Third, it has an increased risk of paradoxical reactions in vulnerable populations, to which Christopher Lee

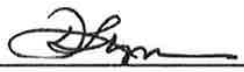
Price belongs. A paradoxical reaction would render the drug useless for deep anesthesia. Additionally, the protocol lacks appropriate safeguards to assess unconsciousness. The protocol also lacks safeguards to assure viability of the intravenous access, providing an opportunity to repeat the catastrophic and horrific events recorded during the Clayton Lockett execution and other botched executions. The protocol also lacks specification of drug concentrations, appropriate timing, and specific method of drug administration, leading to an increased risk of erroneous administration.

45. As such, based on the information that I have been provided thus far, it is my opinion to a reasonable degree of medical certainty that using midazolam in the manner intended by Defendants in the Midazolam Protocol creates a substantial risk of serious harm to Christopher Lee Price.

46. If I were given additional information, such as pictures of the exact set up, an examination of the execution chamber, a video of the practice runs inclusive of consciousness checks, a video of the actual execution, specifically including close pictures of all connections and tubings, more detailed logs of timing of delivery of the actual chemicals, expiration dates and storage conditions of drugs, training and experience of the person

conducting the IV insertions and that of the person conducting the consciousness check, I would be able to offer a more complete opinion.

Pursuant to 28 U.S.C. Sec. 1746 I declare under penalty of perjury that the foregoing is true and correct.



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Dated this 30th day of March, 2016.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CHRISTOPHER LEE PRICE, Plaintiff, v. JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, in his official capacity, CYNTHIA STEWART, Warden, Holman Correctional Facility, in her official capacity, and OTHER UNKNOWN EMPLOYEES AND AGENTS, Alabama Department of Corrections, in their official capacities, Defendants.	)	No. 1:19-cv-00057-KD-MU

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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March 4, 2019

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INTRODUCTION

On January 11, 2019, the State of Alabama moved the Alabama Supreme Court to set an execution date for Christopher Lee Price. Price's conviction for the 1991 robbery-murder of William Lynn was final in 1999,[1] his state postconviction proceedings concluded in 2006,[2] and his federal habeas litigation ended in 2013.[3] Price had even litigated a 42 U.S.C. § 1983 complaint in this Court challenging the constitutionality of the Alabama Department of Corrections' (ADOC) three-drug lethal injection protocol.[4]

Almost one month later, Price initiated the present § 1983 litigation, realleging many of the claims raised in his previous § 1983 litigation concerning the three-drug protocol and claiming that the State was violating his Fourteenth Amendment right to equal protection by refusing to allow him to elect nitrogen hypoxia as his method of execution.[5] According to the complaint, the State had entered into "secret agreements" with many death row inmates allowing them to elect nitrogen hypoxia,

1. *See Price v. State*, 725 So. 2d 1003 (Ala. Crim. App. 1997); *aff'd*, 725 So. 2d 1063 (Ala. 1998); *cert. denied*, 526 U.S. 1133 (1999) (mem.).
2. *See Price v. State*, CR-01-1578 (Ala. Crim. App. May 30, 2003); *cert. denied*, No. 1021742 (Ala. June 2006).
3. *See Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012); *cert. denied*, 133 S. Ct. 1493 (2013) (mem.).
4. *Price v. Dunn*, 1:14-cv-0042-KD-C (S.D. Ala. Mar. 15, 2017), Docs. 107, 108; *aff'd*, *Price v. Comm'r, Ala. Dep't of Corrs.*, No. 17-11396 (11th Cir. Sept. 19, 2018).
5. Doc. 1.

and Price's counsel did not learn of such until approximately January 2019.[6]

While the complaint attempts to portray the ADOC as engaging in cloak-and-dagger dealings with a select few inmates, the reality is far more mundane. When Alabama added nitrogen hypoxia to its list of statutorily approved methods of execution in 2018, all inmates whose death sentences were final as of June 1, 2018, were given a thirty-day period from that date to elect nitrogen hypoxia.[7] All death row inmates at Holman Correctional Facility, including Price, were given a copy of an election form, and forty-eight Alabama inmates made a timely election.[8] Price did not, and now, with his execution date set for April 11, 2019, he claims that ***his failure*** to take advantage of the offer extended to every similarly situated inmate is a violation of his equal protection rights.

Price's complaint is due to be dismissed for the same reason that this Court dismissed his previous § 1983 complaint: he has failed to meet his burden under *Baze v. Rees*[9] and *Glossip v. Gross*[10] of naming a "known and available alternative method of execution that would entail a significantly less severe risk" than the

6. *See* Doc. 1 ¶ 7. The e-mail referenced in the complaint was sent to counsel for the State on February 4, 2019. *See* Exhibit D. Prior to this e-mail, Price sent a letter to Warden Cynthia Stewart on January 27, 2019, requesting to elect nitrogen hypoxia; the request was denied. *See* Exhibit C.
7. ALA. CODE § 15-18-82.1(b)(2) (1975); *see* 2018 Ala. Laws Act 2018-353.
8. *See* Exhibit A (affidavit of Captain Jeff Emberton). A copy of this form with the inmate's identifying information redacted is provided as Exhibit B.
9. 553 U.S. 35 (2008).
10. 135 S. Ct. 2726 (2015).

ADOC's lethal injection protocol—an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[11] Nitrogen hypoxia is not an available method of execution to Price as a matter of state law because he failed to make a timely election. Moreover, it is neither feasible nor readily implemented at this date; the ADOC has yet to finalize a nitrogen hypoxia protocol, nor is it foreseeable that one will be in place by April 11. Thus, because Price's current complaint suffers from the same fatal flaw as his previous complaint, summary judgment is warranted for the Defendants.

11. *Id.* at 2737 (cleaned up).

BACKGROUND

A. Price's crime, trial, and direct appeal

Price has been on death row since 1993 for the capital murder of William "Bill" Lynn, an elderly minister whom Price and an accomplice murdered with a sword outside Lynn's home three days before Christmas 1991.[12] The trial court accepted the jury's death recommendation, finding that the murder had been committed during the course of a robbery and 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 probably thirty (30) minutes to an hour after the initial attack began.[13]

Price's conviction and sentence were affirmed, and his direct appeals concluded in 1999.[14]

12. *Price*, 725 So. 2d at 1011–12.
13. C. 215 (sentencing order).
14. *See Price*, 725 So. 2d 1003 (Ala. Crim. App. 1997); *aff'd*, 725 So. 2d 1063 (Ala. 1998); *cert. denied*, 526 U.S. 1133 (1999) (mem.).

B. Price's postconviction proceedings

Through counsel, Price filed a Rule 32 petition for postconviction relief in the Fayette County Circuit Court, which was summarily dismissed. The Alabama Court of Criminal Appeals affirmed that decision in an unpublished memorandum opinion in 2003, and the Alabama Supreme Court denied certiorari in 2006.[15]

Having exhausted his state remedies, Price filed a petition for writ of habeas corpus in the Northern District of Alabama, which he thrice amended. That court denied his third amended petition, the Eleventh Circuit Court of Appeals affirmed in 2012, and the Supreme Court denied certiorari in 2013.[16]

Price filed a successive Rule 32 petition in 2017, contending that his death sentence was unconstitutional under *Hurst v. Florida*.[17] That petition was denied, the Court of Criminal Appeals affirmed, and the Alabama Supreme Court again denied certiorari.[18]

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

On September 11, 2014, the State moved the Alabama Supreme Court to set

15. *See Price v. State*, CR-01-1578 (Ala. Crim. App. May 30, 2003); *cert. denied*, No. 1021742 (Ala. June 2006).
16. *See Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012); *cert. denied*, 133 S. Ct. 1493 (2013) (mem.).
17. 136 S. Ct. 616 (2016).
18. *See Price v. State*, CR-16-0785 (Ala. Crim. App. Aug. 4, 2017), *cert. denied*, No. 1161153 (Ala. Nov. 17, 2017).

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 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*,[20] a challenge to a three-drug midazolam protocol functionally identical to Alabama's. The court granted the motion on March 27. Three months later, the United States Supreme Court found that the inmate petitioners 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*, the State moved this Court to dismiss Price's § 1983 complaint.[21] Instead, this Court allowed Price to amend his complaint.[22] As an alternative to the midazolam protocol, Price proposed the use of compounded pentobarbital or sodium thiopental,[23] neither of which is available to the ADOC.

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19. Petition, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. Oct. 10, 2014), Doc. 1.
20. 135 S. Ct. 2726 (2015).
21. Defendants' Supplemental Motion to Dismiss in Light of *Glossip v. Gross*, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. July 21, 2015), Doc. 30.
22. Order, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. July 23, 2015), Doc. 31.
23. Amended Complaint at 19–20, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. July 28, 2015), Doc. 32.

The parties engaged in discovery over the next year, culminating in an evidentiary hearing in December 2016. On March 15, 2017, this 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.[24] After holding oral argument, the Eleventh Circuit affirmed on September 19, 2018,[25] and denied rehearing on December 26. Price has not pursued certiorari review of this decision.

D. The introduction of nitrogen hypoxia and the thirty-day election period

On March 22, 2018—while Price's § 1983 appeal was pending—Governor Kay Ivey signed Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama.[26] 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.

The State of Alabama did not create a standardized election form for this purpose. On information and belief, however, the Federal Defenders for the Middle District of Alabama did so and gave a copy to defendant Cynthia Stewart, Warden

24. Order, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. Mar. 15, 2015), Doc. 107.
25. *Price v. Comm'r, Ala. Dep't of Corrs.*, No. 17-11396 (11th Cir. Sept. 19, 2018).
26. *See* 2018 Ala. Laws Act 2018-353.

of Holman Correctional Facility. 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."[27] Warden Stewart 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.[28] Captain Emberton did as instructed in mid-June. Forty-eight Alabama inmates ultimately elected nitrogen hypoxia. While Price, along with every other death row inmate, was given an election form, he was not among the inmates who made the election.

Price alleges that his counsel first learned on January 12, 2019, that some inmates had elected nitrogen hypoxia.[29] Critically, however, Price never alleges that he was not given the option to make the same election. And his counsel clearly knew about the March 2018 passage of Act 2018-353 before January 2019. Indeed, if nothing else, the Eleventh Circuit's September 2018 opinion put counsel on notice of the law, as the court held that Price's challenge to the State's lethal injection protocol was not rendered moot by the Act.[30] Counsel then filed a petition for

27. *See* Exhibit B.
28. *See* Exhibit A.
29. Doc. 1 ¶ 32.
30. 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

rehearing with the Eleventh Circuit, which would have been moot had Price elected nitrogen hypoxia.[31] The Eleventh Circuit denied that petition on December 26, 2018.

Only then did Price send a letter to Warden Stewart on January 27, 2019, attempting to elect nitrogen hypoxia; the belated request was denied.[32] 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."[33] 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,[34] just as Price alleged before this Court. 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

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> 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, No. 17-11396, 2018 WL 4502035, at *2 n.3.

31. Pet. Reh'g, *Price v. Comm'r, Ala. Dep't of Corrs.*, No. 17-11396 (11th Cir. Oct. 10, 2018).
32. *See* Exhibit C.
33. *See* Exhibit D.
34. *In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 11, 2018).

election of nitrogen hypoxia,[35] and the motion was granted.[36] 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.[37]

Price's present § 1983 complaint was filed four days later. On March 1, 2019, the Alabama Supreme Court set Price's execution for April 11, 2019.[38]

35. 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.
36. Order, In re: Alabama Lethal Injection Protocol Litigation, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 11, 2018), Doc. 429.
37. Exhibit D.
38. Exhibit E.

APPLICABLE STANDARDS OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[39] The movant can meet this burden by presenting evidence showing there is no dispute of material fact or by showing the non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof.[40] Federal Rule of Civil Procedure 56(c)(1)(B) also provides that "[a] party asserting that a fact cannot be or is genuinely disputed" may support its contention by showing "that an adverse party cannot produce admissible evidence to support the fact." Thus, because Price bears the burden of proving a Fourteenth Amendment violation, summary judgment is required where "there is an absence of evidence to support the non-moving party's case."[41]

To prevent summary judgment, Price "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,

39. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
40. *Id*. at 322–23.
41. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115–16 (11th Cir. 1993) (quoting *Four Parcels of Real Property in Greene and Tuscaloosa Counties in State of Ala.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991)).

there is no 'genuine issue for trial."[42] "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."[43] *Id*. Finally, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice."[44]

42. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citations omitted).
43. *Id.*
44. *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002).

ARGUMENT

Price's complaint hinges on two questions: (1) whether the State is violating his Fourteenth Amendment right to equal protection by not allowing him to elect nitrogen hypoxia almost seven months after the statutorily set election period ended, and (2) whether Price has satisfied his burden under *Baze* and *Glossip* to name a "known and available alternative method of execution that would entail a significantly less severe risk" than the ADOC's lethal injection protocol—an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[45]

The answer to both questions is no. First, Price cannot prove an equal protection violation because he, like every other death row inmate, was made aware of the election period and given an election form no later than mid-June 2018. That Price did not make a timely election and now wishes to do so does not establish that he has been treated any differently from similarly situated inmates. Second, Price has not satisfied his burden of naming an alternative to the lethal injection protocol because, by law and ***as a result of his own inaction***, nitrogen hypoxia is unavailable to him. As Price cannot show that there is a genuine dispute of a material fact concerning his equal protection claim, and as this Court previously dismissed his Eighth and Fourteenth Amendment claims concerning the constitutionality of the

45. *Glossip*, 135 S. Ct. at 2737 (cleaned up).

lethal injection protocol for the deficiency present here—failure to name a feasible, readily available, and significantly safer alternative—Defendants are entitled to summary judgment.

I. Price cannot establish an equal protection violation as to his nitrogen hypoxia claim.

Defendants are entitled to summary judgment as to Price's equal protection claim concerning the election of nitrogen hypoxia[46] because Price cannot show that there is a genuine dispute of a material fact suggesting that he was treated any differently from his fellow Holman death row inmates.

"To prevail on an equal-protection claim, a plaintiff must demonstrate that (1) he is similarly situated with other persons who receive more favorable treatment, and (2) the defendants acted with discriminatory intent based on some constitutionally protected interest, such as race."[47] Price cannot make this showing. Captain Emberton stated that he gave every death row inmate at Holman Correctional Facility an election form and an envelope in mid-June 2018.[48] In total, forty-eight Alabama inmates elected to be executed by nitrogen hypoxia. Further disproving Price's theory that the State entered into "secret agreements" with John Palombi's clients, inmates such as Lam Luong, Bobby Waldrop, and Aubrey Shaw,

46. Doc. 1 ¶¶ 87–93.
47. *Jones v. Ray*, 279 F.3d 944, 946–47 (11th Cir. 2001).
48. Exhibit A.

who are not represented by the Federal Defenders for the Middle District of Alabama, made a timely election.[49]

Price had the same opportunity as every other death row inmate to elect nitrogen hypoxia if he so chose. He was represented by counsel at the time and could have consulted with counsel about the matter, had he wished. Instead, Price sat on his hands and allowed the election period to expire. Not until nearly seven months later, approximately two weeks after the State moved for Price's election date to be set, did Price suddenly decide that he would like to be executed by nitrogen hypoxia, write a letter to Warden Stewart, and discuss the matter with his counsel.

The issue Price presents is a problem of his own making, not an equal protection violation. Indeed, the State would be treating Price differently than other death row inmates if he were allowed to make a late election.[50] Therefore, Defendants are entitled to summary judgment on this claim.

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49. *See* Exhibit F. Lam Luong is no longer on death row due to intellectual disability.
50. *See, e.g.*, *Ray v. Dunn*, No. 2:19-cv-00088-WKW, 2019 WL 418105, at *2 (M.D. Ala. Feb. 1, 2019) ("By default, an inmate 'shall be executed by lethal injection.' ALA. CODE § 15-18-82.1(a). An inmate has 'one opportunity to elect that his or her death sentence be executed by . . . nitrogen hypoxia.' *Id.* § 15-18-82.1(b). But to be executed by nitrogen hypoxia, Ray had to request it in writing by July 1, 2018. *See id.* § 15-18-82.1(b)(2). He did not elect nitrogen hypoxia until January 29, 2019. Because Ray made his election several months too late, the State denied his request." (citation omitted)).

II. Price cannot satisfy his burden under *Glossip* because nitrogen hypoxia is not a method of execution available to him.

Defendants are entitled to summary judgment as to Price's claims concerning the constitutionality of the ADOC's lethal injection protocol[51] for the same reason that this Court entered judgment for the State in Price's previous § 1983 litigation: he has failed to satisfy his burden under *Glossip* of naming a "known and available alternative method of execution that would entail a significantly less severe risk" than the ADOC's lethal injection protocol—an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[52]

To successfully challenge a method of execution, Price must establish two things. First, he must prove "that the method presents a risk that is 'sure or very likely to cause serious illness and needless suffering' and will give rise to 'sufficiently imminent dangers.'"[53] Specifically, he must show that "there must be 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.'"[54] *Id*. Second, Price "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s]

51. Doc. 1 ¶¶ 71–86.
52. *Glossip*, 135 S. Ct. at 2737 (cleaned up); *see* Order, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. Mar. 15, 2017), Doc. 107.
53. *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50).
54. *Id.*

a substantial risk of severe pain.'"[55] This is so because Price "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."[56] As the Eleventh Circuit has stated:

> *Glossip*'s "known and available" alternative test requires that a petitioner must prove that (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.[57]

The evidentiary burden is on Price to meet this standard.[58]

Here, Defendants are entitled to summary judgment because Price, once again, has failed to satisfy his burden as to the second *Glossip*/*Baze* prong. Price had the same opportunity as every other death row inmate to elect nitrogen hypoxia during the thirty-day period provided by statute.[59] That election period expired on July 1, 2018. Therefore, as a matter of law, nitrogen hypoxia will not be available to Price unless both lethal injection and electrocution are held to be unconstitutional by the Alabama Supreme Court or the United States Supreme Court.[60]

This is not the first time that Alabama has allowed inmates a thirty-day

55. *Id.* (quoting *Baze*, 553 U.S. at 52).
56. *Baze*, 553 U.S. at 51.
57. *Arthur v. Comm'r, Ala. Dep't of Corrs.*, 840 F.3d 1268, 1300 (11th Cir. 2016).
58. *Id.* at 1302.
59. ALA. CODE § 15-18-82.1(b)(2) (1975).
60. *See id.* § 15-18-82.1(c) (1975).

election period. When lethal injection was introduced as the primary method of execution in 2002, inmates were given thirty days to elect electrocution; otherwise, they would be subject to execution by lethal injection.[61] The Eleventh Circuit noted as much in affirming this Court's dismissal of Price's first § 1983 petition—and, moreover, put Price on notice that he had failed to elect nitrogen hypoxia:

> The State of Alabama provided death-row inmates thirty days to "opt out" of lethal injection and to elect electrocution as the method of execution. *See* ALA. CODE § 15-18-82.1(b). Price did not opt for electrocution, so he became subject to lethal injection on August 1, 2002. 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.[62]

If the statute were unconstitutional on its face, then surely the Eleventh Circuit would have noted that fact. On the contrary, it is entirely reasonable for Alabama to set time limits as to when an inmate may elect a method of execution so as to ensure the efficient use of State resources in planning and preparing for executions. In sum, because of Price's failure to act, nitrogen hypoxia is not an available method of

61. *See id.* § 15-18-82.1(b)(1) (1975).
62. *Price*, No. 17-11396, 2018 WL 4502035, at *2 n.3 (emphasis added).

execution for him.

Moreover, nitrogen hypoxia is not a readily available method of execution for the ADOC. On March 1, 2019, the Alabama Supreme Court set Price's execution for April 11, 2019.[63] Although the Code of Alabama now ***contemplates*** nitrogen hypoxia as a method of execution, the ADOC is still developing a nitrogen hypoxia protocol, a process that will not be complete by April 11. Further, as the election forms expressly reserve to the inmates the right to challenge the constitutionality of the nitrogen hypoxia protocol,[64] the State anticipates that there will be litigation once the protocol is designed, regardless of what the protocol provides.

Thus, Price has failed to carry his burden for a second time. Defendants are entitled to summary judgment because nitrogen hypoxia is not a method of execution available to Price by law or readily available to the ADOC, which now has less than six weeks to prepare for Price's execution. As Price has not named an appropriate alternative method of execution, his § 1983 complaint is due to be dismissed, just as this Court dismissed its previous iteration.

63. Exhibit E.
64. *See* Exhibit B.

CONCLUSION

Wherefore, for the foregoing reasons, the State respectfully requests that this Court grant summary judgment in favor of Defendants.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

/s/ Lauren A. Simpson
Lauren A. Simpson
Beth Jackson Hughes
Henry M. Johnson
Alabama Assistant Attorneys General
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on March 4, 2019, I served a copy of the foregoing upon counsel for the Plaintiff by filing the same via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to: **Aaron M. Katz**.

/s/ Lauren A. Simpson

Lauren A. Simpson
Alabama Assistant Attorney General
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Montgomery, AL 36130-0152
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EXHIBIT A

AFFIDAVIT OF CAPTAIN JEFF EMBERTON

On January 31, 2019, Captain Jeff Emberton personally appeared before the undersigned notary public and, under oath, did solemnly swear to the following:

(1) I am presently employed with the Alabama Department of Corrections as a Captain. I have been employed in that capacity since 2016. Prior to being a Captain, I was a Correctional Lieutenant at Decatur Community Work Center. I have been employed with the ADOC since 2000.

(2) I am currently assigned to Holman Correctional Facility in Atmore, Alabama. I have worked at Holman since December 2016.

(3) In mid-June 2018, after Alabama introduced nitrogen asphyxiation as a method of execution, Warden Cynthia Stewart tasked me with giving every death row inmate an election form and an envelope. If an inmate wished to be executed by nitrogen asphyxiation, he was to sign and date the form and put it in the envelope, which would be delivered to Warden Stewart.

(4) The form I handed out stated:

> ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA
>
> Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.
>
> This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this ___ day of June, 2018.

If the inmate wished to elect nitrogen asphyxiation, he would date the form, then sign his name and inmate number at the bottom.

(5) I delivered a form and an envelope to every death row inmate at Holman as instructed.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that to the best of my knowledge, the foregoing is true and correct.

EXECUTED on this the 31st day of January 2019.

CAPT. JEFF EMBERTON

SUBSCRIBED AND SWORN TO before me on this the 31 day of January 2019.

NOTARY PUBLIC

My Commission Expires July 17, 2020

My commission expires: _____

EXHIBIT B

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this ____ day of June, 2018.

_____ _____

Name / Inmate Number Signature

EXHIBIT C

State of Alabama
Alabama Department of Corrections
W. C. Holman Correctional Facility
Holman 3700
Atmore, AL 36503

KAY IVEY
GOVERNOR

Jefferson S. Dunn
COMMISSIONER

Cynthia D. Stewart
Warden III

Phillip Mitchell
Warden I

Terry Raybon
Warden II

Christopher Lee Price
AIS #Z-546 / N-14
Holman Unit 3700
Holman, AL 36503-3700

To Mr. Price:

This letter is in response to your request to be executed by Nitrogen Hypoxia rather than by Lethal Injection dated January 27, 2019

I received your request on January 28, 2019; This request is past the deadline of June 2018. However, I do not possess the authority to grant, deny or reject your request.

Any further consideration in this matter needs to go through your attorney to the Attorney General's office.

Sincerely,

C Stewart

Cynthia D. Stewart, Warden III
Holman Correctional Facility

EXHIBIT D

From: Johnson, Henry
Sent: Monday, February 04, 2019 1:57 PM
To: 'Katz, Aaron' <Aaron.Katz@ropesgray.com>
Cc: Coriell, David <David.Coriell@ropesgray.com>; Hughes, Beth <BHughes@ago.state.al.us>; Simpson, Lauren <lsimpson@ago.state.al.us>
Subject: RE: Christopher Price

Aaron,

With respect, I do not know where you are getting your information, but I believe that you are mistaken regarding what occurred during the midazolam litigation. By mutual agreement of the parties, that litigation became moot upon the timely election of nitrogen hypoxia by the inmates involved in that lawsuit. Again, the statute provided for a thirty (30) day opt-in period for nitrogen hypoxia, and your client's request is untimely.

Thanks,
Henry

From: Katz, Aaron <Aaron.Katz@ropesgray.com>
Sent: Monday, February 04, 2019 1:38 PM
To: Johnson, Henry <HJohnson@ago.state.al.us>
Cc: Coriell, David <David.Coriell@ropesgray.com>; Hughes, Beth <BHughes@ago.state.al.us>; Simpson, Lauren <lsimpson@ago.state.al.us>
Subject: RE: Christopher Price

Henry,

Thank you for responding so quickly. Are you representing that the Attorney General's Office did not in fact enter into an agreement with John Palombi's clients that if they opted into the nitrogen hypoxia protocol (1) the State would not seek to execute them with the midazolam-based three drug cocktail, and (2) they would retain the right to bring an as-applied challenge the nitrogen hypoxia protocol once finalized?

Aaron

Aaron M. Katz
ROPES & GRAY LLP
T +1 617 951 7117 | M +1 617 686 0677
Prudential Tower, 800 Boylston Street

Boston, MA 02199-3600
aaron.katz@ropesgray.com
www.ropesgray.com

From: Johnson, Henry <HJohnson@ago.state.al.us>
Sent: Monday, February 04, 2019 2:34 PM
To: Katz, Aaron <Aaron.Katz@ropesgray.com>
Cc: Coriell, David <David.Coriell@ropesgray.com>; Hughes, Beth <BHughes@ago.state.al.us>; Simpson, Lauren <lsimpson@ago.state.al.us>
Subject: RE: Christopher Price

Aaron,

The Attorney General's Office did not make any offer to John Palombi's clients. The statute provided a thirty (30) day opt-in procedure for nitrogen hypoxia, and it is too late now for Price to make that election.

Thanks,
Henry

Henry M. Johnson
Assistant Attorney General

Office of the Attorney General
State of Alabama
Capital Litigation Division
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130
334.353.9095 Office
334.353.3637 Fax

From: Katz, Aaron <Aaron.Katz@ropesgray.com>
Sent: Monday, February 04, 2019 1:12 PM
To: Johnson, Henry <HJohnson@ago.state.al.us>

Cc: Coriell, David <David.Coriell@ropesgray.com>
Subject: Christopher Price

Henry,

My client Christopher Price last week wrote a letter to the Holman Warden asking to opt into the nitrogen hypoxia protocol, on the same terms that I understand you offered to John Palombi's clients in the civil rights lawsuit before Judge Watkins. Mr. Price received this letter in response, and so I am following up to you. Mr. Price has authorized me to inform you of his desire to opt in to the nitrogen hypoxia protocol, again on the same terms that I understand you offered to John Palombi's clients.

Please let me know the Attorney General's position on this matter.

Thank you,
Aaron

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aaron.katz@ropesgray.com
www.ropesgray.com

EXHIBIT E

IN THE SUPREME COURT OF ALABAMA
March 1, 2019

1970372

Ex parte Christopher Lee Price. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Christopher Lee Price v. State of Alabama) (Fayette Circuit Court: CC-92-3, CC-92-4, CC-92-5, CC-92-6; Criminal Appeals: CR-92-882).

ORDER

The State of Alabama having filed a motion to set an execution date, and the same having been submitted and duly considered by the Court, it is considered that the motion to set an execution date is due to be granted.

IT IS NOW ORDERED that Thursday, April 11, 2019, be fixed as the date for the execution of the convict, Christopher Lee Price, who is now confined in the William C. Holman Unit of the Prison System at Atmore, Alabama.

IT IS, THEREFORE, ORDERED that the Warden of the William C. Holman Unit of the prison system at Atmore in Escambia County, Alabama, execute the order, judgment and sentence of law on April 11, 2019, in the William C. Holman Unit of the prison system, by the means provided by law, causing the death of such convict.

IT IS FURTHER ORDERED that the Marshal of this Court shall deliver, within five (5) days from this date, a certified copy of this order to the Warden of the William C. Holman Unit of the prison system at Atmore, in Escambia County, Alabama, and make due return thereon to this Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit forthwith a certified copy of this order to the following: the Governor of Alabama, the Clerk of the Court of Criminal Appeals, the Attorney General of Alabama, the Commissioner of the Alabama Department of Corrections, the attorney of record for Christopher Lee Price, the Clerk of the United States District Court for the Northern District of Alabama, the Clerk of the United States Court of Appeals for the Eleventh Circuit, the Clerk of the United States Supreme

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Court, and the Clerk of the Circuit Court of Fayette County, Alabama, electronically or by United States mail, postage prepaid.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

* * * * * * * * *

I, Julia Jordan Weller, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true and correct copy of the judgment and order of the Supreme Court of Alabama directing the execution of the death sentence of Christopher Lee Price as the same appears of record in this Court.

Given under my hand and the seal of this Court on this date, March 1, 2019.

Julia Jordan Weller

Julia Jordan Weller
Clerk
Supreme Court of Alabama

EXHIBIT F

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this 27 day of June, 2018.

Lam Luong Z-759-I-6
Name / Inmate Number

Lam Luong
Signature

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this 26 day of June, 2018.

Bobby Wayne Waldrop Z661 Bobby Wayne Waldrop Z661

Name / Inmate Number Signature

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this 26 day of June, 2018.

AUBREY SHAW / Z-780
Name / Inmate Number

Signature