In the Supreme Court of the United States

No. 18A1053

CHRISTOPHER LEE PRICE, PETITIONER,

v.

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

RESPONSE TO EMERGENCY MOTION TO VACATE STAY OF EXECUTION

CAPITAL CASE: EXECUTION SCHEDULED FOR APRIL 11, 2019 AT 7:00 PM EDT

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RESPONSE TO EMERGENCY MOTION AND APPLICATION TO VACATE STAY OF EXECUTION

The Alabama legislature decided in March 2018 to make nitrogen hypoxia a statutorily authorized method of execution in the State. See Ala. Code § 15-18-82(a) (providing that nitrogen hypoxia "shall" be the method of execution "[i]f lethal injection is held unconstitutional"). The Alabama Department of Corrections ("ADOC") is in the midst of finalizing its nitrogen hypoxia execution protocol, and the State represented to the District Court below that the ADOC might even have the protocol completed by the summer. The State is so confident in the ADOC's ability to carry out executions by nitrogen hypoxia that it already has agreed to use nitrogen hypoxia as the method of execution for at least 48 of the State's 177 death row inmates—including a number who have been on death row for longer than Christopher Price.

The District Court—in its critical role as fact-finder—determined that Mr. Price, on the evidentiary record before it, has demonstrated a substantial likelihood of prevailing on the merits of his Eighth Amendment method-of-execution claim. And just as critically, the District Court also—based on its intimate familiarity with the entire procedural history of Mr. Price's Eighth Amendment litigation, a procedural history that the State misrepresents in its motion—rejected out of hand the State's assertion that Mr. Price had somehow "delayed" or was "dilatory" in seeking relief from his execution until the eleventh hour.

Indicative of the District Court's careful consideration of this matter is that the stay it issued is not indefinite. Rather, the stay is for only 60 days. The District

Court has instructed that, during that 60-day stay period, the State come forward with whatever evidence it might have to counter the significant scientific evidence that Mr. Price has submitted showing that (1) the State's lethal injection protocol is substantially likely to cause Mr. Price severe pain and needless suffering, and (2) execution by nitrogen hypoxia, properly conducted, would have a significantly reduced risk of causing Mr. Price pain. The District Court, which has deep experience with constitutional questions relating to capital punishment, has determined to put this matter on track for a full-blown evidentiary hearing by no later than early summer, so that it can render a fully informed final judgment on questions of scientific fact where, in the District Court's view, the evidentiary record as it now stands tilts decidedly in favor of Mr. Price.

The State's motion to vacate the District Court's 60-day stay asks this Court not just to second guess the District Court's factual findings and determination of how best to shepherd this matter expeditiously to a final judgment on the merits. It also asks this Court to wade into and resolve, without the benefit of anything close to normal briefing and argument, (1) complicated jurisdictional issues that have broad application to civil litigation (and not just capital litigation), and (2) how last week's decision in *Bucklew v. Precythe* applies in circumstances where the State's legislature has specifically authorized nitrogen hypoxia as an enumerated method of execution.

I. This Court Should Not Vacate the District Court's Stay, Because the District Court Did Not Abuse Its Discretion in Resolving Factual Questions in Mr. Price's Favor.

A. Mr. Price Did Not "Delay" in Litigating His Eighth Amendment Claim.

The State's principal argument is that Mr. Price somehow delayed in seeking to enjoin the State from carrying out his execution by lethal injection. This accusation is completely unfounded.

The District Court has familiarity with how this entire litigation has unfolded. Based on this familiarity, the District Court rejected out of hand the State's accusations of delay. In asking this Court to engage in last-minute second-guessing of the District Court, the State gives short shrift to the procedural history of this matter. Indeed, its motion to vacate misrepresents the procedural history in fundamental ways—perhaps purposefully in order to convince this Court that Mr. Price is somehow similar to Dominique Ray, who filed an entirely new lawsuit bringing an entirely new constitutional claim roughly a week before his execution date.

Mr. Price filed his complaint on February 8, 2019—more than two months ago, and weeks before the Alabama Supreme Court even set an execution date for Mr. Price.[1] The State did not move to dismiss Mr. Price's complaint, but rather answered it. The State, in its answer to paragraph 54 of Mr. Price's complaint *admitted* that death by nitrogen hypoxia bears no resemblance, in terms of physical pain, to death

[1] In fact, Mr. Price has been challenging the constitutionality of the State's midazolam-based three-drug cocktail since October 2014, less than a month after the ADOC announced its adoption.

by suffocation, asphyxiation, or strangulation. Then, in consultation with the Court and Mr. Price, the State agreed to an expedited briefing schedule that called for Mr. Price to submit his summary judgment briefing and briefing on any motion for injunctive relief on March 29th. After the Alabama Supreme Court set Mr. Price's execution date for April 11, 2019, Mr. Price asked the State's counsel whether the State wished to revisit the briefing schedule, in order to expedite it even further. The State declined Mr. Price's invitation. Finally, when it moved for summary judgment on Mr. Price's Eighth Amendment claim, the State did not argue—let alone introduce any evidence—that death by nitrogen hypoxia would not be significantly less painful than death by the State's three-drug lethal injection cocktail.

Mr. Price's supplemental evidentiary submission to the District Court this morning was not a product of "delay." It was the product of the Eleventh Circuit resolving Mr. Price's appeal on a technical evidentiary ground that the State had never argued in the District Court or on appeal, on an issue—whether execution by nitrogen hypoxia, properly conducted, would result in a humane and essentially painless death—that the State had even contested.[2] To characterize Mr. Price as a dilatory litigant, when the record makes clear that he was tailoring his initial evidentiary submission to the questions of fact that the State actually was contesting (such as whether pure compressed nitrogen can be purchased no questions asked with

[2] Mr. Price's pending petition for certiorari, No. 18-8766, addresses in detail how the Eleventh Circuit *sua sponte* called into question whether Mr. Price's evidentiary submission to the District Court was lacking on the question of whether execution by nitrogen hypoxia, properly conducted, poses a significantly reduced risk of pain.

ordinary transactional effort), is absurd. The District Court was in the best position to assess the State's claims of delay, and the District Court rejected the State's claims. This Court should not second guess the District Court's factual finding on the question of delay.

B. The Court Should Not Wade Into and Resolve Complex Jurisdictional Questions That Have Broad Application to Civil Litigation Without the Benefit of Normal Briefing and Argument.

The State argues that the District Court lacked jurisdiction even to address Mr. Price's motion for a stay. The State is wrong as a matter of fact and law. The District Court understood that the question if was addressing in its stay order from earlier today was not the same question that the Eleventh Circuit had addressed in its appellate decision on Wednesday. The Eleventh Circuit on Wednesday addressed *sua sponte* whether a particular piece of evidence that Mr. Price previously had submitted to the District Court—a report by scholars at East Central University regarding execution by nitrogen hypoxia—was unreliable because it was a preliminary draft, and not a final version of the report. The District Court, in issuing its stay order today, was not revisiting that question at all. Instead, it was addressing whether Mr. Price had carried his evidentiary burden by submitting this morning (1) the final version of the East Central University report, (2) an affidavit from one of the report's authors, and (3) affidavits from two medical experts regarding why nitrogen hypoxia will cause euphoria quickly followed by loss of consciousness, but not any significant physical pain.

In support of its jurisdictional arguments, the State relies cases involving complex patent litigation, see *Apple, Inc. v. Samsung Electronics*, 2012 WL 1987042 (N.D. Cal. June 4, 2012), and mass torts, see *Green Leaf Nursery* v. *E.P. Dupont*, 341 F.3d 1292 (11th Cir. 2003). Even setting aside that the procedural details of those cases bear no resemblance to this one, those cases make clear that the jurisdictional questions that the State wants this Court to resolve in the posture of an emergency motion to vacate are complex and have broad application to all types of civil litigation. It would be deeply unwise for the Court to wade into those complex, broadly applicable jurisdictional questions without the benefit of normal briefing and argument—or even a decision by the Eleventh Circuit below addressing the State's jurisdictional arguments. If the State wishes to seek certiorari review on those jurisdictional issues, with a normal briefing and argument schedule, it can do so.

C. The Court Should Not Address, Let Alone Resolve, the State's *Bucklew* Arguments, Including the Question of "Availability" on an Emergency Motion to Vacate That Provides No Opportunity for Meaningful Briefing.

Mr. Price agrees with the State that the Court's decision last week in *Bucklew* did not address how a court should analyze an Eighth Amendment claim where the inmate's proposed alternative method of execution—whether it be nitrogen hypoxia or something else—is one that the State's own legislature has statutorily authorized as a specifically enumerated method of execution and already has agreed to use on a significant number of the State's death row inmates. Mr. Price respectfully submits that the Eleventh Circuit, in applying *Bucklew* to such circumstances as a matter of first impression, got it right.

But whether the Eleventh Circuit's application of *Bucklew* in the circumstances of this case is debatable is not the point here. One of the principal purposes of the courts of appeals is to allow important questions of constitutional law, including how this Court's decisions should be applied in novel circumstances, to percolate before this Court addresses them. *Bucklew* was issued last week, and there has been no lower court percolation at all. The important point here is that the Court should not resolve, on an emergency motion to vacate, difficult questions of how *Bucklew* applies in the unique circumstances of this case. Again, if the State wishes to seek certiorari review on these issues, it can do so.

D. The Court Should Not Engage in a Plenary Review of the District Court's Factual Findings and Application of the Preliminary Injunction/Stay Standard.

The State's motion to vacate complains about the District Court's factual findings and its application of the standard for standard for obtaining preliminary injunctive relief. Mr. Price submits that the District Court got it exactly right. Certainly the District Court did not abuse its discretion or commit such clear error (factual or legal) that this Court should reverse the District Court's decision in the posture of an emergency motion to vacate. And, in any event, this Court does not sit as a court of error. If the State disagrees with the District Court's order, its first recourse should be the Eleventh Circuit. The Eleventh Circuit considered the State's motion to vacate the District Court's stay, and the Eleventh Circuit declined to resolve the State's motion to vacate on an emergency basis—likely because it recognized that the State's motion asked the court of appeals to decide too many

complex questions on an inappropriately expedited basis (*i.e.*, in mere hours). This Court should decline the State's invitation as well.

II. The State Makes No Argument for Why the Court Should Dissolve the Eleventh Circuit's Stay Order.

In asking the Court to dissolve the Eleventh Circuit's stay order, the State complains only that the Eleventh Circuit "threw up its hands" and did not provide enough analysis. That is not an argument of any kind.

The Eleventh Circuit, like the District Court, is deeply experienced with capital litigation, including Mr. Price's constitutional challenge to the State's lethal injection method. The panel that issued the stay order was the same panel that has adjudicated Mr. Price's appeals on his Eighth Amendment claim. The Court should not dissolve the Eleventh Circuit's stay order simply because the Eleventh Circuit refused the State's demands that it act rashly.

CONCLUSION

For the reasons stated above, the Court should grant this petition and stay Petitioner's execution pending this case's resolution.

Respectfully submitted,

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APRIL 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2019, I did serve a copy of the foregoing on Alabama's Assistant Attorney General and counsel of record by electronic mail, addressed as follows:

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/s/ Aaron M. Katz

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