No. 18A1238
CAPITAL CASE

In the
Supreme Court of the United States

CHRISTOPHER LEE PRICE,
Petitioner,
v.
JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

To the Honorable Clarence Thomas, Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Seven weeks ago, on April 11, 2019, Christopher Lee Price's untimely second 42 U.S.C. § 1983 action came before this Court after his scheduled execution was stayed that afternoon by the lower federal courts. In the early morning hours of April 12, the Court vacated the stays approximately ninety minutes after Price's execution warrant had expired. At that time, the Court stated:

> In June 2018, death-row inmates in Alabama whose convictions were final before June 1, 2018, had 30 days to elect to be executed via nitrogen hypoxia. Ala. Code § 15-18-82.1(b)(2). Price, whose conviction became final in 1999, did not do so, even though the record indicates that all death-row inmates were provided a written election form, and 48 other death-row inmates elected nitrogen hypoxia. He then waited until February 2019 to file this action and submitted additional evidence today, a few hours before his scheduled execution time. *See Gomez v. United States Dist. Courtfor Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").[1]

Price's claims—once again before this Court on his execution day—are no more timely today than they were seven weeks ago.

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1. *Dunn v. Price*, 139 S. Ct. 1312 (2019) (mem.).

In the wake of Price's stayed execution, the State immediately moved the Alabama Supreme Court to reset the date. Contemporaneously, Price asked the district court to set a trial in this matter. The district court acted first, setting Price's trial for June 10, though it cautioned that it would not be granting another stay of execution. At the end of April, the Alabama Supreme Court—aware of this Court's order and the district court's trial date—reset Price's execution for May 30. Though Price asked the district court to move up the trial date, that court refused to do so.

To date, the parties have conducted pretrial depositions of two of the five expert witnesses. The district court denied Price's Rule 52(c) motion on May 26, refusing to grant judgment before trial on incomplete evidence. Moreover, both the district court and the Eleventh Circuit denied Price's third and fourth motions for stay of execution, reiterating that this Court has already deemed his claims untimely.[2]

Price avoided his April 11 execution by legal machinations. As Your Honor noted in concurring with the denial of certiorari in Price's first § 1983 suit ("*Price I*"), Price's "strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless."[3] And "[t]he proper response

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2. *See* Application for a Stay of Execution, Ex. A.
3. *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring).

to this maneuvering is to deny meritless requests expeditiously," lest courts "reward[] gamesmanship and threaten[] to make last-minute stay applications the norm instead of the exception."[4]

Price insists that he has not been dilatory,[5] but the timeline of this litigation proves otherwise. Price has known since *Glossip v. Gross*[6] was decided in June 2015 that to raise a § 1983 method-of-execution claim, he was required to name a feasible, readily available, and significantly safer alternative method of execution. Instead, for years, he demanded that the State use pentobarbital, despite the fact that this Court rejected a similar § 1983 claim from another Alabama inmate because pentobarbital is not available to the Alabama Department of Corrections.[7] Not until February 2019 did Price file a second § 1983 suit, the matter at issue here, asserting that nitrogen hypoxia should be the alternative method of execution. Price could have raised this claim years before, and certainly by June 2018, during the thirty-day nitrogen hypoxia election period, as he was made aware of the hypoxia election that month. And his current *counsel* certainly could have advised Price about nitrogen hypoxia by no later than September 2018, when the Eleventh Circuit mentioned nitrogen hypoxia in its opinion in *Price I*—an opinion that Price's current counsel attached

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4. *Id.* (citing *Bucklew v. Precythe*, 139 S. Ct. 1112, 1114 (2019)).
5. Application for a Stay of Execution 13–15.
6. 135 S. Ct. 2726.
7. *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (mem.).

to the petition for rehearing that they filed in that court. Even so, Price waited until nearly a month after the State moved for his execution date to claim ignorance of the nitrogen hypoxia election and bring the matter currently before the Court.

Price is not entitled to a stay of execution because, as this Court made clear last month, his Eighth Amendment claim is untimely. Even if it were timely, Price has not shown a substantial likelihood of success as to the merits of his claim, either as to the safety of the *Glossip* protocol or as to the availability of nitrogen hypoxia under the *Glossip/Bucklew* standard. Price obtained a de facto stay in April not due to the merits of his case, but rather through eleventh-hour gamesmanship. The Court should not stay his lawful execution.

STATEMENT OF THE CASE

Since this matter was before this Court last month, Respondents include only a partial recitation of the procedural history. In brief, Christopher Price has been on death row since 1993 for the capital murder of William "Bill" Lynn, whom Price and an accomplice robbed and murdered with a knife and sword three days before Christmas 1991.[8] Price's conviction and sentence were affirmed,[9] his state postconviction petition was unsuccessful,[10] and the Court denied certiorari in his federal proceedings in 2013.[11]

Price filed his first 42 U.S.C. § 1983 method-of-execution complaint (*Price I*) in September 2014. The district court entered judgment for the State in 2017.[12]

On March 22, 2018—while *Price I* was pending in the Eleventh Circuit—Governor Kay Ivey signed Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama.[13] While Price received notice from Warden Stewart of the opportunity to elect hypoxia during the

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8. *Price v. State*, 725 So. 2d 1003, 1011–12 (Ala. Crim. App. 1997).
9. *See id.*; *aff'd*, 725 So. 2d 1063 (Ala. 1998); *cert. denied*, 526 U.S. 1133 (1999) (mem.).
10. *See Price v. State*, CR-01-1578 (Ala. Crim. App. May 30, 2003); *cert. denied*, No. 1021742 (Ala. June 2006).
11. *See Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012); *cert. denied*, 133 S. Ct. 1493 (2013) (mem.).
12. Order, Price v. Dunn, 1:14-cv-00472-KD-C (S.D. Ala. Mar. 15, 2015), Doc. 107.
13. *See* 2018 Ala. Laws Act 2018-353.

statutory thirty-day window,[14] he failed to do so, "even though he was represented throughout this time period by a well-heeled Boston law firm."[15]

After holding oral argument, the Eleventh Circuit affirmed the district court's decision in *Price I* on September 19, 2018, commenting in a footnote that Price had failed to elect nitrogen hypoxia pursuant to section 15-18-82.1(b)(2) of the Code of Alabama.[16] Price, through current counsel, petitioned for rehearing of that decision on October 10, attaching a copy of the opinion to his petition. The court denied the petition on December 26.

On January 11, 2019, the State moved the Alabama Supreme Court to set Price's execution date. Price alleges that his counsel first learned on January 12 that some inmates had elected nitrogen hypoxia,[17] despite the notice provided by the Eleventh Circuit in September 2018. On January 27, 2019, Price wrote to Warden Stewart, requesting to make an untimely election; the request was denied.[18] On February 4, counsel asked the same of the

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14. As Your Honor noted, Warden Stewart "went beyond what the statute required by affirmatively providing death-row inmates at Holman a written election form and an envelope in which they could return it to her." *Price*, 139 S. Ct. at 1535 (Thomas, J., concurring).
15. *Id.* (Thomas, J., concurring).
16. *Price v. Comm'r, Ala. Dep't of Corrs.*, 752 F. App'x 701, 703 n.3 (11th Cir. 2018) (citing ALA. CODE § 15-18-82.1(b)(2)).
17. App'x Doc. 1 at 23. Price incorporated by reference the appendix submitted to the Eleventh Circuit on May 28. Application for Stay of Execution at 3 n.2 Document numbers refer to filings in the district court below.
18. App'x Doc. 1 at 10.

Attorney General's Office, and the request was again denied.[19] Four days later, on February 8—nearly one month after the State moved for Price's execution—Price filed a second § 1983 complaint in the Southern District of Alabama, initiating the present litigation ("*Price II*").[20]

On March 1, the Alabama Supreme Court set Price's execution for April 11. At the district court's direction, the State moved for summary judgment in *Price II* on March 4, and Price filed a response, cross-motion for summary judgment, and motion for stay of execution on March 29.

Meanwhile, litigation continued in *Price I*. Three months after the Eleventh Circuit denied rehearing, Price filed a cursory six-page petition for writ of certiorari in this Court on March 26.[21]

Back to *Price II*, the district court heard arguments on April 4 and denied Price's motions the next day. Price moved for reconsideration later that afternoon and renewed his motion for stay of execution the following day, but the district court denied both on April 6. Price then appealed to the Eleventh Circuit, which affirmed the district court on different grounds on April 10.[22]

The following day, April 11, was Price's scheduled execution date. He filed a petition for writ of certiorari in this Court late that morning. Shortly

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19. *See id.*
20. App'x Doc. 1.
21. Petition for Writ of Certiorari, Price v. Dunn, No. 18-1249 (Mar. 26, 2019).
22. *Price v. Comm'r, Ala. Dep't of Corrs.*, 920 F.3d 1317 (11th Cir. 2019).

after noon, he filed another motion for stay of execution (or, alternatively, Rule 60(b) motion) in the district court, pointing to the Eleventh Circuit's finding that nitrogen hypoxia was available to him[23] and offering additional evidence to support his claim that lethal injection is cruel and unusual.[24] To try to ensure that the district court had authority to consider his renewed request for a stay, Price filed an emergency motion in the Eleventh Circuit asking that court to issue the mandate.

Though the Eleventh Circuit did not issue the mandate, the district court (without jurisdiction) granted Price's motion and stayed his execution for sixty days.[25] The State unsuccessfully moved for reconsideration and moved the Eleventh Circuit to vacate the district court's stay. Instead, the Eleventh Circuit issued its own stay. This Court ultimately vacated the stays, but not until the early morning hours of April 12, after the expiration of the execution warrant.[26] The Court also denied certiorari without opinion.[27] In vacating the stays, the Court explained that Price did not make a timely hypoxia election in June 2018, though he was aware of the election period, that he waited until

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23. The State petitioned for rehearing or rehearing en banc concerning this holding on April 19, and that petition remains pending before the Eleventh Circuit.
24. Doc. 45.
25. Doc. 49.
26. *Dunn v. Price*, 139 S. Ct. 1312 (2019) (mem.).
27. *Price v. Dunn*, 139 S. Ct. 1542 (2019) (mem.).

February 2019 to initiate his second § 1983 action, and that he filed additional evidence on his execution day.[28]

On April 15, the following Monday, the State filed an emergency motion for an expedited second execution date in the Alabama Supreme Court. Later that morning, the district court held a telephonic status conference "to put on the record and to make sure everybody is clear where we are."[29] The district court then made clear that she "read the opinion from the Supreme Court" as holding "[t]hat no injunctive relief is available, and I don't see any other available remedies in this case."[30] Finally, she cautioned, "I don't want another last-minute process that we had the last time."[31]

On April 22, the district court entered a scheduling order setting *Price II* for trial on June 10. The court concluded, "The Plaintiff's request that the case be expedited further, if the execution date is set before the trial, is **DENIED**. Pursuant to the Supreme Court's decision, no further stay of execution will be granted."[32]

The Alabama Supreme Court reset Price's execution on April 29. Though Price had asked for a delayed execution date to accommodate his federal

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28. *Dunn*, 139 S. Ct. at 1312.
29. App'x Tab C at 2:14–21, Price v. Dunn, No. 19-11878 (11th Cir. May 17, 2019).
30. *Id.*
31. *Id.*
32. Doc. 61.

proceedings, the Alabama Supreme Court reset the execution for May 30.[33] The following day, Price filed in the district court a motion for stay of execution (his third), amendment of the trial date, or injunction prohibiting the administration of rocuronium bromide during his execution. The district court denied the order in part the next day, May 1, explaining, "The Supreme Court vacated the stay of execution due to Price's failure to timely elect for nitrogen hypoxia, making clear that a stay of execution is not an available remedy to Price."[34] At the court's direction, Respondents argued why Price's motion for injunction should be denied, and the court entered an order in Respondents' favor on May 2.

Meanwhile, *Price I* remained pending before this Court, which denied certiorari without opinion on May 13.[35] Your Honor wrote a concurrence "to set the record straight regarding the Court's earlier orders vacating the stays of execution entered by the District Court and the Court of Appeals in [*Price II*]," [36] explaining that the district court lacked jurisdiction to enter a preliminary injunction,[37] that "there is simply no plausible explanation for the delay" in Price "presenting his 'new evidence'" to the district court "other than

33. Doc. 63.
34. Doc. 65 at 2.
35. *Price v. Dunn*, 139 S. Ct. 1533 (2019) (mem.).
36. *Id.* at 1533 (Thomas, J., concurring).
37. *Id.* (Thomas, J., concurring).

litigation strategy,"[38] and that Price was unlikely to succeed on the merits of his Eighth Amendment claim.[39] Beyond the fact that Price is challenging the *Glossip* protocol, Your Honor "cast serious doubt on the Eleventh Circuit's suggestion that the State bears a heavy burden of showing that a method of execution is unavailable as soon as its legislature authorizes it to employ a new method."[40]

On May 15, two days after the denial of certiorari in *Price I*, and weeks after the district court's April 22 and May 1 orders denying another stay of execution, Price filed a notice of interlocutory appeal.[41] The Eleventh Circuit affirmed the district court's denial of Price's third motion for stay of execution on May 24.[42]

That afternoon, Price filed a Rule 52(c) motion for judgment on partial findings and, in the alternative, a fourth motion for stay of execution in the district court.[43] That court denied both on May 26. As to the stay request, the court stated:

> Price's **fourth** motion to stay implicates the same issue as the **first** and **third** motions, albeit with additional evidence. Thus, this Court is without jurisdiction to consider Price's **fourth** motion to stay.

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38. *Id.* at 1538 (Thomas, J., concurring).
39. *Id.* (Thomas, J., concurring).
40. *Id.* at 1539 (Thomas, J., concurring).
41. Doc. 75.
42. *Price v. Comm'r, Ala. Dep't of Corrs.*, No. 19-11878 (11th Cir. May 24, 2019).
43. *See* Doc. 80.

> However, even if this Court had jurisdiction over the **fourth** motion to stay execution, the Court would deny the motion based on the Supreme Court's decision on Price's **first** motion to stay. The Supreme Court determined that Price's claim, that his method of execution should be by nitrogen hypoxia and not the three-drug method, is untimely and therefore cannot be the basis of a stay of execution.[3] [FN3: This is the what the undersigned meant to convey in the order stating that "[p]ursuant to the Supreme Court's decision, no further stay of execution will be granted." (Doc. 61). As the Supreme Court's opinion addressed the only issue before the court (whether nitrogen hypoxia should be substituted for the three-drug method of execution), the Court's statement was not intended to be a categorical denial of a stay of execution based on claims not before the Court.] And as the Eleventh Circuit stated, this is now the law of the case. So if the Court is mistaken as to its jurisdiction, the **fourth** motion to stay execution is also **DENIED** on the merits.[44]

On the morning of May 28, Price filed notice of his second interlocutory appeal.[45] The Eleventh Circuit affirmed the district court on May 29.[46] As of this writing, no court has stayed Price's execution.

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44. App'x Doc. 88 at 4–5.
45. Doc. 89.
46. Application for Stay of Execution, Ex. A.

REASONS FOR DENYING THE STAY

Price's claims are manifestly untimely. As this Court explained when vacating the previous stays in this case, Price waited until February 2019 to initiate this litigation, despite having notice of the nitrogen hypoxia election period in June 2018. And as the Eleventh Circuit recognized only last Friday, "if Price's claims were untimely in April 2019, they are no more timely now that an additional six weeks have passed."[47] Moreover, as Your Honor made clear, Price failed to show a substantial likelihood of success on the merits because he attacked the execution protocol upheld in *Glossip* and because the Eleventh Circuit's finding that nitrogen hypoxia was available to Price was "suspect" in light of *Glossip* and *Bucklew*. Nothing has changed in this litigation to cast doubt upon these conclusions, and so Price is not entitled to another stay of execution.

Price committed his crimes in 1991, his convictions became final in 1999, habeas relief was denied in 2013, and his justly imposed sentence has not been carried out only because he made a last-minute play in the district court, which then entered a stay despite lacking the jurisdiction to do so. Nor is Price's limited evidence so compelling that he is due another stay of execution.[48] He

47. *Price*, No. 19-11878, slip op. 10.

48. As the Eleventh Circuit noted, "Price has presented nothing that persuades us that the 'new' evidence is actually new and was not available to him previously." Application for Stay of Execution, Ex. A at 5 n.2.

has received a seven-week stay through gamesmanship, not by showing that he is entitled to a reprieve. As before, Price pursues the sort of "last-minute claims that will delay the execution, no matter how groundless,"[49] and his tactics should not be rewarded.

ARGUMENT

I. Price's claims are untimely.

In vacating the stays entered on April 11, the Court made plain—and Your Honor further explained in *Price I*—why Price is not entitled to another stay:

> In June 2018, death-row inmates in Alabama whose convictions were final before June 1, 2018, had 30 days to elect to be executed via nitrogen hypoxia. Ala. Code § 15-18-82.1(b)(2). Price, whose conviction became final in 1999, did not do so, even though the record indicates that all death-row inmates were provided a written election form, and 48 other death-row inmates elected nitrogen hypoxia. **He then waited until February 2019 to file this action and submitted additional evidence today, a few hours before his scheduled execution time.** *See Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").[50]

In *Gomez*, inmate Robert Alton Harris joined with two other inmates three days before his scheduled execution and filed a § 1983 action seeking to enjoin

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49. *Price*, 139 S. Ct. at 1540 (Thomas, J., concurring).
50. *Dunn*, 139 S. Ct. at 1312 (citation edited, emphasis added).

the State of California from executing him by lethal gas. The Ninth Circuit entered a stay hours prior to Harris's execution, which this Court vacated, explaining:

> Whether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. *See In re Blodgett*, 502 U.S. 236 (1992); *Delo v. Stokes*, 495 U.S. 320, 322 (1990) (KENNEDY, J., concurring). This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.[51]

The issue is not merely that Price made last-minute filings on April 11 but rather that he waited until February 8—almost a full month after the State moved for an execution date—to initiate litigation concerning a matter that should have been settled in June 2018. As with Harris before him, Price's "obvious attempt at manipulation" should not have been successful.

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51. *Gomez*, 503 U.S. at 653–54 (citations edited); *see Delo*, 495 U.S. at 321–22 ("The equal protection principles asserted by respondent are not novel and could have been developed long before this last minute application for stay of execution. . . . The fourth federal habeas petition now pending in the District Court 'is another example of abuse of the writ.' *Woodard v. Hutchins*, 464 U.S. 377, 378–80 (1984) (Powell, J., concurring, joined by four other Justices) (vacating stay of execution where claims in a successive petition could, and should, have been raised in a first petition for federal habeas corpus). The District Court abused its discretion in granting a stay of execution.") (citation edited).

The Eleventh Circuit recognized last Friday in affirming the district court's denial of Price's third stay motion that Price is not entitled to a stay of execution:

> We need not opine on how much of a role Price's missing the thirty-day opt-in period played in the Supreme Court's determination to vacate the stays. The Supreme Court made clear by pointing to various examples—including Price's delay in bringing his action and filing additional evidence just a few hours before his execution—that Price waited too long to advance his claims. Accordingly, the Supreme Court deemed Price's claims untimely regardless of the thirty-day opt-in period put into place by the State of Alabama.
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> [. . .]
>
> [T]he problem for Price is that the Supreme Court's reasoning for denying Price a stay applies equally to his Third Motion for Stay as it did to his First and Second Motions. In other words, Price brings no new claims that he could not have known about earlier. And if Price's claims were untimely in April 2019, they are no more timely now that an additional six weeks have passed.[52]

It has now been almost seven weeks since Price's first execution date, and his claims are no more timely now than they were at this Court's last writing. Thus, Price is not entitled to another stay of execution.

II. Price cannot satisfy the requirements for a stay to issue.

Even if Price's claims were timely—which they are not—he would not be entitled to a stay because he cannot satisfy the requirements for a stay to issue. In *Hill v. McDonough*, this Court explained that "a stay of execution is an

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52. *Price*, No. 19-11878, slip op. 9–10.

equitable remedy . . . and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."[53] An inmate asking for a stay must show "a significant possibility of success on the merits,"[54] and a reviewing court "must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'"[55] As the Court noted in *Gomez*, the "last-minute nature of an application" or an applicant's "attempt at manipulation" may be grounds for denial of a stay.[56]

In a method-of-execution challenge, "[a] stay of execution may not be granted . . . unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives."[57] Specifically, as the Court set out in *Glossip*:

> [P]risoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is '"*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading

53. 547 U.S. 573, 584 (2006).
54. *Id.*
55. *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).
56. 503 U.S. 653, 654 (1992).
57. *Baze v. Rees*, 553 U.S. 35, 61 (2008).

> that they were 'subjectively blameless for purposes of the Eighth Amendment.'" . . . [P]risoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." Instead, prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[58]

For the reasons that follow, Price cannot satisfy the requirements for a stay to issue.

A. Price cannot show a substantial likelihood of success on the merits concerning the "substantial risk of serious harm" prong.

Price is not entitled to a stay of execution because he cannot show that the ADOC's lethal injection protocol—the *Glossip* protocol—"presents a risk that is sure or very likely to cause serious illness and needless suffering, amounting to an objectively intolerable risk of harm."[59] To date, the parties have taken the depositions of two witnesses, Dr. Joel Zivot and Dr. Daniel Buffington,[60] who reached different conclusions as to the safety and efficacy of the protocol. The district court—which has expert reports but no testimony

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58. 135 S. Ct. at 2737 (citations omitted).
59. *Id.* at 2736 (quotation omitted).
60. As Price did in the lower courts, he insists upon referring to Dr. Buffington as "Mr." or without any honorific. Application for Stay of Execution at 9–11. Dr. Buffington obtained a Doctor of Pharmacy (PharmD) from Mercer University and completed a postgraduate fellowship in clinical pharmacology at Emory University Hospital. App'x Tab L-2 at 1.

from Dr. David Lubarsky, Dr. Mark Edgar, and Dr. Curt Harper[61]—denied Price's Rule 52(c) motion on May 26.[62] Respondents maintain that the three-drug protocol is safe and constitutional.

Dr. Buffington—a pharmacologist and toxicologist who maintains a practice providing medical consultation services and performing clinical research, consults for the federal government, and teaches at the University of South Florida Colleges of Medicine and Pharmacy[63]—provided testimony in a pretrial deposition. He explained that there is no documented, demonstrated ceiling effect for midazolam[64] and that doses far lower than the 500 milligrams (or 1000 milligrams) administered in the ADOC protocol can produce BIS scores "consistent with general anesthesia for a duration of time consistent with pharmacological effect."[65] As Dr. Buffington testified on cross-examination:

> Q. You're aware that there are a number of anesthesiologists that disagree with your opinions about midazolam, correct?
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> A. There might be pharmacists who disagree with my opinions.

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61. Dr. Harper, also denied an honorific in Price's brief, *see* Application for Stay of Execution at 11–12, holds a PhD in pharmacology and toxicology from the UAB School of Medicine. App'x Tab D at 2.
62. Doc. 88.
63. App'x Tab L-2 at 2.
64. App'x Tab L at 49:2–12. As he explained, there has never been a demonstration of midazolam totally saturating GABA receptors, and other synaptic receptors are involved in the process as well. *Id.* at 95:22–96:4.
65. *Id.* at 49:15–16.

Q. Okay. Do you know of pharmacists that disagree with your opinion?

A. No. Per your point, there may be multiple people. Mine is based on the literature and facts that we know and clinical experience with the product.

Q. Okay. But you're aware that there are a number of anesthesiologists who have actually testified for I guess we're the plaintiffs, so testified on behalf of the capital inmates in these cases and they have disagreed with your opinions about midazolam's ability to induce general anesthesia sufficient to protect against the pain of the second and third drugs?

A. Less than five that I'm aware of that I've seen. And if the issue is the ability to achieve general anesthesia, then I would say I disagree with their statement as well.

Q. Do you think they're just lying?

A. No. I'd say confused because if you look at what we've presented already, it's logical that the medication is capable of inducing general anesthesia. It's used for that. [Its] effect is positive for short, rapid administration and effect and short duration sufficient for this procedure. It's not an analgesic. So I've seen several of the anesthesiologists get that completely wrong and try to argue about analgesia and miss the point about the anesthesia. So they're missing the literature that shows that midazolam can achieve states of deep sedation and general anesthesia and at doses far less and we're giving—so the ceiling is irrelevant. It's able to do it at doses of 10 and 20 milligrams.[66]

Dr. Buffington also testified that there were no data to support Dr. Zivot and Dr. Edgar's contention that a large dose of midazolam led to pulmonary

66. *Id.* at 119:25–121:10.

edema,[67] nor is there anything "that implies that pulmonary edema post mortem is indicative of pain."[68]

Price asks the Court to discount Dr. Buffington's testimony on the ground that he is a pharmacologist, not an anesthesiologist,[69] but Dr. Buffington's experience as a pharmacologist makes him, if anything, even more qualified than an anesthesiologist to opine on the key issues in this case. As Dr. Buffington explained, anesthesiologists treat patients "[w]ith the wisdom and knowledge that I've taught them through the classes they've taken, that I'm there as a consultant when they have their hardest of patients, yes. So with that, they are practicing in a domain that I am totally familiar with."[70] While Dr. Buffington readily admitted that an anesthesiologist would have more hands-on experience with anesthetizing patients, he noted that his experience is greater "when you now bring in the realm the pharmacologic agents used by an anesthesiologist."[71] In other words, while an anesthesiologist like Dr. Zivot can anesthetize patients, a pharmacologist like Dr. Buffington has a greater understanding of the pharmacological properties of the drugs the

67. *Id.* at 127:4–16.
68. *Id.* at 128:5–7.
69. Application for Stay of Execution at 10.
70. App'x Tab L at 123:24–124:3.
71. *Id.* at 124:12–14.

anesthesiologist uses—including at doses an anesthesiologist would never dream of employing.

And that, after all, goes to the question at the heart of this prong of the analysis: whether a dose of midazolam that is, without dispute, exceedingly greater than would ever be used for therapeutic purposes can sufficiently render an inmate insensate to any noxious effects of the second and third drugs of the lethal injection protocol. Dr. Zivot would never have occasion to administer 500 milligrams of midazolam in his practice,[72] but Dr. Buffington, who studies and teaches about the pharmacological properties of drugs, can render an expert opinion on this dose.

Respondents' other expert, Dr. Harper, has yet to offer testimony in this matter. As a pharmacologist and toxicologist, Dr. Harper will testify about the pharmacokinetic properties of midazolam, its uses, and his personal review of toxicology reports from inmates executed with a midazolam protocol showing the toxic level of midazolam found in the inmates postmortem. His expert testimony will show that when midazolam is administered in the dose used in the ADOC protocol, executed inmates have blood concentrations of the drug well above the sedative range and within the toxic or lethal range, and certainly high enough to induce anesthesia. Dr. Harper was deposed as an

72. App'x Tab K at 126:18–24.

expert witness for the State in *Price I* in the Southern District of Alabama and in *Arthur v. Dunn*[73] in the Middle District of Alabama.[74]

Of Price's experts, only Dr. Zivot has been deposed. An anesthesiologist, Dr. Zivot has never had occasion to administer a dose of midazolam in the range of the dose administered in the ADOC protocol,[75] and as Dr. Buffington pointed out, some of his conclusions concerning midazolam—e.g., a ceiling effect or its ability to cause painful pulmonary edema—are unsupported. Moreover, Dr. Zivot is a staunch and vocal opponent of lethal injection, as seen in his numerous op-eds; television, radio, podcast, and symposium appearances; and comments made in various media.[76]

In light of the evidence before the lower courts and now this Court, Price has not shown a substantial likelihood of the success on the merits of this prong.

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73. 2:11-cv-00438-WKW-TFM, 2016 WL 1551475 (M.D. Ala. Apr. 15, 2016).
74. In both instances, Dr. Harper was not called to testify because the proceedings were bifurcated, and the matter was decided against the inmate for failing to name an available alternative method of execution.
75. Tab K at 126:18–24.
76. *Id.* at 85:20–114:14.

B. Price cannot show a substantial likelihood of success on the merits concerning the "alternative method of execution" prong.

Price is also not entitled to a stay of execution because he has not named an alternate method of execution that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[77] While the Eleventh Circuit held that nitrogen hypoxia is available to Price solely because it is contemplated by statute, Your Honor considered that conclusion "suspect" under Supreme Court precedent,[78] adding:

> The facts of this case cast serious doubt on the Eleventh Circuit's suggestion that the State bears a heavy burden of showing that a method of execution is unavailable as soon as its legislature authorizes it to employ a new method. That kind of burden-shifting framework would perversely incentivize States to delay or even refrain from approving even the most humane methods of execution.[79]

Indeed, Price's challenge to his method of execution was materially indistinguishable from the challenge brought in *Bucklew v. Precythe*,[80] and *Bucklew* should have resolved this case, for as the Eleventh Circuit recognized, "Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement."[81] The Eleventh

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77. *Baze*, 553 U.S. at 52.
78. *Price*, 139 S. Ct. at 1538 (Thomas, J., concurring).
79. *Id.* at 1539 (Thomas, J., concurring).
80. 139 S. Ct. 1112 (2019).
81. *Price*, 920 F.3d at 1328.

Circuit, however, distinguished Price's case from Bucklew's on a "key distinction" that was no distinction at all.[82] While the Eleventh Circuit believed that Bucklew had proposed "a new alternative method of execution that had not yet been approved by" Missouri,[83] that belief was mistaken. In fact, as Justice Breyer noted, "Bucklew identified as an alternative method of execution the use of nitrogen hypoxia, which is a form of execution by lethal gas. **Missouri law permits the use of this method of execution.**"[84] The Eleventh Circuit's decision, therefore, was based on overlooked facts that caused it to misinterpret the law.

Price's position is virtually identical to that of Missouri inmate Russell Bucklew, who challenged Missouri's plan to execute him by lethal injection and "claimed that execution by 'lethal gas' was a feasible and available alternative method," "later clarif[ying] that the lethal gas he had in mind was nitrogen."[85] "Lethal gas" and "lethal injection" are Missouri's two statutorily approved methods of execution.[86] Thus, everyone involved in that litigation agreed that nitrogen hypoxia, a form of lethal gas, was statutorily available. The Eighth Circuit noted that "[n]itrogen hypoxia is an authorized method of execution

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82. *Id.*
83. *Id.*
84. *Bucklew*, 139 S. Ct. at 1142 (Breyer, J., dissenting) (citing MO. REV. STAT. § 546.720 (2002)) (emphasis added).
85. *Bucklew*, 139 S. Ct. at 1121.
86. MO. REV. STAT. § 546.720 (1).

under Missouri Law,"[87] and Missouri "did not dispute that lethal gas is legally authorized in Missouri under Mo. Rev. Stat. § 546.720."[88]

But even though nitrogen hypoxia was a statutorily authorized method of execution in Missouri, this Court held that Bucklew needed to "show that his proposed alternative method is not just theoretically 'feasible' but also 'readily implemented.'"[89] Statutory authorization did not relieve him of his burden to submit a "proposal . . . sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly."[90]

The Eleventh Circuit, perhaps unaware of the full facts of Bucklew's case and how similar it was to Price's, reached the opposite conclusion: "nitrogen hypoxia is an available method of execution for [Price] because the Alabama legislature has authorized it."[91] Departing from *Bucklew*, the Eleventh Circuit held that "[i]f 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."[92] But as the facts and reasoning of *Bucklew* make clear, statutory authorization alone does not make a method of execution

87. *Bucklew v. Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018) (citing MO. STAT. ANN. § 546.720).
88. Brief of Respondents at 33, Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (No. 17-8151).
89. *Id.* at 1129 (quoting *Glossip*, 135 S. Ct. at 2737–38).
90. *Id.* (quotation omitted).
91. *Price*, 920 F.3d at 1326.
92. *Id.* at 1327–28.

"available" under *Baze* and *Glossip*'s requirement that an inmate prove its ready availability to him. Bucklew could not satisfy this requirement, and neither could Price.[93]

As Price cannot show a substantial likelihood of success as to the second *Glossip/Bucklew* prong under this analysis, he is not entitled to a stay of execution.

C. Price is not entitled to a stay of execution because the State and victims have an important interest in the timely enforcement of his sentence.

While Price contends that public interest favors a stay of execution,[94] he overlooks the fact that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence."[95] As Your Honor noted in *Price I*:

> Take Bessie Lynn, Bill's widow who witnessed his horrific slaying and was herself attacked by petitioner. She waited for hours with her daughters to witness petitioner's execution, but was forced to leave without closure. . . . [B]y enabling the delay of petitioner's execution on April 11, we worked a 'miscarriage of justice' on the State of Alabama, Bessie Lynn, and her family."[96]

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93. *Id.* at 1328 ("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.").
94. Application for Stay of Execution at 15.
95. *Bucklew*, 139 S. Ct. at 1133 (quoting *Hill*, 547 U.S at 584).
96. *Price*, 139 S. Ct. at 1540 (Thomas, J., concurring).

Price avoided his April execution date by gamesmanship. He has not met the standard for a stay of execution, and his delay tactics should not be rewarded.[97]

CONCLUSION

For the reasons stated above, Price is not entitled to a stay of execution.

Respectfully submitted,

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97. As for Price's contention that the ADOC will be able to execute him "in a few months" by hypoxia, Application for Stay of Execution at 16, he misstates the ADOC's position. At the motions hearing in the district court, counsel for Respondents indicated when pressed for a date by the district court that hypoxia would not be available before the end of the summer. The ADOC does not have a hypoxia protocol at this time, nor is there any date certain for the first hypoxia execution, though it is safe to say that there will not be any such execution during the summer of 2019.

CERTIFICATE OF SERVICE

I certify that on May 30, 2019, I served a copy of the foregoing brief upon counsel for the Petitioner via electronic mail, addressed as follows:

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