

No. _____

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE, PETITIONER,

v.

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*

PETITION FOR A WRIT OF CERTIORARI

**CAPITAL CASE: EXECUTION SCHEDULED
FOR
APRIL 11, 2019**

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QUESTIONS PRESENTED

In the district court below, petitioner adduced evidence sufficient to prove that Alabama’s three-drug lethal injection protocol, which utilizes midazolam hydrochloride as the first drug, will cause his execution to be excruciatingly painful—similar to being suffocated and burned at the stake at the same time. The district court, however, held that petitioner’s Eighth Amendment challenge failed, and that Alabama may proceed to execute petitioner using that protocol, because petitioner could not identify a compounding pharmacy willing to supply the Alabama Department of Corrections (ADOC) with pentobarbital, an alternative to midazolam that would dramatically reduce the physical pain of Petitioner’s execution. The Eleventh Circuit affirmed. Contrary to Sixth Circuit precedent, the Eleventh Circuit held that the Eighth Amendment places no “onus” on the ADOC to try to obtain pentobarbital, regardless of how much pain the midazolam protocol will cause petitioner to suffer. This petition presents the following questions:

(1) Has an Alabama death row inmate shown that pentobarbital is “available” to the ADOC where he proves that pentobarbital is easily made by any compounding pharmacy, multiple states are presently able to obtain the drug for use in executions, and the ADOC failed to undertake “ordinary transactional efforts” to obtain the drug?

(2) If a state’s lethal injection protocol will cause the inmate to experience gruesome and brutal pain, is the state entitled to proceed with the execution anyways, merely because the state cannot immediately obtain alternative drugs known to be effective in accomplishing a humane lethal injection execution?

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 29.6 STATEMENT**

Petitioner Christopher Lee Price is an inmate sentenced to death and currently incarcerated at the Holman Correctional Facility in Atmore, Alabama. Petitioner's execution is scheduled for 7 p.m. Eastern Standard Time on April 11, 2019. App., *infra*, 40a-42a.

Respondents are the Alabama Department of Corrections (ADOC), ADOC Commissioner Jefferson Dunn, Holman Warden Cynthia Stewart, and other unknown employees and agents of the ADOC.

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OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is unreported and available at No. 17-11396, 2018 WL 4502035 (11th Cir. Sep. 19, 2018). The opinion of the district court (App., *infra*, 26a-39a) is unreported and available at No. 14-cv-0472, 2017 WL 1013302 (S.D. Ala. Mar. 15, 2017).

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2018. Petitioner's timely request for rehearing en banc was denied on December 26, 2018. App., *infra*, 43a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

STATEMENT OF THE CASE

The State of Alabama wants to execute petitioner with a three-drug lethal injection protocol that utilizes midazolam hydrochloride. Midazolam is a controversial drug that has been implicated in numerous “botched” executions over the past few years, several states have recently abandoned due to serious constitutional concerns, and is pharmacologically incapable of preventing petitioner from experiencing gruesome pain during his execution.

The problem with midazolam is that it cannot induce the deep, coma-like state of unconsciousness that is necessary to protect an inmate from experiencing gruesome and brutal pain from the second and third drugs in the sequence. The second drug, rocuronium bromide, paralyzes the entire body, including the diaphragm. The third drug, potassium chloride, causes a fire-like burning sensation through the entire venous pathway and causes cardiac arrest. Price C.A. Br. 3-4; Am. Compl. ¶¶19-20. Midazolam will sedate petitioner, but the second and third drugs will cause severe pain that will “break through” that sedation, causing petitioner to feel as though he is simultaneously being suffocated and burned at the stake for at least several minutes before he finally dies.

Because of his fear that Alabama’s lethal injection protocol will cause him to experience substantial physical pain and suffering, Petitioner filed a civil rights lawsuit challenging the protocol under the Eighth Amendment. After the district court denied Alabama’s motion to dismiss, the parties proceeded to discovery. During discovery, petitioner adduced substantial scientific and expert evidence demonstrating the significant problems with midazolam.

After the district court denied Alabama’s motion for summary judgment, petitioner’s lawsuit proceeded to a bench trial before District Judge Kristi DuBose. Judge DuBose decided to bifurcate the trial. Phase one would address the question of whether petitioner’s proposed alternative to midazolam—pentobarbital, a barbiturate commonly used to induce general anesthesia in invasive surgeries—is “available” to the Alabama Department of Corrections (ADOC). Phase two would resolve whether the challenged midazolam protocol would be likely to cause petitioner substantial pain.

At phase one of the trial, petitioner showed that a compounding pharmacy can easily make pentobarbital by mixing together the drug’s constituent parts in the appropriate ration. Petitioner also showed that several States still utilize pentobarbital in their lethal injection protocols and remain able to obtain new supplies of the drug from compounding pharmacies for use in executions. Petitioner also showed that the ADOC’s attempts to find a willing and able supplier of compounded pentobarbital were both limited and inept; among other things, the ADOC did not contact a single compounding pharmacy outside of Alabama. Nevertheless, the district court concluded that the Eleventh Circuit’s decision

in *Arthur v. Dunn*, 840 F.3d 1268, 1274 (11th Cir. 2016), required petitioner to affirmatively identify a specific compounding pharmacy currently willing and able to provide the ADOC with pentobarbital, which petitioner was unable to do. App., *infra*, 38a-39a. The district court acknowledged that *Arthur*'s burden was a practically impossible one for petitioner (or any other inmate) to satisfy and, in addition, would place petitioner's counsel in an ethical quandary, but it considered itself constrained by *Arthur*. *Id.* at 37a. The district court thus entered judgment in favor of Alabama after phase one of the trial, rendering phase two moot.

The Eleventh Circuit affirmed. Like the district court, the court of appeals concluded the prior panel decision in *Arthur* dictated the result. “[O]ur precedent * * * clearly places on [petitioner],” the court of appeals explained, “the burden to show that ‘there is *now* a source for pentobarbital *that would sell it to the ADOC* for use in executions.’” App., *infra*, 21a (quoting *Arthur*, 840 F.3d at 1302). Responding to petitioner's undisputed evidence that the ADOC had failed to contact a single compounding pharmacy outside of Alabama to try to obtain pentobarbital—a logical and simple step to take under the circumstances—the court of appeals held that there is not any “onus on the State to locate pentobarbital. Instead, *Arthur* squarely place[s] the burden on [petitioner] to identify likely sources and determine whether any pharmacy would be willing to make pentobarbital available to the ADOC for use in executions.” *Id.* at 22a.

Petitioner filed a timely petition for rehearing en banc, which the court of appeals denied on December 26, 2018. App., *infra*, 43a.

REASONS TO GRANT THE PETITION

In *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015), this Court held that an inmate challenging a state’s lethal injection protocol under the Eighth Amendment must “plead and prove a known and available alternative.”

There is currently a split between the Sixth Circuit and the Eleventh Circuit with respect to what an inmate must show to satisfy *Glossip*’s requirement. The Sixth Circuit has held that an inmate must show that the State “should be able to obtain” the proposed alternative drugs using “ordinary transactional effort.” *In re Ohio Execution Protocol*, 860 F.3d 881, 891 (2017). By contrast, the Eleventh Circuit held below that, under its *Arthur* decision, there is no “onus” at all on the ADOC to try to obtain the proposed alternative drugs; instead, it is the inmate’s burden alone to “identify a source for [the alternative drugs] and prove that the ADOC ‘actually has access’ to [them].” App., *infra*, 21a (quoting *Arthur v. Dunn*, 840 F.3d 1268, 1300 (11th Cir. 2016)). The difference between these two standards will be outcome determinative where, as here, the inmate can show that the state should be able to obtain the alternative drugs by taking a few simple and basic steps that it has thus far failed to take, even if he cannot identify in the first instance the compounding pharmacy that would agree to provide the drugs. The Court should grant certiorari in order to resolve this split between the Sixth Circuit and Eleventh Circuit.

The Court should also grant certiorari in order to resolve the important constitutional question that Justice Kavanaugh asked counsel for the State of Missouri during oral argument in *Bucklew v. Precythe*, No. 17-8151 (argued Nov. 6, 2018): “[E]ven if the method creates

gruesome and brutal pain you can still do it because there's no alternative?" Oral Arg. Tr. 43:22-25. At a minimum, the Court should hold the petition until it issues its decision in *Bucklew*.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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