No. 18-1249

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

REPLY BRIEF OF PETITIONER

CAPITAL CASE

STATE'S MOTION FOR AN EXECUTION DATE PENDING AS OF APRIL 15, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner's pursuit of his Eighth Amendment claim in the district court and court of appeals below was constrained and stymied by—and then, both at trial and on appeal, denied under—the Eleventh Circuit's decision in *Arthur* v. *Commissioner of the Alabama Department of Corrections*, 840 F.3d 1268 (11th Cir. 2016). Last week, the Eleventh Circuit acknowledged that *Arthur* is "incorrect" in light of this Court's April 1, 2019, decision in *Bucklew* v. *Precythe*, No. 17-8151. *Price* v. *Commissioner, Ala. Dep't of Corrections*, ___ F.3d ____, 2019 WL 1550234, at *6 (11th Cir. Apr. 10, 2019) (scheduled for publication). The Eleventh Circuit agreed that *Bucklew* has "abrogated" *Arthur* and "clarified" how an inmate may plead and prove an available, readily implemented alternative method of execution. *Ibid.*

Arthur dictated how Petitioner was allowed to litigate his Eighth Amendment claim below, and it also dictated the outcome of his litigation in the district court and in the court of appeals. *Bucklew*, therefore, calls into serious question everything that happened in the courts below. Incredibly and tellingly, however, the State's brief in opposition, which was filed eight days after this Court issued its opinion in *Bucklew*, does not discuss *Bucklew* at all.

Anticipating that *Bucklew* might be relevant but not knowing when the Court would issue its opinion in *Bucklew*, Petitioner had asked the Court to "hold [his] petition [for certiorari] until [the Court] issue[d] its decision in *Bucklew*." Pet. at 6. *Bucklew* has now arrived, and it is clear that the decision is not only relevant but has eroded the core underpinnings of the Eleventh Circuit precedent, *Arthur*, that Petitioner labored under in the district court and on appeal. The Court should therefore grant, vacate, and remand this action back to the Eleventh Circuit in light of *Bucklew*.

I. The Eleventh Circuit's Flawed Decision In *Arthur* Fundamentally Infected The Proceedings Below

The Eleventh Circuit's flawed, "incorrect," and "abrogated" decision in *Arthur* fundamentally warped the proceedings below—from trial through appeal. And because of how the district court bifurcated the trial proceedings below, *Arthur* enabled the State to avoid any judicial scrutiny into whether its midazolam-based

three-drug lethal injection cocktail causes severe pain and needless suffering.[1]

First, under *Arthur*, Petitioner was required not merely to identify an alternative, more humane method of execution. Rather, *Arthur* required Petitioner to identify an alternative, more humane method of execution *specifically authorized under the Alabama execution statutes*. See *Arthur*, 840 F.3d at 1317-1318. At the time of the district court proceedings below, lethal injection and the electric chair were Alabama's only statutorily authorized methods of execution. Alabama's electric chair, of course, is infamously torturous. Thus, *Arthur* effectively limited Petitioner to pleading and proving, as an alternative to the State's midazolam-based lethal injection protocol, that the State should execute him with *different lethal injection drugs*. So constrained, Petitioner proposed that, rather than midazolam, the State

[1] In January 2019, after a four-day evidentiary hearing, a federal judge in Ohio made factual findings regarding the same three-drug cocktail that the State of Alabama wishes to utilize on Petitioner. The court concluded that midazolam hydrochloride—the first drug in the cocktail—"cannot prevent the physical pain known to be caused by injection of the paralytic and the potassium chloride," and "is certainly or very likely [to] cause[] pulmonary edema, which is both physically and emotionally painful to a severe level." *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 U.S. Dist. LEXIS 8200, at *226-227 (S.D. Ohio Jan. 14., 2019) (finding that the inmate will experience "a sense of drowning" and "panic and terror, much as would occur with the torture tactic known as waterboarding," as a result of the pulmonary edema).

should use compounded pentobarbital as the first drug in the three-drug cocktail.[2]

Compounded pentobarbital is simple to make, see Pet. App. 15a, and, so long as properly prepared, is pharmacologically equivalent to the manufactured pentobarbital that the State of Alabama had been using as the first drug in its three-drug cocktail up until September 2014. The departments of corrections of several other states have been able to consistently obtain compounded pentobarbital from compounding pharmacies. Petitioner served subpoenas on those departments of corrections in an effort to ascertain the identities of the compounding pharmacies from which they obtain compounded pentobarbital. Unfortunately for Petitioner, those departments of corrections—aided by state secrecy laws—stonewalled and thwarted Petitioner's discovery attempts. In the face of this predicament, *Arthur* precluded Petitioner from calling an audible and proposing a non-pharmacological alternative method of execution that would not be wrought with such discovery roadblocks.

Second, under *Arthur*, the State had no burden whatsoever to attempt to procure either compounded pentobarbital or any other analgesic drug that could be used in lieu of midazolam as the first drug in the cocktail. See *Arthur*, 840 F.3d at 1303. In *Arthur*'s words, the

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[2] Under the Eleventh Circuit's decision in *Brooks* v. *Warden*, 810 F.3d 812, 821 (2016), Petitioner was precluded from proposing that he be executed with "midazolam alone, and not in concert with two other drugs." And, in any event, execution with midazolam alone would be severely painful due to the issue of pulmonary edema. See *supra* note 1.

"State need not make any showing [regarding its efforts to obtain compounded pentobarbital] because it is [the inmate's] burden, not the State's, to plead and prove both a known and available alternative method of execution." *Ibid.* Indeed, under *Arthur*, it was not sufficient for Petitioner to show that (i) the departments of corrections of Georgia, Texas, Missouri, and Virginia all had been able to obtain compounded pentobarbital from compounding pharmacies; (ii) the Alabama Department of Corrections had failed to contact a single compounding pharmacy located in any of those states; (iii) the Alabama Department of Corrections had failed to take other simple and obvious steps to facilitate communications with those other states' pentobarbital suppliers; and (iv) the Alabama Department of Corrections could have made its own compounded pentobarbital by setting up its own compounding pharmacy. See Pet. App. 19a-23a, 31a. *Arthur* held that an inmate could not prove compounded pentobarbital's "availability" in such a circumstantial fashion, leaving the Alabama Department of Corrections without any incentive to try to procure the drug and preventing the district court from penalizing the agency for its obstinance.

As the district court and court of appeals acknowledged, these two aspects of *Arthur*—individually but especially when combined—made it impossible for Petitioner to show an available, readily implemented alternative to the State's midazolam-based lethal injection protocol.[3] See Pet. App. 12a n.13; *id.* at 19a; *id.* at 19a

[3] Analgesics such as pentobarbital are available from only two sources—pharmaceutical manufacturers and compounding

n.20; *id.* at 37a n.10. The other consequence of *Arthur* was to allow the State to evade any judicial inquiry into whether its midazolam-based cocktail is tantamount to torture. This is because the district court, acting *sua sponte*, decided that the bench trial on Petitioner's Eighth Amendment claim should be bifurcated—with the question of whether the State's midazolam-based three-drug cocktail poses a substantial risk of severe pain and needless suffering addressed only if Petitioner first satisfied *Arthur*'s impossible burden of identifying a source from which the State could immediately obtain compounded pentobarbital.

II. The Court Should Grant, Vacate, And Remand In Light Of *Bucklew*

This Court's decision in *Bucklew* fundamentally erodes *Arthur*'s core underpinnings. As the Eleventh Circuit acknowledged just last week, *Bucklew* has "abrogated" *Arthur*'s "incorrect" holding that an inmate's proposed alternative method of execution had to be specifically authorized by the State's statutory law in order to be deemed "available" for Eighth Amendment purposes. *Price*, ___ F.3d ____, 2019 WL 1550234, at *6. Thus, as *Bucklew* clarifies, Petitioner should not have been required to undertake the Sisyphean task of pleading and proving that the State could obtain an analgesic to be used in lieu of midazolam—a task made all the more Sisyphean by the unattainable evidentiary burden that

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pharmacies. Other than by materially misrepresenting themselves (which would be unethical and probably illegal), it is undisputed that neither an inmate nor his legal counsel could call a pharmaceutical manufacturer or compounding pharmacy, offer to purchase an analgesic, and be taken seriously.

Arthur imposed. Instead, Petitioner should have been allowed to plead and prove in the district court alternative methods of execution that did not involve pharmaceutical drugs (*e.g.*, nitrogen hypoxia). Further, the impossible-to-satisfy burden that *Arthur* imposed on Petitioner cannot be squared with *Bucklew*'s assurance (and as specifically echoed by Justice Kavanaugh in his concurring opinion), that there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an alternative." *Bucklew*, slip op. at 20. Finally, *Bucklew*'s holding that a "State's choice of which methods to authorize in its statutes" cannot dictate whether an alternative method of execution is "available," slip op. at 20, cannot be reconciled with how *Arthur* enabled a State, by refusing to pursue the most logical leads for obtaining compounded pentobarbital, to effectively prevent an inmate from showing that the drug is "available."

Petitioner has been challenging the State's midazolam-based lethal injection protocol since October 2014, filing his civil rights lawsuit less than a month after the Alabama Department of Corrections announced that it was abandoning its pentobarbital-based cocktail in favor of a midazolam-based cocktail. Because he was forced to try his case in the district court, and then pursue his case on appeal, under the Eleventh Circuit's "incorrect" and now "abrogated" *Arthur* precedent, Petitioner never had a fair opportunity to litigate his October 2014 complaint within the correct legal framework or under the correct legal standard. This is constitutionally intolerable given the mounting evidence—evidence that is consistent with how midazolam is known to work on the body and the brain—that the three-drug cocktail with which the State of Alabama wishes to execute Petitioner

will cause him severe pain and prolonged, needless suffering before he dies.

Knowing that its midazolam-based lethal injection cocktail is no longer shielded from judicial review by the Eleventh Circuit's "incorrect" and now "abrogated" *Arthur* precedent, the State of Alabama is now trying to evade judicial review by rushing Petitioner to his execution date. The Court can and should put a stop to this. Given how *Arthur* fundamentally warped the proceedings in both the district court and court of appeals below, and given that the Eleventh Circuit already has recognized that *Bucklew* abrogates *Arthur*'s core underpinnings, the Court should grant the petition, vacate, and remand in light of *Bucklew*. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (*per curiam*). The Eleventh Circuit would have the option to remand the case back to the district court, with instructions either to (i) assess in the first instance whether Petitioner's uncontroverted evidence establishes by a preponderance of the evidence that compounded pentobarbital is in fact "available" to the State under *Bucklew*, or (ii) allow Petitioner to pursue a non-pharmacological alternative method of execution, such as nitrogen hypoxia, that *Arthur* had incorrectly barred him from pursuing originally. Because the Eleventh Circuit has now held that nitrogen hypoxia is, as a matter of law, an available and readily implemented alternative method of execution in Alabama under *Bucklew*, see *Price*, ___ F.3d ___, 2019 WL 1550234, at *6-9, the district court could then proceed straight to trial on the question of whether, as compared to nitrogen hypoxia, the State's midazolam-based three-drug cocktail will cause Petitioner severe pain and needless suffering. Petitioner respectfully submits that

the outcome of such a trial is scarcely in doubt—he will prevail.[4]

CONCLUSION

For the reasons stated above, the Court should grant, vacate, and remand in light of *Bucklew*.

Respectfully submitted,

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[4] If the Alabama Supreme Court were to schedule Petitioner's execution for a date that precedes the date on which such a trial could reasonably occur, Petitioner could not plausibly be denied a stay of execution on timeliness grounds. Petitioner pursued his October 2014 Eighth Amendment complaint as quickly as possible. He did everything that could be reasonably expected of any ordinary litigant, and he did so despite being an indigent death row inmate.