

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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CHRISTOPHER LEE PRICE, PETITIONER,

v.

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

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

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**APPLICATION FOR A STAY OF EXECUTION  
TO THE HONORABLE CLARENCE THOMAS,  
AS CIRCUIT JUSTICE**

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

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IN THE SUPREME COURT OF THE UNITED STATES

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Christopher Lee Price, Applicant

v.

Jefferson Dunn, Commission, Alabama Department of Corrections, *et al.*

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**EMERGENCY APPLICATION FOR A STAY OF EXECUTION  
PRESENTED TO THE HONORABLE CLARENCE THOMAS,  
AS CIRCUIT JUSTICE**

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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:

Applicant Christopher Lee Price respectfully requests a stay of his execution using a three-drug lethal injection protocol with midazolam hydrochloride as the first drug, pending the Court's disposition of his concurrently filed Petition for Writ of Certiorari. Petitioner's petition seeks review of the decision of the United States Court of Appeal for the Eleventh Circuit affirming the district court's denial of his motion for a preliminary injunction. Alternatively, Mr. Price requests a stay of execution unless and until the state of Alabama (the State) agrees to execute him with nitrogen hypoxia.

## JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Price v. Commissioner, Alabama Dep't of Corrections, et al.*, No. 19-11268 (11th Cir. April 10, 2019) (attached as Exhibit A).

## JURISDICTION

On April 10, 2019, The Eleventh Circuit issued its decision affirming the district court's denial of a motion for a preliminary injunction. Mr. Price has concurrently filed a Petition for a Writ of Certiorari with this Application.

This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651, and Supreme Court Rule 23.

## REASONS FOR GRANTING THE STAY

Applicant Christopher Lee Price is scheduled to be executed by lethal injection today at 7 p.m. EST, April 11, 2019. The State of Alabama intends to execute him with a three-drug cocktail utilizing midazolam hydrochloride as the first drug. He respectfully requests a stay of his execution pending disposition of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit or, alternatively, a stay of his execution until the State agrees to execute him using nitrogen hypoxia. To be clear, Mr. Price does not seek to indefinitely halt the State's efforts to execute Mr. Price. All Mr. Price asks is that the State execute him using nitrogen hypoxia, rather than the three-drug lethal injection cocktail that utilizes midazolam as the first drug. Mr. Price's looming

execution date will, in the absence of a stay, preclude this Court from considering his petition before the scheduled execution, thus necessitating this Application.

Mr. Price is entitled to a stay 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. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Where a stay applicant is a death row inmate who has brought a constitutional challenge to his execution, the applicant's entitlement to a stay of 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, is conclusive of the other elements needed to justify a preliminary injunction.

In the context of a stay pending the Court's ruling on a petition for certiorari, an applicant need show only a "reasonable probability" that the Court will grant certiorari and a "fair prospect" that the decision below will be reversed. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

As set forth below, Mr. Price has a substantial likelihood of succeeding on his Eighth Amendment claim, and the equities weigh in his favor. Thus, he is entitled to a stay.

**I. Mr. Price Has a Substantial Likelihood of Success on the Merits of his Eighth Amendment Claim.**

As shown in his Petition for a Writ of Certiorari, Mr. Price will likely prevail on his Eighth Amendment claim. He incorporates that Petition here for the purposes of this Application.

**II. The Equities Weigh in Mr. Price's Favor Because the Harm to Him Is Irreparable, He was Not Dilatory in Pursuing His Rights, and There is a Public Interest in Staying Mr. Price's Execution to Resolve His Claims.**

First, irreparability of injury is clear. Without a stay, Mr. Price will die today or, at minimum, suffer a failed and horrendously painful execution attempt. See *Wainwright v. Booker*, 473 U.S. 935 (1985) (Powell, J. concurring) (recognizing that death by execution constitutes irreparable injury).

Next, Mr. Price was not dilatory in pursuing his rights. He filed this lawsuit before the Alabama Supreme Court had even scheduled his execution date. See *Murphy v. Collier*, No. 18A985 (March 28, 2019) (slip op. at 2 n.\*) (Kavanaugh, J., concurring in grant of application for stay) (concluding that, by making his request to the State “one month before the scheduled execution,” the inmate had done so “in a sufficiently timely manner”). This is not a case brought mere days before a looming execution date. Compare *Bucklew v. Precythe*, No. 17-8151 (April 1, 2019) (slip op. at 29-30).

Last, a brief stay of execution is in the public interest, as “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994). To the extent the State argues that the public has an interest in the finality

of criminal convictions, here, the Constitution compels a *de minimus* impairment of such an interest. See *Lee v. Kelley*, 854 F.3d 544, 550 (8th Cir. 2017) (Kelly, J., concurring) (concluding that, in the stay of execution context, the state's interest in an expedited execution timeline was outweighed by the inmate's "interest in ensuring that his execution is not carried out in violation of the [Constitution]").

Moreover, as the Eleventh Circuit noted, Alabama will be able to execute Mr. Price with nitrogen hypoxia in less than three months. See *Price*, No. 19-11268 (slip op. at 22). The State's interest in executing Mr. Price today rather than by nitrogen hypoxia in less than three months cannot outweigh Mr. Price's—or the people of Alabama's—interest in ensuring that an execution is carried out without violating the Constitution. Rather, because Mr. Price has a substantial likelihood of prevailing on his Eighth Amendment claim, any interest in seeing Mr. Price's death sentence carried out immediately is outweighed by the broader interest in permitting meritorious Constitutional claims involving fundamental rights to be litigated to completion.



## CONCLUSION

For the reasons stated above, this Application should be granted, and Mr. Price's execution should be stayed pending disposition of his Petition for Writ of Certiorari or, alternatively, until the state of Alabama agrees to execute him by nitrogen hypoxia.

Respectfully submitted,

/s/ Aaron M. Katz

Aaron M. Katz

Jonathan Ference-Burke

ROPES & GRAY LLP

*Counsel for Applicant Christopher Lee Price*

April 11, 2019

No. 19A-\_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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Christopher Lee Price, Applicant

v.

Jefferson Dunn, Commission, Alabama Department of Corrections, *et al.*

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CERTIFICATE OF SERVICE

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I, Jonathan Ference-Burke, a member of the Bar of this Court, certify that on this 11th day of April, 2019, I caused to be served by e-mail and first-class mail, postage prepaid, a copy of the Application for a Stay of Execution in the above-captioned case on:

Lauren A. Simpson  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, AL 36130-0152  
Telephone: 334-242-7300

*Counsel*

*for*

*Respondents*

I further certify that all parties required to be served have been served.

*/s/Jonathan Ference-Burke*  
Jonathan Ference-Burke