No. ____

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE, PETITIONER,

v.

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

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

CAPITAL CASE: EXECUTION SCHEDULED FOR MAY 30, 2019

JONATHAN R. FERENCE-BURKE
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4731
jonathan.ference-burke@ropesgray.com

AARON M. KATZ
Counsel of Record
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
(617) 951-7419

Counsel for Petitioner Christopher Lee Price

IN THE SUPREME COURT OF THE UNITED STATES

Christopher Lee Price, Applicant

v.

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

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

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 brief, time-limited stay of his execution, so that District Judge Kristi DuBose has the opportunity to resolve Mr. Price's Eighth Amendment claim on the merits at the conclusion of a bench trial that is scheduled for the week of June 10. Only 12 days away, Mr. Price's federal civil rights trial concerns a single issue: whether the first drug in Alabama's lethal injection protocol, midazolam hydrochloride, will put Mr. Price into a state of deep anesthesia sufficient to protect him from feeling the severe, excruciating pain of his execution. Mr. Price has a substantial—indeed, an overwhelming—likelihood of prevailing on that issue: Mr. Price and the State have already conducted trial depositions of their key witnesses, exchanged discovery, and

submitted expert declarations. The evidence heavily favors Mr. Price. The State, however, is desperately seeking to prevent federal judicial review of its lethal injection protocol, hoping that Mr. Price's execution on May 30 will moot his Eighth Amendment claim before the district court is able to issue a ruling on the merits.

Mr. Price's principal expert witness, Emory University Medical School professor and practicing anesthesiologist Dr. Joel Zivot, M.D., testified in a May 17 trial deposition that (1) even a 500 mg intravenous dose of midazolam will not be effective at preventing Mr. Price from experiencing the excruciating pain and suffering of the second and third drugs in the protocol, and (2) a 500 mg dose of midazolam will cause Mr. Price's lungs to fill with fluid, effectively drowning him, before it has any impact whatsoever on his cerebral cortex. Mr. Price's two other expert witnesses—anesthesiologist and former Chief Medical Officer of the University of Miami Health System Dr. David Lubarsky, and Emory University professor and surgical pathologist Dr. Mark Edgar—are expected to testify similarly. The State, by contrast, will not call any medical doctors to support its contention that its lethal injection protocol satisfies the Constitution's requirements. Instead, the State is relying on the opinions of a pharmacist (Daniel Buffington) and a forensic toxicologist (Curt Harper), the former of whom testified by trial deposition on May 20 and the latter of whom signed an "expert declaration" that fails to say anything relevant to the sole issue in dispute.

The State has known since April 22 that Mr. Price's trial was scheduled to be completed the week of June 10. Despite this, the State pushed the Alabama

Supreme Court to schedule Mr. Price's execution for a date preceding trial. The Alabama Supreme Court's elected judges acceded to the State's request. The Court should not endorse the State's tactic of pushing the Alabama Supreme Court to set an execution date preceding Mr. Price's scheduled federal civil rights trial—a tactic clearly designed and intended to evade meaningful federal judicial review of the State's lethal injection protocol—where the evidence is substantially in Mr. Price's favor and trial is just 12 days away.[1] The Court should issue an order staying Mr. Price's May 30 execution so that the district court can issue a ruling on the merits of Mr. Price's Eighth Amendment claim following trial on June 10.

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. 19-12026 (11th Cir. May 29, 2019) (attached as Exhibit A).[2]

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[1] Notably, at the time the State was pushing the Alabama Supreme Court for an execution date that would precede Price's scheduled civil rights trial, the State knew that the district court in the Eastern District of Arkansas was just weeks away from completing a trial addressing whether the midazolam-based three-drug lethal injection protocol poses a substantial risk of causing severe (and unconstitutional) pain. *See McGehee* v. *Hutchinson*, No. 17-cv-00179 (E.D. Ark.). Particularly given that a judge in the Southern District of Ohio earlier this year ruled against the State of Ohio on that same exact issue, *see In re Ohio Execution Protocol,* No. 11-cv-1016, 2019 WL 244488, at *65 (S.D. Ohio Jan. 14, 2019), it is clear that the State is seeking to evade federal judicial review for an improper purpose: because it knows that, based on the evidence that has been developed since this Court's *Glossip* decision, it likely will lose on the merits of the Price's Eighth Amendment claim.

[2] Mr. Price incorporates by reference the appendix that he submitted to the Eleventh Circuit yesterday in connection with his Emergency Motion for Stay of Execution, *Price* v. *Commissioner, Alabama Dep't of Corrections, et al.*, No. 19-

JURISDICTION

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. Mr. Price has already sought, and been denied, a stay in both the district court and the court below.

REASONS FOR GRANTING THE STAY

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 addition to an inmate's likelihood of success at trial, both this Court and lower courts also consider, when evaluating whether to grant a stay of execution, whether the inmate has been dilatory in pursuing his rights. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Brooks v. Warden*, 810 F.3d 812, 824-826

12026 (11th Cir. May 29, 2019). Citations appear here as references to particular documents contained within that appendix.

(11th Cir. 2016). The Supreme Court has never held this to be the dispositive factor when deciding whether to grant a stay, however—especially where, as here, the inmate is almost certain to prevail at an imminent trial. Mr. Price fervently maintains that he has not engaged in any undue delay in his case. *See* Section II-B. And to the extent this Court or the lower courts found the evidentiary support for Mr. Price's prior requests for a stay lacking, Mr. Price presents with this stay application significantly more evidence than in any previous request, and therefore his showing on the principal stay factor—his likelihood of success on the merits—is entitled to even more weight.

To prevail on his Eighth Amendment claim, Mr. Price must show by a preponderance of the evidence that the State's midazolam-based lethal injection protocol carries a substantial risk of causing him severe pain relative to the available, feasible, readily implemented alternative of nitrogen hypoxia. See, e.g., *Glossip* v. *Gross*, 135 S. Ct. 2726, 2737 (2015). The Eleventh Circuit already has held that nitrogen hypoxia is an available, feasible, and readily implemented alternative method of execution for Mr. Price. See *Price* v. *Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1326-1329 (11th Cir. 2019), cert. denied *sub nom. Price* v. *Dunn*, No. 18-8766, 2019 WL 1572429 (U.S. Apr. 12, 2019). That is now the law of this case. *See United States* v. *Anderson*, 772 F.3d 662, 668 (11th Cir. 2014). In addition, the State agrees with Mr. Price that execution by nitrogen hypoxia would be essentially

painless.[3] Accordingly, there is only one issue that is at all in dispute: whether the State's midazolam-based lethal injection protocol is substantially likely to cause Mr. Price severe pain. The testimony of Mr. Price's medical experts, one of whom testified by trial deposition on May 17, demonstrates that the evidence is overwhelmingly in Mr. Price's favor on that issue.

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

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

A. Mr. Price's Expert Evidence.

Mr. Price has three medical experts testifying in support of his Eighth Amendment claim. All three are board certified in their respective fields of medicine, and all three will testify that the State's midazolam-based lethal injection protocol will cause Mr. Price excruciating pain. Dr. Joel B. Zivot, who testified by trial deposition on May 17, is a board-certified anesthesiologist and intensive care specialist at Emory University in Atlanta. He has treated roughly 80,000 patients in his career and has extensive experience administering midazolam and observing its effects. Dr. David Lubarsky, formerly the Chief Medical Officer of the University of Miami Health System and currently Chief Executive Officer of UC Davis Health,

[3] See, e.g., Zivot Tr. 22:14-20 ("I'm of the opinion that if a person breathes pure nitrogen gas . . . they would experience a kind of death that would not be painful."); Buffington Tr. 59:15-22 (denying "any reason to believe that inert gas asphyxiation would be a painful process"); State's Response to Interrogatory 25 ("Defendant is not aware of any assertions by the State that execution by nitrogen hypoxia will cause significant pain to an inmate").

is a board-certified anesthesiologist with extensive knowledge and experience about the properties and usages of benzodiazepines, including midazolam. Both Dr. Zivot and Dr. Lubarsky will testify that, as a matter of basic pharmacology, and as a generally accepted principle among anesthesiologists, midazolam is incapable of protecting an inmate from experiencing the severe pain of the second and third drugs (rocuronium bromide and potassium chloride) in Alabama's lethal injection protocol. In addition, Mr. Price will offer the testimony of Dr. Mark Edgar, a board-certified pathologist who recently concluded based on publicly available autopsy reports for inmates executed with a midazolam-based protocol that midazolam itself causes painful, rapid-onset pulmonary edema in an inmate, even prior to the injection of the second and third drugs in the protocol. The strength of the testimony of these three experts—and the lack of medical and scientific support for the State's pair of witnesses—show that Price is substantially likely to succeed at his June 10 trial.

Dr. Zivot's testimony is already complete. Because he is unavailable to attend trial in Mobile on June 10, the parties by agreement deposed Dr. Zivot on May 17. At his trial deposition, Dr. Zivot testified that an injection of the second drug in the State's lethal injection protocol, rocuronium bromide, a paralytic, would be terrifying and painful, because a person would remain awake and fully sensate but he would not be able to move or breathe. Zivot Tr. 51:6-52:11.[4] Likewise, an

[4] Dr. Zivot explained that breath holding causes carbon dioxide levels in the blood to rise, Zivot Tr. 27:22-28:2, a sensation he described as "very painful," Zivot Tr. 24:10-15, "extremely uncomfortable," Zivot Tr. 27:19, and "very stressful," Zivot Tr. 27:25.

injection of the third drug, potassium chloride, would cause a "burning pain" and "tissue destruction" that would be "extraordinary and significant." Zivot Tr. 49:15-25; 60:7-21. Dr. Zivot further testified that the first drug in the lethal injection protocol, midazolam, is a benzodiazepine that has no analgesic properties and cannot protect Mr. Price from feeling the pain of the paralytic and potassium chloride. Zivot Tr. 41:1-10. Dr. Zivot explained that benzodiazepines like midazolam have anxiolytic and amnestic effects, meaning they reduce anxiety and block the formation of new memories, Zivot Tr. 41:11-16, but these properties would not in any way protect Mr. Price from the pain from the second and third drugs in the State's protocol. Similarly, Dr. Zivot testified that although midazolam may cause some sedation, Zivot Tr. 55:4-5, a person who is sedated with midazolam will still feel and react to pain from significantly noxious stimuli, like the large dose of potassium chloride that the State intends to use to induce fatal cardiac arrest in Mr. Price. Zivot Tr. 59:15-60:6. Finally, Dr. Zivot testified that a 500 mg IV injection of midazolam causes the rapid onset of acute pulmonary edema, during which a person's lungs fill with fluid, causing severe pain even prior to the injection of the second and third drugs. Zivot Tr. 61-74:11.

The reports and anticipated testimony of Dr. David Lubarsky and Dr. Mark Edgar further secure Mr. Price's likelihood of success on his Eighth Amendment claim. Dr. Lubarsky is a board-certified anesthesiologist who will testify, consistent with Dr. Zivot, that midazolam cannot render an inmate insensate to the severe pain caused by rocuronium bromide and potassium chloride. Lubarsky Report ¶ 5.

This is because midazolam lacks analgesic (pain-blocking) properties, *Id.* at ¶ 9, and its ability to sedate inmates is limited by a "ceiling effect," i.e., "a point at which any further dosage of the drug will not create any greater sedative effect on the body," *Id.* at ¶ 11. Dr. Lubarsky will also testify that a 500 mg dose of midazolam will cause acute pulmonary edema in an inmate, which he describes as "analogous to waterboarding," because "you are unable to catch your breath and you drown in your own fluids." *Id.* at ¶ 29.

Dr. Mark Edgar, a practicing, board-certified anatomic pathologist and neuropathologist, will testify that, based on his review of autopsy reports of inmates executed with midazolam-based protocols, midazolam causes acute pulmonary edema, which he describes as a "terrifying, horrific and painful condition." Edgar Report ¶¶ 5, 86. The pulmonary edema is caused by "the relatively rapid IV injection of a large dose of midazolam in a highly acidic form, which enters the lungs almost immediately after injection and promptly begins to destroy the delicate blood vessels in the lungs, thereby causing the lungs to immediately begin to fill with fluid and blood." *Id.* ¶ 85. Dr. Edgar will testify that Mr. Price will suffer the pain of pulmonary edema almost immediately upon being injected with midazolam, and prior to the injection of the second and third drugs.

B. The State's Expert Evidence.

Neither of the State's expert witnesses is a medical doctor. One is a clinical pharmacist, and the other is a forensic toxicologist who is a State employee. The State has already taken the trial deposition of its primary witness, Daniel

Buffington, a pharmacist who runs a consulting business. Mr. Buffington did not attend medical school, and he has never conducted research or clinical studies on anesthesia or midazolam. Buffington Tr. 140:18-21. Buffington conceded at his deposition that anesthesiologists like Dr. Zivot and Dr. Lubarsky are more expert in anesthesiology than he is. Buffington Tr. 124:6-12.

Buffington's opinion is, in essence, that midazolam alone will suffice to prevent pain during an execution. This is despite the facts that (1) midazolam has absolutely no analgesic (pain relieving) properties, and (2) midazolam is never used as a standalone anesthetic in any clinical procedure. While Buffington testified that midazolam can be used "alone" in certain short procedures, every procedure he identified involves the simultaneous use of an analgesic to prevent pain. Buffington Tr. 88:17-89:11. Similarly, despite Buffington's reliance on midazolam's FDA package insert, that document only approves midazolam for anesthesia when used in combination with other drugs. Buffington Tr. 136:22-139:1; *see also* Def.'s Resp. to Pl.'s First Set of Requests for Admission at Request 3 (admitting that, for even minor surgical procedures, midazolam is indicated "for the induction of general anesthesia" but only "before the administration of other anesthetic agents."). Buffington's opinion, which Price's experts will explain is a complete outlier, is an extrapolation from a single study of how a dose of 10 mg of midazolam affects patients. The average bispectral index (BIS) score[5] in the study was 69.7. Buffington's conclusions rely on a few outliers who reached BIS levels below that

[5] This score is intended to be a proxy for the depth of a patient's sedation.

average. But Buffington also agrees that BIS numbers are not a perfect proxy for determining whether a person is under general anesthesia. Buffington Tr. 97:1–5. It is therefore not reliable for him to render opinions dependent on BIS scores, and a few outliers in a single study.

Buffington's testimony boils down to an unsupported opinion that the State can use midazolam to achieve effects that doctors *never* achieve in a clinical setting, such as pain prevention and the maintenance of general anesthesia. Similarly lacking in scientific basis or credibility is Buffington's philosophical and metaphysical opinion that if midazolam is capable of causing a person to have amnesia, and that amnesia renders the person unable to remember the excruciating physical pain of an event, then the person did not experience any physical pain at all. Buffington's testimony therefore has no impact on Mr. Price's likelihood of success on the merits.

The State also has identified Curt Harper, a forensic toxicologist employed by the Alabama Department of Toxicology, as a trial witness. The State has produced a self-styled "expert declaration" for Harper that does not even comply with Federal Rule of Civil Procedure 26's expert disclosure requirements. In any event, a forensic toxicologist is not plausibly an expert—by training, education, or experience—on whether midazolam is capable of inducing a deep state of anesthesia in a patient or inmate. Not surprisingly, Harper's declaration does not address whether a 500 mg dose of midazolam will protect Mr. Price from feeling the severe pain of the second and third drugs in the State's lethal injection protocol, nor does it

address whether midazolam causes pulmonary edema. Instead, Harper's declaration opines that a 500 mg dose of midazolam might be fatal all on its own, which is completely beside the point given that the State is not proposing to kill Mr. Price using only midazolam. Simply put, Harper's trial testimony will add nothing to the State's body of evidence with respect to the issue on which the outcome of Mr. Price's Eighth Amendment claim actually turns. See, e.g., *SE Property Holdings, LLC* v. *Center*, No. 15-033-WS-C, 2017 WL 1349174, at *7 (S.D. Ala. Apr. 7, 2017) ("[W]itnesses' trial testimony will be limited to the subject matter of their expert reports, such that they will not be allowed to testify to matters beyond the scope of those [reports].").

Viewing the State's evidence on the one hand, and Mr. Price's evidence on the other, it is crystal clear why the State intends to execute Mr. Price prior to his June 10 trial: it is because Mr. Price will prevail. He has a substantial likelihood of success on the merits of his Eighth Amendment claim, and this Court should enter a stay that permits the district court to issue a judgment on the merits following trial on June 10.

II. The Equities Weigh in Mr. Price's Favor.

A. Mr. Price Will Be Irreparably Harmed if a Stay is Not Granted.

Without a stay, Mr. Price will be executed or, at minimum, suffer a failed and horrendously painful execution attempt. See *Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (recognizing that death by execution constitutes irreparable injury).

B. Mr. Price Has Not Been Dilatory in Pursuing His Rights.

Since 2014, Mr. Price has diligently pursued an alternative method of execution to the State's midazolam-based three-drug protocol. Mr. Price first brought suit seeking an alternative method of execution in 2014 and brought this suit earlier this year, before he even had an execution date. His sole aim has always been to secure execution by a means other than the midazolam-based protocol because that protocol is substantially likely to cause him severe pain. Because he has ardently pursued such an alternative for so long, his pursuit of vindicating his Eighth Amendment rights could not possibly be characterized as dilatory.

At every single point in time from October 2014, which was less than a month after the State adopted its current lethal injection protocol, to the present, Mr. Price has been asserting in federal court that the State's lethal injection protocol will cause him severe pain, in violation of the Eighth Amendment. To the extent that Mr. Price's litigation is ongoing, right up to the final days before his execution, that is the result of the state of Alabama continuing to change its opaque execution statutes, this Court continuing to develop the meaning of *Glossip*, and the State's consistently pushing for an execution date that effectively prevents meaningful federal judicial review.

In no way, shape, or form does Mr. Price's pursuit of an alternative method execution pass for dilatory. For *four and a half years*, Mr. Price has been challenging the midazolam-based protocol. This is neither a case where Mr. Price

sat on his rights while under sentence of death with no pending litigation, *contra Gomez* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1993) (per curiam) (petitioner's constitutional "claim could have been brought more than a decade" before he filed it), nor a case where Mr. Price brought his claim mere days before his scheduled execution, *contra Dunn* v. *Ray*, 139 S. Ct. 661 (2019) (Mem.).

Instead, Mr. Price, like the petitioner in *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019), requested relief from the State and from the federal courts "in a sufficiently timely manner." *Id.* at 1476 n.* (Kavanaugh, J., concurring in grant of application for stay). In *Murphy*, the petitioner challenged Texas's policy prohibiting non-Christian and non-Muslim spiritual advisors from accompanying inmates into the execution chamber. *Id.* at 1475. Texas's policy had been in place since at least 2012, and the petitioner's execution was scheduled for March 28, 2019. *Murphy v. Collier*, 919 F.3d 913, 915 (5th Cir. 2019). On February 28, 2019, the petitioner requested that the State allow his Buddhist priest to accompany him into the execution chamber. He filed his federal lawsuit on March 26, 2019, after the State denied his request. *Ibid.* This Court stayed Mr. Murphy's execution. 139 S. Ct. at 1475. As Justice Kavanaugh highlighted in his statement respecting the grant of application for stay, Mr. Murphy's application was timely because he "made his request to the State of Texas a full month before his scheduled execution." *Id.* at 1477. Here, Mr. Price asked to be executed using nitrogen hypoxia in January 2019, more than a month before his execution *was even scheduled.* Apparently recognizing that, under *Murphy*, Mr. Price's application is timely, the Eleventh

Circuit made no real attempt to distinguish the cases. Instead, the Eleventh Circuit emphasized that Mr. Murphy's application was timely because "the holding in *Murphy*, is the law in *that* case." *Price*, No. 19-11878 (May 24, 2019) (slip op. at 10) (emphasis in original). But "the law treats like cases alike," *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 865 (2018) (Breyer, J., dissenting), and an italicized word cannot, and should not, be the basis for deciding whether a death row inmate lives to see his or her constitutional rights vindicated or dies in contravention of those rights. Accordingly, Mr. Price has not been dilatory, and this element tips in his favor.

C. The Public Interest Favors a Stay.

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 minimis 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 has noted, the State will be able to execute Mr. Price with nitrogen hypoxia in a matter of months. *Price* v. *Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1329 (11th Cir. 2019), cert. denied *sub nom. Price v. Dunn*, No. 18-8766, 2019 WL 1572429 (U.S. Apr. 12, 2019). The State's interest in

executing Mr. Price at the end of the month rather than by nitrogen hypoxia in a few 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.[6]

CONCLUSION

For the reasons stated above, this Application should be granted, and Mr. Price's execution should be stayed pending trial on the merits of his Eighth Amendment claim, or, alternatively, until the state of Alabama agrees to execute him by nitrogen hypoxia.

Respectfully submitted,

/s/ Aaron Katz
Aaron Katz
ROPES & GRAY LLP

Counsel for Applicant Christopher Lee Price

May 29, 2019

[6] In addition, the people of Alabama have an overriding public interest in seeing Mr. Price's Eighth Amendment claim resolved on the merits. If Mr. Price prevails on the merits of his claim, it will ensure that the State does not execute one of its citizens using an unconstitutional method. If Mr. Price loses on the merits of his claim, the people of Alabama will have some measure of certainty that its lethal injection protocol is constitutionally sound.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2019, I caused the foregoing Application to be electronically served on the following attorneys to be noticed in this matter:

Lauren Ashley Simpson (lsimpson@ago.state.al.us)

Beth Jackson Hughes (bhughes@ago.state.al.us)

Edmund Gerard LaCour, Jr. (elacour@ago.state.al.us)

Henry Mitchell Johnson (hjohnson@ago.state.al.us)

Dated: May 29, 2019

/s/ Aaron M. Katz

Aaron M. Katz, Esq.
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199-3600
Tel.: (617) 951-7000
Fax: (617) 951-7050
aaron.katz@ropesgray.com

Counsel for Plaintiff-Appellant
Christopher Lee Price

EXHIBIT A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12026
Non-Argument Calendar

D.C. Docket No. 1:19-cv-00057-KD-MU

CHRISTOPHER LEE PRICE,

Plaintiff - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(May 29, 2019)

Before TJOFLAT, WILSON, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Christopher Lee Price appeals the district court's denial of his motion for entry of Rule 52(c), Fed. R. Civ. P., final judgment in his favor, or in the alternative, a stay of execution. Price seeks for this Court to enter an order staying his May 30, 2019, execution so the district court can issue a ruling on the merits of Price's Eighth Amendment method-of-execution claim. Price also implores this Court to reverse the district court's denial of his motion for final judgment pursuant to Rule 52(c) because he believes the State has been "fully heard" on the key issue in this case—whether the State's lethal-injection protocol is substantially likely to cause Price severe pain. Although Price recognizes that at least one State expert has not yet been heard from, he asserts this expert's trial testimony would add nothing to the State's evidentiary submission with respect to whether its lethal-injection protocol is substantially likely to cause Price severe pain. For this reason, Price seeks for us to instruct the district court that it may decide the Eighth Amendment claim now, based on two completed trial depositions.

The relevant procedural history of this case is set forth in our most recent decision issued on May 24, 2019. *See Price v. Comm'r, Ala. Dep't of Corr.*, No. 19-11878, 2019 WL 2245921 (11th Cir. May 24, 2019). Therefore, we do not re-hash the procedural history here, other than to note that has Price filed three prior motions for stay of execution.

Following the issuance of our May 24th decision, Price immediately filed with the district court a motion for entry of Rule 52(c) final judgment in his favor, or in the alternative, a stay of execution. Consequently, this appeal includes a challenge to the ruling on Price's fourth motion for stay of execution ("Fourth Motion for Stay") as well as to the ruling denying the Rule 52(c) motion.

I.

We review the district court's denial of the Fourth Motion for Stay for abuse of discretion. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). Where we have jurisdiction, we also review the district court's denial of a motion for entry of Rule 52(c) final judgment, for abuse of discretion. *See In re Fisher Island Inv., Inc.*, 778 F.3d 1172, 1198 (11th Cir. 2015) (noting court's discretion in deciding whether to grant Rule 52(c) motion); s*ee also, Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1503 (11th Cir. 1993) (our standard of review is dictated by the "unique characteristics" of the rule).

II.

We address Price's Fourth Motion for Stay first. Price argues that the district court erred in denying his Fourth Motion for Stay. He acknowledges that to prevail on his Eighth Amendment method-of-execution claim, he must show by a preponderance of the evidence that the State's midazolam-based lethal-injection protocol carries a substantial risk of causing him severe pain relative to nitrogen

hypoxia. Price points to the opinions of his experts and asserts that he has a substantial likelihood of success on the merits of his Eighth Amendment claim, so this Court should enter a stay of execution to allow the district court to issue a ruling on the merits of his claim.

Below, the district court found that it was without jurisdiction to consider Price's Fourth Motion for Stay.[1] But it determined that even if it had jurisdiction over the Fourth Motion for Stay, it would deny the motion based on the Supreme Court's April 12, 2019, holding that Price's Eighth Amendment claim was untimely and could not form the basis for a stay of execution.

We do not address the issue of the district court's jurisdiction to enter a stay because of the very short timeframe available to us to and because, in any case, we agree that the Supreme Court's April 12, 2019, decision in *Dunn v. Price*, 139 S. Ct. 1312 (2019), precludes the entry of a stay of execution here. As we indicated in our May 24th opinion, the Supreme Court has already spoken on the timeliness of Price's Eighth Amendment claim. There, we concluded that the Supreme Court's findings as to the untimeliness of Price's midazolam/nitrogen-hypoxia-based method-of-execution claims were now the law of the case. *Price*, 2019 WL 2245921, at *4.

[1] It noted that this Court issued its opinion affirming the district court's denial of Price's third motion for stay on May 24th and the mandate on the decision has not yet issued. Accordingly, the district court concluded that "jurisdiction on this issue is still pending before the Eleventh Circuit." And because the Fourth Motion for Stay implicates the same issue as the third motion for stay, the district court concluded that it was without jurisdiction to consider the Fourth Motion for Stay.

Nor, as Price asserted in the district court, is the Fourth Motion for Stay "different" in any meaningful way from its predecessors such that the Supreme Court's untimeliness ruling would not apply to it. Price argues that his Fourth Motion to Stay is not governed by the Supreme Court's untimeliness ruling because the current motion is supported by "new evidence" in the form of the expert trial testimony and expert reports. But while the type of evidence presented may be different, Price's underlying Eighth Amendment claim remains the same. So even assuming the evidence is new, it does not change the nature of Price's claim.[2] Price makes the same arguments in this appeal that he did in the previous one—that he is entitled to a stay of execution to allow the district court proceedings to continue.

But as we previously explained, the "fundamental problem for Price is the Supreme Court has already found his claim to be untimely and, therefore, unworthy of a stay of execution." *Price.*, 2019 WL 2245921, at *4. We reiterate that "because that holding it is the law of *this case*, both this Court and the district court are bound by the [Supreme Court's] April 12, 2019, decision." *Id.* In short, the reasoning for denying Price a stay applies equally here as it did the last time we reviewed his application for stay. He simply has brought no new claims that he could not have known about earlier.

[2] Price has presented nothing that persuades us that the "new" evidence is actually new and was not available to him previously.

Because we are bound by the Supreme Court's April 12, 2019, decision, we conclude that the district court did not abuse its discretion when it denied Price's Fourth Motion for Stay. For this same reason, we deny Price's emergency motion for stay of execution.

III.

Price also claims the district court erred when it denied his motion for entry of Rule 52(c) final judgment. Rule 52(c) provides as follows:

> **(c) Judgment on Partial Findings.** If a party has been *fully heard* on an issue *during a nonjury trial* and the court finds against the party on that issue, the court *may* enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. *The court may, however, decline to render any judgment until the close of the evidence.* A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Fed. R. Civ. P. 52(c) (emphases added).

In denying Price's Rule 52(c) motion, the district court noted that, under the rule, "judgment would only be available to Price *after* the State had been fully heard on all the issues." And although Price claimed that the State had already presented evidence of its "primary" witness via trial deposition and that its only other witness "will not testify in any material respect," the district court disagreed. It found Price's characterization to be subjective and "[o]ne which stands in contrast to the State's contention that it has not been fully heard and that it 'has yet to present the testimony

of one of its two expert witnesses.'" Ultimately, the district court concluded that the State had not been fully heard on the issue. Consequently, the district court announced that it "cannot, and will not, decide the issues in this case in the manner proposed by Price."

Price asks us to reverse the district court's determination that the State had not yet been "fully heard" on the critical issue for trial and instruct the district court that it may issue a judgment on the merits under Rule 52(c), Fed. R. Civ. P., based on the trial depositions of his expert Dr. Joel B. Zivot and the State's expert Dr. Daniel Buffington. According to Price, this Court has pendant jurisdiction to review the district court's denial of Price's motion for final judgment. The State, on the other hand, asserts this Court lacks jurisdiction to consider the interlocutory appeal. We agree with the State and find that we lack jurisdiction to review the district court's decision with respect to Price's Rule 52(c) motion.

This Court generally lacks jurisdiction over the denial of the judgment under Rule 52(c) because that decision is neither final in the ordinary sense nor appealable as the denial of injunctive relief. *See* 28 U.S.C. §§ 1291, 1292. And although Price claims we have pendant jurisdiction to review the order, we disagree.

We may exercise pendent appellate jurisdiction over a non-appealable issue that "is 'inextricably intertwined' with or 'necessary to ensure meaningful review' of the appealable issue." *Black v. Wigington*, 811 F.3d 1259, 1270-71 (11th Cir.

2016) (citations omitted); *see also Paez v. Mulvey*, 915 F.3d 1276, 1291 (11th Cir. 2019) (noting pendant jurisdiction over issues that are "inextricably intertwined" or "inextricably interwoven" with the issue on appeal). An issue is not "inextricably intertwined" with the question presented on appeal when "the appealable issue can be resolved without reaching the merits of the nonappealable issues." *Id.* (quoting *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1179 (11th Cir. 2011) (per curiam)).

And even when we have pendant jurisdiction, we have discretion to decline to review issues over which we have pendant jurisdiction. *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999). Pendant appellate jurisdiction is "limited and rarely used." *Paez*, 915 F.3d at 1291; *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009) (per curiam) ("[T]he Supreme Court has signaled that pendent appellate jurisdiction should be present only under rare circumstances.").

Here, we lack pendant appellate jurisdiction to review the district court's order on the Rule 52(c) motion because the issue presented in that order is not "inextricably intertwined" with or "necessary to ensure meaningful review" of the denial of the Fourth Motion for Stay. In other words, the Rule 52(c) order is not necessary to review of the denial of the Fourth Motion for Stay. Indeed, as the parties know, we have previously reviewed denials of Price's prior motions for stay

without also reviewing a decision on a Rule 52(c) motion. We also find nothing about the decision with respect to the Rule 52(c) motion necessary to review the denial of the Fourth Motion for Stay—especially where here, the denial of the stay was required under the Supreme Court's prior finding that Price's claims were untimely. Put simply, the district court's decision with respect to the Rule 52(c) motion—that the State had not yet been fully heard—is completely different than the basis for the denial of the Fourth Motion for Stay. Because the two are independent of each other, we lack pendant appellate jurisdiction.

But even if we had jurisdiction, we would affirm the district court's denial of the Rule 52(c) motion. The district court based its denial on its determination that the State had not yet been "fully heard." Rule 52(c)'s language makes clear that the district court enjoys discretion to decline to render judgment until the close of the evidence. *See* Rule 52(c), Fed. R. Civ. P. The Advisory Committee Notes to the rule's 1991 Amendment also highlight the discretionary nature of the rule, noting that the district court "retains discretion to enter no judgment prior to the close of the evidence." *See* Advisory Committee Note to the 1991 amendments to Rule 52. And the same Advisory Committee Notes also note that "[a] judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be

clearly erroneous." *See* Advisory Committee Note to the 1991 amendments to Rule 52 (internal quotation marks omitted).

We cannot say that the district court abused its discretion when it denied Price's Rule 52(c) motion. After all, the district court did not unreasonably rule that the State had not been "fully heard" on the critical issue before the district court, since one of the State's experts, Curt E. Harper, Ph.D., had yet to testify. Although Price contends Dr. Harper is unnecessary to the issue before the district court—whether the State's midazolam-based lethal-injection protocol carries a substantial risk of causing him severe pain relative to nitrogen hypoxia—we do not find the district court abused its discretion in reaching the opposite conclusion. In its Response Brief, the State claims Dr. Harper will testify during trial about the pharmacokinetic properties of midazolam as well as his opinion that when midazolam is administered in the dose used in the relevant protocol, executed inmates have blood concentrations high enough to induce anesthesia.

Price describes Dr. Harper's range of knowledge as more limited and claims that his trial testimony will add nothing to the issue at hand. Price also points out that Dr. Harper's trial testimony would be limited to the scope of his expert declaration. We have reviewed Dr. Harper's expert declaration and although we do not discuss its contents at length because it was filed under seal, we conclude that it was not unreasonable for the district court to decline to enter judgment in this case

before hearing from Dr. Harper. While Dr. Harper's expert report covers a range of topics, it does state that certain doses of midazolam are sufficient to cause sedation and induce anesthesia. Accordingly, it was not unreasonable for the district court to conclude that Dr. Harper would testify similarly at trial.

At bottom, Rule 52(c) contemplates that a party be fully heard before judgment is entered against it. And the rule itself speaks of a motion for judgment being made during trial. *See United States v. $242,484.00*, 389 F.3d 1149, 1172 (11th Cir. 2004); *In re Fischer Island Inv., Inc.*, 778 F.3d 1172 (11th Cir. 2015). Here, trial has not yet begun. Notwithstanding this fact, Rule 52(c) makes clear that the district court retains discretion to wait to render a judgment until all relevant evidence is heard. *See* Rule 52(c), Fed. R. Civ. P. ("The court may, however, decline to render any judgment until the close of the evidence."). Here, based on the circumstances, we find that it was the district court's prerogative to deny the Rule 52(c) motion as premature. We find no abuse of discretion in the way the district court handled the Rule 52(c) motion.

IV.

For the foregoing reasons, we affirm the district court's denial of Price's motion for entry of final judgment in his favor, or in the alternative, for a stay of execution. We also deny Price's emergency motion to stay his execution, as it is

precluded by the Supreme Court's April 12, 2019, decision. *See Dunn v. Price*, 139 S. Ct. 1312 (2019).

AFFIRMED.