AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Punishments: The Death Penalty

**Dunn v. Price** and **Price v. Dunn** (2019)

*Christopher Price brutally murdered Bill Lynn on December 22, 1991. He was tried, convicted and sentenced to death. After a long round of appeals failed, Price in 2019 claimed that death by Alabama’s lethal injection protocol would be cruel and unusual punishment in violation of the Eighth Amendment, which is incorporated by the due process clause of the Fourteenth Amendment. He claimed that death by nitrogen hypoxia would be less painless. Alabama courts rejected that claim. On the day he was scheduled to be executed, Price filed a revised version of that claim, which convinced a federal district court to give a stay of execution. The Court of Appeals refused to lift the stay. Alabama appealed to the Supreme Court of the United States.*

*The Supreme Court, by a 5-4 vote, lifted the stay. Justice Clarence Thomas claimed that Price had to have elected nitrogen hypoxia during the statutory time period. Justice Stephen Breyer claimed that the lifting of the stay with discussion heighted the arbitrariness of the death penalty in the United States. Why does he make that claim? Why does Justice Thomas disagree? Neither Chief Justice John Roberts nor Justice Brett Kavanaugh signed the Thomas opinion explaining the withdrawal of the stay. Was this to preserve judicial harmony or because of some substantive disagreement? What do you think is the best method for resolving last minute appeals fairly and expeditiously? Can last minute appeals be resolved fairly and expeditiously?*

*The Supreme Court’s lifting of the stay came too late as the execution warrant had expired. Alabama obtained a new execution warrant and all of Price’s appeals were denied. He was executed by lethal injection on May 30, 2019.*

Dunn v. Price, \_\_\_ U.S. \_\_\_ (2019)

Opinion

The application to vacate the stay of execution, presented to Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibbe61100390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ibbe61100390f11e99687ad62ac048e9b) and by him referred to the Court, is granted, and the stays entered by the District Court for the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit on April 11, 2019, are vacated. 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](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). 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](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). He then waited until February 2019 to file this action and submitted additional evidence today, a few hours before his scheduled execution time.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibbe61100390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ibbe61100390f11e99687ad62ac048e9b), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ibbe61100390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ibbe61100390f11e99687ad62ac048e9b), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ibbe61100390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ibbe61100390f11e99687ad62ac048e9b), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ibbe61100390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ibbe61100390f11e99687ad62ac048e9b) join, dissenting from grant of application to vacate stay.

Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way, let that person review the following circumstances as they have been presented to our Court this evening.

This case comes to us on the assumption that executing Christopher Lee Price using Alabama’s current three-drug protocol is likely to cause him severe pain and needless suffering. Price submitted an expert declaration explaining why that is so, and the State “submitted nothing” to rebut his expert’s assertions. . . .

Price proposed nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as an alternative method of execution. Alabama expressly authorized execution by nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) in 2018, and state officials have actively worked to develop a [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) protocol since that time. The State is mere months away from finalizing its protocol. In light of those facts, the Court of Appeals correctly held that nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) is “available,” “feasible,” and “readily implemented” by the State.

The only remaining question was whether Price could show that death by nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) would be substantially less painful than death by the existing lethal injection protocol. To make this showing, Price submitted an academic study on which the Oklahoma Legislature had relied in adopting nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as a method of execution. That study noted that death by nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) has been described as “painless,” “peaceful,” and unlikely to cause “any substantial physical discomfort.” . . .

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The Court of Appeals found the District Court’s determination on this question clearly erroneous. It reached that conclusion primarily because the version of the Oklahoma study that Price’s counsel submitted was “a preliminary draft report that is stamped with the words ‘Do Not Cite.’” . . . It turns out, however, that a *final* version of the same Oklahoma study was published and available. That version is identical in every relevant respect to the preliminary version that Price submitted. . . .

Price’s counsel, realizing the error, quickly sought to ensure the District Court would be able to consider the final version of the report. Price filed a new motion for preliminary injunction in the District Court, along with the final report and additional expert declarations. The District Court found this new evidence “reliable,” and noted that the State had “not submit[ted] anything in contradiction.” . . . The District Court then considered the remaining stay factors. Notably, the District Court found that Price had *not* “timed his motion in an effort to manipulate the execution.” “Rather, Price, the State and the [District Court] have been proceeding *as quickly as possible* on this issue *since before the execution date was set*.” *Ibid.* (emphasis added). The District Court ultimately concluded that a 60–day stay of the execution was warranted.

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The Court of Appeals refused to vacate the District Court’s stay. It explained that the parties had raised “substantial questions” about jurisdiction.

Shortly before 9 p.m. this evening, the State filed an application to the Justice of this Court who is the Circuit Justice for the Eleventh Circuit. It was later referred to the Conference. I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference. . . . The Court nevertheless grants the State’s application to vacate the stay, thus preventing full discussion among the Court’s Members. In doing so, it overrides the discretionary judgment of not one, but two lower courts. Why? The Court suggests that the reason is delay. But that suggestion is untenable in light of the District Court’s express finding that Price has been “proceeding *as quickly as possible* on this issue since *before the execution date was set*.” . . .

The Court also points out that Price did not elect nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) within 30 days of the legislature authorizing this method of execution on June 1, 2018. State law appeared to provide death row inmates only until June 30, 2018, to make the election. Yet based on the limited information before us, it appears no inmate received a copy of the election form (prepared by a public defender) until June 26, and the State makes no representation about when Price received it other than that it was “before the end of June. Thus, it is possible that Price was given no more than 72 hours to decide how he wanted to die, notwithstanding the 30–day period prescribed by state law. . . .

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Alabama will soon subject Price to a death that he alleges will cause him severe pain and needless suffering. It can do so *not* because Price failed to prove the likelihood of severe pain and *not* because he failed to identify a known and readily implemented alternative, as this Court has recently required inmates to do. Instead, Alabama can subject him to that death due to a minor oversight (the submission of a “preliminary” version of a final report) and a significant mistake of law by the Court of Appeals (the suggestion that a report marked “preliminary” carries *no* evidentiary value). These mistakes could be easily remedied by simply allowing the lower courts to consider the final version of the report. Yet instead of allowing the lower courts to do just that, the Court steps in and vacates the stays that both courts have exercised their discretion to enter. To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate.

Price v. Dunn, \_\_\_ U.S. \_\_\_ (2019).

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I343dda2e5f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I343dda2e5f8811e9adfea82903531a62), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I343dda2e5f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I343dda2e5f8811e9adfea82903531a62) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I343dda2e5f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I343dda2e5f8811e9adfea82903531a62) join, concurring in the denial of certiorari.

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The dissent omitted any discussion of the murder that warranted petitioner’s sentence of death and the extensive procedural protections afforded to him before his last-minute, dilatory filings. . . .

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Twenty years later, after multiple unsuccessful attempts to obtain postconviction relief,[\*](https://1.next.westlaw.com/Document/I343dda2e5f8811e9adfea82903531a62/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa70000016c7c50599d09b1b431%3FNav%3DCASE%26fragmentIdentifier%3DI6f467047198611e9a5b3e3d9e23d7429%26startIndex%3D41%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&list=CASE&rank=46&grading=na&sessionScopeId=7d253bb8e86feba240d6d45b8b6106cc6bd727043f50c8069a9ff80679d9df55&originationContext=previousnextdocument&transitionType=SearchItem&contextData=%28sc.Search%29&listPageSource=cfd5b8754c916785140519514ae5bcb3#co_footnote_B00012048247961) petitioner brought an action . . . attacking the constitutionality of the State’s lethal injection protocol. . . . While petitioner’s appeal was pending before the Eleventh Circuit, Alabama . . . approved nitrogen ****[hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as an alternative to lethal injection. Death-row inmates whose convictions were final before June 1, 2018, had 30 days from that date to elect to be executed via nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). . . .

According to Justice BREYER, the warden may not have given petitioner an election form until “72 hours” before the June 30 deadline. That “possibil[ity],” even if true, is irrelevant. As an initial matter, petitioner (like all other individuals) is presumed to be aware of the law and thus the June 30 deadline. Moreover, the Alabama statute neither required special notice to inmates nor mandated the use of a particular form. It merely required that the election be “personally made by the [inmate] in writing and delivered to the warden.” . . . No fewer than 48 other inmates took advantage of this election. Petitioner did not, even though he was represented throughout this time period by a well-heeled Boston law firm. It was not until January 27, 2019—two weeks after the State sought to set an execution date and six months after petitioner declined to elect nitrogen hypoxia—that petitioner’s counsel asked the warden, for the first time, that petitioner be executed through nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) instead of lethal injection. The warden explained that she was unable to accept the belated request under state law. Petitioner’s counsel then approached the State’s counsel, who gave the same response. . . .

On April 5, the District Court denied petitioner’s motion for a preliminary injunction to stay his execution pending resolution of his new claim. The court found that nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) could not be “readily implemented” because although Alabama had legally approved nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as a future method of execution, the State was still preparing its execution protocol. It also found that the State had “legitimate reason[s]” for declining to use nitrogen hypoxia—namely, that petitioner failed to comply with the statutory deadline. . . . On April 10, the Eleventh Circuit affirmed on alternative grounds and denied petitioner’s motion to stay his execution. . . . In particular, the court held that the District Court had before it “no reliable evidence” from which to conclude that nitrogen would reduce petitioner’s risk of pain in execution, as compared to the lethal injection protocol. . . .

A few hours before his scheduled execution on April 11, petitioner filed a petition for a writ of certiorari and an accompanying application for a stay of his execution. While that petition and application were pending here, and before any mandate issued from the Eleventh Circuit, petitioner filed yet another motion for a preliminary injunction in the District Court. Petitioner attached several affidavits and a final version of the report by the East Central University. The District Court granted a stay approximately two hours before the scheduled execution time of 6 p.m. central time, holding that, in light of the Eleventh Circuit’s opinion and the new submissions, petitioner had now demonstrated a likelihood of success on the merits. . . .

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Justice BREYER framed the issue before the Court as “the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment.” That framing was incorrect. The issue before the Court was whether the lower courts abused their discretion in staying the execution. For three independent reasons—all raised by the State in its application—the State was entitled to vacatur. The dissent failed to adequately address any of them.

First, the District Court abused its discretion in granting a preliminary injunction because it manifestly lacked jurisdiction over the case, which was pending in the Court of Appeals. It is well settled that “[f]iling a notice of appeal,” as petitioner did, “transfers adjudicatory authority from the district court to the court of appeals.”

Even if the Eleventh Circuit believed that the jurisdictional issue was difficult, that belief still would not have been a sufficient reason to grant a stay. Under the traditional stay factors, a petitioner is required to make “ ‘a strong showing that he is likely to succeed on the merits.’ It is not enough, as the dissent suggests, that the question be “substantial.”

Second, the Eleventh Circuit did not consider how petitioner’s unjustified delay in presenting his “new evidence” to the District Court factored into the equitable considerations of a stay. Notably, the Eleventh Circuit did not conclude that petitioner’s new affidavits or the “final” version of the report made him likely to succeed on the merits or that those materials were unavailable to him earlier. And more broadly, petitioner delayed in bringing this successive action until almost a year after Alabama enacted the legislation authorizing nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as an alternative method, six months after he forwent electing it as his preferred method, and weeks after the State sought to set an execution date. There is simply no plausible explanation for the delay other than litigation strategy. A stay under these circumstances—in which the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place—only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage. 

Third, petitioner was unlikely to succeed on the merits of his method-of-execution claim. The three-drug protocol petitioner attacks is the very one we upheld in [*Glossip*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036562397&originatingDoc=I343dda2e5f8811e9adfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). And the Eleventh Circuit’s April 10 analysis about whether nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) was “available” and could be “readily implemented” was suspect under our precedent. As we recently held, “the inmate’s proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly.” Here, petitioner’s haphazard, one-page proposed protocol—provided for the first time in his motion for reconsideration less than a week before his scheduled execution date—was, to put it charitably, untested. . . . .

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.

. . .

Given petitioner’s weak position under the law, it is difficult to see his litigation strategy as anything other than an attempt to delay his execution. . . . . To be sure, the dissent gestures at a compressed timeframe, as if to suggest the legal issues were too complicated to allow reasoned consideration before the State’s execution warrant expired. But as explained above, the legal issues were remarkably straightforward. And any blame for decisions “in the middle of the night,” falls on petitioner, who filed the new preliminary injunction motion that resulted in the stays just *five hours* before his execution.

Insofar as Justice BREYER was serious in suggesting that the Court simply “take no action” on the State’s emergency motion to vacate until the following day, [*id.*, at ––––, 139 S.Ct., at 1314](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047980825&pubNum=0000708&originatingDoc=I343dda2e5f8811e9adfea82903531a62&refType=RP&fi=co_pp_sp_708_1314&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1314), it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences. This approach would only further incentivize prisoners to file dilatory challenges to their executions by rewarding them with *de facto* stays of execution while requiring timely petitioners to meet the ordinary legal standards for a stay. Justice BREYER’s approach would also have significant real-world consequences. It would hamper the States’ ability to carry out lawful judgments, while simultaneously ****flooding the courts with last-minute, meritless filings. And this practice would harm victims. 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. . . .

Of course, the dissent got its way by default. Petitioner’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. The proper response to this maneuvering is to deny meritless requests expeditiously. . . .

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