[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13781

Non-Argument Calendar

KENNETH EUGENE SMITH,

Plaintiff-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:22-cv-00497-RAH

(Filed Nov. 17, 2022)

Before WILSON, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

Kenneth Eugene Smith is a death row inmate in the custody of the Alabama Department of Corrections (ADOC) at William C. Holman Correctional Facility (Holman). Smith sued the Commissioner of ADOC, John Hamm, for alleged constitutional violations

under 42 U.S.C. § 1983. Smith appeals the district court's order granting the Commissioner's motion to dismiss and the district court's order denying Smith's motion to amend judgment. Smith also moves in this court to stay his execution—set for Thursday, November 17, 2022—pending this appeal.

After careful review and with the benefit of oral argument, we **REVERSE and REMAND**. Further, we deny as moot Smith's motion for stay of execution pending appeal.

I.

In April 1996, a jury convicted Smith of capital murder based on the robbery and murder of Elizabeth Sennett. *Smith v. State*, 908 So.2d 273, 278 n.1, 279 (Ala. Crim. App. 2000). Ultimately, the jury recommended by a vote of 11 to 1 a sentence of life imprisonment without the possibility of parole. *Id.* at 278. Yet the trial judge overrode the jury's recommendation and sentenced Smith to death.[1] *Id.*

On June 24, 2022, Alabama moved to set Smith's execution date. On September 30, 2022, the Supreme Court of Alabama granted Alabama's motion and set Smith's execution for Thursday, November 17, 2022.

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[1] In 2017, Alabama amended its law to no longer permit judicial override in capital cases. *See* Ala. Code § 13A-5-47(a) ("Where a sentence of death is not returned by the jury, the court *shall* sentence the defendant to life imprisonment without parole.") (emphasis added).

On August 18, 2022, Smith sued the Commissioner asserting two Section 1983 claims. First, Smith alleged a constitutional challenge to Alabama's method of execution. He argued that ADOC has substantially deviated from its Execution Protocol to the point that it would subject Smith to intolerable pain and torture in violation of the Eighth Amendment. Second, Smith alleged that his execution would violate his Fourteenth Amendment due process rights based on ADOC's failure to provide him with the information necessary to make an informed decision on whether to elect nitrogen hypoxia as his method of execution.

The Commissioner moved to dismiss Smith's complaint, arguing that Smith's claims were time barred by the two-year statute of limitations. Smith opposed but also sought leave to amend his complaint. In response to allegations that ADOC used a cutdown procedure and intramuscular sedation on a prior inmate,[2] the Commissioner represented to the district court that it would not attempt either of those procedures in Smith's execution.

The district court granted the Commissioner's motion to dismiss with prejudice. Specifically, the district court found that Smith's Eighth Amendment claim was a challenge to Alabama's entire lethal injection

[2] On July 28, 2022, ADOC executed Joe Nathan James. For three hours, James was behind closed curtains with Alabama's execution team who proceeded to attempt intravenous (IV) access. Two doctors have opined on what happened, with one doctor finding that ADOC attempted a cutdown procedure and the other doctor disagreeing with that assessment.

protocol. As a result, the court held that Smith's claims were time barred because the latest that Smith could have objected to Alabama's Execution Protocol was December 31, 2021—two years after Alabama released its redacted version of its Execution Protocol.[3] The court also found that Smith's Fourteenth Amendment claims were time barred because the time to elect nitrogen hypoxia ended in July 2018, and related claims had to be filed by July 2020. The district court ultimately incorporated into its order the Commissioner's stipulation that he would not employ a cutdown procedure or intramuscular sedation in Smith's execution. The district court further ordered the Commissioner not to deviate from the Execution Protocol.

Smith then moved to amend the judgment, specifically asking that the district court amend its judgment to dismissal without prejudice to allow Smith to replead his Eighth Amendment claim. Smith's proposed amended complaint focused on Joe Nathan James's execution in July 2022 and the attempted execution of Alan Eugene Miller in September 2022 as evidence that ADOC deviated from its protocol and will likely do it again. He further alleged that ADOC's "[u]se of [the] Protocol" would subject him to an Eighth Amendment violation because, "as ADOC implements it," he will likely be subject to cruel and unusual punishment due to particular physiological

[3] In March 2019, this court affirmed the district court's order to release Alabama's Execution Protocol. *Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1173 (11th Cir. 2019).

predispositions.[4] To evidence ADOC's handling of prior condemned inmates with similar difficulties, Smith's proposed amended complaint details how long it took Alabama's execution team to get intravenous (IV) access in James's execution and Miller's attempted execution at Holman. In James's execution, James remained hidden behind a curtain for over three hours. When the execution team could not access James's veins to place an IV, they allegedly employed a cut-down procedure. In Miller's attempted execution, Miller was strapped to a gurney for almost two hours while the execution team attempted IV access. Smith alleged that ADOC will likely either take advantage of the Execution Protocol's lack of specificity or disregard or deviate from its Protocol by attempting any means necessary to proceed with and complete the execution, which often subjects the inmate to cruel and intolerable pain.

The district court denied Smith's motion. First, the court determined that it did not commit a manifest error of law in dismissing Smith's original complaint. Second, after considering Smith's amended complaint, the district court reversed course on whether Smith's claims were timely. The court found that Smith's allegations were challenges to specific deviations from Alabama's Execution Protocol, rather than a challenge to the Protocol as a whole, and that Smith's Eighth

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[4] The Execution Protocol states that "[t]he standard procedure for inserting IV access will be used," but "[i]f the veins are such that [IV] access cannot be provided, [an unknown person] will perform a central line procedure to provide [IV] access."

Amendment claim was therefore not time barred in its entirety. But the district court determined, after examining the proposed amended complaint, granting leave to amend would be futile. Again, the district court reiterated that Smith's allegations that the Commissioner deviated from its Execution Protocol by using a cutdown procedure or intramuscular sedation was mooted because the Commissioner stipulated under oath not to use those procedures on Smith. The district court explained that, to support an Eighth Amendment violation, Smith had to show how ADOC's deviations—or how implementation of its Execution Protocol more broadly—subjected Smith to a substantial risk of serious harm. The court explained that Smith's amended complaint failed to do so.

Smith timely appealed. Smith also seeks to stay his execution pending this appeal.

II.

First, Smith argues that the district court erred in dismissing his Eighth Amendment claim from his original complaint by re-shaping it into a different claim. Second, Smith argues that the district court erred in denying his request for leave to file his proposed amended complaint, finding that Smith failed to plausibly state a claim and thus amendment was futile. Third, Smith argues that the district court erred in concluding that his Eighth Amendment claim, specifically ADOC's alleged use of a cutdown procedure and intramuscular sedation, was mooted. Last, Smith

argues the district court erred by dismissing his Fourteenth Amendment due process claim as untimely. Because we find that the district court erred in not granting leave to amend Smith's complaint because it found amendment to be futile, we focus only on Smith's arguments related to his allegations in his proposed amended complaint.

A.

First, Smith argues that the district court erred in concluding that his Eighth Amendment claim, specifically ADOC's alleged use of a cutdown procedure and intramuscular sedation, was mooted. He argues that despite the district court order prohibiting the Commissioner and his agents from employing a cutdown procedure, intramuscular sedation, or other protocol violation, protocol violations may still occur.

We review the question of mootness de novo. *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004). An issue is moot when it "no longer presents a live controversy with respect to which the court can give meaningful relief." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (per curiam) (internal quotation mark omitted).

The district court's order resolves Mr. Smith's concern that ADOC will likely violate the lethal injection

protocol.[5] Smith's proposed amended complaint—asserting ADOC's alleged use of a cutdown procedure, intramuscular sedation, or any other violation of the protocol places him at risk of experiencing cruel and unusual punishment—is no longer a live controversy because ADOC is prohibited by court order from attempting those things. Thus, the district court did not err in finding these allegations to be moot.

B.

Even if part of his claim is mooted, as we have concluded it is, Smith contends that his proposed amended complaint nonetheless contained allegations that support an Eighth Amendment method-of-execution claim that is not moot.[6] Specifically, he argues that the

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[5] The district court has also placed ADOC on notice that severe sanctions will result if there are any protocol deviations during Smith's execution.

[6] As a preliminary matter, Smith's proposed amended complaint contains some general protocol challenges that (we agree with the Dissent) are time-barred. To challenge the Execution Protocol, Smith had to bring his claim within the statute of limitations. "All constitutional claims brought under § 1983 are tort actions, subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). Thus, in order to have his claim heard, Smith was required to bring it within two years from the date the limitations period began to run. *See* Ala. Code § 6-2-38.

Although Alabama implemented lethal injection as its primary method of execution, Ala. Code § 15-18-82.1(a), in 2002, the district court liberally assumed (which the Commissioner does not argue against) that the release of the redacted Execution Protocol in 2019 was a substantial change and thus allowed that to

Execution Protocol does not expressly prevent the hours-long attempt to establish intravenous access that allegedly resulted in superadded pain during James's execution and Miller's attempted execution. We agree with Smith that this claim is not mooted by the district court's order that ADOC not violate its Execution Protocol. We next ask whether these remaining allegations state a claim under the Eighth Amendment.[7] In the context of this appeal, we ask whether leave to amend the complaint would have been futile.

Leave to amend under Federal Rule of Civil Procedure 15(a)(2) "shall be freely given when justice so requires." *McKinley v. Kaplan*, 177 F.3d 1253, 1255 (11th Cir. 1999) (per curiam). But leave to amend is not always guaranteed, including when amendment would be futile. *See Garcia v. Chiquita Brands Int'l, Inc.*, 48 F.4th 1202, 1220 (11th Cir. 2022). "We generally review a district court's decision to deny leave to amend for abuse of discretion, but review *de novo* an order denying leave to amend on the grounds of futility, because it is a conclusion of law that an amended complaint

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reset the statute of limitations. Smith therefore had until the end of 2021 to bring his general challenge, which he failed to do. Smith did not file his challenge until August 2022.

[7] Smith pleaded these allegations alternatively as a deviation from or as an implementation of the Execution Protocol. Either way, the court's order that ADOC not deviate from the Execution Protocol as written does not moot this aspect of his claim. The parties disagree on whether the protocol permits an extended attempt to achieve intravenous access via the first provided procedure, so ADOC can, in its view, follow the protocol as written and per the district court's order while still subjecting Smith to the lengthy ordeal he challenges.

would necessarily fail." *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 864 (11th Cir. 2017).

We conclude that the district court erred in not granting leave to amend Smith's complaint because it found amendment to be futile. After reviewing Smith's proposed amended complaint de novo, we conclude that he pleaded sufficient facts to plausibly support an Eighth Amendment method-of-execution claim that is not barred by the applicable statute of limitations, and thus amendment would not have been futile. As a result, the district court erred in denying Smith's leave to amend his complaint.

To state a plausible claim for relief under the Eighth Amendment, Smith must plead "a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (internal quotation marks omitted). The Eighth Amendment inquiry focuses on whether the state's chosen method of execution "cruelly superadds pain to the death sentence" by asking whether the state has "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125, 1127 (2019).

We turn to Smith's non-moot allegations, which detail how the Execution Protocol does not specify how long the execution team can attempt to access a vein before moving to a central-line procedure, how this

played out in the James execution and Miller attempted execution, and how it will affect Smith's execution. In James's execution and Miller's attempted execution, the execution team spent considerable time attempting to establish IV access. As Smith alleges in his proposed amended complaint, by the time James's scheduled execution date occurred, James had no outstanding litigation[8] that would prevent his execution from starting at 6:00 p.m. CST as typically set by Holman. James entered the execution chamber behind a closed curtain and remained there for over three hours while the execution team tried to access a vein. In Miller's attempted execution, Miller remained behind the closed curtain for over two hours as the execution team attempted IV access. Dr. Joel Zivot, an anesthesiologist who reviewed James's autopsy findings and documents in Miller's ongoing litigation about his attempted execution, opined that the risk of a prolonged ordeal "are real and not theoretical": "Reports after the attempted execution of AE Miller . . . indicate that ADOC personnel had the same trouble establishing IV access that they had in JN James' execution, concluding their efforts after about two hours only as midnight approached when the death warrant

[8] Often with executions, the inmate seeks relief from the courts close to the date of execution. As a result, ADOC often does not move the inmate into the execution room until the courts resolve an inmate's case. *See Miller v. Hamm*, ___ F. Supp. 3d ___, 2022 WL 16720193, at *2 (M.D. Ala. Nov. 4, 2022) (describing how the Supreme Court vacated the district court's injunction at 9:00 p.m. then at 9:55 p.m. Miller was taken to the execution room where prep for his execution began).

expired." These factual allegations[9] show a pattern of difficulty by ADOC in achieving IV access with prolonged attempts.[10]

Smith alleges that it will be difficult to access his veins because of both general and specific risks. Dr. Zivot explained that establishing IV access in an execution where the inmate knows they will die increases the general risks with IV access. Dr. Zivot discussed how extreme anxiety caused by an impending execution triggers the condemned inmate's sympathetic nervous system, which in turn causes his or her blood vessels to constrict, making them harder to locate for IV access. Dr. Zivot also discussed that another general risk is that the execution team at Holman has likely undergone less training and therefore possesses fewer skills than medical professionals who establish IV's regularly.[11]

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[9] Based on the many news articles reporting on James's execution, the time James spent behind the curtain is a verifiable, true fact. Further, Miller's length of time has been supported by Miller's own declaration in his lawsuit against the Commissioner for the torture he experienced during that time frame.

[10] Although there is little case law on the length of time typically needed to obtain IV access during an execution, Kentucky's protocol, which the Supreme Court in *Baze* approved, gave a one-hour time limit to obtain IV access. *See* 553 U.S. at 45.

[11] ADOC's execution team is unidentified, so the court has no way of knowing the medical training of the individuals who are setting up IV access. And while we recognize the need to protect the specific individuals who perform these functions, many other states detail what training and credentials are required for those individuals. *See Baze*, 553 U.S. at 45 (detailing Kentucky's requirements); *Lopez v. Brewer*, 680 F.3d 1068, 1075 (9th Cir. 2012)

Turning to Smith's specific risks, Dr. Zivot explained that Smith's height and weight corresponds to a BMI that is borderline obese and "[i]t is much more difficult to locate suitable veins in obese individuals." Also, Dr. Zivot discussed that Smith recently started on medications for depression and insomnia, conditions likely triggered in anticipation of his impending execution. Dr. Zivot opined that Smith's anxiety and anguish levels at his execution will likely be high. Bolstering Smith's specific risks is Dr. Zivot's declaration in which he opined that Smith's "risks [for] a failed intravenous attempt are very likely quite similar in circumstance to the recent failed attempt at IV access of" Miller.

Considering these allegations, Smith has plausibly alleged that there will be extreme difficulty in accessing his veins. Because of the difficulty in accessing Smith's veins, Smith plausibly pleaded that, considering ADOC's inability to establish difficult IVs swiftly and successfully in the past, he will face superadded pain as the execution team attempts to gain IV access.

We also find that Smith plausibly pleads that there is an available alternative method that will reduce the risk of severe pain. In *Price v. Commissioner, Department of Corrections*, we found that Alabama's statutorily authorized method of execution (nitrogen hypoxia) could not be considered unavailable simply

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(discussing Arizona's updated protocols along with the training and experience of the IV team); *Cooey v. Strickland*, 589 F.3d 210, 219 (6th Cir. 2009) (addressing Ohio's new protocol requiring that medical team meet certain training and qualifications).

because no mechanism to implement the procedure had been finalized. 920 F.3d 1317, 1328 (11th Cir. 2019) (per curiam). Yet the Commissioner continues to argue that Smith failed to provide an available alternative method. The Commissioner completely misses our point from *Price*. We find that nitrogen hypoxia is an available alternative method for method-of-execution claims. Further, Smith has sufficiently pleaded that nitrogen hypoxia will significantly reduce his pain.

Finally, accepting the allegations in Smith's proposed amended complaint, we agree with the district court that his Eighth Amendment challenge is not plainly time barred. In his proposed amended complaint, Smith details how long it took Alabama's execution team to establish IV access in James's execution and Miller's attempted execution at Holman. It is the emergence of ADOC's pattern of superadding pain through protracted efforts to establish IV access in the two previous execution attempts that caused Smith's claim to accrue. This pattern emerged at the onset of Miller's attempted execution. Thus, Smith's Eight Amendment challenge is not plainly time barred.

Under a de novo review, we find that Smith's proposed amended complaint states a plausible claim for relief that was brought within the statute of limitations. The district court should have allowed Smith to file his proposed amended complaint. Thus, the district court erred in denying Smith's motion for leave to

amend his complaint on the ground that amendment would be futile.[12]

III.

Lastly, Smith moved to stay his execution while we consider his appeal.[13] At Smith's request, we expedited briefing and held oral argument to address Smith's underlying arguments. Because we have resolved Smith's underlying appeal, Smith's motion for stay of execution pending appeal is **DENIED as moot**.

REVERSED AND REMANDED.

GRANT, Circuit Judge, dissenting:

The question before us is whether Smith's proposed amended complaint stated a plausible Eighth Amendment claim. The majority concludes that that Smith plausibly alleged that "there will be extreme difficulty in accessing his veins" for the lethal injection procedure, and that "considering ADOC's inability to establish difficult IVs swiftly and successfully in the

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[12] We find no error in the district court's treatment of Smith's remaining arguments.

[13] A stay pending appeal is appropriate only if the moving party establishes: "(1) a substantial likelihood of success on the merits; (2) that the [stay] is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the [stay] would cause the other litigant; and (4) that the [stay] would not be averse to the public interest." *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1280 (11th Cir. 2015) (per curiam).

past, he will face superadded pain as the execution team attempts to gain IV access." Majority Op. at 13–14. Two problems with this conclusion come immediately to mind: first, that claim is nowhere to be found in Smith's proposed amended complaint. And second, even if we re-frame Smith's Eighth Amendment claim as arising from the Department's demonstrated "inability to establish difficult IVs swiftly and successfully," it is barred by the two-year statute of limitations. I respectfully dissent.

In his initial complaint, Smith alleged that execution by Alabama's lethal-injection process would violate his Eighth Amendment rights. After the district court dismissed that claim as time barred, Smith submitted a proposed amended complaint alleging that the execution of Joe Nathan James and the attempted execution of Alan Eugene Miller "made clear for the first time that ADOC's lethal injection 'protocol' is entirely advisory—meaning executions are being carried out by individuals who are either unable or unwilling to follow the Protocol." Proposed Amended Complaint ¶ 10; *see id.* ¶ 25. He alleged that James's autopsy showed "two significant protocol violations"—an unauthorized 'cutdown' procedure" and "an unauthorized intramuscular injection"—and that eyewitness accounts indicated that the Department may also have gone off-protocol by sedating James before the execution began. *Id.* ¶ 8; *see id.* ¶¶ 27–46. He also alleged that the Department deviated from its protocol during the attempted execution of Miller by strapping him to a gurney "in a stress position" and by slapping him on

his neck. *Id.* ¶ 9; *see id.* ¶¶ 48–56. And he alleged that because the Department's "lethal injection protocol is only advisory," permitting Alabama to execute him by that method would expose him to "an intolerable risk of torture, cruelty, or substantial pain."[1] *Id.* ¶ 13. He did *not* allege that executing him by strictly following the written protocol would violate the Eighth Amendment.

That is significant because, as the majority holds, the district court's order prohibiting any deviation from the lethal injection protocol "resolves Mr. Smith's concern that ADOC will likely violate" the protocol during his execution. Majority Op. at 8. The order renders his claim arising from anticipated protocol violations moot—and that is the only claim alleged in his proposed amended complaint.

The majority concludes that Smith has stated an Eighth Amendment claim with allegations that "detail how the Execution Protocol does not specify how long the execution team can attempt to access a vein before moving to a central-line procedure." Majority Op. at 11. But Smith has not made any such claim in his proposed amended complaint, and we cannot rewrite his complaint for him. *See West v. Warden, Comm'r,*

[1] In seeking leave to amend his complaint, Smith represented that his Eighth Amendment claim was directed exclusively at deviations from the lethal injection protocol: "To be clear, Mr. Smith's challenge is not to the entirety of the protocol. It is to deviations from the protocol—namely, ADOC's treatment of the Protocol as advisory only—about which information has only recently surfaced." Doc. 24 at 2.

Alabama DOC, 869 F.3d 1289, 1299 (11th Cir. 2017); *see also United States v. Cordero*, 7 F.4th 1058, 1068 n.11 (11th Cir. 2021) (even for pro se litigants, the Court may not rewrite a deficient pleading).

Smith has urged us to interpret his proposed amended complaint as raising a similar claim by arguing that repeatedly "jabbing" the condemned inmate over a period of "nearly two hours" in an attempt to establish an IV (as in Miller's attempted execution) constitutes a violation of the written protocol that also violates the Eighth Amendment. Appellant's Brief at 31–32. It would be a stretch to say that Smith's proposed amended complaint articulated that claim, either. And even if it did, the proposed amendment would still be futile.

The ordeal of being strapped to a gurney and repeatedly jabbed with a needle while Department staff attempt unsuccessfully to start an IV line could eventually cross the line and amount to cruel and unusual punishment. But whether the possibility that Smith might endure such treatment is described as a deficiency in the lethal injection protocol or a violation of it, that risk was or should have been known to him more than two years before he filed his initial § 1983 complaint on August 18, 2022.

As Smith himself alleges in his proposed amended complaint, the Department attempted to execute Doyle Lee Hamm by lethal injection on February 22, 2018. Proposed Amended Complaint ¶ 62. Department staff tried for two-and-a-half hours to establish an IV line

for Hamm, but were unable to do so. *Id.* During that two-and-a-half-hour period, Department staff "punctured Hamm at least 11 times in his limbs and groin, causing him to bleed profusely on the gurney." *Id.* The Department called off the execution, and Hamm's experience was reported contemporaneously in various news publications. *See*, *e.g.*, *Doyle Lee Hamm punctured at least 11 times in execution attempt, report states*, Montgomery Advertiser (March 6, 2018). Smith's Eighth Amendment claim related to the Department's potentially extended efforts to establish IV access is therefore barred by the two-year statute of limitations.[2] *See McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) ("a federal claim accrues when the prospective plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" (citation omitted)).

* * *

Smith's concern about the Alabama Department of Corrections's difficulties with efficiently starting an IV line for its lethal injection protocol is understandable—as is his concern that the Department may be willing to disregard its protocol altogether if it is unable to start an IV line in the usual way. But unfortunately for everyone involved, the Department's problems in quickly establishing IV access for lethal injection are nothing new. To the extent that his proposed amended complaint states an Eighth

[2] Smith's 42 U.S.C. § 1983 claim is governed by Alabama's two-year statute of limitations. *See* Ala. Code 6-2-38; *McNair*, 515 F.3d at 1173.

Amendment claim based on potentially extended efforts to start an IV, that claim accrued more than two years ago, and it is therefore time barred. And Smith's claim that the Department is likely to violate his Eighth Amendment rights by performing off-protocol procedures during his execution—in starting an IV or otherwise—is mooted by the district court's order prohibiting any such deviations. I would affirm the district court's decision denying Smith's request to amend his complaint because the proposed amendment would be futile. *See Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

KENNETH EUGENE SMITH, Plaintiff, v. JOHN Q. HAMM, Commissioner, Alabama Department of Corrections, *et al.*, Defendants.	)	CASE NO. 2:22-CV-497-RAH [WO]

MEMORANDUM OPINION AND ORDER

(Filed Nov. 9, 2022)

On October 16, 2022, this Court granted the Commissioner's Motion to Dismiss Plaintiff Kenneth Eugene Smith's Complaint, concluding that Smith's claims are time-barred.[1] (Docs. 22, 23.) On October 19, 2022, Smith filed a Motion to Alter or Amend the order of dismissal, along with a proposed amended complaint. (Doc. 24.) The Defendants have filed a response. (Doc. 26.) The parties also filed supplemental briefing as to whether Smith should be granted leave to file an amended complaint in this matter. (Docs. 30, 31.) For

[1] The Court also dismissed the claims against the Alabama Department of Corrections upon Smith's consent. (Doc. 22 at 15.)

the reasons that follow, Smith's motion is due to be denied.

I. STANDARD OF REVIEW

A court may only grant a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) if the movant presents newly discovered evidence or can show "manifest errors of law or fact" in the court's prior judgment. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly." *Richards v. United States*, 67 F. Supp. 2d 1321, 1322 (M.D. Ala. 1999) (quoting *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994)). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur*, 500 F.3d at 1343 (alterations in original) (quoting *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005)).

II. DISCUSSION

In his motion, Smith argues the Court committed a manifest error of law by misunderstanding his Eighth Amendment claim as a general challenge to the lethal injection protocol, rather than construing it as a specific challenge to the *advisory nature* of the

protocol.[2] Smith also asserts the Court committed a manifest error of law by dismissing the Complaint with prejudice and not giving him an opportunity to file an amended complaint. Finally, Smith argues the threat of sanctions against the Alabama Department of Corrections (ADOC) and its attorneys is insufficient to protect him from cruel and unusual punishment. None of these contentions warrant relief under the strict standards that govern a Rule 59(e) motion, and therefore the order of dismissal will not be altered or amended.

A. Manifest Error of Law in Construing Smith's Complaint

Smith first contends the Court committed a manifest error of law by dismissing his Eighth Amendment claim, arguing the Court failed to make all inferences in the light most favorable to him when it failed to interpret the Complaint as alleging that Joe Nathan James's execution shows that the ADOC's lethal injection protocol is merely advisory. The Court committed no manifest error of law by not construing Smith's Complaint in the manner he now asserts.

When ruling on a motion to dismiss under Rule 12(b)(6), a court must decide whether the complaint contains "sufficient factual matter, accepted as true, to

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[2] Smith does not challenge the Court's dismissal of his Fourteenth Amendment procedural due process claim, although he has reserved the right to appeal from that dismissal. (Doc. 24 at 1 n.1.)

'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To survive a motion to dismiss, a plaintiff must plead sufficient facts to nudge his claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. When ruling on a motion to dismiss, the Court accepts as true the complaint's factual allegations and construes them in the light most favorable to the plaintiff. *See Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 854, 864 (11th Cir. 2017).

Smith argues the Court erred by not interpreting the Complaint in the light most favorable to him—namely, that the Joe Nathan James execution demonstrated that the ADOC's lethal injection protocol is merely advisory. The Court committed no manifest error of law when it primarily construed the Complaint as challenging the lethal injection protocol as a whole. The Complaint references the lethal injection process as a whole several times, especially when presenting its claim for relief pursuant to the Eighth Amendment. (*See*, *e.g.*, Doc. 1 at 2 ("Given that ADOC's lethal injection process is unexplained, shrouded in secrecy, and, in all events, insufficient to prevent subjecting Plaintiff to an intolerable risk of torture, cruelty, or substantial pain. . . ."); 12 ("Absent a change in ADOC's lethal injection process after an independent review. . . ."); 16

("Defendant's lethal injection process. . . .").) At no point does the Complaint allege that the lethal injection protocol is merely advisory, nor did Smith argue as much in his response in opposition to the motion to dismiss. (*See generally* Doc. 12.)

Smith's Complaint focuses heavily on the events surrounding the Joe Nathan James execution. In particular, Smith alleged in the Complaint that the ADOC deviated from its lethal injection protocol in James's execution, citing the alleged use of a cutdown procedure and intramuscular sedation during his execution. (Doc. 1 at 7–12.) But these events do not allege, mention, or even plausibly show that the ADOC has treated its lethal injection protocol as merely advisory, nor does this plausibly show how a mere advisory protocol is, in itself, cruel and unusual punishment in violation of the Eighth Amendment. Thus, the Court committed no manifest error of law in failing to discern this advisory-protocol theory when it ruled on the motion to dismiss.

The plausible reading of the events surrounding the Joe Nathan James execution from the Complaint is that ADOC personnel went off-protocol by using a cutdown procedure and intramuscular sedation. In its order now challenged by Smith, the Court addressed those two concerns by ordering the Commissioner of the ADOC and his agents to comply with his sworn stipulation that the ADOC will not use a cutdown or intramuscular sedation during Smith's execution. (Doc. 22 at 15.) The Court discerns no manifest error of law here.

Smith also argues the Court did not properly consider the issue of the duration of James's execution as being a deviation from the protocol. Without addressing whether the duration of an execution is addressed in the published 2019 protocol, or whether there is a duration of an execution that would violate the Eighth Amendment, the Court will not disturb its original finding that "Smith does not plead sufficient facts to show that the duration of James's execution was a substantial change in protocol." (*Id.* at 9.) Smith points to no section of the Complaint that undermines the Court's conclusion.

Smith may not relitigate this matter in a Rule 59(e) motion. To obtain relief, Smith must show that the Court committed a manifest error of law. He has not done so.

B. Manifest Error of Law in Not Granting Leave to Amend the Complaint

Smith also asserts that the Court committed a manifest error of law by not granting his request to amend his Complaint—a request that was embedded within his responsive brief to the Commissioner's Motion to Dismiss. As a general matter, under Rule 15(a)(2), leave to amend a complaint "shall be 'freely given when justice so requires.'" *McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999) (quoting Fed. R. Civ. P. 15(a)(2)). When a complaint is dismissed under the affirmative defense of the statute of limitations, dismissal with prejudice is generally inappropriate,

and leave to amend the complaint under Rule 15(a) shall be granted except in the following three circumstances: "(1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments . . . ; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Garcia v. Chiquita Brands Int'l, Inc.*, 48 F.4th 1202, 1220 (11th Cir. 2022) (quoting *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001)).

A district court does not abuse its discretion when it denies a motion for leave to amend a complaint when the amendment would be futile. *Harris v. Ivax Corp.*, 182 F.3d 799, 807–08 (11th Cir. 1999). "[D]enial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004) (quoting *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999)); *see also Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) ("Leave to amend a complaint is futile when the complaint *as amended* would still be properly dismissed or be immediately subject to summary judgment for the defendant." (emphasis added)); *Wyatt v. BellSouth, Inc.*, 176 F.R.D. 627, 630–31 (M.D. Ala. 1998) ("An amendment adding a cause of action is considered futile if the new cause of action does not state a claim upon which relief can be granted, or if the claim would not survive an affirmative defense." (internal citations omitted)).

After considering supplemental briefing by the parties on this issue (Docs. 30, 31), the Court concludes

that amendment of the Complaint would be futile. Therefore, the Court's prior judgment dismissing Smith's Complaint with prejudice did not constitute a manifest error of law. While Smith presents the stronger argument as to whether his claim survives the statute of limitations defense, the Court nevertheless finds that his proposed Amended Complaint does not plausibly allege a violation of Smith's Eighth Amendment.

1. Statute of Limitations

The Court agrees with Smith that his proposed Amended Complaint is not plainly time-barred under the relevant statute of limitations. As discussed in the Memorandum Opinion dismissing Smith's original Complaint, "a federal claim accrues when the prospective plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008) (quoting *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)). To determine the statute of limitations for a claim brought pursuant to § 1983, the Court looks to the law of the state where the claim accrued. *Id.* at 1183. In Alabama, the statute of limitations applicable to personal injury actions is two years. Ala. Code § 6-2-38. Therefore, for Smith's Eighth Amendment claim to be timely, it must have been brought within two years of its accrual.

Typically, an Eighth Amendment method of execution claim "accrues on the later of the date on which

state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." *McNair*, 515 F.3d at 1174. Smith's claim, however, is somewhat atypical for a method of execution challenge, as it is rooted in a series of alleged violations of Alabama's lethal injection protocol, rather than a particular change to the State's protocol.[3] For pleading purposes, the proposed Amended Complaint plausibly alleges that, during the execution of Joe Nathan James and attempted execution of Alan Miller, ADOC officials deviated from standard practices for establishing intravenous access. Smith alleges no particular change to the protocol. Since the proposed Amended Complaint is rooted in a series of alleged protocol violations, the Court must look elsewhere for guidance on determining when Smith's proposed claim accrues.

When evaluating claims challenging repeated actions by government actors, the Eleventh Circuit recently held in a published opinion that courts must "sort a continuing violation, on the one hand, from a series of repeated violations that result in related harms, on the other" to determine the accrual of a cause of action. *Doe ex rel. Doe #6 v. Swearingen*, No. 21-10644, ___ F.4th ___, 2022 WL 12338515, at *7 (11th

[3] In the proposed Amended Complaint, Smith repeatedly asserts an allegation that recent difficulties in various executions suggests that the protocol is now merely advisory. The Court finds that the more plausible reading of the facts, in the light most favorable to Smith, would be that the State has violated its own lethal injection protocol in various recent executions, rather than set its entire protocol aside.

Cir. Oct. 21, 2022) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)) (discussing a § 1983 challenge to Florida's sex offender registry law). "When a discrete violation 'gives rise to a new cause of action,' then each new violation 'begins a new statute of limitations period as to that particular event.' " *Id.* (quoting *Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994)). "[W]hen a defendant takes separate and discrete acts that repeatedly violate the law, the continuing violation doctrine does not apply," and "a plaintiff may seek to remedy the discrete violations that occurred within the limitations period." *Id.* (citing *Knight*, 19 F.3d at 580–82).

For statute of limitations purposes, each allegation by Smith concerning a deviation from Alabama's lethal injection protocol can be plausibly read as a separate and discrete act that violates Smith's Eighth Amendment rights. Each alleged (and unique) deviation from the lethal injection protocol affirmatively created a new risk for Smith. Each deviation is also distinct from an alleged change in protocol because, unlike a change in protocol, a unique and unexpected harm emerges following each distinct violation. *Cf. Arthur v. Thomas*, 674 F.3d 1257, 1261–62 (11th Cir. 2012) (holding that the district court erred in dismissing complaint on statute of limitations grounds where, among others, plaintiff relied on recent executions of Alabama inmates to show there had been a substantial change in protocol). Accordingly, the Court finds that the statute of limitations on Smith's claim more reasonably accrued on the date of the most recent lethal

injection protocol violation alleged—the date of Miller's recent attempted execution—and incorporates all violations alleged to have occurred within the past two years. As the attempted execution occurred on September 22, 2022, less than two months ago, Smith's proposed claim is not time-barred in its entirety.

2. Merits of Smith's Eighth Amendment Claim

Nevertheless, the Court finds that the proposed Amended Complaint fails to state sufficient factual detail to raise a plausible Eighth Amendment method of execution challenge. This is particularly true in light of the Court's order prohibiting the State from using a cutdown procedure, intramuscular sedation, or any other off-protocol tactics during Smith's execution.

"[T]he Eighth Amendment does not guarantee a prisoner a painless death. . . ." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019). Instead, the relevant Eighth Amendment inquiry is whether the State's chosen method of execution "'superadds' pain well beyond what's needed to effectuate a death sentence." *Id.* at 1126–27. And "[t]o determine whether the State is cruelly superadding pain," the Supreme Court requires "asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain." *Id.* at 1127; *see also Boyd*, 856 F.3d at 858 (explaining that a plaintiff asserting an Eighth Amendment method of execution challenge "must

plausibly plead, and ultimately prove, that there is an alternative method of execution that is feasible, readily implemented, and in fact significantly reduces the substantial risk of pain posed by the state's planned method of execution"). The plaintiff must establish that the challenged method poses a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citation omitted).

Smith's proposed Amended Complaint is replete with references to the execution of Joe Nathan James, particularly the ADOC's alleged use of a cutdown procedure and intramuscular sedation during his execution. But the Court has mooted those issues by ordering the Commissioner and his agents to avoid using a cutdown procedure or intramuscular sedation during Smith's execution.

Putting aside those moot issues, Smith's other allegations regarding the Joe Nathan James execution are insufficient to state a plausible Eighth Amendment claim. Although Smith alleges that James was tortured for approximately three hours behind closed curtains during his lethal injection execution, a declaration attached to Smith's proposed Amended Complaint clarifies this allegation in a material way. Board-certified anesthesiologist Dr. Joel Zivot, who witnessed a private autopsy of James, opines that James was tortured and suffered "unnecessary pain" because, in Dr. Zivot's opinion, James was subjected to a cutdown

procedure and intramuscular sedation. (Doc. 24-1 at 27–31.) The specific details in Dr. Zivot's attached declaration control over the general allegation of torture in Smith's proposed Amended Complaint. *See Gill ex rel. K.C.R. v. Judd*, 941 F.3d 504, 514–16 (11th Cir. 2019). Dr. Zivot also mentions that James's autopsy revealed evidence of pulmonary edema. But other than Dr. Zivot's vague reference to "unnecessary" pain, neither his declaration nor Smith's proposed Amended Complaint says anything about the severity or duration of pain James would have suffered from the alleged cutdown procedure, intramuscular sedation, or any other aspect of James's execution—let alone whether Smith likely faces a risk of such pain. Nor do they explain whether these alleged procedures lasted the duration of the three hours during which James was hidden from the public eye. Nor do they say anything about the severity or duration of pain that could be inferred from the presence of pulmonary edema—let alone whether Smith likely faces a risk of such pain.

These omissions are fatal because the relevant Eighth Amendment question is "how long [the inmate] will be capable of feeling pain." *See Bucklew*, 139 S. Ct. at 1133. Assuming without deciding that the Court could infer, based on common sense, that James experienced some pain during his execution, Smith's proposed Amended Complaint is insufficient to plausibly demonstrate that James experienced the severe pain required for an Eighth Amendment violation. *Cf. id.* at 1124 (explaining that "the Eighth Amendment does not guarantee a prisoner a painless death"); *Baze v.*

Rees, 553 U.S. 35, 50 (2008) (plurality opinion) ("Simply because an execution method may result in pain . . . does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."). And even if the Court could infer that James experienced severe pain, that does not render plausible the allegation that *Smith* faces the requisite "objectively intolerable risk of harm," *cf. Baze*, 553 U.S. at 50 (citation omitted), as the Court will discuss in more detail below. Finally, as explained above, the Court addressed any concerns related to the cutdown procedure and intramuscular sedation by ordering the Commissioner and his agents not to use either procedure during Smith's execution.

The proposed Amended Complaint also alleges other protocol violations that occurred during the James execution. (*See*, *e.g.*, Doc. 24-1 at 4 ("Mr. James was rendered unconscious before the warrant was read and his last remarks were requested, two steps in the Protocol that cannot meaningfully occur if the condemned is unconscious.").) Just because the ADOC allegedly violated some aspect of the protocol does not mean that an Eighth Amendment violation resulted from the ADOC's actions. The central question remains whether the method of execution will subject the plaintiff to a "substantial risk of serious harm." *See Baze*, 553 U.S. at 50 (citation omitted). Rather than decry alleged deviations from the protocol, Smith must show either how these *particular* deviations, or how deviation from an established protocol more broadly, will plausibly subject him to a substantial risk of serious

harm. Smith's proposed Amended Complaint fails to do so.

The proposed Amended Complaint also cites the recent execution attempt of Alan Miller to allege that Smith will face a similarly troubled execution. To show that the State's lethal injection process will pose a "substantial risk of harm" sufficient to trigger an Eighth Amendment violation, and therefore survive a motion to dismiss for failure to state a claim, Smith must plead that *he* faces an additional risk of pain above and beyond that expected for establishing intravenous access. *See Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1312 (11th Cir. 2016) (to prevail on an Eighth Amendment method of execution challenge, plaintiff must show that "as applied to him," a protocol is "sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers" (quoting *Glossip*, 576 U.S. at 877)), *abrogated on other grounds by Nance v. Comm'r, Ga. Dep't of Corr.*, 981 F.3d 1201 (11th Cir. 2020); *Valle v. Singer*, 655 F.3d 1223, 1233 (11th Cir. 2011) ("[T]he fact that 'an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual.'" (quoting *Baze*, 553 U.S. at 50)). Smith simply does not plead sufficient factual detail in his proposed Amended Complaint to show that he will undergo a similarly painful experience while ADOC personnel try to establish intravenous access.

Smith's proposed Amended Complaint references allegations that Alan Miller was repeatedly "slapped, poked, prodded, and punctured" over the course of two hours during his September 22, 2022 execution attempt. (Doc. 24-1 at 14.) This allegation alone is insufficient to show that Smith faces a similar risk of suffering intravenous access issues while undergoing the lethal injection process—let alone that Smith faces a substantial risk of severe pain. Experience and common sense show that individuals are biologically distinct. *See Iqbal*, 556 U.S. at 679 (explaining that courts must rely on their experience and common sense when evaluating the plausibility of a claim for relief). For instance, just because one person suffers consequences from a medical procedure does not mean that other individuals who undergo the same procedure will suffer the same consequences. A plaintiff cannot point to one death row inmate's complications from lethal injection and simply say he is thus at risk because of said complications; the plaintiff must show the Court that he faces a similar risk. *See Miller v. Hamm*, No. 2:22-cv-506-RAH, 2022 WL 16720193, at *14 (M.D. Ala. Nov. 4, 2022) (explaining that a plaintiff cannot necessarily raise "a plausible method of execution claim by identifying one recent execution (or execution attempt) that allegedly caused another inmate severe pain," but rather must show a plausible reason why *he* faces a substantial risk of severe pain). Smith cites no authority to the contrary, nor does he argue how the Court could infer that *he* faces a substantial risk of serious harm based on the uncompleted execution of Miller. Thus, on this record, Smith's references to the Miller execution

attempt alone do not satisfy Smith's burden to plead that he will face a substantial risk of serious harm in the manner that Miller and other death row inmates not subject to a cutdown or intramuscular sedation will.

In his declaration attached to the proposed Amended Complaint, Dr. Zivot states that execution personnel will likely have difficulty establishing intravenous access on Smith because his body mass index is "borderline obese," as "[i]t is much more difficult to locate suitable veins in obese individuals." (Doc. 24-1 at 34.) Dr. Zivot also attests that Smith is on medication for depression and insomnia and explains that "[i]t is highly likely that his mental state will be one of great anguish and anxiety," which he explains is a risk factor for rendering intravenous access difficult. (*Id.*) But just because obtaining venous access will likely be difficult on account of a generalized risk factor does not plausibly suggest anything about the severity or duration of pain Smith will likely experience due to that difficulty. Similarly, while Dr. Robert Jason Yong's declaration details various challenges to establishing intravenous access, his statements are not specific to *Smith* or the risk of harm *Smith* likely faces from a lethal injection execution. (*Id.* at 115–23.) Dr. Zivot's and Dr. Yong's references to generalized and probabilistic risk factors do not plausibly show that Smith will likely experience pain "well beyond what's needed to effectuate a death sentence." *See Bucklew*, 139 S. Ct. at 1127. The conclusions in Dr. Zivot's and Dr. Yong's

declarations are too speculative to help Smith's proposed Amended Complaint survive a motion to dismiss.

Because Smith fails to allege facts plausibly showing that he will face a substantial risk of serious harm by undergoing execution via lethal injection, and given the strict requirements for challenging a method of execution, the Court finds that granting leave to amend the Complaint would be futile.[4] Accordingly, the Court's judgment dismissing the matter with prejudice will stand.[5]

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[4] Since the Court finds that Smith has failed to plead facts showing that he faces a "substantial risk of serious harm" from a lethal injection execution, it is unnecessary for the Court to address the comparative level of pain that a nitrogen hypoxia execution would cause. The Court does note, however, that nitrogen hypoxia is an available alternative method, even though the State disclosed at oral argument that it has yet to establish a protocol for carrying out executions via nitrogen hypoxia. The Eleventh Circuit has explicitly held that a state may not statutorily authorize a particular method of execution and simultaneously deny it as "available." *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019) (per curiam). Because the State of Alabama voluntarily adopted nitrogen hypoxia by statute, *Price* rejected the State's argument that nitrogen hypoxia is not available "simply because the State has not yet developed a protocol to administer this method of execution." *Id.*

[5] Because the Court rests its conclusion that it committed no manifest error of law in not granting leave to Smith to file a complaint on the grounds of futility, the Court will not address whether granting leave to amend would impose undue prejudice on the Defendants.

C. Sanctions as a Sufficient Safeguard

Finally, Smith argues this Court's order that the Commissioner and his agents are to strictly adhere to and not deviate from the ADOC's established lethal injection protocol is insufficient to counter the risk that Smith will be executed in a cruel and unusual manner. Smith asserts that because the ADOC prepares inmates for execution in secret, there is no way to ensure that the Commissioner and his agents will abide by this Court's order.

Smith has not demonstrated that the gravity of the potential sanctions, including criminal sanctions, is insufficient to deter any conduct violative of the Court's order. Smith's argument presupposes that the ADOC (likely) will violate the Court's order. However, Smith's argument lacks factual support and is instead based on speculation and conjecture. To the extent Smith is concerned that the secrecy which shrouds the ADOC's execution protocol and process would obscure any violations of the Court's order and therefore prevent enforcement, the Court assures Smith that there are means by which deviations from the protocol could nevertheless be brought to the Court's attention. And the secrecy of the execution protocol and process, without more, is insufficient to demonstrate *ex ante* that the ADOC (likely) will violate the Court's order and expose itself to sanctions. In sum, Smith has not demonstrated that the Court committed a manifest error of law on this issue.

III. CONCLUSION

Accordingly, it is hereby ORDERED that Plaintiff Kenneth Eugene Smith's *Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59(e) and to Expedite Resolution of the Motion* (Doc. 24) is DENIED.

DONE this the 9th day of November, 2022.

/s/ R. Austin Huffaker, Jr.
R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

920 F.3d 1317
United States Court of Appeals, Eleventh Circuit.

Christopher Lee PRICE, Plaintiff - Appellant,
v.
COMMISSIONER, Alabama DEPARTMENT OF CORRECTIONS, Warden, Holman Correctional Facility, Defendants - Appellees.

No. 19-11268
|
Non-Argument Calendar
|
April 10, 2019

Attorneys and Law Firms

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Lauren Ashley Simpson, Beth Jackson Hughes, Henry M. Johnson, Alabama Attorney General's Office, MONTGOMERY, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:19-cv-00057-KD-MU

Before TJOFLAT, WILSON, and ROSENBAUM, Circuit Judges.

Opinion

PER CURIAM:

Christopher Lee Price, an Alabama prisoner sentenced to death for killing a man during the commission of a robbery, has moved this Court for an emergency stay of his execution, which is scheduled to take place on April 11, 2019, at 6:00 p.m. Central Standard Time at the Holman Correctional Facility ("Holman"). Price also appeals the district court's order denying his motion for preliminary injunction and its order denying his renewed motion for preliminary injunction. Included within those orders is the district court's denial of Price's Cross-Motion for Summary Judgment.[1] After careful consideration, we affirm the district court's denial of Price's Cross-Motion for Summary Judgment as well as its denial of Price's original and renewed motions for preliminary injunction. We also deny Price's motion for a stay of execution because he cannot show a substantial likelihood of success on his petition.

I. Background

Price was convicted of capital murder for killing William Lynn during the commission of a robbery, and Price was subsequently sentenced to death. *See Price v. State*, 725 So.2d 1003, 1011 (Ala. Crim. App. 1997), *aff'd sub nom. Ex parte Price*, 725 So.2d 1063 (Ala.

[1] Price's Notice of Appeal makes clear that he appeals from "any and all adverse rulings incorporated in, antecedent to, or ancillary to" those orders.

1998). Price filed a direct appeal of both his conviction and death sentence, but both were affirmed. *See Price*, 725 So.2d at 1062, *aff'd*, 725 So.2d 1063 (Ala. 1998). Price's conviction and sentence became final in May 1999 after the Supreme Court denied his petition for writ of certiorari. *See Price v. Alabama*, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999).

Price then filed a state post-conviction Rule 32 petition, but the petition was denied, and the Court of Criminal Appeals of Alabama affirmed. *See Price v. State*, 880 So.2d 502 (Ala. Crim. App. 2003). The Alabama Supreme Court denied certiorari review. *Ex parte Price*, 976 So.2d 1057 (Ala. 2006).

Later, Price filed a petition for writ of habeas corpus in the Northern District of Alabama. The district court issued an opinion denying the petition with prejudice and entering judgment against Price. We affirmed that judgment. *See Price v. Allen*, 679 F.3d 1315, 1319-20 (11th Cir. 2012) (per curiam). The Supreme Court also denied Price's petition for writ of certiorari. *Price v. Thomas*, 568 U.S. 1212, 133 S.Ct. 1493, 185 L.Ed.2d 548 (2013).

Price filed a successive state post-conviction Rule 32 petition in 2017, arguing that his death sentence was unconstitutional under *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). That petition was also denied, and the Court of Criminal Appeals of Alabama affirmed. *Price v. State*, No. CR-16-0785, 2017 WL 10923867 (Ala. Crim. App. Aug. 4,

2017), *reh'g denied* (Sept. 8, 2017). The Alabama Supreme Court denied certiorari.

Following his direct criminal appeals and after the State moved the Alabama Supreme Court to set an execution date, Price brought a civil lawsuit under 42 U.S.C. § 1983 alleging that the Alabama Department of Corrections's ("ADOC") use of midazolam in its three-drug lethal-injection protocol violates the Eighth Amendment's ban on cruel and unusual punishment because it is not effective in rendering an inmate insensate during execution (the "first § 1983 action"). The district court held a bench trial on Price's § 1983 claim. But the district court bifurcated the trial, addressing only whether Price could meet his burden of showing that his chosen alternative drug—pentobarbital—was available to the ADOC. The district court found in favor of the ADOC and against Price. It concluded that Price had failed to meet his burden of showing that pentobarbital was a feasible and available drug for use by the ADOC.

Price appealed and, on September 18, 2018, we affirmed. *Price v. Comm'r, Ala. Dep't of Corr.*, 752 F. App'x 701 (11th Cir. 2018). Price recently filed a petition for writ of certiorari with the Supreme Court of the United States. That petition is currently pending.

II. Facts Relevant to this Appeal

While the appeal of Price's first § 1983 action was pending before this Court, the Alabama legislature amended the State's execution statute to add nitrogen

hypoxia as an approved method of execution. The amendment became effective on June 1, 2018. *See* Ala. Code § 15-18-82.1. The statute reads, in relevant part, "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution or nitrogen hypoxia." Ala. Code § 15-18-82.1(a). The statute also provides that the election of death by nitrogen hypoxia is waived unless it is personally made by the inmate in writing and delivered to the warden within thirty days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death. Ala. Code § 15-18-82.1(b)(2). If a judgment was issued before June 1, 2018, as was the case with Price, the election must have been made and delivered to the warden within thirty days of June 1, 2018. *See Id.*

On January 11, 2019, the State moved the Alabama Supreme Court to set an execution date for Price. The Alabama Supreme Court granted the motion on March 1, 2019, ordering that Price be executed on April 11, 2019, by lethal injection.

In the meantime, on January 27, 2019, Price wrote a letter to the warden of Holman asking that he be executed by nitrogen hypoxia.[2] The warden responded by

[2] Price suggests that he was unaware of the ability to elect nitrogen hypoxia as a means of execution until his pro bono counsel, Aaron Katz, called Federal Public Defender John Palombi on January 12, 2019. According to Price, during that phone conversation, Palombi "informed Attorney Katz about the Alabama legislature's March 2018 amendments to the State's execution

notifying Price that his request was past the thirty-day deadline set forth in the statute. Nevertheless, she further noted that she did not have the authority to grant, deny, or reject the request, and she indicated that any further consideration of the matter needed to go through Price's attorney to the Attorney General's Office. Price's attorney then reached out to the Attorney General's Office and reiterated Price's desire to "opt in to the nitrogen hypoxia protocol." Assistant Attorney General Henry Johnson denied the request, citing the thirty-day period to opt into the protocol.

On February 8, 2019, (approximately one month after the State sought an execution date), Price filed a civil complaint against the Commissioner of the ADOC and others. The new complaint set forth a § 1983 claim in which Price realleged many of the claims raised in his previous § 1983 action concerning the three-drug lethal-injection protocol (the "second § 1983 action"). For example, Price claims that the use of midazolam as the first drug in its three-drug lethal-injection protocol violates the Eighth Amendment's ban on cruel and unusual punishment. The complaint in the second § 1983 action also alleges that the State violated Price's Fourteenth Amendment right to equal protection by refusing to allow him to elect nitrogen hypoxia as his method of execution. With respect to that claim, Price

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protocol." However, as we note later in this opinion, our opinion in Price's first § 1983 action, which we issued in September 2018, specifically referenced the fact that Alabama had adopted nitrogen hypoxia as a means of execution. We further noted that Price apparently had not elected this option.

contended that the State entered into "secret agreements" with many death row inmates allowing them to elect nitrogen hypoxia but would not allow him to do so outside of the 30-day opt-in period.[3]

III. Discussion

We review *de novo* an order on summary judgment. *Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017). As for the district court's denial of Price's motion for stay of execution, we review that for abuse of discretion. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). With respect to the district court's factual findings, we review those for clear error. *Glossip v. Gross*, ___ U.S. ___, 135 S.Ct. 2726, 2739, 192 L.Ed.2d 761 (2015). Under this standard, we may not reverse "simply because we are convinced that we would have decided the case differently." *Id.* (cleaned up).

Finally, we may grant Price's motion for stay of execution filed in this Court only if Price establishes that "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; *and* (4) if issued, the

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[3] The complaint in the second § 1983 action further alleges that the State failed to take steps to prevent material deviations from its lethal-injection procedures in future executions, but Price abandoned that claim, as he did not argue it to the district court below, and it is not part of the present appeal. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) (claims or arguments not briefed before an appellate court are deemed abandoned and will not be addressed).

injunction would not be adverse to the public interest." *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1321 (11th Cir. 2016) (quoting *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (emphases in original)), *abrogated on other grounds by Bucklew v. Precythe*, ___ U.S. ___, 139 S.Ct. 1112, 1127–29, ___ L.Ed.2d ___ (2019). The "first and most important question" regarding a stay of execution is whether the petitioner is substantially likely to succeed on the merits of his claims. *Jones v. Comm'r. Ga. Dep't of Corr.*, 811 F.3d 1288, 1292 (11th Cir. 2016).

After careful consideration, we conclude that the district court did not err when it denied Price's Cross-Motion for Summary Judgment, although our basis for affirmance differs from the grounds set forth by the district court. We further find that the district court did not abuse its discretion when it denied Price's initial and renewed motions for preliminary injunction in which he sought a stay of execution. Finally, we deny Price's motion for stay of execution because he has not satisfied the requirements for such a stay.

We now examine each of Price's claims in turn.

A. Fourteenth Amendment Equal Protection Claim

Price contends that the State violated his Fourteenth Amendment right to equal protection by not permitting him to elect nitrogen hypoxia as a method of execution. To prevail on his equal-protection claim, Price must first show that "the State will treat him

disparately from other similarly situated persons." *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (quoting *DeYoung v. Owens*, 646 F.3d 1319, 1327 (11th Cir. 2011)). Second, "[i]f a law treats individuals differently on the basis of . . . [a] suspect classification, or if the law impinges on a fundamental right, it is subject to strict scrutiny." *Id.* (quoting *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009)). Otherwise, Price "must show that the disparate treatment is not rationally related to a legitimate government interest." *Id.* (quoting *DeYoung*, 646 F.3d at 1327–28).

The district court did not err in denying Price's equal-protection claim. Importantly, Price has not demonstrated that he was or will be treated differently than similarly situated inmates. Although Price appeared to initially contend that the State made "secret agreements" with other death-row inmates—suggesting that these inmates elected to opt in to the nitrogen hypoxia protocol outside of the thirty-day window—he seems to now concede that these other inmates made their election within the thirty-day window.

The record reveals that Price had the same opportunity as every other inmate to elect nitrogen hypoxia as his method of execution. When the State added nitrogen hypoxia as a statutorily viable method of execution in June 2018, all inmates whose death sentences were final as of June 1, 2018, received a thirty-day period to elect nitrogen hypoxia. *See* Ala. Code § 15-18-82.1(b)(2). Significantly, Price was represented by

counsel when the State added nitrogen hypoxia as a method of execution.

According to the State, all death-row inmates at Holman, including Price, were provided with a copy of an election form, and forty-eight of those inmates timely elected nitrogen hypoxia. Price did not. The record contains the affidavit of Captain Jeff Emberton, who attested to the fact that, in mid-June 2018, after the State authorized nitrogen hypoxia as a method of execution, the warden of Holman directed him to provide every death-row inmate an election form and an envelope. According to Emberton, he delivered the form to every death-row inmate at Holman as instructed. The form identified Act 2018-353 (which amended Ala. Code. § 15-18-82.1 to include nitrogen hypoxia) and allowed for the inmate to state that he was making the election of nitrogen hypoxia as the means of execution.[4] Price did not contend that he did

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[4] The form stated as follows:

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia.

Dated this _____ day of June, 2018.

_____ _____

Name/Inmate Number Signature

ECF No. 19-2. The State admits though that it did not create the election form. Rather, it claims the Federal Public Defender's Office created the form and gave a copy of it to the warden of

not receive the form or that he was not given the option to make the same election.

In sharp contrast to other inmates who opted for the protocol by the July 1, 2018, deadline, Price waited until late January 2019 to seek to elect nitrogen hypoxia for his execution. Price appears to argue that the ADOC's provision of the election form was insufficient. But Price was represented by counsel, so any doubts Price had about the form could have been resolved by consulting with his attorney. Plus, several other inmates were able to make the timely election based on the provision of the form by the State. Price takes issue with the fact that most of the inmates that timely elected nitrogen hypoxia were represented by the Federal Public Defender's Office and that they were given an explanation of their rights by that office before receiving the form. But as we have noted, Price was also represented by counsel, and he could have asked for an explanation of the form. Nor does Price make any Sixth Amendment claim, in any event. Finally, the interactions between other inmates and the Federal Public Defender's Office do not support any unequal treatment by *the State* of similarly situated individuals.

Further, to the extent Price claims that he did not become aware of the change in law until January 2019, he has not asserted that the State treated Price differently than other death-row inmates with respect to this information. Moreover, the record here shows that

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Holman. But inmates not represented by the Federal Public Defender's Office were among those who timely completed the form.

Price and his counsel plainly had reason to know of the change in Alabama's law before January 2019 because we specifically described that change when we issued our decision in Price's first § 1983 action appeal. *See Price*, 752 F. App'x at 703 n.3.

Because Price did not timely elect the new protocol, he is not similarly situated in all material respects to the inmates who did make such an election within the thirty-day timeframe. And because Price has not shown that he is similarly situated to those inmates, he cannot demonstrate any equal-protection violation due to the State's denial of execution by nitrogen hypoxia. But even if Price were similarly situated to the other death-row inmates, he cannot establish an equal-protection violation because he was treated exactly the same as the other inmates. Every inmate was given thirty days within which to elect nitrogen hypoxia as their method of execution. Ironically, if the State *did* allow Price to make the belated election he seeks, it would be treating him differently than other death-row inmates who were not afforded the same benefit.

In the end, it appears that Price takes issue with the thirty-day election period itself, arguing that it is arbitrary. But even considering Price's claim as a challenge to the statute itself—that it treats similarly situated death-row inmates differently based on a criterion (a thirty-day election) that does not rationally further any legitimate state interest—the claim fails. As noted by the district court, a statute is presumed constitutional, and a classification not involving fundamental rights nor proceeding along suspect lines

"cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations omitted). Here, a rational basis exists for the thirty-day rule—the efficient and orderly use of state resources in planning and preparing for executions. And Price has not negated this rational basis for the thirty-day election requirement.[5] *See id.* (noting "[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it").

B. Eighth Amendment Claim

The Supreme Court's decision in *Glossip v. Gross*, ___ U.S. ___, 135 S.Ct. 2726, 2737, 192 L.Ed.2d 761 (2015), sets forth the relevant two-pronged standard a plaintiff must meet to succeed on an Eighth Amendment method-of-execution claim.

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[5] On appeal, Price claims that the district court committed error in refusing to apply strict scrutiny to the State's alleged differential treatment of him. He argues that once the district court concluded he was substantially likely to prevail on his allegation that the State's lethal-injection protocol will cause him severe pain and needless suffering, it should have applied strict scrutiny to his equal-protection claim, since the right to be free from cruel and unusual punishment is a fundamental right. We do not evaluate this argument of Price's, as we conclude that binding precedent requires us to find on this record that Price is not substantially likely to prevail on his allegation that the State's lethal-injection protocol will cause him severe pain.

Prisoners cannot succeed on a method-of-execution claim unless they can establish that the method challenged presents a risk that is "'s*ure or very likely* to cause serious illness and needless suffering,' and gives rise to 'sufficiently *imminent* dangers.'" *Id.* (emphasis in original) (quoting *Baze v. Rees*, 553 U.S. 35, 50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993)). The Supreme Court further elaborated in *Baze*, "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual" punishment prohibited by the Eighth Amendment. *Baze*, 553 U.S. at 50, 128 S.Ct. 1520. So to prevail on a method-of-execution claim, an inmate must show a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Glossip*, 135 S.Ct. at 2737 (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520 (plurality opinion) (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

The inmate must also "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 52, 128 S.Ct. 1520). Where a prisoner claims a safer alternative to the State's lethal-injection protocol, he cannot make a successful

challenge by showing a "slightly or marginally safer alternative." *Id.* (quoting *Baze*, 553 U.S. at 51, 128 S.Ct. 1520). Death-row inmates face a heavy burden.

The Supreme Court recently reiterated an inmate's burden in an Eighth Amendment method-of-execution challenge in *Bucklew v. Precythe*, ___ U.S. ___, 139 S.Ct. 1112, 1125, ___ L.Ed.2d ___ (2019). As summarized by the Court, a prisoner "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.*

In reaffirming this standard, however, the Supreme Court recognized the burden an inmate has under the *Baze-Glossip* test can be "overstated." *Id.* at 1128. It clarified that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Id.* So a petitioner can identify a "well-established protocol in another State as a potentially viable option." *Id.* Justice Kavanaugh noted that all nine Justices agreed on this point. *Id.* at 1136 (Kavanaugh, J., concurring) (citing *Arthur v. Dunn*, 580 U.S. ___, 137 S.Ct. 725, 733-34, 197 L.Ed.2d 225 (2017) (Sotomayor, J. dissenting from denial of certiorari)).

For this reason, a portion of our decision in *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), has been abrogated by *Bucklew*. In particular, in *Arthur*, we determined that a proposed method of execution (death by firing squad) was not an available

alternative because the state in which the inmate would be executed did not authorize it. *Id.* at 1317-18. We made this determination despite the fact that another state authorized the particular method of execution proposed by the inmate. *Id.* But *Bucklew* demonstrates our conclusion in *Arthur* was incorrect. Having clarified the applicable law, we turn to the *Baze-Glossip* test in reverse order, tackling the availability issue first.

1. Price has shown that nitrogen hypoxia is an available alternative method of execution that is feasible and readily implemented

Price claims that nitrogen hypoxia is an available method of execution for him because the Alabama legislature has authorized it. In proposing nitrogen hypoxia as an alternative to the State's midazolam lethal-injection protocol, Price emphasizes that he is merely seeking to be executed by a method of execution that the Alabama legislature, "after considerable thought, has expressly authorized." He also argues that nitrogen hypoxia is feasible and readily implemented because pure nitrogen gas is easily purchased. No supply concerns exist for nitrogen, and counsel for Price notes that he was recently able to easily purchase a tank of 99.9% pure compressed nitrogen gas.

The State retorts that nitrogen hypoxia is not an available method of execution to Price as a matter of state law because he failed to make a timely election

under the applicable statute. It also claims nitrogen hypoxia is neither feasible nor readily implemented at this date, since the ADOC has not yet finalized a nitrogen hypoxia protocol, and it is not likely that one will be in place by April 11, 2019. Finally, the State asserts Price did not meet his burden to prove a known and available alternative method of execution because he did not provide sufficient details of how the State could induce nitrogen hypoxia.

To resolve this issue, we turn to *Bucklew* for guidance. *Bucklew* sheds some light on the "availability" prong of the *Baze-Glossip* test, and it specifically addresses an inmate's proposal of nitrogen hypoxia as an alternative method of execution.

In *Bucklew*, the Supreme Court determined that the inmate had not presented a triable question on the viability of nitrogen hypoxia as an alternative to lethal injection for two reasons. First, the Court noted, to establish that a proposed alternative method is available, an inmate must do more than show that it is theoretically "feasible"; he must also show that it is "readily implemented." *Bucklew*, 139 S.Ct. at 1129 (citing *Glossip*, 135 S.Ct. at 2737-38). To meet this burden, the inmate's proposed alternative must be "sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" *Id.* (quoting *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017); *Arthur*, 840 F.3d at 1300).

The Court in *Bucklew* found that the inmate had failed to meet this burden because he presented no

evidence on details such as how nitrogen gas would be administered, in what concentration, and for how long the gas would be administered. *Id.* The inmate also did not suggest how the State could ensure the safety of the execution team. *Id.* Instead, the inmate pointed only to reports from correctional institutions in other states revealing that additional study was needed to put in place a protocol for execution by nitrogen hypoxia. *Id.*

Second, the Court in *Bucklew* determined that the State had a legitimate reason for not switching its current lethal-injection protocol: nitrogen hypoxia was an "entirely new method—one that had 'never been used to carry out an execution' and had 'no track record of successful use.'" *Id.* (quoting *McGehee*, 854 F.3d at 493). The Court concluded by stating that the Eighth Amendment "does not compel a State to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution." *Id.* (quoting *Baze*, 553 U.S. at 41, 128 S.Ct. 1520).[6]

Here, the State argues that although the Code of Alabama now contemplates nitrogen hypoxia as a means of execution, it is not "available" because the ADOC is still developing a protocol, and the process will not be complete in time for Price's April 11, 2019, execution. We are not persuaded. If a State adopts a

[6] The Supreme Court did note, however, while the case was pending, a "few" states had authorized nitrogen hypoxia as a method of execution. *Bucklew*, 139 S.Ct. at 1130 n. 1. But, it emphasized, "[t]o date, no one in this case has pointed us to an execution in this country using nitrogen gas." *Id.*

particular method of execution—as the State of Alabama did in March 2018—it thereby concedes that the method of execution is available to its inmates. Unlike in *Bucklew*, where the inmate proposed the adoption of a new method, here, the State of Alabama chose, on its own, and after careful consideration, to offer nitrogen hypoxia as a method of execution for its death-row inmates. So unlike the inmate in *Bucklew*, Price is not attempting to "compel" the State to adopt a different and new method of execution at all. The method was already adopted well before Price's Eighth Amendment challenge—and more than a year before Price's scheduled execution date.

A State may not simultaneously offer a particular method of execution and deny it as "unavailable." Rather, because the State voluntarily included nitrogen hypoxia in its statute, we reject the State's argument that nitrogen hypoxia is not "available" to Price simply because the State has not yet developed a protocol to administer this method of execution. If we were to find otherwise, it would lead to an absurd result. States could adopt a method of execution, take no action at all to implement a protocol to effectuate it, and then defeat an inmate's Eighth Amendment challenge by simply claiming the method is not "available" due to a lack of protocol.

Roughly two years ago, the Alabama legislature introduced a bill that would make nitrogen hypoxia a statutorily authorized method of execution in Alabama. The bill was also passed and enacted into law more than a year ago, and inmates have been electing

nitrogen hypoxia since June 2018. Under these circumstances, we cannot agree that nitrogen hypoxia is not available in the State of Alabama. Indeed, Alabama's official legislature-enacted policy is that nitrogen hypoxia is an available method of execution in the State.

We also reject the State's suggestion that nitrogen hypoxia is not available to Price only because he missed the 30-day election period. If nitrogen hypoxia is otherwise "available" to inmates under *Bucklew*, that the State chooses to offer the chance to opt for it for a period of only 30 days does not somehow render it "unavailable" by *Bucklew*'s criteria. To the contrary, for the same reason that *Bucklew* abrogates *Arthur*'s requirement that a state offer a method of execution for it to be "available," *Bucklew* renders a state's time limit on a given execution option of no moment to whether that option is "available."

The closer question is whether Price's alleged lack of detail with respect to *how* the State would implement his execution by nitrogen hypoxia defeats his Eighth Amendment claim. We agree that Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate proposes a new method of execution. But under the particular circumstances here—where the State by law previously adopted nitrogen hypoxia as an official method of execution—we do not believe that was Price's burden to bear. Rather, an inmate may satisfy his burden to demonstrate that the method of execution is feasible

and readily implemented by pointing to the executing state's official adoption of that method of execution.

True, in *Bucklew*, the Supreme Court discussed how Bucklew had failed to set forth evidence of essential questions like how the nitrogen gas would be administered, and it used this as a basis to defeat the Eighth Amendment claim. But as we have noted, a key distinction between *Bucklew* and our case is present. Again, in *Bucklew*, the *inmate* was *proposing* a new alternative method of execution that had not yet been approved by the state. And in addressing whether the suggested alternative method was "feasible" and "readily implemented," the Supreme Court explained that the *inmate's proposal* must be sufficiently detailed. *Bucklew*, 139 S.Ct. at 1129.

Here, Price did not "propose" a new method of execution; he pointed to one that the State already made available. The State, on its own, had already adopted nitrogen hypoxia as an alternative to lethal injection. Under these circumstances, the State bears the responsibility to formulate a protocol detailing how to effectuate execution by nitrogen hypoxia. Indeed, it would be bizarre to put the onus on Price to come up with a proposed protocol for the State to use when the State has already adopted the particular method of execution and is required to develop a protocol for it, anyway. For these reasons, we conclude that Price's lack of detail as to how the State would implement death by nitrogen hypoxia does not prevent him from establishing that this method of execution is available to him.

Finally, we acknowledge the potential for abuse in delaying execution that a state's decision to make multiple methods of execution available could present. Under *Bucklew*, 139 S.Ct. at 1133 (citation and quotation marks omitted), "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." So to the extent that a particular available method of death reasonably requires a certain period for the state to prepare for execution, a prisoner may not successfully seek execution by an alternative method inside that window of time. But this is not that case.

Here, Price sought execution by nitrogen hypoxia in January 2019, and his execution is not scheduled to occur until April 11, 2019. While the State has not yet developed a protocol for execution by nitrogen hypoxia, it has submitted no evidence to suggest that once it has satisfied its burden to develop its execution-by-nitrogen-hypoxia protocol, preparing to carry out execution by nitrogen hypoxia will reasonably require more than two-and-one-half months.

2. Price has not established a substantial likelihood that he would be able to show that nitrogen hypoxia significantly reduces a substantial risk of pain when compared to the three-drug protocol

Nevertheless, Price cannot succeed on his Eighth Amendment challenge because he has not shown that

nitrogen hypoxia will "significantly reduce a substantial risk of severe pain." *Bucklew*, 139 S.Ct. at 1130. As the Supreme Court in *Bucklew* recently indicated, a minor reduction in risk is not enough; "the difference must be clear and considerable." *Id.* at 1130. Here, Price has failed to meet that standard.

As an initial matter, we reject Price's contention that, by not moving for summary judgment on this issue, the State has somehow conceded that a genuine issue of material fact exists with respect to whether its lethal-injection protocol carries a substantial risk of causing severe pain. At this stage, where Price seeks a stay of execution, he bears the burden to show that a substantial likelihood of success on the merits exists. And, during the hearing before the district court, the State contended that its three-drug lethal-injection protocol using midazolam was a safe and effective constitutional method of execution.

In the district court, Price pointed to two things to support his motion: (1) the declaration of his expert Dr. David Lubarsky, which he also presented during his appeal on the first § 1983 action; and (2) a decision by a district court in the Southern District of Ohio—*In re Ohio Execution Protocol Litigation*, No. 11-cv-1016, 2019 WL 244488, at *70 (S.D. Ohio Jan. 14, 2019). Dr. Lubarsky's declaration contains his opinion that midazolam will not provide adequate analgesic effects during Price's execution. And Price relies on the Southern District of Ohio's opinion because the court there found Ohio's lethal injection protocol—which uses

midazolam—"will certainly or very likely cause [an inmate] severe pain and needless suffering."

The State submitted nothing on the record in response to contest Dr. Lubarsky's assertions. Rather, it relied on the evidence it submitted in Price's first § 1983 action. But the district court never reached this question in the first § 1983 action, and the State failed to file its evidence on this issue in the pending matter. As a result, the record contains only Dr. Lubarsky's uncontested assertions that the State's use of midazolam in the three-drug protocol presents a substantial risk of severe pain to Price. So the district court's conclusion that Price satisfied his burden to establish that lethal injection carries a substantial risk of severe pain cannot be clearly erroneous, since the only evidence of record supports that conclusion.

Nevertheless, the district court did clearly err in concluding that Price had met his burden to show that execution by nitrogen hypoxia presented an alternative that would significantly reduce the risk of substantial pain to Price. The district court based its finding in this regard on Dr. Lubarsky's declaration in the first § 1983 action appeal and on a report from East Central University. But Dr. Lubarsky's declaration did not compare the effectiveness of the current three-drug protocol to the proposed use of nitrogen hypoxia.[7]

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[7] The district court likewise recognized that Dr. Lubarsky offered no opinion regarding the comparison between the pain incurred with the lethal-injection protocol and that incurred with the administration of nitrogen hypoxia.

And Price's reliance on the East Central University report entitled "Nitrogen Induced Hypoxia as a Form of Capital Punishment," in which the authors studied nitrogen hypoxia, is also problematic. Importantly, the report is a preliminary draft report that is stamped with the words "Do Not Cite." So we cannot conclude that Price's reliance on this report alone could satisfy his burden to show that execution by nitrogen hypoxia would significantly reduce the risk of substantial pain to Price. And in the absence of the East Central University report, the district court was left without any evidence supporting a conclusion that nitrogen is not likely to result in any substantial physical discomfort during executions. Consequently, we find that the district court clearly erred when it found that Price satisfied his burden to establish that nitrogen would likely not result in substantial physical discomfort to Price. The district court simply had no reliable evidence upon which to make this determination.

We further note that the report itself also did not compare the two methods of execution, and to the extent Price claims he would feel like he was suffocating if executed by lethal injection, the petitioner in *Bucklew* admitted that feelings of suffocation could also occur with nitrogen gas. *Bucklew*, 139 S.Ct. at 1132. Likewise, the record in *Bucklew* supported the conclusion that the petitioner could be capable of feeling pain for 20 to 30 seconds when nitrogen is used for an execution. *Id.* The Court also recognized expert testimony that suggested the effects of nitrogen could vary

depending on how it was administered. *Id.* In short, the district court clearly erred when it concluded Price had satisfied his burden to establish that nitrogen hypoxia would significantly reduce a substantial risk of severe pain. For these reasons, Price has failed to show a substantial likelihood of success on the merits of his claim.

IV. Conclusion

For the foregoing reasons, we affirm the district court's denial of Price's Cross-Motion for Summary Judgment as well as its denial of Price's original and renewed motions for preliminary injunction. And because Price has not satisfied his burden to show a substantial likelihood of success on the merits with respect to either his Fourteenth Amendment equal-protection claim or his Eighth Amendment method-of-execution claim, we deny his emergency motion to stay his execution.

AFFIRMED and MOTION FOR STAY DENIED.