

No. 22A441

IN THE
Supreme Court of the United States

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS

Petitioner,

V.

KENNETH EUGENE SMITH,

Respondent.

ON APPLICATION TO VACATE STAY

***EXECUTION SCHEDULED FOR NOVEMBER 17,
2022 AT 6 PM CST***

OPPOSITION TO APPLICANT'S MOTION TO VACATE ELEVENTH
CIRCUIT COURT OF APPEALS' STAY OF EXECUTION

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Petitioner asks this Court to take the extraordinary measure of vacating a stay entered by the Eleventh Circuit Court of Appeals preventing the imminent execution of Respondent Kenneth Eugene Smith before he is able to present his viable Eighth Amendment claim that was improperly dismissed by a federal court before he was allowed any discovery. Even the Eleventh Circuit Judge who dissented from the order concluding that Mr. Smith stated a claim under the Eighth Amendment agreed that a temporary stay pending the current appeal of the district court's summary dismissal of Mr. Smith request for a preliminary injunction is appropriate. *See* Ex. B at 3. Petitioner has not met its burden to show it is entitled to relief.

Petitioner's insistence on immediately carrying out this execution despite the serious constitutional issues raised in Mr. Smith's suit is particularly extraordinary in light of Alabama's two most recent execution attempts, both of which went horrifyingly awry. It is undisputed that Petitioner's July 28, 2022 execution of Joe Nathan James lasted more than three hours—one of the longest executions in history. While the full extent of what happened to Mr. James is unknown because he was concealed from public view for much of that time,

eyewitnesses reported that when Mr. James was finally visible to them, he did not appear to be conscious. *See generally* DE 1, 24-1. An independent autopsy revealed that Mr. James’s arm was cut open, in violation of Alabama’s lethal injection protocol, and that he suffered numerous puncture wounds, including in an area where veins would not ordinarily be found, which is also not permitted by the protocol. *Id.* To date, Petitioner has not indicated that any review or investigation is ongoing. *Id.* Instead, Petitioner rushed forward to carry out more executions. *Id.*

On September 22, 2022, Petitioner tried and failed to execute Alan Miller, who has provided a first-hand account of his ordeal by way of his own lawsuit. *See Miller v. Hamm*, No. 2:22-cv-506-RAH, Doc. No. 79-1 (M.D. Ala. Oct. 6, 2022). According to Mr. Miller, he was strapped to a gurney in a stress position with his arms outstretched and over his head while three men in scrubs poked, prodded, and punctured his arms, hands, and feet for nearly two hours, resulting in what he described as “excruciating” pain. *Id.* ¶¶ 112–29. The execution gurney was then lifted to an upright position so that Mr. Miller was left hanging vertically in a crucifixion position—with his chest and outstretched arms strapped to

the gurney—for 20 minutes while blood leaked from his wounds, which seemingly served no purpose, and was not permitted by the protocol. *Id.*

¶ 134. Then just before midnight, an Alabama Department of Corrections (ADOC) employee told Mr. Miller that his execution had been “postponed,” and he was taken to the medical unit where ADOC documented a “body chart” exam but offered no medical assistance for Mr. Miller’s pain. *Id.* ¶¶ 135, 140.

Once again, Petitioner has offered no indication that he is taking steps to review what happened in the Miller execution attempt and prevent similar occurrences. Instead of taking reasonable steps to understand why its two previous execution attempts have resulted in hours of gratuitous suffering, the State of Alabama is speeding ahead to execute Mr. Smith and moot his claim, thereby avoiding any need to provide condemned individuals like Mr. Smith and the citizens of Alabama—in whose name these executions are being carried out—answers about what goes on behind the curtain in its execution chamber.

As the Eleventh Circuit clearly appreciated, the district court’s dismissal of Mr. Smith’s complaint was erroneous, and his allegations

state a plausible claim. Alabama cannot be permitted to immediately execute Mr. Smith by lethal injection to prevent him from presenting his viable claim challenging that method of execution.

BACKGROUND

A. Mr. Smith's Complaint Expressly Sought Injunctive Relief.

As the district court has already concluded, Mr. Smith's claims are premised on a series of protocol violations during the July 28, 2022 execution of Joe Nathan James and the more recent attempted execution of Alan Miller. *See* DE 33 at 8–9. Thus, the earliest Mr. Smith could have brought his claim is shortly after July 28, 2022, which is what he did by filing his complaint on August 18, 2022, before any execution date had been set for him. In his complaint, Mr. Smith sought, among other things, an injunction preventing the State from executing him by lethal injection absent a change in Alabama's lethal injection protocol that would reduce the intolerable risk of torture, cruelty, or substantial pain. *See* DE 1. In other words, despite ADOC's repeated (and wrong) assertions to the contrary, Mr. Smith has been seeking injunctive relief since the day he filed his complaint.

That complaint alleged, *inter alia*, that his execution by lethal injection would subject him to an intolerable risk of torture, cruelty, or substantial pain in violation of the Eighth Amendment based on ADOC's recent deviation from its protocol when it executed Mr. James three weeks earlier on July 28, 2022. *Id.* ¶¶ 3–5, 31–53, 80–89. In particular, “during the three hours of the [execution] process that was not open to the public, ADOC strapped Mr. James to a gurney and poked, prodded, and cut him attempting to access a vein for intravenous injection of the lethal drug cocktail.” *Id.* ¶ 35; *see also id.* ¶¶ 4–5.

Mr. Smith additionally alleged that results of an independent autopsy revealed that “ADOC staff attempted a cutdown procedure,” which is an emergency surgical procedure to “expose[] a patient’s vein after applying local anesthesia when rapid access is required for intravenous therapy and other less-invasive procedures have failed.” *Id.* ¶ 36. The independent autopsy “further revealed evidence that Mr. James was administered an intramuscular injection” to sedate him, which is consistent with reports that, after his three-hour ordeal, when he became visible to public observers, “Mr. James did not open his eyes or move and did not respond when asked if he had any last words.” *Id.*

¶¶ 39–40. Neither a “cutdown” procedure nor intramuscular injections are permitted by the protocol. DE 12-1, Ex. A.

Moreover, the protocol authorizes only two methods for establishing IV access: the “standard” method and a “central line method.” DE 24-1 ¶¶ 22–23. The protocol specifies that “[t]he standard procedure for inserting IV access will be used,” but “[i]f the veins are such that intravenous access cannot be provided, [redacted] will perform a central line procedure.” *Id.* ¶ 23.¹ The Protocol does not permit any other procedure to establish IV access. *Id.* ¶ 22; *see also* DE 12-1, Ex. 1, Annex C. Accordingly, if the IV team is unable to obtain IV access through the standard procedure, it should use a central line procedure, and if that procedure is not feasible, then the execution attempt should stop. *See id.* In other words, continuing to poke and jab an inmate for hours using the standard procedure—particularly without ever attempting the central line procedure—is a violation of the protocol. *Id.*

¹ Central line placement requires “more equipment, time, and expertise” than a standard IV procedure, and involves inserting a catheter through the skin and into deeper and larger veins using a guidewire. *See* Doc. 24-1, Ex. C at 4–5. In medical practice, ultrasound machines are used to allow proper placement of central lines. *Id.* at 8.

After the execution, ADOC offered only the vague statement that its “execution team strictly followed the established protocol” and “admitted that it ‘cannot confirm that’ Mr. James was fully conscious when he was executed.” *Id.* ¶¶ 42, 45. But “ADOC did not provide any information about what steps it took to establish an intravenous line, what complications arose that prevented it from doing so for more than three hours, how many attempts it made to establish an intravenous line, whether the process caused bleeding or any other physical or emotional harm to Mr. James, whether the ADOC execution team included people qualified and/or trained to perform the various procedures on Mr. James, whether qualified medical professionals were on hand to perform or supervise those procedures, or anything else about what transpired during those three hours.” *Id.* ¶ 43. Nor has “ADOC []or any State representative . . . publicly indicated that any review or other investigation, much less an independent one, of ADOC’s lethal injection process . . . is underway or contemplated.” *Id.* ¶ 52. Mr. Smith’s complaint further alleged that, as a matter of law, nitrogen hypoxia is an available and feasible method of execution that would reduce the intolerable risk created by ADOC’s implementation of its lethal injection

protocol. *See id.* ¶ 54 (citing *Price v. Dunn*, 920 F.3d 1317, 1328–29 (11th Cir. 2019)).

Since filing his complaint on August 18, 2022, Mr. Smith has diligently pursued his claims. After Mr. Smith filed his complaint, Petitioner moved to dismiss the complaint for failure to state a claim. On September 30, 2022, while that motion was pending, the Alabama Supreme Court set November 17, 2022 as Mr. Smith’s execution date. DE 13. On October 11, 2022, seven business days after the Alabama Supreme Court set an execution date, Mr. Smith filed a motion asking the district court to order expedited discovery and set a scheduling order that would allow a preliminary injunction motion to be decided in advance of the scheduled execution date. DE 17. At the same time, Mr. Smith served discovery requests on Petitioner. That same day, the district court ordered the parties to be prepared to address the motion for scheduling order on October 13, 2022, during a hearing that had already been scheduled on Petitioner’s pending motion to dismiss. DE 18. At that hearing, counsel for Mr. Smith stated his intent to file a preliminary injunction motion by October 19, 2022. DE 32 at 48. The court also discussed setting a hearing on November 4th, which would leave “time

for somebody to file an appeal if they want to on it.” *Id.* at 49–50. But none of that came to pass: one business day after the hearing, the court dismissed Mr. Smith’s complaint with prejudice, thereby mooting his discovery requests and his request to set a scheduling order for briefing and argument on a preliminary injunction motion. DE 22, 23.

B. Mr. Smith Diligently Sought to Overturn The District Court’s Incorrect Dismissal of his Complaint with Prejudice.

Three business days after the district court’s order dismissing the complaint, Mr. Smith filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59. DE 24. Among other things, Mr. Smith argued that the district court erred in dismissing his Eighth Amendment claim as untimely and requested leave to amend the complaint. *Id.* His motion included a proposed amended complaint that further detailed the bases for his claims and attached declarations from three physicians supporting those allegations. See DE 24-1. The proposed amended complaint also included allegations pertaining to ADOC’s failed attempt to execute Alan Miller on September 22, 2022, which happened after Mr. Smith had filed his original complaint. *Id.* For example, as Mr. Miller alleged in his own separate lawsuit, he was strapped to a gurney in a stress position for two hours while three men

in scrubs punctured his arms, hands, and feet like a pincushion. *Id.* In light of his pending execution date, Mr. Smith requested expedited consideration of his motion. *See* DE 24.

Three weeks later, at 4:53 pm CST on November 9, 2022 (one week before the scheduled execution), the district court entered an order agreeing with Mr. Smith that his Eighth Amendment claim was timely, contrary to its previous order dismissing the claim. DE 33. But it nonetheless concluded that Mr. Smith had not provided enough detailed allegations about what happened outside of public view in the other executions to state a claim under the Eighth Amendment. *Id.* Mr. Smith appealed the following morning, and given the imminent execution date, requested that the Eleventh Circuit set an expedited briefing schedule and stay the execution pending its resolution of the appeal.

C. The Eleventh Circuit’s Reversed of the District Court’s Dismissal.

Only hours ago, the Eleventh Circuit reversed the district court’s judgment dismissing Mr. Smith’s complaint with prejudice. *See* Ex. A. The Eleventh Circuit concluded, upon reviewing the proposed amended complaint *de novo*, that Mr. Smith has pleaded sufficient facts “to plausibly support an Eighth Amendment method-of-execution claim that

is not barred by the applicable statute of limitations” that is not moot. *Id.* at 10. The court found that Mr. Smith’s factual allegations “show a pattern of difficulty by ADOC in achieving IV access with prolonged attempts.” *Id.* at 12. It further concluded that Mr. 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.” *Id.* at 13-14. It further noted plausible allegations (supported by an expert declaration) of other issues with Alabama’s implementation of lethal injection, including that members of the IV team likely are not well trained. *Id.* at 12-13. It also held that Mr. Smith’s claim regarding the extreme difficulty of access veins accrued at the “emergence of ADOC’s pattern of superadding pain through protracted efforts to establish IV access in the two previous execution attempts,” and that the pattern “emerged at the onset of Miller’s attempted execution.” *Id.* at 14. It further reaffirmed its statement in *Price* that that nitrogen hypoxia is a feasible and available method of execution as a matter of law, despite the State’s attempt to argue that “as a matter of fact,” nitrogen hypoxia is unavailable because it has failed to develop a protocol. *Id.* at 14.

D. Mr. Smith Immediately Sought A Stay So He Could Pursue His Claim.

Immediately after this Court's ruling, Mr. Smith sought a stay of execution in the district court until the court could rule on a preliminary injunction. As Mr. Smith argued in his motion for a stay, he filed his complaint in this action three months ago. At that time, there was no execution scheduled and no basis to move for a stay of execution. When the Alabama Supreme Court set an execution date on September 30, Defendant's motion to dismiss was almost fully briefed. After the court scheduled oral argument on the motion to dismiss, Mr. Smith served discovery and moved to expedite discovery and set a scheduling order for Mr. Smith's anticipated preliminary injunction motion. At oral argument, the district court discussed a schedule for Mr. Smith's anticipated preliminary injunction motion that would have led to an evidentiary hearing on November 4.

That schedule became moot when the district court dismissed Mr. Smith's complaint with prejudice without an opportunity to amend on October 16, 2022. On October 19, Mr. Smith moved to alter or amend the judgment under Rule 59(e), including on the ground that the district court ignored his request to amend his complaint. On November 9, the

district court denied Mr. Smith’s motion even though it conceded that the amended complaint would not have been subject to dismissal on statute of limitations grounds—the stated basis for dismissal of the original complaint.

For those reasons, through no fault of Mr. Smith, since he filed his complaint three months ago, he has had no opportunity to file a preliminary injunction motion or otherwise to develop his case through discovery, even though critical facts in support of his allegations are in the exclusive possession of ADOC and its agents.

Nevertheless, the district court denied both the stay request and the preliminary injunction motion. Mr. Smith sought a stay pending appeal from the Eleventh Circuit Court of Appeals, which was granted.

ARGUMENT

The standard of review on an application to vacate a stay of execution is highly deferential. A stay of execution is an equitable remedy that lies within a court’s discretion. *See Kemp v. Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). “Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision.” *Dugger v.*

Johnson, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting); *see also Doe v. Gonzales*, 546 U.S. 1301, 1307, 1309 (2005) (Ginsburg, J., in chambers) (denying application to vacate stay entered by court of appeals “[a]lthough there is a question as to the likelihood of ... success on the merits” because “the applicants have not shown cause so extraordinary as to justify this Court’s intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding”) (internal quotation marks omitted).

II. Petitioner Has Not and Cannot Justify the Extraordinary Relief of Vacating the Eleventh Circuit’s Stay.

Petitioner’s repeated attempts to paint Mr. Smith as dilatory were rejected by the Eleventh Circuit, and should be reject here. As the Eleventh Circuit concluded:

On August 18, 2022, Kenneth Eugene Smith sued the Commissioner of the Alabama Department of Corrections (ADOC). Within his complaint, he requested a preliminary injunction prohibiting ADOC from executing him by lethal injection. When Smith filed his complaint, there was no active death warrant. But on September 30, 2022, the Supreme Court of Alabama set his execution date for Thursday November 17, 2022.

As a result, Smith then sought to obtain a briefing schedule and date for oral argument for his request for preliminary injunction. But then the district court dismissed Smith’s complaint with prejudice. Smith has continuously sought to

rectify that dismissal since then and has pursued his claims diligently through the district court and here. We further conclude that the other factors favor granting a stay.

Ex. B at 1. Moreover, Judge Grant, who dissented from the majority opinion on whether Mr. Smith's Eighth Amendment claim should have been dismissed, "agree[d] that a temporary stay of the execution is appropriate" in light of the majority's decision. *Id.* at 3.

The Eleventh's Circuit's ruling—premised on both the majority opinion holding that Mr. Smith stated an Eighth Amendment claim and his diligence in pursuing that claim—was well within its discretion, and premised on the obvious, common sense fact that Mr. Smith has sought injunctive relief from day one: it is apparent on the face of his complaint, DE 1, which expressly requested entry of "a preliminary and permanent injunction prohibiting Defendant from executing Plaintiff by lethal injection" in the prayer for relief. A request that was so apparent, in fact, that his complaint was docketed as both a complaint and a "motion for preliminary injunction." *See* DE 1. And he has diligently pursued that relief ever since.

Petitioner's arguments to the contrary are based on the notion that Mr. Smith should have sought a stay in the district court before the Alabama Supreme Court set an execution date when there was nothing to stay or after his complaint was improperly dismissed when there was no live claim in which to seek equitable relief. Mr. Smith is not at fault for the improper dismissal of his complaint. Nor is he at fault for any delay.

Moreover, Defendant is in no position to challenge the evidence Mr. Smith has submitted when he has been improperly denied the opportunity for discovery because after his complaint was improperly dismissed. That is especially true where critical facts are in the sole possession of the Defendant. As this Court previously has held, "the lack of factual development in this record is only exacerbated by Alabama's policy of maintaining secrecy surrounding every aspect of its three-drug execution method." *Arthur v. Thomas*, 674 F.3d 1257, 1261 (11th Cir. 2012). Defendant should not be rewarded for running out the discovery clock.

Nor is obtaining discovery or developing evidence a prerequisite for a stay of execution. For example, In *Hill v. McDonough*, this Court

granted a stay of execution pending appeal. 547 U.S. 573, 578 (2006) (citing *Hill v. Crosby*, 546 U.S. 1158 (2006)). The *Hill* plaintiff had brought a Section 1983 action in the district court four days before his scheduled execution that sought an injunction preventing his execution under the State’s current method. *Id.* The district court dismissed the complaint for lack of jurisdiction the following day, and the Eleventh Circuit affirmed on the day of the scheduled execution. *See Hill v. Crosby*, No. 4:06-cv-032, 2006 WL 167585 (N.D. Fla. Jan. 21, 2006); *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006). That same day, plaintiff petitioned for certiorari to this Court, which issued a temporary stay of execution, and later continued the stay pending resolution of the appeal. *Hill*, 547 U.S. at 578.

Here, as in *Hill*, Mr. Smith’s complaint sought an injunction “prohibiting Defendants from executing Plaintiff by lethal injection absent a change in Defendants’ lethal injection process” *Compare* DE 1 at 18 *with Hill*, 547 U.S. at 578. Also as in *Hill*, due to the district court’s dismissal of the complaint, there was no development or presentation of evidence. But this Court nevertheless stayed his execution pending the resolution of his appeal. *See Hill*, 547 U.S. at 578.

Accordingly, the Eleventh Circuit's decision to grant a stay was well within its discretion.

The remainder of Petitioner's motion recycles the same arguments the Eleventh Circuit correctly rejected hours ago. There is no basis for Petitioner's extraordinary request, much less a clear abuse of discretion. To the contrary, the Eleventh Circuit acted well within its discretion in finding that Mr. Smith has demonstrated a likelihood of success in his appeal and that the equities favor a stay.

III. The Equities Weigh In Favor of Upholding the Stay.

Contrary to Petitioner's position, Mr. Smith's request for a stay of execution was not an attempt to manipulate the system. As detailed above, Mr. Smith's Eighth Amendment claim did not arise until July 28, 2022, at the earliest, (according to the Eleventh Circuit, it arose with Mr. Miller's attempted execution on September 22, 2022) and Mr. Smith has diligently pursued that claim ever since.

Indeed, much of the alleged delay about which Petitioner now complains largely resulted from the time it took for the district court to resolve Petitioner's own motion to dismiss. When the Alabama Supreme Court issued the death warrant on September 30, 2022, a motion to

dismiss was already pending. Nevertheless, seven business days later, Mr. Smith filed a motion asking the district court to order expedited discovery and enter a schedule to allow a preliminary injunction motion to be heard in sufficient time before the execution. DE 17. But he was ultimately not allowed to make his preliminary injunction motion because only a few days later, the court dismissed his complaint with prejudice. DE 22, 23. Mr. Smith promptly filed a meritorious motion to alter or amend the judgment and expressly sought expedited consideration. DE 24. Nevertheless, the district court's decision was not issued until three weeks later, DE 33, leaving Mr. Smith with only one week to pursue appellate relief.

It is clear that Mr. Smith brought his Eighth Amendment claim soon after it arose, and any delay in the claim reaching the appellate courts is because of the time it has taken for courts to consider and rule on Petitioner's motion to dismiss, demonstrating that the stay of execution pending appeal was appropriate. Indeed, this Court has granted a stay of execution to allow consideration of meritorious arguments on appeal even when the suit was brought just days before the scheduled execution. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 578

(2006) (citing *Hill v. Crosby*, 546 U.S. 1158 (2006)) (granting stay pending appeal where petitioner had filed his 42 U.S.C. § 1983 complaint in the district court four days before his scheduled execution).

Moreover, Mr. Smith will suffer irreparable harm if this Court vacates the Eleventh Circuit’s stay of his execution. Failure to issue a stay risks “foreclos[ing] . . . certiorari review by this Court,” which itself constitutes “irreparable harm.” *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984); accord, e.g., *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989). In fact, this Court has granted stay applications to prevent far less severe consequences, ranging from the chilling of witness testimony to the reduction of commercial competition. See, e.g., *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010); *California v. American Stores Company*, 492 U.S. 1301, 1304, 1302 (1989). Such harms pale in comparison to the irreparable harm that would result if the State of Alabama executed Mr. Smith in a manner that violated the Eighth Amendment. Allowing Petitioner to proceed towards executing Mr. Smith while a viable Eighth Amendment claim remains pending risks “effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari.” *Garrison*, 468 U.S. at 1302. The state would not

“be significantly prejudiced by an additional short delay,” and a stay would serve both the public interest and judicial economy. *Id.*

Finally, the public interest is not served by executing individuals before they have had the opportunity to avail themselves of the legal process to challenge the legality and constitutionality of their executions. Instead, the public interest lies in ensuring that agencies act in accordance with the Constitution and federal law. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). This interest is only heightened in the context of executions. The public will be ill-served if Mr. Smith is executed before being given a full opportunity to test the constitutionality of Alabama’s execution protocol as it is currently being applied. Indeed, this Court has confirmed that brief stays or injunctions—to permit potentially meritorious claims to be adjudicated before prisoners are executed—are warranted under these circumstances. *See Barr v. Roane*, 140 S. Ct. 353 (2019) (Alito, J., respecting the denial of stay or vacatur) (“[I]n light of what is at stake, it would be preferable for the District Court’s decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out.”); *see also Lee*, 2020 WL 3964985, at *3

(Sotomayor, J., dissenting) (noting that “because of the Court’s rush to dispose of this litigation in an emergency posture, there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring”); Order, *In the Matter of the Federal Bureau of Prisons’ Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (per curiam).

This is especially compelling here where Mr. Smith has made every effort to pursue his claims, which he could not possibly have known about until July 28, 2022. What is more, Petitioner’s own history of delay in carrying out executions dwarfs any interest it now claims in timeliness. In 2018, Alabama law was amended to authorize the use of nitrogen hypoxia as a method of execution and to allow condemned persons 30 days to make that election. *See* Ala. Code § 15-18-82.1. Since that time, Alabama has failed to develop any protocol for nitrogen hypoxia. And when the district court below asked for Petitioner’s “official position on nitrogen hypoxia and when is it going to be ready,” Petitioner’s counsel conceded that even more than four years after the legislation authorizing its use, “that is not something we can know right now.” DE 32 at 41. In essence, then, the State of Alabama has issued an indefinite stay of

execution to inmates who chose nitrogen hypoxia in 2018. Alabama’s 4-years-and-counting delay for that set of persons undercuts its current assertion that executions must be carried out immediately, even when substantial issues with its implementation of the protocol have been alleged. *See, e.g., Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) (“the fact that the Government has not – until now – sought to” act “undermines any urgency” to do so now). The Eleventh Circuit Court of Appeals acted well within its discretion to stay the execution pending the disposition of Mr. Smith’s appeal. And for all the State’s grandstanding about the people of Alabama, those people—represented by a jury of Mr. Smith’s peers—voted that he be sentenced to life imprisonment without the possibility of parole.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners’ motion.

Respectfully submitted,

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November 17, 2022

EXHIBIT A

[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

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

22-13781

Opinion of the Court

3

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.

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

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).

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 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.

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.

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).

22-13781

Opinion of the Court

5

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 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 cutdown 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

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."

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 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.

22-13781

Opinion of the Court

7

II.

First, Smith argues that the district court erred in dismissing his Eighth Amendment claim from his original complaint by reshaping 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

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

22-13781

Opinion of the Court

9

argues that the 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

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 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.

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 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

22-13781

Opinion of the Court

11

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 litigation⁸ 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

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).

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 expired.” These factual allegations⁹ 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

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.

22-13781

Opinion of the Court

13

undergone less training and therefore possesses fewer skills than medical professionals who establish IV's regularly.¹¹

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

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

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 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 Eighth Amendment challenge is not plainly time barred.

22-13781

Opinion of the Court

15

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.

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).

22-13781

Grant, J., Dissenting

1

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 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 reframe 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.

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.

22-13781

Grant, J., Dissenting

3

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, 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)).

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.

22-13781

Grant, J., Dissenting

5

* * *

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 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).

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13781-P

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

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

BY THE COURT:

On August 18, 2022, Kenneth Eugene Smith sued the Commissioner of the Alabama Department of Corrections (ADOC). Within his complaint, he requested a preliminary injunction prohibiting ADOC from executing him by lethal injection. When Smith filed his complaint, there was no active death warrant. But on September 30, 2022, the Supreme Court of Alabama set his execution date for Thursday November 17, 2022.

As a result, Smith then sought to obtain a briefing schedule and date for oral argument for his request for preliminary injunction. But then the district court dismissed Smith's complaint with prejudice. Smith has continuously sought to rectify that dismissal since then and has pursued his claims diligently through the district court and here. We further conclude that the other factors favor granting a stay.

Thus, Appellant's Motion for Stay of Execution is GRANTED.

GRANT, Circuit Judge, concurring:

I believe that Smith's Eighth Amendment claim is either mooted by the district court's order requiring strict adherence to the Department's lethal-injection protocol or barred by the statute of limitations, as explained in my dissent to this Court's opinion issued earlier today. *See Smith v. Comm'r, Alabama Dep't of Corr.*, No. 22-13781 (11th Cir. Nov. 17, 2022). But in light of the majority's decision holding that Smith's proposed amended complaint stated a plausible Eighth Amendment claim that was not time barred, I agree that a temporary stay of the execution is appropriate.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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November 17, 2022

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Appeal Number: 22-13846-P
Case Style: Kenneth Eugene Smith v. Commissioner, Alabama Department of Corrections
District Court Docket No: 2:22-cv-00497-RAH

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The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13781-P

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

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

BY THE COURT:

On August 18, 2022, Kenneth Eugene Smith sued the Commissioner of the Alabama Department of Corrections (ADOC). Within his complaint, he requested a preliminary injunction prohibiting ADOC from executing him by lethal injection. When Smith filed his complaint, there was no active death warrant. But on September 30, 2022, the Supreme Court of Alabama set his execution date for Thursday November 17, 2022.

As a result, Smith then sought to obtain a briefing schedule and date for oral argument for his request for preliminary injunction. But then the district court dismissed Smith's complaint with prejudice. Smith has continuously sought to rectify that dismissal since then and has pursued his claims diligently through the district court and here. We further conclude that the other factors favor granting a stay.

Thus, Appellant's Motion for Stay of Execution is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13846-P

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

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

BY THE COURT:

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Thus, Appellant's Motion for Stay of Execution is GRANTED.

GRANT, Circuit Judge, concurring:

I believe that Smith's Eighth Amendment claim is either mooted by the district court's order requiring strict adherence to the Department's lethal-injection protocol or barred by the statute of limitations, as explained in my dissent to this Court's opinion issued earlier today. *See Smith v. Comm'r, Alabama Dep't of Corr.*, No. 22-13781 (11th Cir. Nov. 17, 2022). But in light of the majority's decision holding that Smith's proposed amended complaint stated a plausible Eighth Amendment claim that was not time barred, I agree that a temporary stay of the execution is appropriate.