

Appendix A

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 26-12710

JEFFERY LEE,

Plaintiff-Appellant,

versus

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

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:25-cv-00680-ECM

Before JORDAN, LUCK, and KIDD, Circuit Judges.

BY THE COURT:

Jeffery Lee is scheduled to be executed on September 17, 2026. He brought a successful method-of-execution lawsuit under

42 U.S.C. § 1983, permanently enjoining his execution by nitrogen hypoxia under Alabama's current protocol. Alabama now plans to execute him by lethal injection.

Mr. Lee seeks a stay of his execution. For the reasons which follow, we deny the motion for a stay.

I

In December of 1998, Mr. Lee shot and killed Jimmy Ellis and Elaine Thompson and attempted to kill Helen King during an attempted armed robbery of a pawn shop in Orville, Alabama. *See Lee v. State*, 44 So. 3d 1145, 1148–49 (Ala. Crim. App. 2009). A jury convicted Mr. Lee of capital murder and attempted murder. *See id.* at 1148. By a vote of 7 to 5, the jury recommended that Mr. Lee be sentenced to life in prison without the possibility of parole. *See id.*

The trial court overrode the jury's recommendation and sentenced Mr. Lee to death for the capital offenses. *See id.* Mr. Lee's convictions and sentence of death were affirmed on direct appeal and withstood collateral challenges. *See Lee v. State*, 898 So. 2d 790 (Ala. Crim. App. 2001); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172 (11th Cir. 2013).

A

Before 2018, Alabama law authorized execution by lethal injection or electrocution. *See* Ala. Code § 15-18-82.1(a) (2017). On March 22, 2018, Alabama Governor Kay Ivey signed into law Senate Bill 272, which amended § 15-18-82.1 to include nitrogen hypoxia as an approved method of execution. Alabama took five

26-12710

Order of the Court

3

years to develop a protocol for executions by nitrogen hypoxia—releasing the protocol in August of 2023 and executing the first prisoner by that method in January of 2024.

In September of 2016, before nitrogen hypoxia became an approved method of execution, Mr. Lee had brought an Eighth Amendment challenge under 42 U.S.C. § 1983 to Alabama’s lethal injection protocol. *See Lee v. Dunn*, No. 16-473, 2017 WL 1483530 (S.D. Ala. Apr. 24, 2017) (*Lee I*), *vacated in part*, 731 F. App’x 885 (11th Cir. 2018). But in June of 2018, Mr. Lee elected to be executed by nitrogen hypoxia while reserving his right to challenge the constitutionality of the forthcoming protocol.

Accordingly, Mr. Lee and Alabama jointly moved to dismiss his lethal injection lawsuit without prejudice. The parties represented to the district court that “[b]ecause of [Mr. Lee’s] election, all claims in [Mr. Lee’s] complaint [were] moot because [they] relate[d] to [Alabama’s] current lethal-injection protocol.” *Lee I*, No. 16-473, D.E. 37 at 2. Their motion explained that because Mr. Lee had “elected to be executed by nitrogen hypoxia, rather than lethal injection, pursuant to [§] 15-18-82.1, [Mr. Lee’s] claims and causes of action [were] moot because if he is to be executed, [Alabama] will carry out that execution by nitrogen hypoxia.” *Id.* at 2–3. The district court agreed that the case was moot and granted the joint motion to dismiss pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The dismissal was without prejudice.

B

In August of 2025, Mr. Lee filed this § 1983 action, challenging the nitrogen hypoxia protocol as violative of the Eighth Amendment. The district court held a three-day bench trial, at which it heard the testimony of eleven witnesses and admitted hundreds of exhibits. The court assessed the Eighth Amendment claim under the test set out in *Glossip v. Gross*, 576 U.S. 863, 877–81 (2015), which required Mr. Lee to show (1) that the challenged method of execution presents a substantial risk of severe harm—severe pain over and above death itself, and (2) that there is an alternative method that is feasible, readily implemented, and significantly reduces the risk of harm involved, which Alabama has refused to adopt. *See Lee v. Lovelace*, No. 2:25-CV-680-ECM, 2026 WL 1493098, at *12 (M.D. Ala. May 28, 2026) (*Lee II*).

The district court made extensive factual findings but ultimately concluded that Mr. Lee had not proven that the “nitrogen hypoxia execution protocol causes severe pain or suffering well beyond what’s needed to effectuate a death sentence.” *Id.* at *22 (internal quotation marks and citation omitted). The court declined to reach the second *Glossip* prong and did not decide whether Mr. Lee’s proposed alternative—execution by firing squad—was feasible, readily implemented, or less painful. *See id.*

We reversed and held, based on the district court’s factual findings, that Alabama’s nitrogen hypoxia protocol presented a substantial risk of serious pain and suffering. *See Lee v. Comm’r, Ala. Dep’t of Corr.*, No. 26-11864, 2026 WL 1651147, at *8 (11th Cir. June

26-12710

Order of the Court

5

8, 2026) (*Lee III*). We concluded that Mr. Lee had satisfied the first prong of his Eighth Amendment challenge, and remanded to the district court to address the second prong of *Glossip* based on the evidence presented at trial. *See id.* at *6–*8.

On remand, the district court concluded that Mr. Lee had shown that execution by “firing squad is feasible, readily implemented, and significantly reduces the substantial risk of serious harm posed by the [p]rotocol, and that [Alabama] failed to proffer a legitimate penological reason not to adopt it.” *Lee v. Lovelace*, No. 2:25-CV-680-ECM, 2026 WL 1664095, at *1 (M.D. Ala. June 9, 2026) (*Lee IV*). Based on its conclusion that Mr. Lee satisfied the two prongs of his Eighth Amendment challenge, the court entered a permanent injunction prohibiting Alabama from executing him using the nitrogen hypoxia protocol. *See id.* at *11.

Originally, Alabama had planned to execute Mr. Lee by nitrogen hypoxia during a 30-hour time frame, beginning at midnight on Thursday, June 11, 2026, and ending at 6:00 a.m. on Friday, June 12, 2026. It sought a stay of the district court’s permanent injunction to proceed with this execution date.

We denied Alabama’s stay motion. *See Lee v. Comm’r, Ala. Dep’t of Corr.*, No. 26-12027, 2026 WL 1741802, at *8 (11th Cir. June 10, 2026) (*Lee V*). So did the Supreme Court. *See Lovelace v. Lee*, No. 25A1381, ___ S. Ct. ___, 2026 WL 1694504, at *1 (U.S. June 11, 2026) (mem.). The parties then jointly filed a motion for voluntary dismissal of Alabama’s appeal, which we granted.

C

On June 12, 2026, Alabama filed an expedited renewed motion in the Alabama Supreme Court to authorize Mr. Lee's execution by lethal injection following the entry of the permanent injunction. The Alabama Supreme Court granted Alabama's motion, and the Governor then set a 30-hour window for Mr. Lee's execution to occur, beginning at midnight on September 17, 2026, and expiring at 6 a.m. on September 18, 2026.

Mr. Lee moved the district court to amend the scope of the permanent injunction related to nitrogen hypoxia pursuant to Federal Rules of Civil Procedure 52(b) and 59(e). Mr. Lee asked the court to amend its earlier order to declare that Alabama was judicially or equitably estopped from executing him by lethal injection. He also asked the court to modify its order to remove any language suggesting that Alabama could, consistent with Alabama law, execute him by lethal injection or electrocution.

The district court denied Mr. Lee's motion. It assumed without deciding that Mr. Lee had successfully shown that the factors in *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), weighed in favor of applying judicial estoppel and that he had satisfied the equitable estoppel elements. The court then exercised its discretion to decline to estop Alabama from executing Mr. Lee by lethal injection based on the totality of the circumstances.

Mr. Lee appealed and filed an emergency motion to stay his execution by lethal injection. We address only the stay motion in this order.

26-12710

Order of the Court

7

II

“We review the denial of a Rule 59 motion for abuse of discretion.” *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (citing *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006)). We also review a Rule 52 motion to amend the district court’s findings of fact and conclusions of law for abuse of discretion. *See Trigo v. Fed. Deposit Ins. Corp.*, 847 F.2d 1499, 1504 (11th Cir. 1988). A court abuses its discretion when, for example, it commits a “clear error of judgment[.]” *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc) (citation omitted).

“Because judicial estoppel is an equitable doctrine, we review the district court’s decision to apply the doctrine for abuse of discretion.” *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 n.4 (11th Cir. 2017) (en banc) (first citing *New Hampshire*, 532 U.S. at 750, and then citing *Talavera v. Sch. Bd. of Palm Beach Cnty.*, 129 F.3d 1214, 1216 (11th Cir. 1997)). Though we have cases stating that the application of equitable estoppel is subject to de novo review, *see Doe v. Garrett*, 903 F.2d 1455, 1458 (11th Cir. 1990), the parties agree that the abuse of discretion standard governs our review of the district court’s order denying Mr. Lee’s motion to amend the scope of the permanent injunction.

III

In deciding whether to grant a stay, we consider the following four factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Mr. Lee argues that a stay is warranted because the district court abused its discretion in declining to apply the doctrines of judicial and equitable estoppel to amend its permanent injunction. He relies on the following language of the joint motion to dismiss in his lethal injection lawsuit: “Plaintiff’s claims and causes of action are now moot because if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia.” *Lee I*, No. 16-473, D.E. 37 ¶ 6.¹

A

Mr. Lee has not shown a substantial likelihood that the district court abused its discretion in deciding not to amend its permanent injunction. A permanent injunction entered after a bench trial must be supported by factual findings. *See* Fed. R. Civ. P. 52(a), 65(d). *Cf. Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 394 n.4 (1997) (“Any injunction must be justified by the elements that support it.”) (emphasis in original). As a general matter, a “remedy

¹ As things stand, Mr. Lee has not attempted to show that Alabama’s lethal injection protocol violates the Eighth Amendment.

26-12710

Order of the Court

9

must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

In his amended complaint in this case, Mr. Lee brought one § 1983 claim to “challenge[] the method and means by which [Alabama] intend to execute him—by nitrogen hypoxia—and [sought] declaratory and injunctive relief to prevent [Alabama] from violating the federal prohibition on cruel and unusual punishment.” *Lee II*, No. 2:25-CV-680, D.E. 40 ¶ 4. He sought an injunction that would prevent the defendants from executing him “using any method other than one of the alternatives provided by his attorneys.” *Id.* at 23. He did not seek any other relief specifically related to lethal injection.

In his trial brief, Mr. Lee did not indicate that he would present any evidence related to execution by lethal injection. Indeed, his witnesses’ testimony referenced the availability of lethal injection as an execution method in Alabama only in passing. In his proposed findings of fact and conclusions of law, Mr. Lee did not ask the district court to make any findings related to execution by lethal injection. Nor did he propose injunctive relief related to lethal injection.

Nevertheless, after we remanded in *Lee III* for findings on the second *Glossip* prong, Mr. Lee asked the district court to prevent Alabama from executing him through any method other than those proposed by his attorneys. As the court explained, Mr. Lee wanted “to permanently enjoin [Alabama] from executing him by

nitrogen hypoxia or any other method other than firing squad.” *Lee IV*, 2026 WL 1664095, at *9 (internal quotation marks omitted, emphasis omitted, and alterations adopted). It continued:

Alabama law authorizes two other methods of execution: lethal injection and electrocution. Here, [Mr.] Lee challenged only the ADOC’s nitrogen hypoxia protocol—not lethal injection or electrocution. After carefully considering traditional equitable principles, and given the [c]ourt’s legal conclusions, the [c]ourt concludes that a permanent injunction should issue prohibiting [Alabama] from executing [Mr.] Lee using the [p]rotocol.

Id. (internal citations omitted).

In his motion to amend, Mr. Lee sought to relitigate that matter. But he has not shown that Rules 52 and 59 allow, much less demand, such relitigation. *See Arthur*, 500 F.3d at 1343 (“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.”) (alterations adopted, internal quotation marks and citation omitted).

B

Even if we accept the premise that a party can seek equitable post-judgment relief untethered to the facts proven at trial, Mr. Lee has not shown a substantial likelihood that the district court abused its discretion in applying the estoppel doctrines.

26-12710

Order of the Court

11

Mr. Lee first argues the district court erred by considering that the essential facts had changed since the joint motion to dismiss in 2018 because, in his view, his successful challenge to nitrogen hypoxia is not the type of changed circumstance which makes judicial or equitable estoppel inapplicable. He further asserts that the court abused its discretion in declining to apply equitable estoppel by focusing on whether Alabama anticipated its later change in position, rather than on the material facts that it knew at the time.

In *New Hampshire*, the Supreme Court suggested that judicial estoppel may not apply where the party's changed position was "the result of a change in facts essential to the prior judgment." 532 U.S. at 756. Mr. Lee cites only non-binding authority to support his argument that a later successful litigation position cannot constitute a change in essential facts. See Br. for Appellant at 18–19 (first citing *Henry v. Nationwide Ins. Co.*, No. 06-0612-CG-M, 2007 WL 9717743, at *5 (S.D. Ala. Nov. 5, 2007), and then citing *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797–98 (8th Cir. 2014), and arguing that both cases rejected changed circumstances argument where the later litigation position rested on facts known earlier).

The estoppel analysis in *Henry* lacks persuasive value because it relies on the precedent that we overruled in *Slater*, 871 F.3d at 1189. See *Henry*, 2007 WL 9717743, at *5. As for *Spencer*, it held that a district court, applying Iowa law, did not abuse its discretion in failing to "give enough weight to changed circumstances during the course of the litigation[.]" 757 F.3d at 797. *Spencer* did not pronounce an absolute rule under federal estoppel law, and, even if it

did, the district court here would not be bound by it. *See id.* The court therefore did not unreasonably or incorrectly apply the law by concluding that the events of the intervening six years—including Alabama’s development of the nitrogen hypoxia protocol and Mr. Lee’s successful constitutional challenge to that protocol—constituted a change in circumstances.

The district court also did not make clearly erroneous factual determinations. First, after execution by nitrogen hypoxia became statutorily authorized in Alabama, inmates sentenced to death were given one opportunity to elect to be executed by that method. It was not unreasonable for the court to conclude that, when Alabama signed onto the joint dismissal in Mr. Lee’s earlier lawsuit, it did so with the understanding that it would be able to develop a constitutional protocol and lawfully carry out Mr. Lee’s death sentence. Second, the court did not have to give dispositive weight to Mr. Lee’s reservation of his right to challenge the nitrogen hypoxia protocol. Instead, the court considered that Alabama understood that Mr. Lee chose execution by nitrogen hypoxia, as signified by his election, and that many of the other facts, such as the specifics of the protocol, were unknown to it at the time.

C

Finally, Mr. Lee argues that the district court erred in failing to give meaningful weight to its finding in *Lee IV* that the firing squad is a feasible and readily implemented alternative. But even Mr. Lee agrees that *Glossip*, 576 U.S. at 877, and its progeny do not

26-12710

Order of the Court

13

automatically entitle a prevailing plaintiff to execution by his proposed alternative method. The court considered its finding regarding the implementation of the firing squad and nevertheless concluded that Alabama is not currently prepared to use that method. That determination was likely not an abuse of discretion.

“The abuse of discretion standard allows a range of choices for the district court, so long as any choice made by the court does not constitute a clear error of judgment.” *Collegiate Licensing Co. v. Am. Cas. Co. of Reading*, 713 F.3d 71, 77 (11th Cir. 2013) (citing *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005)). In this case, Mr. Lee asks us to apply estoppel differently than the district court did. But Mr. Lee sought relief through an avenue where the court has considerable discretion, and absent an unreasonable conclusion, “we will not reverse . . . even if we might have reached a different decision.” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005) (citations omitted). *See also Slater*, 871 F.3d at 1176 (explaining that “a district court *may* [not *must*] apply judicial estoppel . . . if it finds that the plaintiff intended to make a mockery of the judicial system”) (emphasis added); *Lengen v. Dep’t of Transp.*, 903 F.2d 1464, 1468 (11th Cir. 1990) (stating that “[t]he decision regarding whether to grant equitable relief and what equitable relief to grant lies in the discretion of the trial court”) (citation omitted).

We therefore conclude that Mr. Lee has not shown a substantial likelihood of success on the merits.²

² Because we do not think that it is likely that the district court abused its discretion based on Mr. Lee’s arguments on appeal, we express no opinion on

D

Although his execution is irreparable, *cf. Moody v. Warden, Holman CF*, 887 F.3d 1281, 1286 (11th Cir. 2018), Mr. Lee does not presently challenge the lethal injection protocol as unconstitutional. *See Humphreys v. Comm’r, Ga. Dep’t of Corr.*, 161 F.4th 1300, 1312 (11th Cir. 2025) (“The irreversible nature of the death penalty cannot, on its own, justify a stay.”). And “[b]oth the [s]tate and the victims of crime have an important interest in the timely enforcement of a sentence.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)).

On this record, the harm to Mr. Lee does not overcome his failure to demonstrate likelihood of success on the merits. And the other stay factors do not weigh heavily in his favor.

IV

Mr. Lee’s motion for a stay of execution is denied.

STAY DENIED.

the other issues raised by Alabama. For example, we do not address whether “the doctrine of equitable estoppel can be applied against the government” under these circumstances. *See Tovar-Alvarez v. U.S. Att’y Gen.*, 427 F.3d 1350, 1353–54 (11th Cir. 2005) (citation omitted).