

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10473
Non-Argument Calendar

D.C. Docket No. 2:17-cv-02083-KOB

DOYLE LEE HAMM,

Plaintiff - Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN HOLMAN CF,
WARDEN DONALDSON CF

Defendants - Appellants,

ALABAMA, ATTORNEY GENERAL,

Defendants.

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

ORDER:

Before TJOFLAT, JORDAN, and ROSENBAUM, Circuit Judges.

Appellee Doyle Lee Hamm is an Alabama inmate who has been on death row since 1990. On December 13, 2017, the Alabama Supreme Court, pursuant to a motion from the Alabama Department of Corrections and the Alabama Attorney General's office (collectively, "Appellants"), set his execution for February 22, 2018. Also on December 13, 2017, Hamm filed suit against Appellants under 28 U.S.C. § 1983, alleging that executing him by intravenous lethal injection would amount to cruel and unusual punishment as applied to him. In his complaint, Hamm alleged that he suffers from lymphoma (a type of blood cancer) and lymphadenopathy (enlarged lymph nodes), which he says have rendered his veins inaccessible for an injection without a complicated procedure carrying a significant risk of "a bloody and excruciating experience." Hamm asked the district court to enjoin Appellants from executing him intravenously. He proposed instead that they execute him by injecting a lethal drug cocktail into a nasogastric tube ending in his stomach. Hamm has not argued at any point that he should not be executed, only that it would violate his Eighth Amendment rights to be executed via intravenous injection specifically.

On January 9, 2018, Appellants filed a motion seeking dismissal of the complaint or, in the alternative, summary judgment. After Hamm amended his

complaint one week later, Appellants then moved for summary judgment once again. Appellants argued the following: (1) Hamm unreasonably delayed filing suit because he knew about his lymphatic cancer well before he filed suit; (2) Hamm's suit is barred by the statute of limitations; and (3) Hamm would lose on the merits, in any case.

On February 6, 2018, after holding a hearing, the district court denied summary judgment on the grounds that genuine disputes of material fact exist over whether intravenous injections would likely subject Hamm to cruel and unusual punishment in violation of his Eighth Amendment rights. The district court observed that while Hamm had not definitively established that execution by intravenous injection would subject him to excruciating pain and suffering, he lacks full access to his own medical information because Appellants continue to exercise complete control over it. The court therefore stated its intention to order an independent medical examiner to conduct a full examination of Hamm and report back to the court. The district also *sua sponte* stayed Hamm's execution until the examination could be completed.

Appellants have filed an emergency motion to vacate stay of execution.

I.

We review for abuse of discretion a stay of execution issued by a district court. *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1321 (11th Cir. 2000).

Appellants raise two arguments for why the stay of execution should be vacated.

First, Appellants contend Hamm engaged in unreasonable delay by waiting to file his section 1983 lawsuit “until nearly six months after the State initially filed an execution motion, a year after his federal habeas proceedings concluded, twenty-seven years after his direct appeal became final, and over fifteen years after Alabama adopted lethal injection as its primary method of execution.” We disagree.

Hamm’s lawsuit raises an as-applied challenge to his method of execution that he contends did not ripen until his lymphadenopathy worsened in the spring of 2017 at the earliest.¹ And indeed, evidence in the record supports the notion that Hamm’s Eighth Amendment rights did not stand in jeopardy before the spring of 2017. The district court concluded that if his lymphadenopathy in fact did not materially worsen until then, Hamm did not engage in unreasonable delay by filing suit in December of 2017, the same day that the state of Alabama announced his scheduled execution date of February 22, 2018. That is enough, as the district court correctly pointed out, to preclude summary judgment. The district court did not abuse its discretion by declining to conclude on this record that Hamm’s

¹ The district court found a genuine issue of material fact as to whether Hamm’s condition worsened recently enough to keep him from filing his lawsuit in good faith before he did. Because the question is not before us, we must assume for the purpose of this appeal that a genuine dispute of fact does indeed exist.

actions amounted to unreasonable delay.

Appellants respond that Hamm “sat on his hands and did not make any move to file a federal lawsuit until December 13,” despite the fact that the State of Alabama first sought an execution date from the Alabama Supreme Court on June 23, 2017. Again, the summary-judgment record—which must be viewed in the light most favorable to Hamm—contradicts Appellants’ assertions.

For starters, the record shows Hamm actively attempted to acquire information about his health both before and during the six months intervening between Alabama’s first request that the Alabama Supreme Court issue an execution date for Hamm and the Alabama Supreme Court’s actual issuance of the execution date. And of course, Hamm needed the information about his health in order to file a section 1983 lawsuit in good faith.

With respect to Hamm’s efforts, as the district court noted, Hamm sought medical records from the state in January of 2017 but did not receive them until six months later. He also sought a medical examination from Dr. Mark Heath of Columbia University as early as August 6, 2017, to determine how accessible his veins in fact were. But Appellants did not permit the examination until September 23, 2017—and only then after being ordered to do so by the Alabama Supreme Court.

Additionally, it was not unreasonable for Hamm to attempt to exhaust his

state remedies by completing litigation on the State's motion to set his execution date before filing his section 1983 lawsuit here. That state-court litigation ended on December 13, 2017, when the Alabama Supreme Court set a date for Hamm's execution. Hamm did not wait even one full day to then file the present lawsuit. As the district court pointed out, the Alabama Supreme Court requested he respond to the State's motion in that litigation. It also ordered his September 2017 medical examination and sought multiple status updates from him. The district court did not abuse its discretion in declining to fault Hamm on this record for concluding the state-court litigation process before filing his federal lawsuit. In short, Hamm did not engage in unreasonable delay from the time he first had notice of a cause of action.

Nor, as Appellants suggest, does *Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016), require a different result. In *Brooks*, we denied a stay of execution sought by an inmate "eleven weeks and four days prior to his . . . execution date." Appellants argue that since Hamm's suit here left only ten weeks to litigate his claims, it is foreclosed by *Brooks*. They are incorrect. True, in *Brooks* we took note of the district court's factual finding that the plaintiff seeking relief there had filed a facial challenge to Alabama's method of execution just eleven weeks and four days before his scheduled execution. *See Brooks*, 810 F.3d at 824. But we denied Brooks's stay because he had remained on death row for nineteen months—

during which Alabama twice sought to schedule an execution date—before finally filing his facial challenge to the state’s lethal injection protocol under section 1983. *Id.* at 825. And Brooks offered no reasonable explanation for his delay. We concluded that under those circumstances the district court made no clear error when it found the plaintiff had delayed his litigation unnecessarily. *Id.* But as discussed, Appellants are not entitled to summary judgment on their claim that Hamm engaged in inexcusable delay. He could not have filed his section 1983 action before his medical condition materially changed. And once it allegedly did, as we have explained, Hamm did not wait an unreasonable amount of time to file suit. Therefore, the amount of time remaining until Hamm’s scheduled execution at the time he filed his section 1983 action in this case does not, on summary judgment, bear on the timeliness of Hamm’s filing.

II.

Next, Appellants argue that the district court abused its discretion in granting a stay because it made no express finding that Hamm established a substantial likelihood of success on the merits.²

Where an inmate seeks a stay of execution pending a challenge to the state’s execution protocol, the inmate “must satisfy all of the requirements for a stay” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A district court cannot grant a stay

² Appellants do not dispute—and we thus assume without deciding—that the district court had authority to grant a stay *sua sponte*, provided all requirements for a stay were satisfied.

without expressly finding (1) “a substantial likelihood of success on the merits,” (2) that the inmate “will suffer irreparable injury unless the injunction issues,” (3) “the stay would not substantially harm the other litigant,” and (4) “if issued, the injunction would not be adverse to the public interest.” *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). *See also Hill*, 547 U.S. at 584 (requiring a showing of a “significant possibility of success on the merits”).

To prevail on his Eighth Amendment claim, Hamm must make two showings. First, Hamm must demonstrate “that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers.” *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)) (italics and internal quotation marks omitted). Second, he must “identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.” *Id.* (internal quotation marks omitted).

We conclude the district court abused its discretion by staying Hamm’s execution without making sufficient findings to establish a significant possibility of success on the merits. The district court did find several “genuine dispute[s] of material fact” related to whether intravenous lethal injections would likely subject Hamm to needless suffering, based on his medical condition. In addition, the district court determined that Hamm’s proposed alternative method of execution,

“oral injection” of a lethal cocktail via a nasogastric tube, sufficed to deny Appellants summary judgment on whether Hamm had proposed a viable alternative. And the district court concluded that Hamm “offered at least some evidence that, *as applied to him*, Alabama’s method of execution may be ineffective and painful, while his proposed alternative is very likely to be effective and painless.”

But the Supreme Court has made clear that a stay requires findings supporting a “*significant* possibility of success on the merits.” *See Hill*, 547 U.S. at 584 (emphasis added). In our own circuit we similarly require that success on the merits be shown with a “substantial likelihood.” *See Brooks*, 810 F.3d at 818. While the district court stated that Hamm had shown “a substantial likelihood of success on the merits,” that conclusion alone is insufficient without express findings to support it.

And the findings the district court did state made clear that the record failed to meet the requisite threshold. The court observed that Hamm “has not presented evidence *establishing* that he lacks the number and quality of peripheral veins needed” for a constitutional execution, nor did he present “evidence *establishing* that he is experiencing lymphadenopathy” severe enough to preclude all manners of intravenous injection.

The court stated at the conclusion of the first hearing that Hamm has a

substantial likelihood of success on the merits “if” he “is able to prove the things he said.” A stay of execution does not require an inmate to prove his case once and for all. But the standards require more than the mere existence of an evidentiary toss-up. A district court must make some findings that tilt the scales in the inmate’s favor. The district court did not do so here. Since the district court’s findings establish only the existence of genuine factual disputes concerning whether, as applied to Hamm, Alabama’s method of execution carries a significant risk of being ineffective and painful, we conclude that the court abused its discretion in granting a stay.

III.

The district court noted, however, that the record before it was bereft of evidence in large part because Appellants control access both to Hamm’s existing health records and to the medical-examination process by which Hamm could obtain evidence showing that Alabama’s method of execution is unconstitutional as applied to Hamm. Specifically, the record shows Dr. Heath attempted to perform a medical examination on Hamm in prison on September 23, 2017. When Dr. Heath arrived, however, prison officials barred him from bringing medical equipment into the facility. As a result, Dr. Heath was unable to do anything but a visual and palpable examination. Dr. Heath could not measure Hamm’s vital signs, for example, and he had to resort to using a necktie as a tourniquet in order

to test access to Hamm's veins. The physician opined that his lack of access to equipment during the medical exam "limited [his] ability to perform a complete examination." Indeed, it is difficult to conceive of how Dr. Heath could have sufficiently examined Hamm under the circumstances.

In light of these facts, the district court granted Hamm a stay so that an independent medical examiner could be appointed to perform a complete examination on Hamm and provide the district court with a full report on the status of Hamm's venous access. While we have concluded the stay was improvidently granted on the record currently before us, we note that the district court denied Appellants' motion for summary judgment. Neither that order nor the decision to appoint a medical examiner is before us on appeal.

Our decision to vacate the stay on the present record therefore does not preclude the district court from moving forward with the case, appointing a medical examiner to evaluate Hamm fully (*i.e.*, with access to all medical equipment and records), and making factual findings thereafter. Nor, of course, does our decision today decide the fate of any potential future motions made on a different record.

To ensure adequate review ahead of Hamm's scheduled execution, we direct the district court to immediately appoint an independent medical examiner and schedule an independent medical examination, and to thereafter make any

concomitant factual findings—pursuant to a hearing or otherwise—by no later than Tuesday, February 20, 2018, at 5:00 p.m. Central Standard Time.

We grant the State of Alabama’s emergency motion vacate the district court’s stay and remand for further proceedings consistent with this order.

VACATED AND REMANDED.

**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

For rules and forms visit
www.ca11.uscourts.gov

February 13, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10473-P

Case Style: Doyle Lee Hamm v. Commissioner, Alabama Department of Revenue, et al

District Court Docket No: 2:17-cv-02083-KOB

The enclosed copy of this Court's order of remand is issued as the mandate of this Court. Counsel and parties are advised that with this order of remand this appeal is concluded. If further review is to be sought in the future a timely new notice of appeal must be filed.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas

Phone #: (404) 335-6171

Enclosure(s)

DIS-4 Multi-purpose dismissal letter