[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12271

D.C. Docket No. 1:16-cv-00473-WS-B

JEFFERY LEE,

Plaintiff - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN,

Defendants - Appellees.

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

(April 24, 2018)

Before TJOFLAT, WILSON and JORDAN, Circuit Judges.

PER CURIAM:

An Alabama jury convicted Jeffery Lee of three counts of capital murder and one count of attempted murder after a two-day trial in April of 2000. The jury recommended a sentence of life imprisonment without parole, but the trial court sentenced Mr. Lee to death. Mr. Lee's direct appeals concluded in 2004, his state Rule 32 proceedings concluded in 2009, and his federal habeas corpus proceedings concluded in 2014.

Mr. Lee faces death by lethal injection under Alabama law. On September 8, 2016, less than two years after Alabama changed the first drug in its three-drug execution protocol to midazolam, Mr. Lee challenged Alabama's proposed method of execution under 42 U.S.C. § 1983, asserting claims under the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.

In his complaint, Mr. Lee alleged that Alabama's substitution of midazolam, a sedative and anti-anxiety medication rather than a barbiturate, as the first drug in its three-drug execution protocol would subject him to a serious risk of feeling unbearable pain when the second and third drugs are administered. He asserted, as well, that pentobarbital is available to Alabama as a known, feasible, and available alternative. He also claimed that Alabama's decision not to update its consciousness check when it changed the first drug to midazolam would increase his risk of suffering a cruel and unusual punishment.

The district court dismissed the complaint, ruling that Mr. Lee's claims were time-barred because Alabama's substitution of midazolam as the first drug in the protocol did not constitute a "substantial change" that would allow a new claim to accrue. D.E. 23 at 8. The district court explained that Mr. Lee "relied on factual allegations that are materially the same as those presented in previous cases in which appellate courts have found no substantial change. Under the circumstances, neither discovery nor an evidentiary hearing on the 'substantial change' issue is warranted." *Id.* The district court also concluded that Mr. Lee had failed to allege an alternative method of execution "that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain," as required in method of execution claims under the Eighth Amendment. *See Glossip v. Gross*, 135 S. Ct. 2726, 2377 (2015). The district court ruled that Mr. Lee's proposed alternative – the use of pentobarbital – was not feasible or available to Alabama. *See* D.E. 23 at 11-12.

The district court also found unpersuasive Mr. Lee's contention that Alabama's failure to adapt its consciousness assessment to its introduction of midazolam to its execution protocol constituted a substantial change. In the district court's view, Mr. Lee "identifie[d] no case authority anywhere endorsing the paradoxical reasoning that, for limitations purposes, a consciousness test can substantially change by staying the same." *Id.* at 9.

In addition to finding his claims time-barred, the district court performed a merits analysis. It concluded that none of Mr. Lee's claims was plausible on its face. *See id.* at 10.

II

We review *de novo* the district court's Rule 12(b)(6) dismissal, accepting the allegations in the complaint as true and construing them in the light most favorable to Mr. Lee. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Following oral argument, and for the reasons which follow, we reverse the dismissal of the Eighth Amendment claim and otherwise affirm.

III

On appeal, Mr. Lee argues that that the district court erred in dismissing his Eighth Amendment claim because he sufficiently alleged that Alabama's switch to midazolam constituted a substantial change, and that pentobarbital is an alternative that is feasible and available to Alabama. He also argues that he properly alleged that midazolam will not adequately anesthetize him, and that Alabama's consciousness test is inadequate because of chemical properties unique to that drug. The state's arguments, which were adopted by the district court, are essentially set forth in the order of dismissal, and are largely unchanged on appeal.

IV

The district court properly articulated the two-part burden of proof set forth by *Glossip*—an inmate must ultimately show (1) that a challenged execution protocol "creates a demonstrated risk of severe pain," and (2) "that the risk is substantial when compared to the known and available alternatives." *Glossip*, 135 S. Ct. at 2737. The district court also properly noted *Glossip*'s requirement that any alternative proffered must be "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id.* At the pleading stage, however, Mr. Lee did not need to prove his Eighth Amendment claim; he only needed to allege sufficient facts to make that claim plausible on its face under *Glossip*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In dismissing Mr. Lee's complaint, the district court relied on factual findings and legal conclusions made in separate cases of other Alabama death-row inmates who had challenged the switch to midazolam. These other cases included *Grayson v. Warden*, 672 F. App'x 956 (11th Cir. 2016) (appeal from dismissal of complaint), *Brooks v. Warden, Comm'r, Ala. DOC*, 810 F.3d 812 (11th Cir. 2016) (appeal from denial of motion for stay of execution), and *Arthur v. Commissioner*, 840 F.3d 1268 (11th Cir. 2016) (appeal from bench trial).

For example, the district court quoted *Grayson*, 672 F. App'x at 964, as support for its statement that the "Eleventh Circuit 'has noted many times' that

pentobarbital is now 'unavailable for use in executions' in Alabama." D.E. 23 at 13. The district court also relied on *Arthur*, 840 F.3d at 1302, and on *Brooks*, 810 F.3d at 819, in its rejection of Mr. Lee's factual assertions that other states have used pentobarbital since 2014, that compounding pharmacists have expressed a willingness to create compounded pentobarbital for lethal injections, and that pentobarbital is available to Alabama.

In so doing, the district court made the same errors discussed at length in two of our recent cases, both of which addressed Eighth Amendment method of execution claims based on Alabama's switch to midazolam. *See West v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1289 (11th Cir. 2017); *Grayson v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1204 (11th Cir. 2017) (referred to as *Frazier* by the panel that decided it, as well as by litigants in this case).[1] These cases generally instruct that

[1] *Frazier* involved an appeal by four inmates of the district court's grant of summary judgment in favor of the Alabama Department of Corrections (ADOC) on their Eighth Amendment method of execution claim relating to Alabama's use of midazolam. In *Frazier*, the district court found that the "supply of commercially manufactured pentobarbital" had expired and that "'compounded pentobarbital' was unavailable to the ADOC as an alternative single-drug protocol." *Frazier*, 869 F.3d at 1220.

We vacated the district court's decision and remanded the case because the district court had erroneously relied on issue preclusion and had improperly imported factual findings from a separate bench trial (*Arthur v. Dunn*, No. 2:11-cv-438, 2016 WL 1551475 (M.D. Ala. Apr. 15, 2016), *aff'd sub nom. Arthur v. Comm'r, Ala. DOC*, 840 F.3d 1268 (11th Cir. 2016)), in reaching its holding. *See Frazier*, 869 F.3d at 1244. We explained that the district court had made a credibility determination in Mr. Frazier's case based on conflicting testimony which had been before it during the *Arthur* trial, which it was not allowed to do. *See id.* at 1220. We concluded that the district court inappropriately treated as undisputed a fact which was, in actuality, both disputed and material (whether compounded pentobarbital was feasible and "readily available" to the ADOC), such that summary judgment against Mr. Frazier was inappropriate. *See id.*

(1) challenges to midazolam as the first drug in Alabama's three-drug execution protocol are not the same as general challenges to three drug protocols, and accrued for statute of limitations purposes when Alabama announced this change; and (2) district courts assessing the validity of Eighth Amendment claims cannot assume the unavailability of alternative drugs based on factual findings or credibility determinations made in separate cases brought by other Alabama petitioners. *See West*, 869 F.3d at 1299-1300; *Frazier*, 869 F.3d at 1227-29.

In *West*, for example, we reversed the district court's Rule 12(b)(6) dismissal of four of the twelve cases which comprised the "Midazolam Litigation." *See West*, 869 F.3d at 1291. We held that the district court erred in concluding that the *West* plaintiffs' claims were "identical" to those raised by Ronald Bert Smith, which had been dismissed at the Rule 12(b)(6) stage in *Grayson v. Dunn (Smith)*, 221 F. Supp. 3d 1329 (M.D. Ala. 2016). *See West*, 869 F.3d at 1293-94. We explained that, although the *Smith* and *West* cases were joined for the purposes of discovery and trial, they were not thereby transformed into one case. *See West*, 869 F.3d at 1295.

We then assessed Mr. West's complaint and found that it sufficiently pled an Eighth Amendment claim with respect to the "substantial risk of serious harm"

Despite the different procedural posture of Mr. Lee's case, the admonitions announced in *Frazier* are applicable here.

component and the existence of an "alternative procedure" that was "feasible, readily implemented, and in fact significantly reduced a substantial risk of severe pain." *Id.* at 1297. Because Mr. West's complaint had alleged facts that, if proven true, would satisfy both prongs under *Glossip* and *Baze v. Rees*, 553 U.S. 35 (2008), we reversed and remanded. *See West*, 869 F.3d at 1301.

As in *West*, Mr. Lee has alleged concrete facts supporting his claims that the use of midazolam constitutes a substantial change in Alabama's execution protocol, *see* Comp. at ¶¶ 11, 27, 38, 52, that he faces a substantial risk of serious harm, *see id.* at ¶¶ 2, 6, 9, 10, 24, 26, 39, 40, 43, and that a feasible and available alternative to midazolam exists, s*ee id.* at ¶¶ 79, 80, 82, 83. Mr. Lee's complaint expressly alleges that a single dose of pentobarbital is a viable alternative, and that "[p]entobarbital is readily available for use in executions in Alabama." *Id.* at ¶ 83. Mr. Lee claims that "[c]ompounding pharmacists have expressed their willingness to prepare pentobarbital for lethal injection," that the "formula for compounding pentobarbital is 'not a difficult' one for a trained pharmacist," and that the ingredients "required to create pentobarbital at a compounding pharmacy are all readily available." *Id.* Mr. Lee also alleges that pentobarbital is generally available for use in lethal injections, that other states have switched to a single-drug protocol, and that other states have access to pentobarbital. *See id.* at ¶¶ 80, 82.

Mr. Lee is entitled to an opportunity to prove—as he alleged in his complaint—that the switch to midazolam constituted a substantial change, that the use of midazolam will result in a serious risk of serious harm, and that pentobarbital is available to Alabama, regardless of the factual findings and legal conclusions reached by other courts in separate cases. The district court erred in concluding that Mr. Lee's Eighth Amendment claim was time-barred and failed on the merits.

V

Because Mr. Lee's complaint adequately set forth facts which, if proven true, would satisfy *Glossip*, we vacate the dismissal of the Eighth Amendment claim, and remand for further proceedings. In all other respects, we affirm.[2]

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

[2] As noted, the district court alternatively ruled that the equal protection and due process claims failed on the merits. *See* D.E. 23 at 10, 16-19. In his brief, Mr. Lee only devotes three conclusory sentences to the merits rulings on these claims. *See* Appellant Br. at 20. This perfunctory treatment would not be enough to properly raise any challenge to the merits dismissal of the equal protection and due process claims. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (explaining that an appellant abandons a claim by only making passing reference to a ruling, without advancing any arguments or citing any authorities to establish error). At oral argument, Mr. Lee confirmed that he is not pursuing the equal protection and due process claims. As a result, we affirm the dismissal of these claims on the merits. *See id.*