

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-14956
Non-Argument Calendar

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT October 24, 2007 THOMAS K. KAHN CLERK

D. C. Docket No. 07-00295-CV-MEF-WC

DANIEL LEE SIEBERT,

Plaintiff-Appellant,

versus

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
individually and in his official
capacity,
GRANTT CULLIVER, Warden, Holman
Correctional Facility, in his
individual and official capacity,

Defendants-Appellees.

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

(October 24, 2007)

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Daniel L. Siebert appeals the district court's denial of his Emergency Motion for Preliminary Injunction to Stay Execution and moves this Court for a stay of execution. We reverse and grant the motion to stay.

Siebert filed a § 1983 suit in the Middle District of Alabama challenging the constitutionality of Alabama's lethal injection protocol.¹ The district judge dismissed Siebert's general challenge to Alabama's lethal injection protocol, finding that it was untimely. However, in regard to Siebert's personal claims based on his recently diagnosed terminal illness, the district court denied the Motion to Dismiss.

Siebert's initial complaint and his Amended Complaint challenged the constitutionality of the lethal injection protocol that Alabama has had in place since 2002 – the same protocol used in every other state that administers the death penalty. Alabama has announced that the State has somewhat modified its procedure, and Siebert will be the first to be executed in accordance with these

¹ Siebert generally alleged that the State's improper use of anesthesia as a precursor to execution unnecessarily risks infliction of severe pain and suffering. After receiving a recent diagnosis that he was suffering from pancreatic cancer and hepatitis C, however, Siebert filed an Amended Complaint that encompassed the allegations of his first complaint, and added claims that painful complications were likely to arise from the treatment or non-treatment of his recently diagnosed illnesses.

minor changes. Apparently, the change “to the lethal injection protocol has to do with the addition of a check of the condemned inmate for consciousness after injection of anesthesia and before the injections of other chemicals used in the execution.” Court Order, Oct. 17, 2007 at 4.²

The Supreme Court is presently considering the constitutionality of the challenged lethal injection protocol in Baze v. Rees, No. 07-5439, 2007 WL 2850507 (U.S. Oct. 3, 2007). Accordingly, we REVERSE the district court’s denial of Siebert’s Emergency Motion for a Preliminary Injunction and we STAY his execution pending the Supreme Court’s resolution of Baze v. Rees, after which the district court shall reconsider its decision in light of any guidance provided in the Supreme Court’s disposition of that case.

REVERSED.

² As the district court noted, for a variety of reasons unclear to this Court, the “State of Alabama keeps the specifics of its lethal injection protocol secret.” Id. at 2. The district court judge ordered that the State disclose to the court the details of the lethal injection protocol to be followed in Siebert’s execution. Id. at 4. In compliance with that order, the protocol has been filed with the court under seal.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the court's judgment. Although I agree with the majority's result, it is not because of the pendency of Baze v. Rees, but because it was an abuse of discretion for the district court to refuse to enjoin the Commissioner from carrying out Siebert's execution pending the court's final disposition of his claim that Alabama's three-drug method of execution, as applied to him, would deny his right under the Eighth and Fourteenth Amendments not to be subjected to cruel and unusual punishment.

On October 3, 2007, the district court granted the Commissioner's motion to dismiss Siebert's § 1983 claim to the extent that it mounted a general challenge to the constitutionality of Alabama's lethal injection protocol, finding that Siebert had delayed unnecessarily in bringing that claim. However, the court denied the Commissioner's motion to dismiss Siebert's § 1983 claim that, as applied to him specifically, the three-drug execution method would constitute cruel and unusual punishment in violation of the Constitution. Because the factual predicate for that claim – namely, Siebert's diagnosis of hepatitis C and pancreatic cancer – was not in place until late May 2007, the court concluded that Siebert did not unreasonably delay in bringing his claim. Noting that dismissal was also not warranted on

statute-of-limitations grounds, the court held that this claim “survive[s] and will be litigated.” A scheduling conference was accordingly set for October 10, 2007.

On October 9, Siebert moved the district court to enjoin his execution, which is set for October 25, 2007. The court acknowledged that the motion was timely, yet concluded on the basis of the “speculative” and “unsupported” allegations in Siebert’s opening brief and initial evidentiary submissions – which primarily consisted of a letter from a doctor that was attached to Siebert’s reply to the Commissioner’s opposition brief – that Siebert had not satisfied the requisites for a preliminary injunction. Specifically, the court held that all that Siebert’s proffered evidence established – for purposes of a preliminary injunction – was a general challenge to the three-drug protocol, not an as-applied challenge. Thus, he had not demonstrated a substantial likelihood that he would eventually prevail on the merits. Whether Siebert could ultimately prevail on his as-applied challenge would have to await further proceedings, perhaps a trial on the merits.¹

¹ The discussion in the district court’s order of the legal analysis applicable to a motion for a preliminary injunction indicates that the court did not consider the question of whether it should enjoin Siebert’s execution under the All Writs Act, 28 U.S.C. § 1651(a), which provides that the courts may “issue all writs necessary or appropriate in aid of their respective jurisdictions.” The purpose of the Act is to allow courts “to protect the jurisdiction they already have, derived from some other source.” Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099–1100 (11th Cir. 2004); id. at 1102 (“Regarding pending proceedings, a court may enjoin any conduct which, left unchecked, would have . . . the practical effect of diminishing the court’s power to bring the litigation to a natural conclusion.”) (internal quotation marks omitted).

This not a case to which applies the “strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” Nelson v. Campbell, 541 U.S. 637, 650, 124 S. Ct. 2117, 2126, 158 L. Ed. 2d 924 (2004). Although the State possesses a “strong interest in enforcing its criminal judgments without undue interference from the federal courts,” Hill v. McDonough, ___ U.S. ___, 126 S. Ct. 2096, 2104, 165 L. Ed. 2d 44 (2006), it was an abuse of discretion for the district court to refuse to enjoin the execution based solely on its opinion that Siebert’s briefs and his proffer of evidence, at the preliminary injunction stage, were deficient. The court effectively recognized that the claim alleges facts that, if true, establish a right to relief, as evidenced by its refusal to dismiss Siebert’s as-applied § 1983 claim. Combined with the court’s finding of timeliness, this recognition necessitated the grant of a postponement of the execution to enable the court to exercise its jurisdiction and to permit discovery, an evidentiary hearing, and a decision on the merits of Siebert’s constitutional claim. In this respect, this case is analogous to a pre-1996 habeas corpus proceeding in which the district court or court of appeals has issued the petitioner a certificate of probable cause to appeal. In such circumstances, the “petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide

the merits of the appeal.” Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 3395, 77 L. Ed. 2d 1090 (1983)). Accordingly, “where necessary to prevent the case from becoming moot by the petitioner’s execution,” the courts “should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal.” Id.

Accordingly, I conclude that the balance of the equities here dictates that the State’s interest in timely enforcement of a death sentence must yield to further consideration of the merits of Siebert’s claim that the three-drug protocol, as applied, would violate his constitutional rights.

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DANIEL LEE SIEBERT,

Plaintiff-Appellant,

versus

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Alabama Department of Corrections,
individually and in his official capacity,
GRANTT CULLIVER, Warden, Holman
Correctional Facility, in his
individual and official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

(October 25, 2007)

ON PETITION FOR REHEARING EN BANC

Before TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, BARKETT, HULL,

MARCUS, and WILSON, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the Petition for Rehearing En Banc filed by the Defendants-Appellees on 25 October 2007, and a majority of the judges of this court in active service (available and not recused) having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The opinion and stay entered by the panel on 24 October 2007 is hereby VACATED. The en banc Court sua sponte hereby STAYS the execution of the Plaintiff-Appellant pending further en banc consideration of this case.

*Chief Judge Edmondson has not participated in this order. Judges Ed Carnes and William H. Pryor Jr. have recused themselves and will not participate.

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-14956

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT November 5, 2007 THOMAS K. KAHN CLERK

D. C. Docket No. 07-00295-CV-MEF-WC

DANIEL LEE SIEBERT,

Plaintiff-Appellant,

versus

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
individually and in his official capacity,
GRANTT CULLIVER, Warden, Holman
Correctional Facility, in his
individual and official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

(November 5, 2007)

ON PETITION FOR REHEARING EN BANC

Before TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, BARKETT, HULL,

MARCUS, and WILSON, Circuit Judges.*

BY THE COURT:

The order granting en banc rehearing in this appeal, ___ F.3d ___, 2007 WL 3104941, dated 25 October 2007 is **VACATED**, and the case is **REMANDED** to the panel for consideration of the issues raised by State of Alabama in its Petition for Rehearing En Banc.

*Chief Judge Edmondson has not participated in this order. Judges Ed Carnes and William H. Pryor Jr. have recused themselves and have not participated.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-14956

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT November 5, 2007 THOMAS K. KAHN CLERK

D. C. Docket No. 07-00295-CV-MEF-WC

DANIEL LEE SIEBERT,

Plaintiff-Appellant,

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RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
individually and in his official capacity,
GRANTT CULLIVER, Warden, Holman
Correctional Facility, in his
individual and official capacity,

Defendants-Appellees.

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

(November 5, 2007)

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

We sua sponte vacate and reconsider our original opinion and substitute the following.

Daniel L. Siebert appeals the district court's denial of his Emergency Motion for Preliminary Injunction to Stay Execution and requests a postponement of execution. We conclude that the district court erred in refusing to enjoin the Commissioner from carrying out Siebert's execution pending the court's final disposition of his "as-applied" claim, i.e., that the three-drug protocol to be used by Alabama during his execution by lethal injection, as applied to him, would violate his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment. We therefore reverse the district court's order and remand the case for further consideration of Siebert's claim.

Siebert's federal habeas challenge to his conviction and death sentence for the murders of Sherri Weathers and her two sons was denied certiorari by the United States Supreme Court on March 19, 2007. On April 9, 2007, Siebert filed a 42 U.S.C. § 1983 suit in the Middle District of Alabama challenging the constitutionality of the State's three-drug protocol for his execution by lethal injection on the ground that it creates an unnecessary risk of severe pain and suffering. In late May 2007, Siebert was stricken with severe jaundice and diagnosed with hepatitis C. A biopsy was taken on July 12, 2007, and Siebert was diagnosed with pancreatic cancer as well. On July 19, 2007, Siebert immediately filed an Amended Complaint restating the allegations in his first complaint and

adding the claim that, as applied to him specifically, the three-drug protocol would constitute cruel and unusual punishment in violation of the Constitution because of substantial complications likely to arise due to his serious illnesses. The Alabama Supreme Court thereafter entered an order setting October 25, 2007, as the date of Siebert's execution.

On October 3, 2007, the district court granted the Commissioner's motion to dismiss Siebert's § 1983 claim to the extent that it mounted a general challenge to the constitutionality of Alabama's three-drug protocol, finding that Siebert had delayed unnecessarily in bringing that claim. However, the court denied the Commissioner's motion to dismiss Siebert's "as-applied" § 1983 claim. Because the factual predicate for that claim – namely, Siebert's diagnosis of pancreatic cancer and hepatitis C – was not in place until late May 2007,¹ the court concluded that Siebert did not unreasonably delay in bringing his claim. Noting that dismissal was also not warranted on statute-of-limitations grounds, the court held that this "as-applied" claim "survive[s] and will be litigated." A scheduling conference was accordingly set for October 10, 2007, on that claim.

On October 9, 2007, Siebert moved the district court to enjoin his execution.

¹While the district court states late May 2007, it appears the actual diagnosis of pancreatic cancer was even later than that.

The court acknowledged that the motion was timely but concluded that Siebert had not satisfied the requisites for a preliminary injunction. Specifically, the court held that Siebert had not demonstrated a substantial likelihood that he would eventually prevail on the merits of his “as-applied” challenge. Whether Siebert could ultimately prevail on his “as-applied” challenge would have to await further proceedings, perhaps a trial on the merits.

The district court correctly stated the four factors to be considered in determining whether preliminary injunctive relief is to be granted, which are whether the movant has established: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest. See, e.g., Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005).²

²While the district court conducted de novo review of Siebert’s claim, we review the district court’s denial of injunctive relief only for an abuse of discretion. “This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect.” Schiavo, 403 F.3d at 1226; see also Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1096 (11th Cir. 2004); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1309 (11th Cir. 2001). “Short of that, an abuse of discretion standard recognizes there is a range of choices within which we will not reverse the district court even if we might have reached a different decision.” Schiavo, 403 F.3d at 1226; see also McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001); In re Rasbury, 24 F.3d 159, 168-69 (11th Cir. 1994).

We conclude that the district court abused its discretion in denying preliminary injunctive relief as to Siebert’s “as-applied” claim. The district court found that Siebert’s “as-applied” claim was timely filed immediately upon diagnosis of Siebert’s hepatitis C and terminal pancreatic cancer and thus as soon as he could have brought it.³ Specifically, Siebert’s “as-applied” claim derives from his recent diagnosis of hepatitis C and inoperable pancreatic cancer, including but not limited to obstruction of his upper gastrointestinal tract (“GI tract”) due to a cancerous tumor. The district court noted that Siebert has a feeding tube, suffers from chronic nausea and tumor-related pain, and has been losing weight. Dr. Jimmie H. Harvey, Jr., a board-certified medical oncologist, reviewed Siebert’s medical records and opined, among other things, that Siebert’s life expectancy is less than 90 days and that there is a “great likelihood” that Siebert would regurgitate stomach content when administered the current

³The reversal of the district court’s denial of the preliminary injunction relates to only Siebert’s “as-applied” claim, as to which the district court denied the motion to dismiss. We affirm the district court’s denial of a preliminary injunction on Siebert’s general challenge to Alabama’s three-drug protocol, which the district court dismissed on the grounds that Siebert unreasonably and unnecessarily delayed in bringing said claim until his execution was imminent. See Williams v. Allen, 496 F.3d 1210, 1215 (11th Cir. 2007), cert. dismissed, ___ S. Ct. ___, 76 U.S.L.W. 3168 (U.S. Aug. 22, 2007) (No. 07-6034); Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007) (“Grayson II”), cert. denied, ___ S. Ct. ___, 76 U.S.L.W. 3049 (U.S. July 26, 2007) (No. 07-5457); Jones v. Allen, 485 F.3d 635, 639-40 (11th Cir. 2007), cert. denied, 127 S. Ct. 2160 (2007); Rutherford v. McDonough, 466 F.3d 970, 973-74 (11th Cir. 2006), cert. denied, 127 S. Ct. 465 (2006).

three-drug protocol and aspirate prior to death. Moreover, Dr. Harvey stressed, in this regard, Siebert's malignancy and the physiology of his upper GI tract at this particular time. Because Siebert is "cachectic," which the district court found means "having physical wasting with loss of weight and muscle mass due to disease," Dr. Harvey also noted that Siebert will have "very compromised venous access" due to his particular serious medical conditions. Additionally, Dr. Harvey reported that due to "the inevitable death related to this malignancy, Mr. Siebert has elected to receive no palliative chemotherapy or radiation therapy."

Given the timeliness of the filing of Siebert's "as-applied" claim, Dr. Harvey's evaluation and the unique situation presented by Siebert's terminal pancreatic cancer, we conclude that the district court erred in determining that Siebert failed to show a substantial likelihood of success on the merits of his "as-applied" claim. Therefore, it was an abuse of discretion for the district court to deny Siebert's motion for a preliminary injunction as to the "as-applied" challenge to Alabama's three-drug protocol.

Accordingly, we AFFIRM the district court's denial of a preliminary injunction on Siebert's general challenge to Alabama's three-drug protocol. See Williams, 496 F.3d at 1212-13 (quoting Grayson, 491 F.3d at 1322). We REVERSE the district court's denial of Siebert's Emergency Motion for a

Preliminary Injunction on Siebert’s “as-applied” claim, and we REMAND the case for consideration of Siebert’s “as-applied” claim on the merits. The stay previously entered by this Court shall remain in effect until the time that the district court has entered judgment on the merits.⁴

AFFIRMED, in part, **REVERSED**, in part, and **REMANDED**.

⁴In light of this Court’s sua sponte stay in its October 25, 2007 order, we deny as moot Siebert’s Motion for Stay of Execution filed in this Court on October 23, 2007.