

No. 1881555

IN THE SUPREME COURT OF ALABAMA

Ex parte Doyle Lee Hamm,	*	
	*	
In re. State of Alabama	*	Response to Attorney General's
<i>Petitioner,</i>	*	Reply Dated October 10, 2017,
	*	to this Court's Order Dated
v.	*	August 25, 2017
	*	
Doyle Lee Hamm,	*	
<i>Respondent.</i>	*	

**DOYLE HAMM'S RESPONSE TO THE ATTORNEY GENERAL'S REPLY
DATED OCTOBER 10, 2017, TO THIS COURT'S ORDER
DATED AUGUST 25, 2017**

Pursuant to this Court's order dated August 25, 2017, Doyle Hamm respectfully submits the following response to the Attorney General's reply dated October 10, 2017:

1. The Attorney General has just disclosed, for the first time, a new medical report dated August 2, 2017, by a "Corizon Practioner" at Donaldson Correctional Facility named Le Honguan that states that there is "No evidence of ocular lymphoma." See Appendix A to Attorney General's Reply. The Attorney General never previously shared this "Corizon Medical Consultation

Report" with undersigned counsel, who has been filing detailed weekly updates with this Court. With all due respect, the report does not say what qualifications the practitioner, Le Honguan, has, whether he or she is a nurse, intern, resident, or correctional officer. The field "Practitioner Type" at the top of the report is empty, as is the field "Practitioner."¹

2. The newly disclosed "Corizon Practitioner Consultation Report" is also not reliable because the practitioner apparently found a "visually significant cataract [in the] left eye" that requires immediate cataract surgery, and, as a medical matter, such a significant cataract in his left eye, where he had cancer, would prevent an ophthalmologist from seeing inside the eye to determine whether there is any cancer in the eye, according to the ophthalmologist at the UAB School of Medicine who has been treating Mr. Hamm (as per conversation with undersigned counsel).²

3. As evidenced by the newly disclosed "Corizon Practitioner

¹ The Attorney General is misleading this Court when it writes that "On August 4, 2017, a *physician* for the Department of Corrections indicated that there is no evidence of ocular lymphoma. Appendix A, Corizon Practitioner Consultation Report." See State's Reply dated October 10, 2017, page 2, note 1. With all due respect to Mr. or Ms. Honguan, there is no indication or reason to believe that he or she is a physician.

² Undersigned counsel has consistently stated that Mr. Hamm's medical condition involves *lymphatic cancer*. It is misleading for the Attorney General to suggest that counsel has been wrongly claiming that the medical problem has been "ocular lymphoma." See State's Reply dated October 10, 2017, page 2, note 1.

Consultation Report," the Attorney General is using, for litigation purposes, ongoing medical examinations of Mr. Hamm without notifying undersigned counsel or this Court, or giving counsel an opportunity to know or confront the evidence or have an independent medical expert present. The failure to turn over all medical records and the way in which the Attorney General is proceeding undermines everyone's ability to make a fair assessment of the issues presented in this case.

4. Counsel respectfully urges this Court to order the Attorney General to turn over all their medical reports to counsel, so that counsel can adequately respond to them, and so that we all can adequately assess the medical situation. Only at that point would it be possible to properly respond to the Attorney General.

5. The medical reports that the Attorney General appended to its reply make clear that Mr. Hamm needs to be properly evaluated by an independent doctor, under the supervision of a Special Master, and with the opportunity to have his own medical expert present, in order for this Court to know whether his lymphatic cancer is going to interfere with the lethal injection protocol—which the Attorney General still will not disclose. The medical reports in the Attorney General's Appendices A, B, and C confirm or otherwise indicate that Mr. Hamm has a basal cell carcinoma that is sclerosing on his left inferior orbital rim, a

carcinoma that is characterized as having “geometrically shaped tumor islands” that are “mitotically active and demonstrate peripheral palisading.” See Attorney General’s Appendix C. This “BASAL CELL CARCINOMA WITH SCLEROSIS” is located precisely outside the exact area in his cranium where he had cranial cancer, i.e. on the “LEFT INFERIOR ORBITAL RIM.” See Attorney General’s Appendix C. Mr. Hamm now reportedly has a “visually significant cataract [in] left eye” that is so significant that the practitioner is recommending Mr. Hamm for cataract surgery, see See Attorney General’s Appendix A. The medical report of the MRI in September 2016 reveals that they conducted an MRI of his face and orbits, but not of the cranial areas where his cancer had extended. See Attorney General’s Appendix B. In any event, the medical reports all confirm that Mr. Hamm is being observed for “Left orbital lymphoma” and that he is categorized as “LYMPHOMA / C83.39.” See Attorney General’s Appendix B. The 2017/18 ICD-10-CM Diagnosis Code for C83.39 is “Diffuse large B-cell lymphoma, extranodal and solid organ sites.” See ICD List at <http://icdlist.com/icd-10/C83.39>. In other words, Mr. Hamm is indeed being treated for lymphatic cancer.

5. None of these newly appended reports in any way contradict or undermine Dr. Mark Heath’s medical assessment from September 23, 2017, that, as a result of Mr. Hamm’s extensive cranial and lymphatic cancer, cancer treatments, and severely

compromised veins, venous access is extremely difficult and it is unlikely that an execution can be accomplished without cruel and needless pain. See Preliminary Report of Mark. J. S. Heath, M.D., attached as Appendix A to Mr. Hamm's October 2, 2017, answer.

6. Nothing in these reports contradicts Dr. Heath's conclusion that "based on what I know from the David Nelson case, it is my opinion that the state is not equipped to achieve venous access in Mr. Hamm's case." *Ibid.*, ¶16.

7. What the reports do indicate, though, is that the Attorney General has not fully disclosed the evidentiary basis on which this Court should assess Mr. Hamm's situation, and has raised factual allegations that are in dispute and require a proper evidentiary determination.

8. Undersigned counsel respectfully urges this Court to order the Attorney General and the Department of Corrections to turn over all medical reports in their possession to undersigned counsel so that he can evaluate the entirety of his medical records; and also enter an order directing the Attorney General to confidentially disclose to counsel the exact protocol for venous access for lethal injection, along with the complete list of medical equipment that would be used for lethal injection.

9. The Attorney General's reply and disclosure of medical records, including a newly divulged medical report, make clear

that this Court should appoint a Special Master to oversee a proper medical review and examination (as in the case of Alabama death row inmate David Nelson in 2006, *see Nelson v. Campbell*, Civil Action No. 2:03CV1008-T (M.D. Ala. 2006), Appendix D to Mr. Hamm's Answer Dated October 2, 2017) in order to reach agreement on a proper protocol for venous access to avoid an unnecessarily cruel and painful execution. Counsel respectfully requests that the Court enter an order directing a Special Master to appoint an independent doctor to evaluate Mr. Hamm and allow Mr. Hamm to have a medical expert present for the evaluation (as in the case of David Nelson, *see Appendix E to Mr. Hamm's Answer Dated October 2, 2017*); and schedule a hearing, *in camera* if necessary, to review and approve an agreed-upon protocol for venous access, which would be necessary to humanely achieve lethal injection and prevent an unsuccessful execution.

10. The Attorney General repeatedly states, in its pleadings, that this Court should go ahead and set a date, and let the Federal Courts deal with the matter, almost as if the Attorney General is inviting this Court to make an error that the Federal Courts would then have to rectify. In its most recent submission, the Attorney General again emphasizes that "As the State noted in its August 15, 2017, pleading, should Hamm file a lawsuit challenging his execution, the court where

the lawsuit is filed would be in the best position to litigate whatever challenge he brings. This Court should not defer its decision-making authority to set an execution date simply because such litigation is a possibility." See State's Reply dated October 10, 2017, at page 3 note 3; see also State's Reply dated August 15, 2017, page 3, note 2 ("Should Hamm file a lawsuit challenging his execution, the court where the lawsuit is filed would be in the best position to litigate whatever challenge he brings"). With all due respect to the Attorney General, this seems backwards. This Court has full jurisdiction and competency, and is properly evaluating the question of whether, given Mr. Hamm's complicated medical condition, cancer, and cancer treatment, moving forward with a lethal injection at this point, without further agreement on a venous protocol, would likely result in cruel and needless pain in violation of the Alabama Constitution and the Eighth Amendment. Undersigned counsel has no reason to go to Federal Court, because this Court is the highest authority in the State and is actively reviewing this matter.

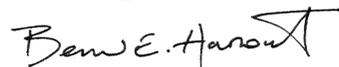
11. Should this Court agree with the Attorney General's somewhat puzzling logic, undersigned counsel would respectfully urge this Court to hold these proceedings in abeyance so that counsel can file in Federal Court.

12. This is not the case of a malingering respondent. The

medical evidence is clear that Mr. Hamm has been struggling against a serious lymphatic cancer, has received and continues to receive very serious medical treatment, and has very compromised veins. This is not the right case for the Attorney General to be pressing this Court for a swift execution because, based on the available medical records and findings, and given Mr. Hamm's cranial and lymphatic cancer, there is a substantial likelihood that the Alabama Department of Corrections will not be able to accomplish a successful execution without cruel and needless pain.

13. Counsel respectfully urges the Court to deny the Attorney General's motion or, in the alternative, if it agrees with the Attorney General's logic, to hold these proceedings in abeyance to allow Mr. Hamm to seek review in the Federal Courts.

Respectfully submitted,



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October 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2017, I served a copy of the attached pleading by electronic mail to Assistant Attorney General Beth Jackson Hughes at bhughes@ago.state.al.us.

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a prominent, stylized initial "B".

BERNARD E. HARCOURT
Counsel of Record