No. 18-10473

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERSON S. DUNN, COMMISSIONER,
Alabama Department of Corrections, et al.,
Defendants/Appellants,

v.

DOYLE LEE HAMM,
Plaintiff/Appellee.

On Emergency Appeal to Vacate Stay of Execution Entered in
the United States District Court for the Northern District of Alabama
by Chief Judge Karon O. Bowdre
(No. 2:17-cv-02083-KOB)

DOYLE HAMM'S RESPONSE BRIEF

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Dated: February 13, 2018

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies that the following persons may have an interest in the outcome of this case:

Allen, Richard, former Commissioner, Department of Corrections;

Armstrong, Jeremy, former Assistant Attorney General during the post-conviction proceedings;

Bolling, Leon, Warden of Donaldson Correctional Facility and defendant in this action;

Bowdre, Karon Owen, Chief Judge of the United States District Court for the Northern District of Alabama;

Brasher, Andrew, Solicitor General of the State of Alabama;

Carnes, Edward E., Chief Judge of the United States Court of Appeals for the Eleventh Circuit, former Chief of the Capital Punishment and Post-Conviction Litigation Division of the Alabama State Attorney General's Office during Doyle Hamm's case;

Crenshaw, J. Clayton, Assistant Attorney General;

Cunningham, Patrick, victim;

Dobbs-Ramey, Kimberly, prior counsel for Plaintiff-Appellee;

Dunn, Jefferson S., Commissioner of the Alabama Department of Corrections and defendant;

Folsom, Fred C., trial judge;

Forrester, Nathan, former Solicitor General for the State of Alabama during the post-conviction appeal;

Govan, Jr., Thomas R., counsel for the appellants;

Hamm, Doyle Lee, plaintiff-appellee;

Harcourt, Bernard E., counsel for plaintiff-appellee;

Hardeman, Donald, Cullman County Circuit Court Judge and post-conviction judge;

Harris, Hugh, prior counsel for plaintiff-appellee;

Hughes, Beth Jackson, Assistant Attorney General, counsel for the appellants;

King, Troy, former Alabama Attorney General during the federal habeas proceedings;

Little, William D., Assistant Attorney General during the direct appeal;

Marshall, Steve, Alabama Attorney General;

Morin, Robert, counsel for Doyle Hamm on appeal to the United States Supreme Court on direct appeal;

Nail, Pamela, prior counsel for plaintiff-appellee;

Newsome, Kevin C., former Solicitor General for the State of Alabama during post-conviction proceedings;

Nunnelley, Kenneth, former Assistant Attorney General during post-conviction proceedings;

Pryor, William H., former Alabama Attorney General during the post-conviction proceedings;

Roden, Douglas, co-defendant;

Roden, Regina, co-defendant;

Siegleman, Don, former Alabama Attorney General during the direct appeal;

Stewart, Cynthia, Warden of Holman Correctional Facility and defendant in this action;

Stewart, Sandra J., former Assistant Attorney General during the direct appeal;

Strange, Luther, former Alabama Attorney General;

Thomas, Kim, former Commissioner, Alabama Department of Corrections; and

Williams, Martha E., prior counsel for plaintiff-appellee.

BERNARD E. HARCOURT
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Counsel for Doyle Lee Hamm

STATEMENT REGARDING ORAL ARGUMENT

Appellee-Plaintiff Doyle Lee Hamm respectfully requests oral argument on appellants' motion to vacate pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Rule 28-1(c) of the Eleventh Circuit Rules, as well as FRAP 27(e) and Eleventh Circuit Rule 27-1(f) which state that motions can be argued with approval of this Court. This is a unique *as-applied* challenge to an execution by lethal intravenous injection that is set for Thursday, February 22, 2018. It is completely different from the other facial challenges that this Court has recently addressed. This execution, if it is allowed to proceed, is likely to cause exceptionally severe and unnecessary pain and suffering to Doyle Hamm, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Because of Doyle Hamm's diagnosed lymphatic cancer and carcinoma, and his current medical condition of compromised peripheral veins, this execution is likely to be the first time that the State of Alabama attempts central venous access, a complicated medical procedure made multiple-times more risky because of Doyle Hamm's particular medical conditions. Accordingly, this death penalty case raises unique and procedurally complex matters, and for these reasons, Doyle Hamm firmly believes that oral argument is necessary to assist the Court in ruling on defendants' emergency motion to vacate the stay. Doyle Hamm respectfully requests oral argument on appellants' motion.

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STATEMENT OF THE CASE

Chief Judge Karon O. Bowdre of the United States District Court for the Northern District of Alabama conducted bifurcated hearings on January 31, 2018, for a total of eight (8) hours: a morning hearing on appellants' motion for summary judgment from 9:00AM to 12:00PM; and an afternoon evidentiary hearing on appellee's request for preliminary injunction from 2:00PM to 7:00PM, including a two-and-a-half (2.5) hours long *in camera* evidentiary hearing, at which the court took the testimony of expert witnesses (including an expert anesthesiologist, Dr. Mark Heath, and an expert oncologist, Dr. Charles David Blanke), admitted and considered fifty (50) exhibits by the parties, and entertained extensive legal argument by counsel.

During and at the close of both parts of the bifurcated hearing, Chief Judge Bowdre made very specific findings of fact and conclusions of law, and ruled from the bench: at the close of the morning hearing, the court denied appellants' motion for summary judgment; and at the close of the afternoon hearing, the court ordered a stay of Doyle Hamm's execution, concluding clearly, based on very specific findings, that Doyle Hamm "does have a substantial likelihood of success on the merits in my opinion." *See* Appendix, Tab 3, p. 149-150 (hereafter "Hearing"). Four days later, Chief Judge Bowdre supplemented those rulings from the bench with a lengthy 25-page memorandum opinion further detailing her findings and her

conclusion that a stay is in order, declaring that: "based on the record as it currently exists, Mr. Hamm has shown a substantial likelihood of success on the merits." *See* Appendix, Tab 2, p. 3 (hereafter "Slip Op.").

This case is before the Court on an emergency motion to vacate Chief Judge Bowdre's order to stay Doyle Hamm's execution. The case raises the following question: Should an appellate court interfere with a District Court's credibility determinations and specific findings that are the basis of a legal ruling ordering a stay based on findings that the plaintiff has a substantial likelihood of prevailing on the merits?

SUMMARY OF THE ARGUMENT

Doyle Lee Hamm presently has two medical conditions—namely, first, severely compromised peripheral veins, and, second, lymphadenopathy related to his diagnosed lymphatic cancer—that raise a significant risk of severe and unnecessary pain and suffering should the appellants proceed with their planned execution by lethal intravenous injection on February 22, 2018.

Before addressing appellants' emergency motion to vacate the stay of execution, it is crucial to understand properly Doyle Hamm's medical condition and why it creates a significant risk of a flawed execution *as applied*:

First, due to his diagnosed lymphatic cancer, his cancer treatments, his lengthy medical condition (including a history of IV drug abuse), and his age (Doyle Hamm turns 61 tomorrow), Doyle Hamm has compromised peripheral veins on his upper and lower extremities (arms, hands, legs, and feet). Because of Doyle Hamm's compromised peripheral veins, there is a significant risk that the attempt to achieve peripheral intravenous access for purposes of a lethal intravenous injection will cause Doyle Hamm severe and unnecessary pain and suffering, given that Alabama's execution protocol [redacted]. *See* Supplemental Appendix, Tab 1 (redacted copy of Alabama's execution protocol).

Regarding peripheral venous access, the execution protocol—a redacted copy of which was only turned over by appellants to Doyle Hamm on the eve of the hearing, on January 30, 2018, despite having been repeatedly requested for more than five months, since August 2017—states only that [redacted]

[redacted]

Moreover, because of the compromised and fragile nature of his peripheral veins, there is a significant risk that even if peripheral venous access is achieved, the injection of large quantities of lethal drugs would "blow out" his peripheral veins and result in the infiltration of the lethal drugs in his flesh, rather than his blood system, which would cause exceptionally severe and unnecessary pain and suffering. *See* Slip Op., p. 2; Appendix, Tab 4, p. 7-8 (hereafter "In Camera Hearing").

Second, because of Doyle Hamm's compromised peripheral veins, his planned execution is likely to be the first time that defendants attempt to gain central intravenous access in the history of lethal injection in the state of Alabama. [redacted]. *See* In Camera Hearing, p. 54. Central venous access is a complicated medical procedure even in a fully-equipped operating room with highly-trained physicians; however, in Doyle Hamm's case, it is multiple-times more complicated because of the risks associated with lymphadenopathy. There is evidence in the record that, as a result of his diagnosed lymphatic cancer, Doyle Hamm has been experiencing

lymphadenopathy (swelling of lymph nodes). *See* Supplemental Appendix, Tab 25, p. 36. Lymphadenopathy creates a significant risk of interference with an attempt to obtain central venous access, possibly resulting in a punctured central artery and causing Doyle Hamm severe and unnecessary pain and suffering. As Dr. Mark Heath explained *in camera*:

[redacted]

In Doyle Hamm's case, given his particular history of lymphadenopathy, there is nothing in the protocol to prevent these risks of serious and unnecessary pain. [redacted] That does not protect Doyle Hamm from the multiple risks that are likely to arise in his particular case given his medical condition.

[1] [redacted]

Chief Judge Bowdre understood the *as applied* medical risks to Doyle Hamm perfectly, summarizing them as follows in her lengthy memorandum opinion: "[A]ttempts to insert the intravenous catheter would subject him to unlimited and repeated needle sticks; the injection of fluid could 'blow out' his veins with infiltration of drugs into the surrounding tissue; and efforts to place a central line could be hindered by enlarged lymph nodes creating a higher risk of puncturing a central artery—all resulting in severe and unnecessary pain." Slip Op. at 2. These risks are especially significant as applied to Doyle Hamm's case, precisely because of the deficiencies of the lethal injection protocol that offer him little, if any, protection. Specifically, as the District Court wrote, "the protocol does not describe how long the IV team may attempt to obtain peripheral access, how many times the team may attempt peripheral venous access, how the team determines if peripheral access is unobtainable, or what sort of medical equipment or medical specialist is available in the event the team must attempt to obtain a central line." Slip Op. at 8.

Chief Judge Bowdre properly held that Doyle Hamm has carried his burden of proof by establishing that he has a substantial likelihood of prevailing on the merits of his *Glossip/Baze* legal claim, which requires (1) that the plaintiff demonstrate that the planned method of execution presents a substantial risk of serious harm, and (2) that the plaintiff identify an alternative that is feasible,

readily implemented, and in fact significantly reduces a substantial risk of severe pain. *See Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015); *Baze v. Rees*, 553 U.S. 35, 50-52 (2008) (plurality opinion); *see also Nelson v. Campbell*, 541 U.S. 637 (2004); *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993); *In re Kemmler*, 136 U.S. 436, 447 (1890). The District Court was also correct in finding that Doyle Hamm diligently pursued his constitutional claims in state and federal court and that, as a result, this §1983 action was timely filed.

At the eight (8) hour long, bifurcated evidentiary hearings on January 31, 2018, Chief Judge Bowdre made specific findings of fact and conclusions of law, which she supplemented in a lengthy 25-page memorandum opinion issued on February 6, 2018. Those findings and legal conclusions amply justify and support a stay of execution in Doyle Hamm's unique *as applied* challenge, in light of his medical condition, to the Alabama execution protocol.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT DOYLE HAMM ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Appellants contend that Chief Judge Bowdre failed to make specific findings that Doyle Hamm has a substantial likelihood of prevailing on the merits. This assertion is not true. Chief Judge Bowdre made specific findings on each of the key elements necessary for Doyle Hamm to win on the merits. *See Hill v. McDonough*,

547 U.S. 573, 584 (2006) (requiring inmates to satisfy all requirements, including making a "showing of a significant possibility of success on the merits," to be granted a stay). In her rulings from the bench and in the memorandum opinion, Chief Judge Bowdre found that Doyle Hamm has a substantial likelihood of success, or more specifically:

1. that his claim was brought in a timely manner; and
2. that he has a substantial likelihood of winning on the two requisite elements of his Eighth Amendment challenge under the *Glossip/Baze* standard, namely:
    a. that Doyle Hamm faces a substantial risk of harm from this method of execution; and
    b. that Doyle Hamm has shown a feasible alternative.

It is critical to emphasize that Chief Judge Bowdre made these specific findings leading to her grant of a stay from the bench during the course of the January 31, 2018, bifurcated hearings *and* subsequently supplemented them in her lengthy written memorandum opinion. Therefore, it is important to give equal weight to *both* the specific findings the court made from the bench, *see* Appendix Tab 3, *and* the findings in the written opinion, *see* Appendix Tab 2.

Despite appellants' suggestion, Chief Judge Bowdre's findings, described in detail below, are anything but conclusory or speculative. Unlike in other cases before this Court, where district courts were found to grant a stay based on

conclusory statements, Chief Judge Bowdre specifically explained, at the end of the evidentiary hearing and in a lengthy memorandum opinion, why Doyle Hamm has a substantial likelihood of success in winning his underlying claim, namely because he could show that his claim was filed in a timely fashion, that he faces a substantial risk of harm, and that his proposed alternative is feasible. *Compare* Slip Op., *with Ferguson v. Sec., FL. Dep't of Correction*, 494 Fed. Appx. 25, 27 (11th Cir. 2012) (reversing a stay because the "district court summarily concluded that '[a] stay of execution [was] necessary to permit a 'fair hearing'"). Furthermore, Chief Judge Bowdre's findings were anything but speculative, as appellants contend. Appellants compare her ruling to what was reviewed in *Brewer v. Landrigan*. *See* Appellant's Brief in Support of Emergency Motion to Vacate Stay of Execution, at 1-2. In *Brewer*, the district court granted a stay *despite* finding it was "left to speculate…whether the non-FDA approved drug will cause pain and suffering." 562 U.S. 996, 996 (2010). Nothing about Chief Judge Bowdre's rulings from the bench or 25-page opinion are reminiscent of this, particularly her clear statement that "based on the record as it currently stands, Mr. Hamm has shown a substantial likelihood of success on the merits." Slip Op. at 3.

It is also important to emphasize that this lawsuit involves an *as applied* challenge to the execution protocol in Doyle Hamm's specific case, given his medical condition, and *not* a facial challenge to the protocol. That is particularly

significant because appellants control all of the evidence in this case, including not only all the relevant medical records and access to Doyle Hamm's doctors, but also the very body of Doyle Hamm and his access to medical examinations. As this Court has explicitly recognized, the context of an *as applied* challenge to the constitutionality of a method of execution makes a significant difference. *See Siebert v. Allen*, 506 F.3d 1047, 1050 (11th Cir. 2007) (distinguishing between as applied and facial challenges in reversing the district court's denial of a stay). An *as applied* challenge means that a plaintiff, like Doyle Hamm, may present a "unique situation" that warrants closer evaluation of the claims and evidence, including medical records and expert testimony. *See Bucklew v. Lombardi*, 565 Fed. Appx. 562, 564-65 (8th Cir. 2014) (finding that Bucklew's as applied challenge, "based on the information actually available" to the plaintiff and his experts, warranted a stay); *see also Arthur v. Haley*, 248 F.3d 1302 (11th Cir. 2001) (affirming the stay because the claims, as the district court found, require "sufficient opportunity to contemplate various claims and their implications").

A. The district court made specific factual findings establishing that Doyle Hamm demonstrated a substantial likelihood of success on the merits.

Chief Judge Bowdre specifically addressed and made specific findings regarding every necessary element to establish that Doyle Hamm has a substantial likelihood of success on the merits:

1) Chief Judge Bowdre made explicit findings that Doyle Hamm filed his §1983 challenge in a timely fashion.

The court specifically found that Doyle Hamm was diligent, acted in good faith, and did not attempt to delay his execution in filing his §1983 lawsuit on December 13, 2017. *See* Slip Op. at 24. Specifically, the District Court declared that "As discussed above, at this stage, and on the record currently before the court, the court finds that Mr. Hamm brought his complaint in a timely manner. If he brought it later than the court would have preferred, *it was not due to lack of diligence or in a bad faith attempt to delay his execution*." *Id*. (emphasis added).

These factual findings and conclusions of law rested on the following seven specific findings by Chief Judge Bowdre, made in the memorandum opinion and from the bench at the evidentiary hearing on January 31, 2018:

Number	District Court Finding	Reference
#1	"[Doyle Hamm] reasonably sought relief in the Alabama Supreme Court before filing his federal lawsuit."	Slip Op. at 4
#2	"[A] nine-month delay is not unreasonable in this case, especially in light of his efforts to exhaust his claim."	Slip Op. at 17
#3	"[T]he court finds that Mr. Hamm reasonably believed that he needed to make his argument to the Alabama Supreme Court before making it to this court."	Slip Op. at 18
#4	Chief Judge Bowdre specifically noted "the diligent efforts of Mr. Hamm's counsel to obtain Mr. Hamm's medical records from Defendants."	Slip Op. at 18

#5	"It was not unreasonable for Mr. Hamm to wait to file his complaint until he had some evidence to support his allegations."	Slip Op. at 18
#6	"[I]t does seem reasonable to me for plaintiff's counsel to have believed that raising these issues in front of the Alabama Supreme Court was an appropriate step before filing the case here. So I find that belief, whether legally correct, to be a reasonable one and to defeat the argument that Mr. Hamm unreasonably delayed or was dilatory in filing the 1983 action."	Appendix, Tab 3, Hearing at 72
#7	"[P]laintiff's counsel diligently tried, since January of this year, to obtain medical records and did not obtain them until July…I don't think a plaintiff should waltz in to court making allegations about a medical condition without having at least reviewed medical records to support that kind of claim."	Appendix, Tab 3, Hearing at 72

First, Chief Judge Bowdre made very clear, on page 14 of her written opinion, that because Doyle Hamm has raised an *as-applied* challenge, his claim's "triggering date…is different from the triggering date for a facial challenge." Slip Op. at 14; *see Siebert*, 506 F.3d at 1049-50. In light of that standard, Chief Judge Bowdre specifically found sufficient evidence that Doyle Hamm's medical situation changed in Spring of 2017, prompting his *as-applied* challenge to be filed that year rather than any earlier. The District Court relied on Doyle Hamm's affidavit, which stated that his medical condition worsened in the Spring of 2017, thereby prompting this suit. Slip Op. at 15; *see* Supplemental Appendix, Tab 6 (Doyle Hamm's affidavit). She also noted that there was no prior testimony from before 2017 from Mr. Hamm that his peripheral veins were compromised. Slip Op.

at 16. She further noted that, based on this information and that there was no lack of diligence or bad faith, a "nine-month delay is not unreasonable in this case, especially in light of his efforts to exhaust his claim." Slip Op. at 17, 24. While "federal courts can and should protect States from dilatory or speculative suits," this is simply not the case here. *See Hill*, 547 U.S. at 585. Rather, Mr. Hamm waited until the reasonable time, after his counsel—due to "diligent efforts"—obtained and reviewed his medical records and presented his claim in state court. *Id*.

2) The District Court made specific findings that Doyle Hamm had a substantial likelihood of satisfying the Glossip/Baze *standard.*

a) The District Court made explicit findings that Doyle Hamm faces a substantial and serious risk of harm

As a preliminary matter, Chief Judge Bowdre made clear, in her memorandum opinion and in her findings of the undisputed facts at the beginning of the evidentiary hearing, that Doyle Hamm's medical history raises serious concerns regarding the risk of an Eighth Amendment violation. She specifically noted the following ten findings:

Number	District Court Finding	Reference
#1	"No one disputes that Mr. Hamm has a long and complicated medical history, which includes intravenous drug use, hepatitis C, and a 2014 diagnosis of B-Cell	Slip Op. at 8

	lymphoma with a tumor behind Mr. Hamm's left eye."	
#2	"And no one disputes that Mr. Hamm's history of intravenous drug use complicates the accessibility of his peripheral veins."	Slip Op. at 8
#3	"In 2014, Mr. Hamm was diagnosed with B-cell lymphoma and particularly had […] a tumor behind his left eye."	Appendix, Tab 3, Hearing, at 11
#4	"I note for that purpose the medical scans and reports from 2014 and 2015 regarding lymph nodes in the chest and abdomen that never were tested or treated."	Appendix, Tab 3, Hearing at 11
#5	"I beg to differ. I think there is at least the initial examination in March [2017] that confirmed that there were palpable knots in his chest and abdomen area, if I'm not mistaken."	Appendix, Tab 3, Hearing at 61
#6	[redacted]	Appendix, Tab 4, In Camera Hearing at 40
#7	"[I]t's undisputed that that carcinoma [under his left eye] has not been removed."	Appendix, Tab 3, Hearing at 27
#8	"Although physicians noted potential lymph node issues in those 2014 reports, Mr. Hamm never received any further medical examinations or treatment relating to those issues. (Doc. 19-1 at 1)."	Slip Op. at 9
#9	"Difficulties obtaining access with a butterfly needle can indicate even more difficult obtaining access with a catheter."	Slip Op. at 10
#10	"There's no dispute of fact as far as I know that he was an intravenous drug user for a significant amount of time."	Appendix, Tab 3, Hearing at 136

The District Court even added, during the *in camera* hearing, [redacted] *See* In Camera Hearing at 8.

At the close of the lengthy evidentiary hearing on January 31, 2018, Chief Judge Bowdre made explicit findings of fact, based specifically on Doyle Hamm's medical records and the testimony of Doyle Hamm's medical expert, Dr. Mark Heath. *See Chavez v. Fl. P.S. Warden*, 742 F.3d 1267, 1272 (11th Cir. 2014) (holding that the trial judge's credibility determination of an expert witness cannot be overturned unless clearly erroneous); *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012) (explaining that appellate courts should "give particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony"). In effect, her statements clearly reflect a credibility determination to weigh Dr. Heath's expert opinion over appellants' experts, which warrants significant deference. *See Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011) (refusing to find, because the trial judge was owed deference, "that the district court abused its discretion by crediting the expert report submitted by the State" over the plaintiff's report). The court made the following findings about Doyle Hamm's medical condition based on this expert testimony:

Number	District Court Finding	Reference
#1	"I am not going to make a decision that could subject Mr. Hamm to unnecessary torturous, I think was the word Dr. Heath used, pain and suffering that could rise to a constitutional level."	Appendix, Tab 3, Hearing at 147-48
#2	"And I don't see where a short stay, especially for a medical exam, creates greater harm to the State of Alabama than would going through with a lethal injection execution that could be extremely problematic given the inferences that I can draw from the medical records that this man may indeed have lymphatic cancer in portions of his body, other than in his head where he was treated with radiation, that could significantly adverse the ability to obtain a central venous line for injection."	Appendix, Tab 3, Hearing at 148
#3	"I find that if the plaintiff is able to prove the things he said, […] he does have a substantial likelihood of success on the merits in my opinion."	Appendix, Tab 3, Hearing at 149-50

Chief Judge Bowdre then supplemented these findings in her written opinion, acknowledging that "even if Alabama's statute requiring 'lethal injection' required a needle piercing the inmate's skin," that sufficient evidence was presented to suggest "that type of 'lethal injection' would be unconstitutional as applied to him." Slip Op. at 21.

b) The District Court made explicit findings that Doyle has shown a feasible, readily implemented, and significantly less painful alternative.

In both her written opinion and her statements at the end of the evidentiary hearing, Chief Judge Bowdre made findings that the alternative proposed by Mr. Hamm was feasible and legal in Alabama. Therefore, Chief Judge Bowdre

explicitly found a substantial likelihood that Mr. Hamm would win on the merits of this element of his underlying claim.

In her opinion, Chief Judge Bowdre specifically determined that Alabama's lethal injection statute *does* permit oral injection. Citing Doyle Hamm's expert, Dr. Charles David Blanke, she found his testimony credible that this proposed alternative would be an "injection," as meant in the statute. Slip Op. at 21; *see also* Appendix, Tab 3, Hearing at 128-29; Supplemental Appendix, Tabs 4, 5, and 32. She also noted that Taber's Medical Dictionary does not define "injection" to require "a needle piercing the body," but that an injection can be any "forcing of a fluid into a vessel, tissue, *or cavity*." *Id.* (emphasis in original).

In her opinion and at the hearing, Chief Judge Bowdre also found:

Number	District Court Finding	Reference
#1	"Alabama statute specifically provides for lethal injection, but does not limit that in terms of intravenous only. And I can only assume, because I have to assume, that had the legislature wanted to limit it to intravenous lethal injection, it could have and would have said so."	Appendix, Tab 3, Hearing, at 143
#2	"As Dr. Blanke testified and as the Tabor Medical Dictionary describes injection, it doesn't require a needle or a vein, and so I find that the statute does not on its face prohibit the oral injection of lethal drugs for execution purposes."	Appendix, Tab 3, Hearing, at 143
#3	"The court finds that, if Mr. Hamm can prove the inaccessibility of his peripheral and central veins, his proposed alternative 'significantly reduce[s] a substantial risk of his severe pain.'"	Slip Op. at 20

#4	"He has 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."	Slip Op. at 20
#5	"The court finds that administration of the proposed alternative drugs through a nasogastric tube would comply with Alabama's statute requiring execution by 'lethal injection' because it would involve forcing the liquid into Mr. Hamm's body."	Slip Op. at 21

In her ruling at the end of the evidentiary hearing, Chief Judge Bowdre stated, even more clearly, her belief that this alternative means of lethal injection is especially proper in light of Doyle Hamm's medical condition:

Number	District Court Finding	Reference
#1	"I do find that the plaintiff has pled sufficiently that there is an alternative to intravenous injection of drugs and for the purpose at this stage where there has been no discovery, that the pleading and the proffer are sufficient on those."	Appendix, Tab 3, Hearing, at 143
#2	"And I can only assume, because I have to assume, that had the legislature wanted to limit it to intravenous lethal injection, it could have and would have said so."	Appendix, Tab 3, Hearing, at 143
#3	"I find that the statute does not on its face prohibit the oral injection of lethal drugs for execution purposes."	Appendix, Tab 3, Hearing, at 143-44
#4	"I also note that the statute does not require specific drugs that are used, that's part of the protocol established by the Department of Corrections, so there's no statutory prohibition."	Appendix, Tab 3, Hearing, at 144

Here, Chief Judge Bowdre again relied, in significant part, on Doyle Hamm's expert witness, Dr. Blanke, to understand the feasibility, availability, and legality of the proposed alternative. Dr. Blanke testified specifically about the availability of the drugs. *See* Hearing at p. 118 et seq. Chief Judge Bowdre credited his testimony, in addition to reviewing the Alabama statute and Doyle Hamm's expansive medical records; thus, deference should be given to her specific findings after her evaluation of the expert witness, who was before her at the lengthy evidentiary hearing. *See Powell*, 641 F.3d at 1257 (finding that the district court did not abuse its discretion in "crediting the expert report"); *Lebowitz*, 676 F.3d at 1009 ("Appellate courts reviewing a cold record give particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony."); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) (noting the deference that should be given to a trial judge's "decision to credit the testimony of one or two or more witnesses, each of who has told a coherent and facially plausible story").

B. The district court did not conflate the summary judgment standard with the standard for a stay of execution.

Chief Judge Bowdre was extremely conscientious and careful to bifurcate the proceedings and strictly distinguish the decision on summary judgment from

the decision on a preliminary injunction and a stay. At the hearing on January 31, 2018, the court expressly bifurcated the proceedings and created a Chinese wall separating the morning session on summary judgment from the afternoon session on injunctive relief, precisely so that the evidentiary standards would not bleed into each other. The District Court emphasized that "I want to note that I am treating all of the exhibits that were offered in support of or objection to the motion for summary judgment as admitted for purposes of the summary judgment hearing *only*." Appendix, Tab 3, Hearing at 3 (emphasis added). Chief Judge Bowdre even structured the memorandum opinion in two separate parts as well, precisely in order to bifurcate and distinguish the legal standards and treatment of evidence.

It is not Chief Judge Bowdre, but appellants who are conflating standards by failing to understand the exact posture of the District Court's ruling. To make this as clear as possible, it is important to understand that there are *three* possible legal standards—not *two*, as defendants assume—and that the District Court placed this case in the second of the three categories:

Level at which plaintiff has established his case and satisfied his burden of proof	Legal ruling	Legal Standard
Level 1	Deny summary judgment	There are genuine issues of material fact in dispute.
Level 2	Grant stay, but deny, for now, injunction	There may be genuine issues of material fact still in dispute, but plaintiff has a substantial likelihood of prevailing on the merits.
Level 3	Grant injunction	There are no genuine issues of material fact in dispute and plaintiff prevails on the merits.

Appellants fail to understand properly the distinction between these three different legal standards and, as a result, misconstrue the District Court as lumping together the first two.

But the point is, at Level 2, there *are* still disputed issues of fact. If they were resolved in plaintiff's favor and no longer in existence, then the District Court would have granted an injunction. Although there are still disputed facts, Chief Judge Bowdre found that, on the present record, there is a substantial likelihood that they will be resolved in Doyle Hamm's favor. That does not confuse the summary judgment standard for the stay standard, but instead places this case squarely at Level 2, and not at Level 3. That is precisely why the District Court wrote that Doyle Hamm "has not presented evidence *establishing* that he lacks the

number and quality of peripheral veins needed for Defendants to execute him under Alabama's lethal injection protocol. Nor has he presented evidence *establishing* that he is experiencing lymphadenopathy, such that Defendants could not safely resort to the protocol's alternative method of execution using a central line." Slip Op. at 22-23 (emphasis in original). The District Court found that Doyle Hamm had satisfied the second, but not the third level of proof.

It is almost as if the District Court anticipated appellants' confusion and tried to clear it ahead of time by emphasizing—literally, by italicizing—the terms "*establishing*" in its memorandum opinion. This underscores that the District Court placed the case at Level 2, not at Level 3. However, even though Doyle Hamm did not reach Level 3, he *did* get to Level 2: "[U]nder the information currently available to Mr. Hamm and to the court, he has shown a substantial likelihood of success on the merits," Slip Op. at 23, and "At this stage, Mr. Hamm has shown a substantial likelihood of success on the merits." Slip Op. at 24.

C. The district court correctly granted a stay where, here, the record clearly establishes that Doyle Hamm has medical conditions that raise a substantial risk of unnecessary pain and suffering if executed as appellants currently plan.

The record in Doyle Hamm's case clearly establishes an extensive medical history, including lymphatic cancer and carcinoma (*see* Supplemental Appendix,

Tabs 7, 8, 28, and 29). As a result, there are five (5) major risks with the Alabama lethal injection protocol *as applied* to Doyle Hamm's specific medical condition:

1) [redacted] *See* Appendix, Tab 4, In Camera Hearing at 5.

The problem arises *as applied* to Doyle Hamm because, as Dr. Heath explained further, [redacted] *See id.* at 6.

As an evidentiary matter, there is substantial evidence that Doyle Hamm only has one small tortuous vein on the right hand that is even accessible to draw blood, a much less onerous procedure than lethal injection. Dr. Heath found, at the physical examination conducted on September 23, 2017, that Doyle Hamm did not have any accessible peripheral veins except for one on the back of Doyle Hamm's right hand: "On the dorsum of the right hand there is a small, tortuous vein that is potentially accessible with a butterfly needle." Supplemental Appendix, Tab 2, p.3, ¶7; Tab 3, p.2 ¶8; Tab 31. Dr. Heath noted, however, that the small tortuous vein on his right hand would likely not sustain a large catheter, and therefore "this small, tortuous vein on his right hand would not provide reliable peripheral venous access." *Id.*

This evidence was substantially and independently corroborated by appellants' own evidence. Appellants submitted two affidavits from nurses at Donaldson Correctional Facility, the only witnesses who have attempted peripheral venous access on Doyle Hamm recently. They state in their affidavits that they had used *only*, and with great difficulty, the small tortuous vein on his right hand—even after *failing* to access that vein.

On October 3, 2017, nurse Kelley McDonald (who had just began running the lab in the medical unit at Donaldson Correctional Facility in October 2017) first tried to draw blood from Doyle Hamm and immediately turned to that small

vein in his right hand—and failed the first time. Despite having failed from that vein, she tried again on the same vein and was able to draw blood. Supplemental Appendix, Tab 34, p.2 ¶5.

Then, on October 31, 2017, nurse McDonald twice attempted to draw blood from Doyle Hamm in the vein on his right hand and did not succeed. *See id.* at p.2 ¶6. Despite having had trouble there before, and despite meeting trouble again on the first try—and despite the fact, according to appellants, that Doyle Hamm has plenty of good veins—nurse McDonald only tried to access the vein on the right hand.

On November 7, 2017, nurse McDonald again tried to draw blood from Doyle Hamm (one can infer from the way the affidavit is written) using the vein on his right hand and again did not succeed. *Id*. That same day, November 7, 2017, nurse Elisabeth Wood then tried to access that same vein—instead of trying to access another location—and ultimately drew blood from the vein on Doyle Hamm's right hand. *Id.* at ¶6; Supplemental Appendix, Tab 35, at p.2 ¶4. Then, on November 14, 2017, nurse McDonald again went for the vein on the right hand and drew blood from Doyle Hamm on his right hand. Supplemental Appendix, Tab 34, at p.2 ¶6. And on December 18, 2017, nurse McDonald again went for the vein on his right hand and drew blood from Doyle Hamm on his right hand. *Id.* at p.2 ¶4.

So the nurses at Donaldson have only been trying to access that small vein on his right hand, even though they have failed on four (4) out of eight attempts—and that was only to draw blood, not to insert a large catheter, which is much more difficult. Drawing blood with a butterfly needle is far easier than inserting a large catheter in a vein. This raises two major problems for peripheral venous access:

(1) venous access for purposes of drawing blood with a small butterfly needle does not ensure venous access for inserting a large catheter necessary to infuse large amounts of toxic drugs. As Dr. Heath testified *in camera*, [redacted] Appendix, Tab 4, In Camera Hearing at 55. He continued: [redacted] *Id.* at 23.

(2) The execution protocol [redacted]

[redacted] Supplemental Appendix, Tab 1, Protocol, Annex C, p. 16.

Accordingly, the record is clear that appellants are unlikely to achieve, [redacted] venous access in Doyle Hamm's case. Given these deficiency of the protocol and Doyle Hamm's medical condition, the risk of unnecessary pain and suffering that would come with this execution cannot be overstated.

2) Risk of Infiltration

Second, given the fragility of Doyle Hamm's veins, peripheral venous access in this case poses a higher risk of infiltration—[redacted] *See* Appendix, Tab 4, In Camera Hearing at 7-8.

Regarding this risk of infiltration, Dr. Heath explained to Chief Judge Bowdre, in response to her specific questions:

[redacted]

[redacted]. *Id.* at 8-9.

3) Risks of Remote Injection For Doyle Hamm

The risks of infiltration are especially dangerous in Doyle Hamm's case because [redacted]

To make matters worse, [redacted] *See id.* at 38.

4) The Risks Associated with Doyle Hamm's Lymphadenopathy

If peripheral venous access is not possible, [redacted], but that presents significant risks because Doyle Hamm may have lymphadenopathy at the time of his execution.

Central venous access is a complex medical procedure. In response to Chief Judge Bowdre's questions, asking Dr. Heath to explain the process of central venous access, Dr. Heath testified *in camera*:

[redacted]

[redacted] *Id*. at 23-24.

Note that [redacted]

In Doyle Hamm's case, this presents a unique problem. In response to the Chief Judge's express line of questioning about the problems *as applied* to Doyle Hamm, or in her words, [redacted] *see id.* at 25, Dr. Heath explained:

[redacted] *Id.* at 10.

This specifically presents a host of risks *as applied* to Doyle Hamm's case. The protocol [redacted] *See* Supplemental Appendix, Tab 1, p. 16-17. The protocol [redacted] *Id*. at 7, 16. But

the protocol [redacted].

In Doyle Hamm's case, this raises substantial risks. As Dr. Heath testified:

> [redacted] *See* In Camera Hearing at 18.

[redacted] As Dr. Heath explained:

> [redacted] *Id.* at 48-49.

5) The Compounded Problem of Lymphadenopathy and Infiltration

As Dr. Heath explained, Doyle Hamm faces an even greater risk because of the compounded nature of his potential lymphadenopathy and chemical infiltration:

[redacted] *See* In Camera Hearing at 18-19.

Again, the protocol [redacted]

All of these concerns are specific to the lethal injection protocol *as applied* to Doyle Hamm, given his medical condition. As Dr. Heath stated, [redacted] *See id.* at 64-65.

There is also the risk of a cut-down procedure. [redacted]

Dr. Heath explained the cut-down procedure as follows:

[redacted]

[redacted] *See id.* at 28.

This would be a cruel and unusual punishment and there is nothing in the protocol to prevent it.

Each of these risks that Doyle Hamm faces was amply testified to at the evidentiary hearing to explain why, in Doyle Hamm's case, the Alabama lethal injection raises significant risks of pain and suffering. The protocol's deficiencies, in light of Doyle Hamm's medical condition, support the District Court's findings that Doyle Hamm has a substantial likelihood of success on the merits of his Eighth Amendment claim.

II. The District Court Did Not Abuse Its Discretion, But Correctly Decided That Doyle Hamm Timely Filed His §1983 Lawsuit

Before addressing appellants' contention that Doyle Hamm unnecessarily delayed bringing this lawsuit, it is important to place the procedural history of this case in its proper context: appellants actually delayed Doyle Hamm from properly investigating and presenting his case for twelve (12) of the past twelve months.

A. As a preliminary matter, the appellants have delayed this case for twelve (12) of the preceding twelve months.

Doyle Hamm could not carry his burden of proof, that his medical condition worsened in the Spring of 2017, without medical examinations and access to his

own medical records and to the Alabama execution protocol. It is literally impossible for him to make his case without those medical records and the lethal injection protocol. The facts and law in Doyle Hamm's case are entirely governed by the medical examinations he has received at the hands of appellants and by the Alabama execution protocol. As Chief Judge Bowdre stated at the evidentiary hearing on this matter: "I don't think a plaintiff should waltz in to court making allegations about a medical condition without having at least reviewed medical records to support that kind of claim." *See* Appendix, Tab 3, Hearing at 72.

Yet, despite "diligent efforts" by Doyle Hamm's counsel, *see* Slip Op. at 18, appellants delayed production of those documents for twelve (12) of the last twelve months. Appellants took six (6) months to release Doyle Hamm's medical records to him, and, after that, delayed another five (5) months to disclose a redacted version of the Alabama execution protocol, and then another one (1) month to update his medical records.

Doyle Hamm first requested his medical records from appellants on January 19, 2017. *See* Supplemental Appendix, Tab 9. It was not until after repeated requests that appellants turned over his medical records on July 20, 2017. *See* Supplemental Appendix, Tab 13 at ¶1. That was six (6) months later. And the District Court specifically found this fact, stating on the record "And the Department of Corrections – and there were repeated efforts to get those. The

Department of Corrections didn't provide those to him until July of 2017. So we have a six, six-and-a-half month delay by the Department of Corrections in providing Mr. Harcourt with records that he needed to assess his client's condition." *See* Appendix, Tab 2, Hearing at 58.

Then, expeditiously,[2] within only twenty days of receiving and reviewing those massive medical records (consisting of 777 pages of medical records[3]) and speaking with a medical expert, Dr. Mark Heath, on a Sunday, August 6, 2017, Doyle Hamm requested the execution protocol from appellants. *See* Supplemental Appendix, Tab 16. It then took five (5) months of repeated requests by Doyle Hamm, addressed both to appellants and to the Alabama Supreme Court, and only after order by Chief Judge Bowdre, for appellants to disclose to Doyle Hamm a highly redacted copy of the Alabama execution protocol in the afternoon of January 30, 2018, less than 24 hours before the January 31, 2018 hearing.

Then, Doyle Hamm complained about not having updated medical records as early as October 11, 2017, when appellants, out of the blue, submitted new medical records that had never been turned over to Doyle Hamm in a pleading with the Alabama Supreme Court. At this point, Doyle Hamm asked the Alabama

[2] The District Court also recognized that this was expeditious, and that "within a month after receiving the medical records he began that process." *See* Hearing at 59.

[3] Both appellants and appellees introduced these 777 pages into the record at the District Court; due to the emergency nature of this motion and expedited briefing, appellee has not had the time yet to format those into three supplemental volumes of appendices and submit to the Court, but will shortly.

Supreme Court to order appellants to turn over all new medical records, but this request was not granted. *See* Supplemental Appendix, Tab 27. Counsel's associate, Nicola Cohen, began pursuing appellants for the new records in December 2017. *See* Supplemental Appendix, Tab 33. Doyle Hamm then asked Chief Judge Bowdre to order appellants to turn over new records. And despite all that, appellants did not turn over those new medical records until February 6, 2018.

For appellants to now be arguing that Doyle Hamm is responsible for delay and should be executed without proper review of his constitutional claims because he delayed this litigation is inequitable.

The Eighth Circuit has agreed. In *Bucklew*, the Eighth Circuit *en banc* granted a stay of execution, finding that the inmate, Bucklew, had shown that there was a substantial likelihood that he would succeed on the merits of his *as applied* challenge: "Bucklew's unrebutted medical evidence demonstrates the requisite sufficient likelihood of unnecessary pain and suffering beyond the constitutionally permissible amount inherent in all executions." *Bucklew*, 565 Fed. Appx. at 564. In so doing, the Eighth Circuit found it unrealistic to expect Bucklew to be able to present his claim sufficiently "without full assessment of his medical condition," which the state of Missouri prevented Bucklew from obtaining. The court there wrote: "Moreover…the state in this case has systematically resisted Bucklew's efforts to obtain medical examinations (and denied and resisted attempts to secure

funding for such efforts) which would be necessary to articulate a feasible alternative." *Id.* at 565. In a similar vein here, the appellants' long delays in producing Doyle Hamm's medical records and the state's lethal injection protocol—documents critical for Doyle Hamm to realistically make his case before a court—should be viewed in Doyle Hamm's favor, not seen as a reason for finding a delay.

In fact, the District Court found as much, finding that "Because Defendants control his access to medical care, Mr. Hamm cannot be faulted for being unable to present a definitive evaluation to the court." Slip Op. at 3, 23. Similarly, at the hearing, the District Court stated that "it does seem to me when we're talking more in line with equitable issues that the entity that controls the only method of determining whether someone's health condition has deteriorated to the state where it could impact the ability to access veins for intravenous injection, that it seems to me to cut against the equitable argument of laches when the Department of Corrections has not done those things that could put to rest Mr. Hamm's allegations or could bring into play the need for a different approach to execution of Mr. Hamm's sentence. And I recognize that." *See* Appendix, Tab 3, Hearing at p.31.

B. The procedural history conclusively establishes that Hamm did not delay filing his §1983 lawsuit.

The record below is clear that the matter was being diligently investigated and litigated by Doyle Hamm's counsel and that, from July to December 2017, the matter was actively being considered by the Alabama Supreme Court. This was not a matter of delay, but rather diligent efforts to raise a reasonable claim before the courts. *See Hill*, 547 U.S. at 585 (explaining that dismissal is warranted when claims are brought in "dilatory or speculative suits").

Counsel requested Doyle Hamm's medical records from Donaldson Correctional Facility in January 2017. *See* Supplemental Appendix, Tab 9 (letter dated January 19, 2017 from Leon Bolling, Correctional Warden II). Counsel renewed his request on several occasions, *see, e.g.*, Supplemental Appendix Tab 10 (e-mail correspondence with Alabama Department of Corrections dated June 29, 2017), but only received those voluminous medical records on July 20, 2017. *See* Supplemental Appendix, Tab 13 at ¶1.

Prior to receiving those medical records, Doyle Hamm filed a motion on July 11, 2017, informing the Alabama Supreme Court that there may be "multiple risks" if the appellants went forward with their planned execution and that counsel needed the medical records. *See* Supplemental Appendix, Tab 11 at ¶1. On July 14,

2017, the Alabama Supreme Court ordered Doyle Hamm to report back to the Court and respond by August 8, 2017. *See* Supplemental Appendix, Tab 12.

Doyle Hamm received 777-pages of medical records from appellants on July 20, 2017 (*see* Supplemental Appendix Tab 13 at ¶1), immediately began reviewing those records, and locating a medical expert anesthesiologist, Dr. Mark Heath, and had a one-hour telephone consultation with Dr. Heath on Sunday, August 6, 2017. *See* Supplemental Appendix Tab 13 at p. 2 ¶3. Two days later, on August 8, 2017, Doyle Hamm reported back to the Alabama Supreme Court, as ordered, and notified the Court of the medical concerns in his case and of the need for a medical examination. *See* Supplemental Appendix, Tab 13 at p. 2 ¶4 and ¶5.

That same day, August 8, 2017, counsel for Doyle Hamm wrote to the Warden of Donaldson Correctional Facility, where Doyle Hamm was incarcerated pending his execution, and requested a medical visit for Dr. Heath. *See* Supplemental Appendix Tab 14.

On Friday, August 25, 2017, in a *sua sponte* order, the Alabama Supreme Court ordered defendants to allow Doyle Hamm to undergo a medical examination by his medical expert, Dr. Heath, to find out his venous condition and ordered "that Hamm give a status update regarding this issue to this Court every seven (7) days from the date of this Order." *See* Supplemental Appendix, Tab 15 (Alabama

Supreme Court order dated August 25, 2017, ordering weekly updates from Doyle Hamm).

Meanwhile, one business day later, on Monday, August 28, 2017, counsel for Doyle Hamm wrote appellants requesting a copy of the Alabama execution protocol. *See* Supplemental Appendix, Tab 16. Defendants denied the request for the execution protocol by letter dated September 7, 2017. *See* Supplemental Appendix, Tab 18. Counsel for Doyle Hamm renewed his request for the execution protocol by letter dated September 11, 2017, emphasizing his willingness to abide by a confidentiality agreement. *See* Supplemental Appendix, Tab 20. Doyle Hamm then repeatedly informed and moved the Alabama Supreme Court to order appellants to disclose the execution protocol. *See* Supplemental Appendices, Tabs 19, 21, 22 at ¶2, 25 at ¶29, ¶31 (explicitly moving for order for execution protocol). As noted earlier, appellants only turned over to Doyle Hamm a redacted version of the execution protocol on the eve of the evidentiary hearing, in the afternoon of January 30, 2018. *See* Hearing at 66.

During this time, in August 2017, counsel for Doyle Hamm sent an associate, Nicola Cohen, to visit with Doyle Hamm to perform a visual inspection of his lymphadenopathy, and Cohen reported seeing lumps under his chin on the left side and on the back right of his neck below his right ear. *See* Supplemental Appendix, Tab 17 at ¶5.

On September 1, 2017, Doyle Hamm began filing weekly status updates with the Alabama Supreme Court, as ordered to do so by that court. Doyle Hamm filed his first weekly status update with the Alabama Supreme Court, as ordered, on September 1, 2017. *See* Supplemental Appendix, Tab 17 (first update). Doyle Hamm filed his second status update on September 8, 2017. *See* Supplemental Appendix, Tab 19 (second update). Doyle Hamm filed his third weekly status update on September 15, 2017. *See* Supplemental Appendix, Tab 21 (third update). Doyle Hamm filed his fourth weekly status update on September 22, 2017. *See* Supplemental Appendix, Tab 22 (fourth update). Doyle Hamm filed his fifth weekly status update on September 29, 2017. *See* Supplemental Appendix, Tab 23 (fifth update). Doyle Hamm filed his sixth weekly status update on October 2, 2017. *See* Supplemental Appendix, Tab 24 (sixth update).

On October 2, 2017, Doyle Hamm also filed a lengthy report and answer with the Alabama Supreme Court addressing the medical concerns, requesting an order for disclosure of the lethal protocol, and asking for the appointment of a special master to facilitate the adjudication of the medical risks. *See* Supplemental Appendix, Tab 25. Two days later, on October 4, 2017, the Alabama Supreme Court ordered appellants to respond within fourteen days. *See* Supplemental Appendix, Tab 26 (Alabama Supreme Court order directing response by October 18, 2017). The Alabama Attorney General filed a pleading regarding Doyle

Hamm's medical concerns with the Alabama Supreme Court on October 10, 2017, responding substantively with new medical reports from medical examinations that had never been turned over to Doyle Hamm. *See* Supplemental Appendix, Tab 27 at ¶1, ¶2. Doyle Hamm filed a supplemental response on October 11, 2017. *See* Supplemental Appendix, Tab 27. And then, on December 13, 2017, the Alabama Supreme Court set an execution date for February 22, 2017. *See* Supplemental Appendix, Tab 28.

During that entire period, the medical issues were properly before the highest court of the state of Alabama, which was the proper court to address the question, under principles of federalism and comity, and because that is the court that has the responsibility for ordering that Doyle Hamm be executed. The United States Supreme Court has long recognized "the seriousness of federal judicial interference with state civil functions" and has cautioned against unnecessary federal interference in state judicial proceedings. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975). The United States Supreme Court has emphasized that the principle of comity requires "a proper respect for state functions" and recognition that, in our federalist system, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Huffman*, 420 U.S. at

603 ("[I]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive polices, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies.").

It was only when the Alabama Supreme Court effectively stopped considering the legal question, by setting an execution date on December 13, 2017, that the medical claims were properly presented to the federal court. If the Alabama Supreme Court had ultimately declined to set an execution date, valuable federal resources would have been wasted. *See Colo. River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976) (counseling against concurrent federal proceedings where the litigation in federal court would be duplicative of litigation occurring in state court based on "conservation of judicial resources and comprehensive disposition of litigation"). Until the Alabama Supreme Court decided to set an execution date, Doyle Hamm's legal claims were properly before the state court and under consideration by that state court.

There are a number of Eleventh Circuit and Supreme Court cases where the *Younger* doctrine has been applied, or at least considered, as a reason to dismiss a federal lawsuit. *See Hale v. Pate,* 694 Fed. Appx. 682 (11th Cir. 2017) (finding that the district court correctly dismissed a §1983 complaint because state action was pending at the time of filing); *Shapiro v. Ingram*, 207 Fed. Appx. 938 (11th

Cir. 2006) (finding that the district court should abstain from issuing an injunction of a state judge's order in a contempt hearing); *Maharaj v. Sec. for Dep't of Corr*., 304 F.3d 1345 (11th Cir. 2002) (finding that the district court correctly dismissed a federal habeas corpus petition because state proceedings were pending).

As the Supreme Court has explained, the *Younger* doctrine was "designed to allow the states the opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479 (1977). And as this Court declared in *Maharaj*, "federal courts should avoid premature interference with ongoing state proceedings," since, referring to *Younger*, "The Court expressed the national public policy against federal court interference with ongoing state proceedings, based in part on 'the notion of "comity," that is, a proper respect for state functions…and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" 304 F.3d at 1347-48.

Appellants' argument that Doyle Hamm should have filed his §1983 lawsuit before raising the claims with the Alabama Supreme Court flips the history of the §1983 statute on its head: a federal challenge under §1983 should not be the first recourse, but rather an avenue to be used where state courts fail to uphold federal rights. *See Monroe v. Pape*, 365 U.S. 167, 174 (1961) (noting that one of the

guiding purposes of this statute "was to provide a federal remedy where the state remedy…was not available"). It is not intended to be a way to avoid state courts, nor to bypass state courts. Here, important matters of comity and federalism are at play.

C. The district court did not abuse its discretion when it found that Doyle Hamm did not delay filing his §1983 lawsuit.

In their emergency motion and brief, appellants misconstrue case law and ignore the principle that "[l]apse of time alone does not establish laches." *Grayson v. Allen*, 499 F.Supp.2d 1228, 1237 (M.D. Ala. 2007) (citing *Merill v. Merrill*, 260 Ala. 408, 409 (1954)). The doctrine of laches is merely a "principle of good conscience dependent on the facts of each case." *Id*. at 1236 (citing *Woods v. Sanders*, 247 Ala. 492 (1946)). The District Court was entirely right to evaluate the reasons for the lapse in time, not just the amount of time that has passed. *Id*. at 1236 ("[T]he defendant must show that the plaintiff delayed in asserting his claim, the delay was inexcusable, and the delay caused undue prejudice to the defendant.").

In this case, the Alabama Supreme Court was actively considering the legal issues presented in this complaint. None of the cases that appellants cite discuss or reject the reasons for delay that Mr. Hamm presents here.

By contrast to the cases that appellants cite, Doyle Hamm's *as-applied* claim relies on the circumstances of his worsening medical condition, not on any general risks presented by the execution protocol, and the fact that the Alabama Supreme Court was actively considering these issues. His condition has only presented a risk of an unconstitutional execution recently, so the lapse in time was not of his making. *See Siebert*, 506 F.3d at 1049 (plaintiff had not delayed unreasonably in bringing his as-applied challenge "[b]ecause the factual predicate of that claim – namely, [his] diagnosis of pancreatic cancer and hepatitis C – was not in place until May 2007," just several months before he filed his complaint). Moreover, because the Alabama Supreme Court was considering the legal issues pertaining to his medical condition up until it set an execution date, Doyle Hamm's claim would not have been properly before the federal court until the date was set. Therefore, in contrast to *Hallford v. Allen,* 634 F.Supp.2d 1267 (S.D. Ala. 2007), *Grayson v. Allen*, 491 F.3d 1318 (11th Cir. 2007), *Williams v. Allen*, 496 F.3d 1210 (11th Cir. 2007), and *Jones v. Allen*, 485 F.3d 635 (11th Cir. 2007), which all involved general challenges to the state's execution protocol, this case is governed by *Siebert*. The District Court was correct in finding that Doyle Hamm has not unreasonably delayed and has presented legitimate reasons for filing at the time he did.

III. The District Court Did Not Abuse Its Discretion When It Found No Substantial Risk Of Harm To Defendants And That A Stay Of Execution Would Not Be Adverse To The Public Interest

Appellants claim that the district court abused its discretion when it found that a stay would present no substantial risk of harm to the defendants and would not be adverse to the public interest. Doyle Hamm does not dispute that the State has a strong interest in enforcing its judgments and that the public has an interest in having Alabama's criminal sentences enforced. *See Jones*, 485 F.3d at 631. However, the State and the public also have a substantial interest in ensuring that executions are performed in compliance with the Constitution. *See In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("[W]e perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment.").

Chief Judge Bowdre properly weighed the interests of the public and the State in deciding that a limited stay of execution was proper, and this decision deserves deference. Judge Bowdre acknowledged that the State "has a legitimate interest in carrying out the execution" and that the family of the victim "has a significant interest in the execution of Mr. Hamm's sentence." Slip Op. at 24. But Chief Judge Bowdre also found that "[t]he public interest requires *constitutional* punishments. An execution that is carried out in a cruel and unusual manner is decidedly adverse to the public interest." Slip Op. at 24. The District Court also

made clear that the interests of the State and the public will not be significantly hindered because Doyle Hamm "will be executed," whether that is by intravenous or oral injection, and that she would ensure the delay would be minimal. Slip Op. at 24.

In her opinion, Chief Judge Bowdre emphasized that the limited nature of this stay should dispel any concern that the interests of the State or the public might be harmed. The stay is not indefinite, but will only last until "an independent medical examiner can be appointed to examine Mr. Hamm and report to the court about his current medical condition." Slip Op. at 23. Only once the examination is performed will the court "determine whether the stay should be extended for discovery on other issues raised by Mr. Hamm's complaint." Slip Op. at 5. Acknowledging the State's "significant interest in carrying out its sentence," Chief Judge Bowdre also made very clear that she would ensure that the case would move quickly and that there would be minimal delay:

> If I deny your motion and if I allow this case to go forward, it will not be a five year delay. It will be a prompt resolution of the medical issues and protocol issues. It will be my highest priority to see that it is done promptly and not a five year delay. Hearing at 56.

Chief Judge Bowdre emphasized that the interests of the State and the public *will* be satisfied because "Hamm will be executed" and the delay will be only slight. Slip. Op. at 24. The court made clear that the State will be

able to enforce its judgment and that Doyle Hamm will not, as appellants claim, "receive a reprieve from his judgment."

Moreover, appellants have significant control over how much longer the execution is delayed. They are the only ones responsible for Mr. Hamm's medical evaluation and treatment and for providing the information to Mr. Hamm's counsel.

Chief Judge Bowdre fairly and properly weighed the interests of the State and the public in determining that the interest in *constitutional* punishments significantly outweighed any minor harm resulting from a minimal delay in executing the State's judgment. Given the District Court's clear articulation of the predominant interest in constitutional executions, combined with the fact that the judgment will ultimately be executed and the fact that the appellants bear responsibility for much of the delay in this case, Chief Judge Bowdre's weighing of the equities and decision to grant the stay should be given deference.

CONCLUSION

For the foregoing reasons, Doyle Hamm respectfully urges the Court to deny appellants' motion to vacate the stay of execution.

Respectfully submitted,

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Dated: February 13, 2018

CERTIFICATE OF COMPLIANCE

This Court ordered appellee to file a "response brief." This response brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Assistant Attorneys General Thomas Govan and Beth Jackson Hughes at tgovan@ago.state.al.us and bhughes@ago.state.al.us, as well as to the Docket Clerk of the Capital Litigation Division of the Office of the Alabama Attorney General, Courtney Cramer at ccramer@ago.state.al.us.

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