

No. 18- \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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DOYLE LEE HAMM,  
*Petitioner,*

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,  
*Respondent.*

\_\_\_\_\_  
On Petition for Writ of  
Certiorari to the United States  
Court of Appeals for the  
Eleventh Circuit

\_\_\_\_\_  
APPLICATION FOR STAY OF EXECUTION OR, IN THE  
ALTERNATIVE, A SUPERVISORY WRIT

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February 22, 2018

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

On February 22, 2018, the State of Alabama has scheduled an execution for Petitioner Doyle Lee Hamm, a 61-year-old man with lymphatic cancer, untreated carcinoma, and severely compromised veins. Doyle Hamm respectfully asks this Court to stay his execution pending consideration of his petition for writ of certiorari, pending a full hearing on the appeal at the Eleventh Circuit, pending a review by this Court that Doyle Hamm is entitled to a stay of his execution, and under the All Writs Act due to the exceptional circumstances of the lower courts' proceedings and the absence of orderly review of Doyle Hamm's case.

Pursuant to Supreme Court Rules 20, 23.1 and 23.2, and under the authority of 28 U.S.C. §§ 1651, 1254, 1290-92, and 2101, this Court has full lawful authority to grant a stay of execution in this case. As such, this Court should exercise its discretion to grant a stay of execution, pending review of his claims, to ensure that Doyle Hamm is not executed by unconstitutional means.

I. DOYLE HAMM HAS RAISED A SUBSTANTIAL QUESTION FOR CERTIORARI THAT WARRANTS THIS COURT'S REVIEW AND ENTITLES HIM TO A STAY OF EXECUTION.

This Court should grant a stay of execution pending consideration of his petition for writ of certiorari. Doyle Hamm's petition before this Court presents the substantial question of whether federal courts should craft individualized lethal injection protocols in order to address the specific medical needs of infirm inmates, without giving them an opportunity to challenge the protocols through an adversarial process, or instead simply grant or deny injunctive relief and thereby

allow the states to develop their own lethal injection protocols for sick and infirm inmates.

The question presented here warrants this Court's review for several reasons. Well-intentioned judicial decisions formulating specialized protocols to protect sick, and often elderly inmates, are typically required to be made under the extreme pressure and anxiety of a pressing deadline: the death warrant. But whether this is the proper role for lower federal courts remains unclear. To involve the lower federal courts in this way raises significant concerns about states' rights, comity, and federalism and the type of adversarial process that a death row inmate is owed in responding to and contesting the creation of these individualized lethal injection protocols. One must assume that lower federal courts do not want to take on such an expansive role in this manner, as to be forced to wrestle with the even-more minute details of a lethal injection protocol or the additional safeguards owed to the inmate.

What is clear, however, is that lower federal courts will continue to face these questions more and more due to the increasingly aging population on death row, and this Court's guidance is therefore necessary to resolve whether, as Justice Breyer warned against, lower federal courts should "develop a constitutional jurisprudence that focuses upon the special circumstances of the aged." *See Dunn v. Madison*, 138 S. Ct. 9, 12 (2017), (denying cert.) (Breyer, J., concurring).

While Doyle Hamm has himself been subjected to the serious problems that arise from lower federal courts crafting individualized lethal injection protocols to address the specific medical needs of an infirm inmate, these problems are

unfortunately not unique to Doyle Hamm. Instead, his case offers a unique and powerful lens to view these problems and the proper vehicle to address them.

This Court is empowered to grant Doyle Hamm a stay of execution in order to adjudicate his constitutional claims. Previously, this Court has held that a stay may be granted when there is “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notion of probable jurisdiction; ... a significant possibility of reversal of the lower court’s decision; and ... a likelihood that irreparable harm will result if that decision is not stayed.” *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (superseded on other grounds by 28 U.S.C. § 2253(c)); *see also Wainwright v. Booker*, 473 U.S. 935 (1985) (Powell, J. concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted). Further, a stay should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve” and when a court cannot “resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits.” *Barefoot*, 463 U.S. at 888-89.

Doyle Hamm respectfully asks this Court to give his petition full consideration in light of the critical question that it poses for him and all death row inmates, as well as all lower federal courts currently and soon to face these very anguishing questions. Doyle Hamm has filed a detailed petition for certiorari laying out the critical reasons for this Court to grant certiorari. In this case especially, the well-intentioned actions of the district court and the appellate court have “so far

departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power," that certiorari must be granted. *See* Rules of the Supreme Court 10. For the multiple reasons articulated in his accompanying petition for certiorari, Doyle Hamm respectfully requests that this Court grant his petition and stay his scheduled execution in order to address the critical question before it.

II. DOYLE HAMM IS ENTITLED TO A STAY OF EXECUTION SO THE ELEVENTH CIRCUIT CAN HAVE A FULL HEARING ON HIS APPEAL OF THE DISTRICT COURT'S DENIAL OF THE PRELIMINARY INJUNCTION.

The proceedings in this case have been rushed because of the execution warrant in Doyle Hamm's case. Despite the fact that counsel for Doyle Hamm has been constantly and repeatedly asking for an independent medical examination and proper judicial oversight of his challenge to the use of intravenous lethal injection in his case—in both the state and federal courts—since at least July 2017, despite the fact that Doyle Hamm requested the state of Alabama's secret execution protocol as early as August 2017 (which was only produced by the Alabama Attorney General on the eve of his evidentiary hearing, on January 30, 2017), despite the fact that Doyle Hamm had asked for his medical records in January 2017 (which were only produced by the Alabama Department of Corrections in July 2017), Doyle Hamm was forced to undergo a medical examination and subjected to a creative set of variations on the execution protocol in his case in the three days leading up to his execution. The pressure of time—which was determined by both the lower federal courts to not be Doyle Hamm's fault, since he was and was held to be a diligent

plaintiff acting in good faith—has prevented the Eleventh Circuit from properly considering the full merits of his challenge in an orderly manner. For instance, the day before his execution, the Eleventh Circuit entered an order directing the Respondents to submit three affidavits to the appellate court (it is not even clear how the Eleventh Circuit can receive affidavits) without even giving Petitioner an opportunity to oppose or challenge or question those affidavits. The result has been a rushed and piecemeal review of Doyle Hamm’s request for a preliminary injunction, which is a ground for this Court to enter a stay of execution to allow the lower court to fully review his claims. *See Bucklew v. Lombardi*, 134 S.Ct. 2333 (2014) (granting stay pending appeal).

III. DOYLE HAMM IS ENTITLED TO A STAY OF EXECUTION ON THE MERITS OF HIS CLAIM.

In this case, Doyle Hamm has survived summary judgment and two motions to dismiss, and his challenge to the state of Alabama’s secret lethal injection protocol is ready for trial. This Court should grant a stay of execution so that Doyle Hamm’s claims may go to trial and be fully heard on the merits. “[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding.” *Barefoot*, 463 U.S. 880. As such, a stay of execution should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve.” *Id.* at 888.

A stay of execution on the merits is appropriate where (1) the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) the

applicant will be irreparably injured if the stay is not granted; (3) the issuance of the stay will not substantially injure the other parties interested in the proceeding; and (4) granting the stay would serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770 (1987); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006).

“A court considering a stay must also apply ‘a strong equitable presumption against the grant of a stay here a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.’” *Hill* at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). In this case, both the district court and the Eleventh Circuit roundly decided that Doyle Hamm diligently and timely brought his claim as soon as he reasonably could have.

A. Doyle Hamm has a likelihood of success on the merits of his claim.

Doyle Hamm has a significant likelihood of success on the merits of his Eighth Amendment claim that (1) he faces a “substantial risk of serious harm” that is “objectively intolerable” if the Alabama Department of Corrections (“ADOC”) attempts to establish venous access on him for purposes of lethal injection, and (2) there exists an alternative method of execution that is “feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain” exists. *Baze v. Rees*, 553 U.S. 35, 50 (2008); *see also Glossip v. Gross*, 135 S. Ct. 2726 (2015).

1) Substantial risk of serious harm

Doyle Hamm has a made a strong showing that he is likely to succeed on his

claim that if ADOC attempts to establish venous access for the purposes of lethal injection, there is a “substantial risk of serious harm” that is “objectively intolerable” in violation of the Eighth Amendment. *Baze*, 553 U.S. at 50. Doyle Hamm’s medical condition creates a significant risk of a botched and painful execution *as applied* to him for several reasons.

a. *Severely Compromised Peripheral Veins*

First, due to his diagnosed lymphatic cancer, cancer treatments, lengthy medical condition, including a history of IV drug abuse, and advanced age, Doyle Hamm has compromised peripheral veins on his upper and lower extremities (arms, hands, legs, and feet). He has presented concrete evidence that his peripheral veins are indeed compromised. Dr. Mark Heath, a leading anesthesiologist who performs anesthesia for open-heart surgeries on a daily basis in a leading hospital in this country, and who has extensive experience with lethal injections procedures, provided multiple reports and sworn testimony to the district court that, based upon his findings after a medical examination, Doyle Hamm’s peripheral veins are damaged and will be extremely difficult, if not impossible, to access for the purposes of lethal injection. *See* Preliminary Report of Mark J.S. Heath, M.D., ¶ 13; Report of Mark J.S. Heath, M.D., ¶ 9.

This evidence was substantially and independently corroborated by Respondents’ own evidence. Respondents 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. See Affidavit Kelley McDonald, LPM; Affidavit of Elisabeth Wood, LPN.

Moreover, the district court’s appointed independent medical expert essentially confirmed that Doyle Hamm *does* have compromised peripheral venous access, concluding that the veins in his upper extremities are completely off-limits for purposes of peripheral venous access. See Expert Report at 2. The expert identified only *two* accessible peripheral veins, but he cautioned that only the lower half of each vein would be readily accessible and recognized that both lower extremities were affected by “venous stasis” and “venous valvular insufficiency,” circulatory problems that that keep blood from moving well in the veins and causes leakage from the veins into the skin. *Id.* at 5; see Report by Charles David Blanke dated February 20, 2018 at ¶6.

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 lethal injection protocol [REDACTED]

[REDACTED]

Alabama’s secret execution protocol—a redacted copy of which was only turned over by Respondents to Doyle Hamm on the eve of the district court hearing on January 30, 2018, despite having been repeatedly requested for more than five months, since August 2017—states only [REDACTED]

[REDACTED]

Executions traditionally begin at 6 PM CST and in Doyle Hamm’s case could extend till midnight of that day, February 22, 2018. There is nothing in the protocol that would prevent the executioners from attempting to obtain peripheral venous access for six hours or for dozens of times.

Without *any* limitation on time or attempts to find a vein, Doyle Hamm faces a significant risk of pain and suffering in light of his likely compromised veins. As Dr. Heath explained, “As I expect, it would be extremely difficult in obtaining the satisfactory IV access, then [REDACTED]

[REDACTED] See In Camera Hearing on January 31, 2018, at 5. This problem arises *as applied* to Doyle Hamm because, as Dr. Heath explained, of his compromised veins. *See id.* at 6. These risks of harm are amplified by the fact that [REDACTED]

[REDACTED]

[REDACTED] All this remains true even despite the inventive specialized protocols put in place by the lower federal courts.

[REDACTED]

[REDACTED] and again, this remains true even after the new federal court execution protocols. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On this question, the Warden of Holman Prison essentially duped the Eleventh Circuit when she said, on affidavit, that “The ADOC will have an MD present during Mr. Hamm’s execution.” Affidavit of Cynthia Stewart dated February 21, 2018 at ¶5. The fact is, there is always a physician “present” during the execution to pronounce death. At every execution in Alabama, there is a physician present, because someone has to pronounce death. But a physician is *not* present in the execution chamber during the execution. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] In any event, Respondents’ recent response to the

Eleventh Circuit's request only states that an MD will be present during the execution, not that a doctor will perform any part of the injection procedure. This greatly heightens the risk to Doyle Hamm since it appears that the person making the decision when to stop peripheral access will likely not be a physician.

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* In Camera Hearing on January 31, 2018, at 2. The risk of infiltration is very high *as applied* to Doyle Hamm's case because his peripheral veins are compromised. *See id.*, p. 7-8.

In addition, the risks of infiltration are especially dangerous *as applied* to Doyle Hamm's case because [REDACTED]

[REDACTED] This would be made even worse by entering only in his legs, because the [REDACTED]

[REDACTED]. In light of the difficulties the executioners would have inserting a catheter, Dr. Heath explained why remote injection is so dangerous when performed from another room:

Well, again, the vein that he has on the back of his hand is tenuous, tiny. And if I were able to get an IV into – catheter into that vein, it would be a very small catheter and may not be able to insert it all the way, it might just be part way in. I might decide that the best, in my best judgment, I'm going to go ahead with this very poor quality access. But I would never attempt to use it from

a remote location, as in through a wall or anything like that. *Id.* at 30.

Moreover, the district court's untested and unprecedented "legs only" lethal injection protocol that it imposed on the Respondents, without permitting Doyle Hamm to challenge it, did not alleviate any of the risks posed by lethal injection *as applied* to Mr. Hamm and, in fact, created many more problems than it resolved. (Petitioner has been deprived of any ability to present evidence or challenge this creative federal court protocol). A "legs only" lethal injection protocol is extremely risky because peripheral access on the lower extremities is a much more complicated, difficult, and rare procedure than on the upper extremities, which is why practically all venous access is achieved on the upper extremities and this "legs only" lethal injection is such an unprecedented and exceptional procedure. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Some of the

reasons that the lower extremities are more difficult is that the saphenous vein on the ankle "curves around the inner side of the bones with a certain particular curvature that makes it much more difficult to insert a catheter." *Id.* at 25.

[REDACTED]

[REDACTED]

[REDACTED]

This creates then a number of significant risks, given that:

(a) the specialized protocol does not set a limit on the time or amount of attempts to get peripheral access on the lower extremities;

(b) this risk is augmented by the fact that [REDACTED]

[REDACTED]

(c) [REDACTED]

[REDACTED]

(d) there is increased risk of infiltration in Doyle Hamm's case because of the poor quality of his veins; and

(e) [REDACTED]

[REDACTED].

Moreover, if either of his saphenous veins on his lower extremities is punctured by a catheter, needle or line during the procedure, that vein will no longer be usable because of infiltration and there will be no alternative for the execution team but to persevere and cause a cruel and unnecessarily painful death.

b. *Central Line Risks Associated with Lymphatic Cancer*

In addition to the risks posed by his severely compromised veins, Doyle Hamm's lymphatic cancer and associated lymph node abnormalities has created a substantial risk that central line access will be highly risky. If ADOC is unable to

establish peripheral venous access, [REDACTED]

[REDACTED] [REDACTED] [REDACTED] However, this presents significant risks because Doyle Hamm may have lymph node problems at the time of his execution, which increases the chances of a botched, painful, and bloody execution.

Dr. Heath concluded, based on Doyle Hamm's medical records from Donaldson Correctional Facility, that there is evidence that he has "intermittent waxing and waning tumors on his chest, neck, and groins. This likely represents lymphadenopathy (swollen lymph nodes) related to his lymphatic malignancy." Preliminary Report of Mark Heath, ¶8. This condition would likely interfere with accessing his central veins. Dr. Heath noted that "Lymphoma, like other cancers, is a progressive disease if not cured. At this point, there may be significant involvement and enlargement of lymph nodes in other areas of his body, including his neck, chest, and groin. If there are enlarged lymph nodes surrounding the veins in his neck, chest, or groin, it would likely complicate or thwart attempts to obtain central venous access." *Id.*, ¶14. Mr. Hamm's medical records from Donaldson also report a nurse or doctor finding knots that "feel like lymph nodes" and a visual inspection also observed lumps on Mr. Hamm's chin and neck. *See* Donaldson Prison medical records from March 2017.

The court's independent medical expert, though not an oncologist, confirmed in his report that there were at least two abnormal lymph nodes present in Doyle Hamm's groin. He also concluded that, if central line access were to be attempted,

ultrasound technology of an “advanced level practitioner” would be necessary, given the complicated nature of the central line medical procedure and the inherent risks involved.

It is for this reason that the Eleventh Circuit has required that a doctor perform central venous access; but ADOC has only said a doctor would be “present.” There is no reason to believe a licensed physician would agree to participate in the execution—or what qualities and background such a physician would have if they did indeed agree to participate in the execution of a human being.

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 his lymph nodes. 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). 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*:

If at the time of the procedure he had lymphadenopathy in the area where they were doing the central line, then that would make it more difficult for the reasons I was discussing, the bulkiness of those nodes, the fact that they can distort the tissue. Lymph nodes have a lot of blood supply, so when you cut into them, they bleed a lot. All of them make it challenging. It turns out that the places where the large veins are accessible, the sexual [sic] line placement, are also places where lymph nodes – there are a lot of lymph nodes that can become infiltrated B tumor cells. The groin, the inguinal area for the groin and the neck and the area around the collar bone, those are the three places where we attempt central venous access and those are three



places where lymphadenopathy occurs.” *See* In Camera Hearing on January 31, 2018, at 25.

In Doyle Hamm’s case, given his particular history of lymphatic cancer, there is nothing in the protocol to prevent these risks of serious and unnecessary pain.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Upon information and belief, they do not. [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

This again is why the Eleventh Circuit sought assurances and crafted its own creative federal court protocol. But Holman Prison Warden Cynthia Stewart’s conclusory affidavit provided to the Eleventh Circuit’s inquiry does not state that the ultrasound equipment would be *used* if a central line were to be performed and does not confirm that a qualified doctor would *perform* a central line, only that a doctor and the equipment would be *present* at the execution. Dr. Heath confirmed, based on his prior experiences in Alabama, that “To the best of my knowledge, Alabama has limited experience with obtaining central vein access for lethal injection procedures.” *Ibid.*, ¶13. In lay terms, central venous access for Mr. Hamm

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<sup>1</sup> [REDACTED]

is likely extremely difficult because of the combination of Mr. Hamm’s lymphatic cancer and the lack of a fully equipped hospital operation-room set up at Holman Prison.

Moreover, the district court’s untested and unprecedented, but very creative “legs only” lethal injection protocol does not address the risks of central line access at all because it assumes, without basis, that central line access will not be necessary. Given the significant and judicially recognized problems with Doyle Hamm’s peripheral veins, [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] central line is indeed very likely and, if performed, will likely result in needless pain and suffering in violation of the Constitution.

**2) A Feasible and Legal and Available Alternative**

Doyle Hamm has also presented concrete evidence that there exists a “feasible, readily implemented” alternative method of execution that would “significantly reduce[] a substantial risk of severe pain” for him. *Baze v. Rees*, 553 U.S. 35, 50 (2008); *see also Glossip v. Gross*, 135 S. Ct. 2726 (2015). In his complaint, Doyle Hamm proposed a ten-gram dose of secobarbital injected orally in four ounces of liquid; alternatively, he proposed a drug cocktail known to doctors as “DDMP II,” which is composed of 1 gram of diazepam, 50 milligrams of digoxin, 15 grams of morphine sulfate, and 2 grams of propranolol, injected orally. These oral forms of lethal injection are both “feasible, readily implemented, and in fact

significantly reduce a substantial risk of severe pain” associated with intravenous administration of the lethal injection in his case. *Baze*, 553 U.S. at 50. These alternative methods of execution were recommended by Dr. Charles David Blanke, an experienced physician who specializes in end-of-life care, specifically in medical-aid-in-dying (MAID). See Affidavit of Dr. Charles David Blank filed with Amended Complaint, ¶ 5, 6, 11.

In both the written opinion and the statements at the end of the evidentiary hearing on January 31, 2018, the district court made findings that the alternative proposed by Doyle Hamm Hamm was feasible and legal in Alabama. In its opinion, the court specifically determined that Alabama’s lethal injection statute *does* permit oral injection. DC Slip Op. 02-06-18 at 21; *see also* Hearing on 01-31-18 at 128-29. The court 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).

Moreover, there is concrete evidence that an oral dose of a lethal drug or drug cocktail is feasible and readily implemented. In his affidavit and in sworn testimony during the January 31, 2018 hearing, Dr. Blanke explained that secobarbital, as well as the drugs used in the DDMP II cocktail are very common and easily obtainable in the United States and, therefore, should be easily accessible to ADOC.

It is also clear that the oral injection would substantially reduce a risk of harm to Doyle Hamm. As Dr. Blanke explained, MAID medications have a 99.4% efficacy rate, which would reduce the chances of a botched execution astronomically.

An oral injection would avoid the need to access Doyle Hamm's veins at all, thus eliminating the substantial risks detailed above.

B. Irreparable injury will occur if the stay is not granted

Irreparable harm will occur to Doyle Hamm if the execution is not stayed until the pending petition for a writ of certiorari is considered. *Wainwright v. Booker*, 473 U.S. 935 (1985) (Powell, J. concurring) (recognizing that there is little doubt that a prisoner facing execution will suffering irreparable injury if the stay is not granted).

C. Issuing the stay will not substantially injure the other parties

The state will not be harmed by briefly delaying Doyle Hamm's execution to allow these important constitutional questions to be resolved. The state's interest in carrying out its sentences will be satisfied because, no matter the result of the proceedings, Mr. Hamm will be executed. Ensuring that the execution is carried out in compliance with the Eighth Amendment will only temporarily delay Doyle Hamm's execution and will further the state's interest related interest in not botching executions in violation of the Constitution.

D. Granting the stay would serve the public interest

Granting the stay would serve the public interest because, as the district court acknowledged in its memorandum opinion granting a stay in this case, "[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.” 30 Memorandum Opinion 02.06.18 at 24.

IV. DOYLE HAMM IS ENTITLED TO A STAY OF EXECUTION, IN LIGHT OF THE EXCEPTIONAL CIRCUMSTANCES, UNDER THE COURT’S BROAD AUTHORITY PROVIDED IN THE ALL WRITS ACT.

While this Court’s power pursuant to the All Writs Act is to be invoked only in extraordinary circumstances, so as to preserve its broad authority for necessary and unique situations, Doyle Hamm’s case presents these very exceptional circumstances. Both the actions of the district court and the court of appeals in reviewing Doyle Hamm’s claim that his scheduled execution poses significant and unconstitutional risk call for this Court to assert its authority to intervene to implement order in the proceedings below.

With Doyle Hamm’s appeal before it, the Eleventh Circuit refused to abide by its limited appellate authority. Instead, before ruling on Doyle Hamm’s appeal, it inserted itself as a factfinder, ordering the state to file three affidavits on the viability and safety of executing Doyle Hamm under this novel protocol, without allowing Doyle Hamm an opportunity to contest the affidavits or respond. The law is undisputed here: The Eleventh Circuit’s review was to have been on the record before it, and its jurisdiction did not make it into a next-level factfinder. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). This Court’s intervention, granting a stay of execution and remanding this matter to the Eleventh Circuit for further appropriate proceedings of Doyle Hamm’s constitutional rights, is now necessary.

The All Writs Act ensures that, when extraordinary circumstances arise, this Court has power to intervene when and as necessary. It provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreed to the usages and principles of law.” 28 U.S.C. § 1651(a); see *F.T.C. v. Dean Foods Co.*, 384 U.S. 597 (1966). The origins of this power predate the passage of this Act. See *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) (“This statute has served since its inclusion, in substance, in the original Judiciary Act as a legislatively approved source of procedural instruments designed to achieve the rational ends of law.”). The All Writs Act gives federal courts the power to “safeguard not only ongoing proceedings, but potential future proceedings, as well as already-issued orders and judgments.” *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004).

Although the courts reviewed Doyle Hamm’s claim and essentially found that he has a substantial likelihood of success on the merits of his Eighth Amendment claim, rather than grant a stay on these grounds, both the district and circuit court proceeded to inject themselves in the state’s execution protocol, and start rewriting execution protocols, in violation of their judicial authority, to decide what was the proper resolution of Doyle Hamm’s case. The district court’s actions alone are sufficient to call for the use of this Court’s power under the All Writs Act. Injecting itself into the state’s lethal injection protocol, the district court devised and imposed a novel method of execution—a “legs only” protocol. Under a rushed timeline, the

district court created an unprecedented method of lethal injection, which failed to sufficiently address the independent expert's concerns with the dangers of executing Doyle Hamm through a central line, and refused to consider the continued risk that Doyle Hamm would face under this new method. The only conclusion that one can derive from the district court's decision to devise its own method of lethal injection for Doyle Hamm is that he had substantially shown that he faced a significant risk of an unconstitutional execution. However, rather than granting a stay then, as was called for, the district court injected itself as the authority over the state's execution protocol.

Then, after improperly injecting itself as the craftsman of the state's execution method, it refused Doyle Hamm the opportunity to be heard on this novel method. It developed and imposed this novel method of execution without having the independent expert's full written report before it, having only received a quick oral report over the phone that described the doctor's findings; failed to notify Doyle Hamm of the medical expert's findings prior to the hearing; did not permit the parties to review the report at any time prior to imposing this unprecedented protocol; and required the state to agree to this novel method of lethal injection without ensuring that the state was even capable of complying with this stipulation.

One might think, then, that the extraordinary circumstances in Doyle Hamm's case ended at this point in the district court. However, on appeal to the Eleventh Circuit, the need for this Court's intervention under the All Writs Act became ever more evident. Rather than review the record from the lower court

before it, the Eleventh Circuit ignored its limited appellate authority and transformed itself into a factfinder in Doyle Hamm’s case. *See Brooks v. Warden*, 810 F.3d 821, 818 (11th Cir. 2016) (noting that an appellate court’s review is limited to whether the district court abused its discretion in denying a stay of execution). It demanded facts from the Respondent—previously not found by the district court, specifically stating that the district court had failed to prepare a record that “facilitate[d] a complete and accurate review of Hamm’s appeal.” Slip Opinion dated February 21, 2018. Instead of determining that insufficient information was on the record to find this novel method of execution constitutional, and thus Doyle Hamm had shown a substantial likelihood of success on the merits, the appellate court attempted to *on its own* remedy the situation by seeking additional facts.

On the morning of February 21<sup>st</sup>, hours after receiving Doyle Hamm’s appeal and before even receiving Respondents’ answer, the Eleventh Circuit required the State to provide three sworn affidavits assuring the circuit court that the state would (1) “follow the stipulation made on the record before the district court”; (2) have an “ultrasound technology and an ‘advanced level practitioner (*i.e.*, a CRNA, PA, or MD) will be present for Hamm’s execution”; and (3) the state be “in fact capable of administering an intravenous line through Hamm’s great saphenous veins.” Slip Opinion issued February 21, 2018. What the Eleventh Circuit requested is simply not within its power as an appellate court, particularly when one considers the stakes of this case and that it was just hours, less than one day, before the scheduled execution.



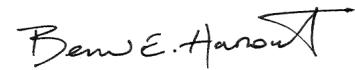
The equities here lie in Doyle Hamm's favor. Doyle Hamm was not responsible for the delay that has resulted in this extraordinarily hurried and forced actions just day before his scheduled execution. Doyle Hamm proved to both courts that he has a meritorious claim worthy of trial and consideration. Stays of execution are demanded in circumstances such as here, where a court must consider the case before it without the execution looming over proceedings. Courts should not provide less consideration, or exceed their judicial authority, to established meritorious claims simply to meet the date and time of a scheduled execution.

With the equities so strongly in Doyle Hamm's favor, since the State has no interest in an unconstitutional execution despite its interest in having its judgment enforced, Doyle Hamm's Eighth Amendment claim deserves the time and consideration that a meritorious claim is owed, not the attempts by the courts to moot out his claims with improper remedies and cause him obvious irreparable harm. Doyle Hamm, therefore, seeks this Court's necessary intervention, to step in and control the interim proceedings below and ensure the proper review that his claims are owed.

#### CONCLUSION

For the above stated reasons, Doyle Hamm respectfully requests that this Court stay his execution.

Respectfully submitted,

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a prominent, sweeping flourish at the end of the name.

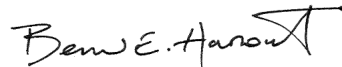
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February 22, 2018

**CERTIFICATE OF SERVICE**

I, Bernard E. Harcourt, hereby certify that on February 22, 2018, I electronically filed the foregoing with the Clerk of the Supreme 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](mailto:tgovan@ago.state.al.us) and [bhughes@ago.state.al.us](mailto: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](mailto:ccramer@ago.state.al.us).

Respectfully submitted,



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