**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA**

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| DOYLE LEE HAMM,<br><br>Plaintiff,<br>v.<br><br>JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, et al.,<br><br>Defendants. | ) | Civil Action No.<br>2:17-cv-02083-KOB<br><br>**EXECUTION SCHEDULED**<br><br>**Thursday, February 22, 2018** |

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**DOYLE HAMM'S SURREPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In their brief, the defendants misconstrue the legal standard that applies to a motion for summary judgment by conflating facts and genuine issues of material fact. Defendants confuse factual assertions for the larger genuine issues of material fact. They conflate direct evidence with the interpretation of that evidence and the legal inferences that can be drawn. As a legal matter, though, it is clear that there is an important distinction between simple factual assertions and whether they give rise to genuine issues of material fact. When factual evidence proffered by the two parties are at odds, it creates a genuine issue of material fact that cannot be resolved on summary judgment. *See Grayson v. Warden*, 869 F.3d 1204, 1226 (11th Cir., 2017); *see also Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) ("[T]here is a difference between direct evidence and inferences that may permissibly be drawn from that evidence" (citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 253-55 (1986)).

Doyle Hamm submits this surreply and the accompanying supplemental affidavit of Dr. Charles David Blanke (Exhibit A) to correct inaccuracies in the defendants' brief and to demonstrate the following:

(1) There are at least nine (9) genuine issues of material fact in dispute.

(2) Doyle Hamm's lymphatic cancer is not in remission.

(3) The central legal question here is Doyle Hamm's current medical condition surrounding venous access for purposes of an intravenous lethal injection.

(4) The four cases defendants rely on to preclude review have been distinguised.

## I. DEFENDANTS MISUNDERSTAND THE LEGAL STANDARD ON A MOTION FOR SUMMARY JUDGMENT

The defendants misconstrue the standard that applies to a motion for summary judgment by confusing factual assertions for genuine issues of material fact. As the Eleventh Circuit explained in *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996), "there is a difference between direct evidence and inferences that may permissibly be drawn from that evidence." In a situation like here, where undisputed factual allegations raise genuine issues of material fact, courts must deny the movant's motion for summary judgment. *See Strickland v. Norfolk Southern Ry. Co*., 692 F.3d 1151, 1154 (11th Cir. 2012) (noting that "the drawing of legitimate inferences from the facts" is a jury function); *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1292 (11th Cir. 2012) ("If the record presents disputed issues of fact, the court may not decide them; rather, we must deny the motion and proceed to trial.").

Defendants disregard this important distinction and draw a long list of what they call "undisputed facts" by citing factual assertions from the record. Doc. 18 at 4-5. So, for instance, they argue that it is an undisputed fact that "Hamm was diagnosed with ocular lymphoma in 2014." Doc. 18 at 4. To be sure, that is a fact that is not in dispute. That does not mean, however, that it does not raise a genuine issue of material fact. To the contrary, when combined with other facts, such as the fact that the nurses now are only able to draw blood from one small tortuous vein on his right hand, it raises several genuine issues of material fact, including for instance *whether Doyle Hamm's current medical condition of compromised veins and lymphadenopathy is likely to prevent defendants from achieving venous access for purposes of a lethal injection without unnecessary pain and suffering?* That presents a genuine issue of material fact that is in

dispute, despite the fact that both parties here agree that Doyle Hamm was diagnosed with ocular lymphoma in 2014. Defendants also fail to recognize that the very undisputed facts that they marshal, in combination with and in opposition to others that they themselves list, raise genuine issues of material fact.

Perhaps the best way to clarify this distinction between facts and genuine issues of material fact is with the following table, which rearranges all of the defendants' simple facts into the proper legal framework, namely the question of "genuine issues of material fact." For ease of reference in this table, where relevant, Doyle Hamm has quoted and retained (and bolded) the defendants numbering of their undisputed facts listed in their brief at pages 4 and 5.

As noted in Doyle Hamm's original response, there are at least nine (9) genuine issues of material fact in dispute:

| Genuine Issues of Material Fact | Facts in the record that support Doyle Hamm | Facts in the record that support defendants |
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| ***I. Count I, prong I: The planned method of execution presents a substantial risk of serious harm.*** | | |
| **A. Whether the defendants can successfully achieve venous access in Doyle Hamm's situation for purposes of a lethal injection given his current medical condition** | – Dr. Mark Heath states that in his expert medical opinion, "based on what I know from the David Nelson case, it is my opinion that the state is not equipped to achieve venous access in Mr. Hamm's case. Mr. Hamm's difficult IV access greatly increases the likelihood of an inhumane execution due to infiltration of the execution drugs, with the onset of paralysis preceding the attainment of adequate anesthesia." Doc. 1 at 30 (Appendix A at 7 ¶16); *see also* Doc. 14-5 at ¶12.<br>– "**5.** Hamm's expert, Dr. Mark Heath, was retained as an expert in the Nelson case. Id. ¶31." | – "**23.** Mr. Butler, a nurse practitioner, located veins on Hamm that could accommodate a 20- or 22- gauge catheter on the distal radius of both arms, the dorsum of both hands, and the ventral surface of the arms just proximal to the wrist bilaterally. Mr. Butler also located veins in Hamm's feet that would accommodate a large 16- or 18- gauge catheter. Doc. 12-5 at 2." |
| **B. Whether there is now venous access for purposes of drawing blood from Doyle Hamm only in the tortuous little vein on the back of his right hand** | – "**17.** Dr. Heath located a vein on Hamm's right hand that was potentially accessible for peripheral IV access. Doc. 15-1 at 3."<br>– Dr. Heath did not find any peripheral veins except for one small tortuous vein on the back of Doyle Hamm's right hand. *See* Doc. 1 at 26 (Appendix A at p. 3, ¶7); *see* | – "**22**. Dr. Roddam located two veins in Hamm's right wrist that would be accessible for venous access. Doc. 12-4 at 2."<br>– "**19.** Dr. Heath was not able to bring his medical equipment to his evaluation, which limited his ability to perform a |

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| | *also* Doc. 14, Ex. E.<br>– Nurses Elisabeth Wood and Kelley McDonald have recently been trying, with some difficulty, to actually draw blood from Doyle Hamm and they have recently *only* been trying to use the one compromised vein on his right hand. Doc 12-6 and 7.<br>– On October 31, 2017, Ms. McDonald twice attempted to draw blood from Doyle Hamm in the small tortuous vein on his right hand and did not succeed. Doc. 12 Ex. F at ¶6.<br>– On November 7, 2017, Ms. McDonald again tried to draw blood from Doyle Hamm using the tortuous vein on his right hand and did not succeed. Doc. 12 Ex. F at ¶6.<br>– That same day, November 7, 2017, Ms. Wood drew blood from the small tortuous vein on Doyle Hamm's right hand. Doc. 12 Ex. F at ¶6; Doc. 12 Ex. G at ¶4.<br>– On November 14, and December 18, 2017, Ms. McDonald drew blood from Doyle Hamm from that tortuous vein on his right hand. Doc. 12 Ex. F at ¶4 and 6.<br>– "**9.** Hamm reported to Dr. Heath that there was difficulty in accessing a vein in his right hand during a medical procedure in 2014. Doc. 15-1 at 3." | complete examination of Hamm's veins. Id. at 2."<br>– "**20.** Dr. Heath did not examine the accessibility of deep veins in Hamm's neck, chest, or groin areas that could be used for obtaining central venous access. Id. at 4, 6-7."<br>– "**21.** The visibility and palpability of veins can vary over time depending on multiple factors such as hydration status, temperature, tissue edema, and medications. Doc. 15-2 ¶11." |

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| **C. Whether venous access for purposes of drawing blood from Doyle Hamm's right hand would provide venous access for purposes of inserting a larger catheter into Doyle Hamm in order to perform a lethal injection from a remote distance away from Doyle Hamm** | – Dr. Mark Heath states that in his expert medical opinion, "It is very important to understand that it is easier and simpler to insert a needle to draw blood than it is to insert an intravenous catheter. This is because a blood draw needle is thinner and sharper than an intravenous catheter, which consists of a needle surrounded by a plastic tube. […] Threading a catheter all the way into a vein is more challenging when the vein is tortuous, as is the case with the vein in the back of Mr. Hamm's right hand. Also, there is a higher chance of rupturing the vein when threading a catheter, as is the case with the vein in the back of Mr. Hamm's right hand. The difficulties encountered in drawing blood from the vein in the back of Mr. Hamm's right hand is fully consistent with, and supportive of, my opinion that it would be extremely challenging or impossible to use it to obtain secure IV access suitable for injecting fluid or drugs." Doc. 14-5 at 2-3.<br>– Dr. Mark Heath states that that in his expert medical opinion, "[b]ased on my knowledge of previous Alabama lethal injection procedures and protocols, this small, tortuous vein on his right hand would not provide reliable peripheral venous access." Doc. 1 at p. 26 (Appendix A at 3 ¶7). | – "**18.** Dr. Heath stated that inserting an intravenous catheter would be challenging in this vein, but he did not state it would be impossible to insert a 20- or 22- gauge catheter in the vein. Id." |

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| **D. (Part 1) Whether Doyle Hamm now suffers from lymphadenopathy** | – In March 2017, Doyle Hamm complained that he was suffering from "lumps" or "knots" on his chest. The medical practitioner noted on the medical record, "These feel like lymph nodes" and observed that there were "subcutaneous nodules about 2 centimeters in diameter," one of which was "about 6 centimeters below right clavicle." Doc. 4-4 at 453; *see also* Doc. 4-4 at 472 and 470.<br>– In August 2017, Nicola Cohen observed "two abnormal lumps on Mr. Hamm, one under his chin on the left side that is visible to someone looking at him, as the area appears swollen; and one on the back right of his neck below his right ear." Doc. 14-9 at ¶5.<br>– In a medical report dated September 16, 2015, the doctors observed: "Abnormal enhancement is seen in the left orbit with involvement in the left pterygopalatine fossa and left infratemporal fossa/masticator space region. Abnormal enhancement is also seen in the inferior orbital fissure and in foramen ovale, and along foramen rotundum on the left." Doc. 14-4 at 629. Those abnormalities have never been tested or ever treated.<br>– In a doctor's report dated May 16, 2014, following a CT scan of Doyle Hamm's head, chest, and abdomen, it is reported | – "Dr. Roddam has not found evidence of lymphadenopathy in the cervical area of Hamm's body." Doc. 12 at p. 11.<br>– "**14.** No medical professional has determined that Hamm's ocular lymphoma has come out of remission."<br>– "**15.** No medical professional has diagnosed Hamm with lymphadenopathy in at least the past two years. When Hamm was examined on January 2, 2018, at the Donaldson medical unit, his treating physician did not find evidence of lymphadenopathy in the cervical, supraclavical, or axillary areas of Hamm's body. Doc. 12-4 at 2." |

that "*In the chest were noted numerous abnormal lymph nodes*" and "*Calcified granulomata were noted within the lung as well. A few small nodes were seen in the abdomen*. The pelvis was not imaged." Doc. 14-3 at 5. None of those abnormal lymph nodes were ever tested or ever treated.

– In a pathology report dated April 18, 2014, Dr. Chandar Sekar reported from a CT scan of Doyle Hamm's neck that there were "Enlarged lymph nodes consistent with reactive lymph nodes is seen." Doc. 14-4 at 151. In another pathology report dated April 18, 2014, Dr. V.C. Scott reported from a CT scan of Doyle Hamm's chest the presence of "adenopathy," a synonym of lymphadenopathy, and indicated that "any of these areas could be due to lymphoma." Doc. 14-4 at 152. Again, none of those abnormal lymph nodes were ever tested or ever treated.

– Doyle Hamm is being prescribed painkillers for pain behind his left eye and states "I take a painkiller called Norco on a daily basis, 10mgs three times a day, because of the pain that I have in my left eye and behind my left eye. It is prescribed by Dr. Roddam for the pain in the back of my left eye." Doc. 4-6 at ¶8.

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| **D. (Part 2) Whether Doyle Hamm's lymphadenopathy would present a substantial risk of serious harm that might interfere with a humane execution** | – Dr. Mark Heath states that "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." Doc. 1 at 28-29 (Appendix A at 5-6 ¶14). | "**8.** Hamm has been in remission from ocular lymphoma since 2016. Doc. 12-4." |
| ***The laches and statute of limitations arguments as to Doyle Hamm's claim that the execution poses a substantial risk of serious harm.*** | | |
| **E. Whether Doyle Hamm's medical condition and venous access got materially worse during the Spring of 2017** | – The combination of Doyle Hamm's lengthy medical history and drug use (*see* Doc. 14-7), his cancer and cancer treatment (*see* Doc. 14-3 and 14-4), his increasing age (Doyle Hamm will be 61 on Feb. 14, 2018), his lymphadenopathy (*see* above), and the worsening condition of his veins has created a new medical condition regarding venous access that presents a substantial risk of serious harm.<br>– "**6.** Hamm alleges his veins are compromised as a result of his cancer, cancer treatments, extensive prior medical history, current medical condition, and age. Doc. 15 at 1."<br>– "**11.** Hamm argued that he had difficult IV access, citing Dr. Heath's preliminary opinion, as early as August 2017. Doc. 12-2."<br>– "**7.** Hamm was diagnosed with ocular lymphoma in 2014. Doc. 15 at 10, Doc. | – "**13.** Hamm has not provided a medical record documenting that his venous access has changed or deteriorated in at least the past two years. Doc. 14-4."<br>– "**1.** Hamm was convicted of capital murder and sentenced to death in 1987. Doc. 15 ¶9."<br>– "**2.** Hamm's sentence became final in 1990. Id."<br>– "**3.** Hamm has been subject to execution by lethal injection since 2002. Ala. Code § 15-18-82.1(a); Doc. 15 at 4–5."<br>– "**4.** An Alabama death-row inmate challenged the ADOC's ability to gain venous access to carry out a lethal injection as early as 2003. Doc. 15 ¶46, citing Nelson v. Campbell, 541 U.S. 637, 642 (2004)."<br>– "**10.** The State moved to set Hamm's execution date in June 2017. Doc. 12-1."<br>– "**12.** Hamm did not file his §1983 action |

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| | 12-4." | until December 13, 2017, after the Alabama Supreme Court set his execution date. Doc. 1." |
| ***I. Count I, prong II: There is an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.*** | | |
| **F. Whether there exists a feasible, readily implementable, and legal alternative method of execution that would significantly reduce a substantial risk of severe pain** | – "**24.** Alabama law only authorizes two methods of execution: lethal injection and electrocution. Doc. 15 at 4."<br>– Oral lethal injection is a form of lethal injection. *See* Oxford English Dictionary (defining "injection" so as not to be confined to only intravenous injection).<br>– "**26.** Medical-aid-in-dying is authorized in Oregon by a legislative enactment in 1997, the Oregon Death with Dignity Act (DWDA), which allows terminally-ill adult Oregonians to obtain and use prescriptions from their physicians for self-administered, lethal doses of medications. Doc. 14-19 at 3, 5."<br>– Dr. Charles David Blanke proposes a ten-gram dose of secobarbital injected orally in four ounces of liquid; or the injection of a drug cocktail known 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. *See* Exhibit S | – "**25.** Lethal drugs used as part of a physician-assisted suicide are administered 'in the form of a drink.' Doc. 14-20 at 17."<br>– "**27.** No state currently employs the self-administration of a lethal dose of medication in the form of a drink as a method of execution." |

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| | (Affidavit of Dr. Charles David Blanke) at ¶ 5, 6 and 11.<br>– These drugs are available and reduce the risk of a botched execution from 100% to 0.6%. *See* Doc. 14 at 27-29. | |
| ***Count II: The cumulative punishment now violates the Eighth Amendment ban on Cruel and Unusual Punishment.*** | | |
| **G. Whether the defendants' overall treatment of Doyle Hamm and constant pricking and needling amount to cruel and unusual punishment** | – Doyle Hamm states that "Lately, since a few months now, the nurses seem to be trying to stick needles in me to draw blood much more often than they were before. They seem to be doing this almost every other week." Doc. 14-6 at ¶6. | – "The fact that prison medical staff conduct routine blood samples for an inmate like Hamm, who admittedly has had health issues such as his lymphatic cancer in 2014 and Hepatitis C is hardly surprising and it is outrageous to make such baseless accusations that Defendants have pricked Hamm with needles to inflict pain under the 'pretext' of drawing blood." Doc. 18 at 34. |
| **H. Whether defendants' overall care of Doyle Hamm's cancer, including medical treatment and non-treatment, amounts to cruel and unusual punishment** | – Dr. Charles Blanke states that "The lesion present on his cheek since at least 2014 also proved to be malignant. He did not receive the recommended therapy for this tumor, surgical resection of his basal cell carcinoma." Exhibit 1 at ¶8.<br>– Doyle Hamm's untreated lesion is getting deeper and bigger and, in his words, "is now stinging and burning all the time." Doc. 14-6 at ¶7.<br>– Doyle Hamm was diagnosed with lymphatic cancer in 2014, with evidence of | – "**16.** The only cancer for which Hamm is currently being treated is skin cancer on the left cheek of his face. Id." |

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| | possible abnormal nodes in his abdomen and chest. His doctors recommended chemotherapy in addition to radiation. Despite that, Doyle Hamm has never received any treatment beyond the radiation for the cancerous mass behind his left eye and in his skull. In other words, defendants have never treated any of his other lymphatic cancer condition or begun chemotherapy treatment, as recommended. |

Though the parties may agree to some significant facts in their filings, for instance that Doyle Hamm was diagnosed with ocular lymphoma cancer in 2014 or that his cancerous lesion on his cheek has not been treated since it was biopsied and determined to be cancerous in February 2014, April 2017, and November 2017, there remains in dispute before this Court significant "genuine issues of material fact." The table above demonstrates just this, and why defendants' simple factual assertions do not resolve these significant genuine issues of material fact.

## II. DEFENDANTS MISCONSTRUE DOYLE HAMM'S MEDICAL CONDITION

Defendants repeatedly state that it is an undisputed fact that Doyle Hamm's lymphatic cancer is "in remission." On four occasions in their brief, defendants repeat that it is undisputed that "Hamm has been in remission from ocular lymphoma since 2016." Doc. 18 at 4 ¶8; *see also* id. at 4 ¶14, 18, and 25. And defendants argue, largely on this basis, that Doyle Hamm has presented no evidence that his veins are compromised. Doc. 18 at 25. But, in reality, Doyle Hamm's cancer is not in remission and there is substantial evidence that his veins are compromised.

### A. *Doyle Hamm's cancer is not "in remission"*

First, defendants' claim that Doyle Hamm's cancer is "in remission" is factually wrong. Doyle Hamm was diagnosed with lymphatic cancer in 2014 and received radiation to his skull for ocular lymphoma in July 2014. At the time, he was also diagnosed with abnormal lymph nodes in his chest, abdomen, and neck; those lymph nodes were not tested, nor treated at the time. They have never been tested or treated to date. Accordingly, there is no basis to state that his lymphatic cancer is in remission. To be sure, defendants can argue that Doyle Hamm has not presented evidence that a

medical professional has diagnosed his lymphatic cancer in the last year or so, but that is only because defendants have deprived Doyle Hamm of adequate medical care.

Moreover, defendants' statement of undisputed fact is clearly contradicted by both Dr. Mark Heath and by Dr. Charles David Blanke. Dr. Heath states in his Preliminary Report:

> Mr. Hamm has active B-cell lymphoma, a form of cancer that involves the lymph nodes. A large tumor was diagnosed in 2014 and extended from his left eye into multiple areas of the skull behind the face, and through the skull into the middle cranial fossa (the area surrounding the temporal lobe of the brain). In 2014 he also had enlarged lymph nodes in his chest, and it is unclear whether these nodes were or are involved in the malignant process. The lymphoma was treated with radiation and medication, with some improvement; however, recent reported symptoms indicate that the malignancy has returned. There appears to have been no follow-up evaluation to determine whether the cancer has spread into lymph nodes beyond his face and skull. 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. Doc. 1 at 28-29 (Appendix A at 5-6 ¶14).

In a similar vein, Dr. Blanke states in his Supplemental Affidavit:

> In 2014, Mr. Hamm was diagnosed with biopsy-proven lymphatic cancer. The primary manifestation was around his left orbit, but at the time of diagnosis he had other abnormal lymph nodes noted on imaging. The latter were not worked up or treated. Based on the medical consultations done to date, it is impossible to state with any degree of certainty whether or not he has active lymphoma overall.

Exhibit 1 at ¶6.

As such, defendants' claim that Doyle Hamm's lymphatic cancer is "in remission" is unfounded. If anything, it raises another genuine issue of material fact. Defendants seem to rely on a recent physical exam by Dr. Roddam, the prison doctor at Donaldson Correctional Facility, who is not an oncologist and has not recently ordered any type of imaging (PET scan, CT scan, MRI, etc.) of his abdomen, chest, or neck. It is

impossible to say that Doyle Hamm's lymphatic cancer is in remission from a simple physical exam.

B. *Doyle Hamm's venous condition is what matters*

In any event, what matters for purposes of Count I of this §1983 challenge is not just Doyle Hamm's cancerous condition, but more specifically *his medical condition regarding venous access, that is whether there are accessible veins and whether his lymphadenopathy would interfere with venous access*. The central genuine issue of material fact is whether Doyle Hamm's present venous condition presents a substantial risk that the attempt to gain venous access for purposes of a lethal injection will be unnecessarily painful.[1]

C. *There is a necessary temporal dimension to his medical condition*

Defendants also do not appreciate that Doyle Hamm's medical condition regarding venous access is a progressive condition. Doyle Hamm may have had slight difficulties with venous access before, but what matters is the point at which those problems, as a result of compounding factors, including age, produce a substantial risk of serious harm.

[1] Regarding the first prong of the *Glossip/Baze* legal standard, two investigative reports in the *New Republic* demonstrate precisely the risk of serious harm in Doyle Hamm's case. (Warning that the pictures are disturbing). *See* Ben Crair, "Photos from a Botched Lethal Injection: An Exclusive Look at What Happens When an Execution Goes Badly," *New Republic*, May 29, 2014, available at https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida; Ben Crair, "Exclusive Emails Show Ohio's Doubts About Lethal Injection," *New Republic*, August 17, 2014, available at https://newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution.

Reviewing all the medical records and evidence that we now have, it is fair to conclude that the medical condition regarding venous access only became a significant problem around the Spring of 2017. This was not known until counsel obtained Doyle Hamm's records and had him examined by Dr. Mark Heath in September 2017. Counsel requested Doyle Hamm's medical records from Donaldson Correctional Facility in January 2017 (*see* Exhibit B, letter dated January 19, 2017 from Leon Bolling, Correctional Warden II) and renewing that request (*see* Exhibit C, e-mail correspondence with Alabama Department of Corrections), counsel only received the medical records in July 2017. Only with the full records and medical evaluation in September 2017 was it possible to identify when the medical condition became serious enough that it presented a substantial risk of serious harm, namely sometime in Spring 2017.

Doyle Hamm's medical condition has evolved, yet only now presents a significant risk of serious harm. Doyle Hamm has long suffered from epilepsy, brain damage, a seizure disorder, significant medications for seizures, extensive intravenous drug use, and cognitive disabilities. *See* Doc. 14-7. In 2014, Doyle Hamm's medical condition deteriorated significantly with large cell lymphoma that was aggressive and fast growing. *See* Doc. 1 at ¶¶15-22. He was found to be "chronically ill." Doc. 14-4 at 111. In March 2017, Doyle Hamm began complaining of lymphadenopathy. Doc. 14-4 at 453, 470, and 472. It is around that time, in light of his evolving and worsening medical condition, that his veins finally became so compromised due to the cancer, cancer treatment, his lengthy medical history, and his age, that the nurses have only been able to draw blood with difficulty from one small tortuous vein on his right hand. The resulting lack of venous

access is the accumulated result of years of medical problems and his aging; but it is a new and progressive result.

## III. THE FOUR CASES THAT DEFENDANTS CITE ON THEIR CLAIM OF EQUITABLE LACHES HAVE BEEN AND CONTINUE TO BE DISTINGUISHED

Doyle Hamm's situation is readily distinguishable from the cases that the defendants cite. In none of those other cases was the inmate actively litigating his as-applied lethal injection challenge before the Alabama Supreme Court. Doyle Hamm was. *See* Doc. 14 at 20; Doc. 14 Exhibits H through R. Doyle Hamm was filing multiple, even weekly, pleadings on a schedule ordered by the Alabama Supreme Court, and conducting a medical exam under the direction of the Alabama Supreme Court. The issues in this § 1983 case only became ripe for federal review when the Alabama Supreme Court terminated its consideration of the very issues that are now before this Court.

In their motion and response, the defendants 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)). There is no cut-off time at which a plaintiff's claim becomes barred by laches; the doctrine 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)). In determining whether Mr. Hamm's complaint is barred by laches, this Court must 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."). Doyle Hamm's legitimate reasons for filing at this time, as set out in his initial response, Doc. 14,

include: (1) the fact that his changing and worsening medical condition did not present a risk of a botched execution until the Spring of 2017, and (2) the fact that the Alabama Supreme Court was actively considering the legal issues presented in this complaint. None of the cases that the defendants cite discuss or reject the reasons for delay that Mr. Hamm presents here.

*Hallford v. Allen*, 576 F.3d 1221 (11th Cir. 2009), involved a general challenge to Alabama's lethal injection protocol, not an as-applied challenge based on a plaintiff's medical conditions. The *Hallford* plaintiff argued that the first drug of Alabama's three-drug protocol "may fail to establish a sufficient plane of anesthesia, such that the condemned inmate may be conscious and physically paralyzed as an excruciatingly painful lethal drug courses through his veins." *Hallford v. Allen*, 634 F.Supp.2d 1267, 1269 (S.D. Ala. 2007). The defendants here conveniently mischaracterize the *Hallford* opinion by focusing only the length of time that had passed in *Hallford* and analogizing that to Doyle Hamm's case. However, the Court in *Hallford* instead focused on the fact that the plaintiff had unreasonably delayed filing only after finding that there had been no *legitimate* reason for the delay. Because of the generalized nature of the plaintiff's claim in *Hallford*, the court found no reason why the plaintiff could not have challenged the execution protocol earlier; the Alabama protocol had not changed and no other intervening circumstances provided reasons for the delay.

By contrast, Mr. Hamm's as-applied claim relies on the circumstances of his worsening medical condition, not on any general risks presented by the execution protocol, in addition to the fact that the Alabama Supreme Court was actively considering these issues. Mr. Hamm's condition has only presented a risk of an unconstitutional

execution recently, so the lapse in time was not of his making. *See Siebert v. Allen*, 506 F.3d 1047, 1049 (11th Cir. 2007) (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 ripe until the date was set. Therefore, in contrast to *Hallford*, Doyle Hamm has not unreasonably delayed and has presented legitimate reasons for filing at this time.

Similarly, *Grayson v. Allen*, 491 F.3d 1318 (11th Cir. 2007), involved a general challenge to the state's lethal injection method and procedure. There, the court found that the plaintiff unreasonably delayed only after first evaluating and rejecting the reasons for the lapse in time. Again, the court did *not* reach its conclusion solely on the amount of time that had passed, nor only on the fact that the plaintiff filed before an execution date was set. Instead, the court only reached this conclusion after rejecting the plaintiff's excuses for delay, none of which are relevant here. *Id.* at 1322 (reasons for the delay cited in *Grayson* included waiting until the Supreme Court decided a relevant case, the confidentiality of Alabama's lethal injection protocol, and the changing factual and legal landscape surrounding lethal injection). The court evaluated these reasons in context of the case's factual circumstances and ultimately decided that these reasons did not establish reasonable delay. *Id.* at 1324–25. By contrast, Doyle Hamm's reasons for the lapse in time, including his unique and worsening medical condition and the fact that the

Alabama Supreme Court was actively considering the legal issues before setting an execution date, establish a legitimate basis for filing his complaint at the time he did.

*Williams v. Allen*, 496 F.3d 1210 (11th Cir. 2007), also involved a general challenge to the state's execution protocol. The court found that the plaintiff could have filed earlier because he knew or should have known about the factual predicate (the state's execution protocol) long before the date on which he filed. *Id.* at 1213. Additionally, the court reached its conclusion only after considering rejecting the plaintiff's reasons for delay, none of which are presented here. *Id.* at 1213–14 (reasons cited in *Williams* included waiting for the Supreme Court to decide a relevant case, the alleged changes to Alabama's lethal injection protocol, and the evolving standards of decency applicable to the Eighth Amendment). By contrast, Doyle Hamm has presented adequate justifications for bringing his claim at this time, including his worsening medical condition and the fact that the Alabama Supreme Court was actively considering his legal claims prior to setting an execution date.

*Jones v. Allen*, 485 F.3d 635 (11th Cir. 2007), also involved a general challenge to the state's execution protocol. Because, again, the argument focused solely on the general risks inherent in the three-drug protocol, the plaintiff could have filed at the time that he knew or should have known that Alabama would use this method of execution. Rather, the plaintiff in *Jones* did not file his challenge until four years after Alabama made lethal injection its primary method of execution, so the court found the claim barred by laches. *Id.* at 639. The court found "no convincing reason why, after Alabama made lethal injection its primary method of execution, Jones could not have brought his method-of-execution challenge sooner than he did." *Id.* at 640. By contrast, Doyle Hamm does have

convincing reasons for waiting to file because his claim relies on his medical condition, which worsened in 2017 to the point that execution is now unconstitutional, and because the Alabama Supreme Court was actively considering the legal issues presented here.

## CONCLUSION

For all the reasons stated in his original response and in this surreply, this Court should deny the defendants' motion for summary judgment and allow this case to move forward to a full evidentiary trial.

Respectfully submitted,

Bernard E. Harcourt
Bar Number: ASB-4316-A31B
Attorney for Plaintiff Doyle Hamm
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, New York 10027
Telephone: (212) 854-1997
Fax: (212) 854-7946
Email: beh2139@columbia.edu

Dated: January 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2018, I served a copy of the attached pleading by electronic mail to opposing counsel, 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.

BERNARD E. HARCOURT
*Counsel of Record*

# Exhibit A

**Division of Hematology &
Medical Oncology**

**Mail code: L586
3181 S.W. Sam Jackson Park Road
Portland, Oregon 97239-3098
tel 503 494-8534
fax 503 494-4285**

**www.ohsu.edu/cancer**

# AFFIDAVIT OF DR. CHARLES DAVID BLANKE

Before me, the undersigned notary public, personally appeared Charles David Blanke, who, after being duly sworn by oath, did depose and say as follows:

1. My name is Charles David Blanke. I am a licensed physician in the State of Oregon, a Professor of Medicine in the Division of Hematology and Medical Oncology at Oregon Health and Science University's Knight Cancer Institute, and current Chair of SWOG, a publically-funded cancer research network.
2. I am a board-certified medical oncologist.
3. I have had a clinical practice in oncology for 24 years.
4. On January 23rd, counsel for Doyle Hamm asked me to review his medical records relative to his diagnoses of lymphoma and basal cell cancer. I was provided with 777 pages of material from Donaldson Correctional Facility, as well as records from Brookwood Cancer Center and the office of Dr. John Donahue.
5. I was asked to comment on the status of both malignancies.
6. In 2014, Mr. Hamm was diagnosed with biopsy-proven lymphatic cancer. The primary manifestation was around his left orbit, but at the time of diagnosis he had other abnormal lymph nodes noted on imaging. The latter were not worked up or treated. Based on the

medical consultations done to date, it is impossible to state with any degree of certainty whether or not he has active lymphoma overall.

7. The lesion present on his cheek since at least 2014 also proved to be malignant. He did not receive the recommended therapy for this tumor, surgical resection of his basal cell carcinoma.

Further affiant sayeth not.

I, Charles David Blanke, declare under penalty of perjury that the foregoing is true and correct and is based on my own personal knowledge.

Dr. Charles David Blanke

Sworn to and subscribed before me on this __24th__ day of January, 2018.

OFFICIAL STAMP
PATRICK JAMES CONNELL
NOTARY PUBLIC - OREGON
COMMISSION NO. 957219
MY COMMISSION EXPIRES DECEMBER 11, 2020

NOTARY PUBLIC
My Commission Expires: 12/11/2020

# Exhibit B

# State of Alabama
# Alabama Department of Correction

Donaldson Correctional Facility
100 Warrior Lane
Bessemer, AL 35023
Telephone (205) 436-3681 Fax (205) 436-3399

ROBERT BENTLEY
GOVERNOR

LEON BOLLING
WARDEN III

JEFFERSON DUNN
COMMISSIONER

ANGELA MIREE
WARDEN II

ERROL PICKENS
WARDEN I

January 19, 2017

Mr. Bernard Harcourt
Columbia Law School
435 West 116th Street
New York, NY 10027

Dear Mr. Harcourt

Correspondence was received on January 19, 2017 requesting a copy of Inmate Doyle Hamm's, AIS# Z479, medical record. The Department of Corrections has a $1.00 per page fee for the first 25 pages, $.50 thereafter, a $5.00 search fee and $19.45 for postage for any copies obtained from the William E. Donaldson Correctional Facility inmate files. We are in receipt of your money order in the amount of $25.00 and have deducted this amount from the total due.

The total number of pages is 805 pages. Please remit $44.00 to address below, with $19.45 made payable to USPS. Once payment is received the requested documents will be mailed to you. Return payment to:

William E. Donaldson Correctional Facility
Attn: Leon Bolling, Correctional Warden II
100 Warrior Lane
Bessemer, AL 35023

Thank you in advance for your cooperation. If I can be of further assistance, feel free to contact me.

Sincerely,

Leon Bolling

Leon Bolling, Correctional Warden II

LB/far

# Exhibit C

LIONMAIL @COLUMBIA

Bernard E Harcourt <[redacted]

# FW: Doyle Hamm

**Bernard E Harcourt** <[redacted]> Thu, Jun 29, 2017 at 1:14 PM
Reply-To: bernard.harcourt[redacted]
To: "Rutley, Faylor (DOC)" <[redacted]>

Dear Ms. Rutley,

I am following up on these medical records request. I sent a money order in the right amount a few months ago, and just wanted to know when you think I might be able to receive the medical records for Doyle Hamm.

Thank you and warm regards, Bernard Harcourt

Bernard E. Harcourt
*Isidor and Seville Sulzbacher Professor of Law, Professor of Political Science, and Director of the Columbia Center for Contemporary Critical Thought,* Columbia University
*Directeur d'études, École des hautes études en sciences sociales (*EHESS*)*