

No. 18-10636-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

◆

DOYLE HAMM, PLAINTIFF/APPELLANT,

V.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS, ET AL., DEFENDANTS/APPELLEES

◆

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

(No. 2:17-cv-02083-KOB)

STATE'S OBJECTION TO COURT'S ORDER

Steve Marshall
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February 21, 2018

No. 18-10636-P

Hamm v. Dunn, Comm'r, Ala. Dep't of Corrs.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel, in compliance with Federal Rule of Appellate Procedure 26.1, certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Allen, Richard, former Commissioner of the Alabama Department of Corrections;
2. Armstrong, Jeremy, former Assistant Attorney General during the postconviction proceedings;
3. Bolling, Leon, Warden of Donaldson Correctional Facility and Defendant in this action;
4. Bowdre, Karon Owen, federal district court judge;
5. Brasher, Andrew, Solicitor General of the State of Alabama;
6. Cunningham, Patrick, victim;
7. Dobbs-Ramey, Kimberly J., counsel for Hamm during the postconviction appeal;
8. Dunn, Jefferson S., Commissioner of the Alabama Department of Corrections.

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9. Folsom, Fred C., trial judge;
10. Forrester, Nathan, former Solicitor General for the State of Alabama during the post-conviction appeal;
11. Govan, Jr., Thomas R., counsel for the Appellees;
12. Hamm, Doyle Lee, plaintiff;
13. Harcourt, Bernard, counsel for Hamm in postconviction proceedings, in federal habeas proceedings, and in this Court;
14. Hardeman, Don L., postconviction judge;
15. Harris, Hugh, trial and direct appeal counsel for Hamm;
16. Hughes, Beth Jackson, counsel for the State in postconviction proceedings, in federal habeas proceedings, and in this Court;
17. King, Troy, former Alabama Attorney General during the federal habeas proceedings;
18. Little, William D., Assistant Attorney General during the direct appeal;
19. Marshall, Steve, Alabama Attorney General;
20. Morin, Robert, counsel for Hamm on appeal to the United States Supreme Court on direct appeal;
21. Nail, Pamela, counsel for Hamm in post-conviction proceedings;

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22. Newsome, Kevin C., former Solicitor General for the State of Alabama during postconviction proceedings;

23. Nunnelley, Kenneth, former Assistant Attorney General during the postconviction proceedings;

24. Pryor, William H., former Alabama Attorney General during the postconviction proceedings;

25. Roden, Douglas, co-defendant;

26. Roden, Regina, co-defendant;

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

28. Stewart, Cynthia, Warden Holman Correctional Facility and Defendant in this action

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

30. Strange, Luther, former Alabama Attorney General;

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

32. Williams, Martha E., trial and direct appeal counsel for Hamm.

/s/ Thomas R. Govan, Jr.

Thomas R. Govan, Jr.

Deputy Alabama Attorney General

STATE'S OBJECTION TO COURT'S ORDER

Come now the Appellees (“the State”) in the above-styled cause, by and through the Attorney General for the State of Alabama, and respectfully object to the Court’s February 21, 2018, order requiring the State to submit affidavits.

1. First, the State objects to the propriety of presenting additional evidence to an appellate court. This Court’s review is limited to whether the district court abused its discretion in denying a stay of execution. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). This review is limited to the record before the district court, and an appellate court is not in position to take additional evidence.

2. Second, the State objects to the Court’s request to produce an affidavit to repeat what the State already stipulated to on the record before the district court. Counsel for the Alabama Department of Corrections (ADOC), after consulting with the ADOC Commissioner and Warden of Holman Correctional Facility who were present during the hearing, stipulated on the record to the district court that the ADOC would achieve peripheral access on Hamm’s lower extremities. App’x, Tab 7 at 22. The Court has no basis to question the veracity of the ADOC’s on-the-record stipulation in the district court and no reason to direct the ADOC to repeat its stipulation in an affidavit. “The good faith of [state] officers and the validity of their actions are presumed.” *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352–53 (1918).

3. Third, the State objects to the Court's request to produce an affidavit concerning whether ultrasound technology and an "advanced level practitioner" would be present at Hamm's execution. The district court did not make any finding concerning whether these matters were necessary or required under the Eighth Amendment. In fact, the district court stated in its order that it "did not inquire as to the standard of care for starting a central line IV," and properly did not allow further inquiry into the procedures for obtaining a central line because, given the lack of evidence of lymphadenopathy concerning Hamm's as-applied challenge, further inquiry into the procedures for a central line would convert his as-applied challenge into a facial challenge to a lethal injection protocol that would have been time-barred. Doc. 58 at 4.

4. Without waiving the following objections, the State has complied with the Court's order by producing the affidavit of the Warden of Holman Correctional Facility, attached as Exhibit A.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

/s/ Thomas R. Govan, Jr.
Thomas R. Govan, Jr.
Alabama Deputy Attorney General

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 409 words. I have relied upon Microsoft Word 2016 to determine the word count.

This motion complies with the typeface requirements of Fed. R. App. 32(g)(1) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Thomas R. Govan, Jr.

Thomas R. Govan, Jr.

Alabama Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2018, I served a copy of the foregoing on the attorneys for the Appellee, by electronic mail addressed as follows:

Bernard Harcourt
Beh2139@columbia.edu

/s/ Thomas R. Govan, Jr.
Thomas R. Govan, Jr.
Alabama Deputy Attorney General

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EXHIBIT A

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

DOYLE LEE HAMM,

Plaintiff,

JEFFERSON S. DUNN,
Commissioner of the Alabama
Department of Corrections, et al.,

Defendants.

Case No. 2:17-cv-02083-KOB

AFFIDAVIT OF CYNTHIA STEWART

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

1. My name is Cynthia Stewart, and I am the Warden of Holman Correctional Facility in Atmore, Alabama. By statute, I am charged with the responsibility and authority to carry out a judicially-ordered execution pursuant to Alabama law.

2. I am over nineteen years of age, the age of majority in Alabama, and I give this statement based on my personal knowledge of the facts and information contained herein.

3. I was present during the hearing conducted in this case on February 16, 2018, and I was present when counsel for the Alabama Department of Corrections (ADOC), after consulting with myself and the ADOC Commissioner,

stipulated on the record before the district court that peripheral IV access would only be achieved on the lower extremities of Mr. Hamm.

4. The ADOC will follow the stipulation made on the record before the district court that peripheral IV access will only be achieved on the lower extremities of Mr. Hamm.

5. The ADOC will have ultrasound technology present during Mr. Hamm's execution. The ADOC will have an MD present during Mr. Hamm's execution.

6. The ADOC is capable of administering an IV line though Mr. Hamm's veins in his lower extremities.

Further affiant sayeth not.

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

Cynthia Stewart
Cynthia Stewart
Warden, Holman Correctional Facility

Sworn to and subscribed before me on this 21st day of February, 2018.



Janifer R Parker
NOTARY PUBLIC
My Commission Expires: My Commission Expires 3/26/2020