No. 18- _____

IN THE SUPREME COURT OF THE UNITED STATES

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In this *as applied* §1983 challenge to a state's secret lethal injection protocol, the federal courts denied plaintiff's request for preliminary injunction by requiring the state to promise, at the last minute, not to attempt peripheral venous access in the arms or hands, to equip the execution chamber with an ultrasound machine, to guarantee that a doctor performs any central venous access, and to ensure that the IV execution team was "in fact capable of administering an intravenous line through [the plaintiff's] great saphenous veins"—raising the following question:

> Should the federal courts 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 grant or deny injunctive relief and thereby allow the states to develop their own lethal injection protocols for sick and infirm inmates?

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Petitioner Doyle Lee Hamm respectfully petitions the Court for a writ of certiorari to address the question whether the federal courts should craft individualized and specialized lethal injection protocols in the case of infirm, and often elderly, death row inmates, or instead grant or deny the sought preliminary injunction, deferring to the states to allow them to tailor, as necessary, its execution protocols to the needs of those who are sick and infirm on its death row.

OPINIONS BELOW

The federal district court's original decision granting Doyle Hamm a stay of execution is attached as Appendix A. The Eleventh Circuit's decision vacating the stay of execution and remanding is attached as Appendix B. The federal district court's subsequent decision denying Doyle Hamm a stay of execution is attached as Appendix C. The Eleventh Circuit's decision issued February 22, 2018, is attached as Appendix D.

JURISDICTION

The Eleventh Circuit rendered its decision, attached as Appendix D, in this case on February 22, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254, 28 U.S.C. § 1292, and 28 U.S.C. § 1651.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides in part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Doyle Lee Hamm is a 61-year-old inmate who has served thirty years on Alabama's death row and is scheduled to be executed on February 22, 2018. Four years ago, when he was 57 years old, Doyle Hamm was diagnosed with large cell lymphoma, a massive cancerous tumor in his left orbit and cranium, and b-cell carcinoma. His cancer and cancer treatments have left him, today, a frail and weak elderly man who suffers from two serious medical conditions, each of which raise a significant risk that, if the state of Alabama were allowed to proceed with its original, secret, lethal injection protocol, he would suffer an unnecessarily painful and torturous death.

Doyle Hamm's two serious medical conditions include, first, severely compromised peripheral veins due to his diagnosed lymphatic cancer, cancer treatments, a lengthy medical history (including a history of IV drug abuse), and his age. Doyle Hamm's medical expert, a cardiac anesthesiologist at Columbia-

Presbyterian Hospital, Dr. Mark Heath, did not find a usable peripheral vein for purposes of inserting a large-bore catheter and infusing the five boluses of lethal drugs and saline solutions to execute him. The district court's independent doctor, who specializes in varicose and spider veins, identified only two usable peripheral veins, the saphenous veins on Doyle Hamm's right and left leg, but indicated that both those veins suffered from venous stasis and venous valvular insufficiency. *See* District Court's Second Memorandum Opinion dated Feb. 20, 2018, Appendix C (Independent Medical Report) at 10-13. [redacted] Because of the compromised and fragile nature of any accessible peripheral veins, there is a significant risk that, even if peripheral venous access is achieved through the two saphenous veins, the injection of large quantities of lethal drugs would "blow out" the 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. Moreover, because of Doyle Hamm's compromised peripheral veins, his planned execution will be the first time that the executioners in Alabama even attempt peripheral venous access through the lower extremities, which is a more complicated medical procedure for which they are not properly trained or experienced.

Similarly, because of his compromised veins and the unlikelihood of obtaining peripheral venous access, this is also likely to be the first time that the executioners in Alabama attempt to gain central intravenous access. In the

centuries-long history of lethal injection in the state of Alabama, in all previous executions by lethal intravenous injection, Alabama has achieved venous access using peripheral, rather than central veins. *See In Camera Hearing on January 31, 2018*, at p. 54. Central venous access is a complicated medical procedure even in a fully equipped operating room with highly trained physicians, and in Doyle Hamm's case, the district court's independent doctor has stated that, given Doyle Hamm's medical condition, it could only be achieved with ultrasound equipment and "an advanced level practitioner" such as a "CRNA, PA or M.D." *See id.* at 14. [redacted]

In Doyle Hamm's specific case, central line access is multiple-times more complicated because of the risks associated with abnormal lymph nodes related to his lymphatic cancer. 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* Appellee-Plaintiff's Supplemental Appendix, Tab 25, p. 36. The district court's doctor visualized at least two pathological lymph nodes in Doyle Hamm's groin. *See* Independent Medical Report at 11; Additional Supplemental Report of Dr. Mark Heath, at 153. Abnormal lymph nodes raise a significant risk of interference with an attempt to obtain central venous access, possibly resulting in a punctured central artery which would cause Doyle Hamm

severe and unnecessary pain and suffering.

In Doyle Hamm's case, given his particular history of lymphatic cancer, there is nothing in the original, secret protocol to prevent these risks of serious and unnecessary pain. [redacted]. There is nothing in the protocol to protect Doyle Hamm from the multiple risks that are likely to arise in his particular case given his medical condition.

Because of all of these medical concerns, Doyle Hamm presented a meritorious claim that executing him as the state planned would result in an unconstitutionally painful and risky execution and was entitled to a preliminary injunction barring intravenous lethal injection. The federal courts, both the district court and the Eleventh Circuit, essentially *accepted* the factual predicates that Doyle Hamm established. But instead of granting a preliminary injunction, the federal courts injected themselves into Alabama's lethal injection protocol and invented, in the three business days preceding the execution date, specialized protocols for Doyle Hamm. In a generous spirit, full of good intentions, the federal

[1] [redacted]

courts rewrote the state's execution protocol, such that Doyle Hamm will be executed, in effect, by a federal court lethal injection protocol.

The district court invented a new variation that one might call "legs only lethal injection": The district court forced the state to promise not to attempt peripheral venous access on Doyle Hamm's upper extremities; and while the district court did not address central venous access, its medical examiner stated in its report's conclusions that any such attempt for central venous access would have to include ultrasound equipment and a highly trained medical professional.

The Eleventh Circuit went with this new variation and further developed its novelty into what one might call "legs, doctors, and ultrasound": The Eleventh Circuit forced the state to submit three affidavits—in effect, transforming the panel into triers of fact—ensuring that the state would not attempt peripheral venous access in the upper extremities, that they have a doctor present at the execution,[2]

[2] [redacted] When the Warden of Holman Prison submitted an affidavit in response to the Eleventh Circuit stating that "the ADOC will have an MD present during Mr. Hamm's execution," at ¶5, the Warden was, it would appear, misleading the Court, which was actually trying to get the state to promise that a doctor would conduct the IV insertion. But Doyle Hamm was provided no time or opportunity to challenge that evidence; as a result, the Eleventh Circuit accepted the empty proffer, finding that "Here, Appellees have stipulated via an affidavit to this court that they will have ultrasound technology and an M.D. present during Hamm's execution." Slip Opinion dated 02.22.18 at 11.

that they have ultrasound technology present at the execution[3], and that they ensure that the IV execution team is capable of administering an IV line in Doyle Hamm's legs or feet[4].

In both cases, the federal courts then precluded Doyle Hamm from challenging the novel specialized protocols that they invented days before the execution by presenting evidence, putting on witnesses, or testing the affidavits sought by the appellate court. The district court precluded Doyle Hamm from calling any witnesses present in court at the hearing that day. The Eleventh Circuit engaged in a form of one-sided, appellate fact-finding by affidavit that did not allow Doyle Hamm the opportunity to be heard.

Both of these novel variations on the lethal injection protocol, though perhaps well intentioned, represent unprecedented developments because the state of Alabama has always gained venous access in all previous lethal injections by peripheral venous access in the upper extremities. The state of Alabama has *never* before attempted venous access through the lower extremities. It has never gone in through the legs or feet, and its IV execution team does not have the experience to do it.

The rushed and flawed nature of creating and imposing these novel twists on

[3] The Warden's affidavit does not confirm that the ultrasound technology will be used, how it will be used, or that the persons establishing venous access will be capable of using the technology properly.

[4] The affidavit also does not explain how the Warden reached this conclusion and whether she communicated with the staff members who will be attempting to establish peripheral intravenous access in Doyle Hamm.

Alabama's secret protocol—occurring between three and one business days before his planned execution—is precisely what Doyle Hamm was trying to prevent since day one. It is why he urged the Alabama Supreme Court more than four months ago and the district court two months ago to assign a special master, order a proper medical examination, allow Doyle Hamm to test the medical evidence and present his own. And all of these last-minute problems—especially the last-minute inventions of new specialized protocols *as applied* to Doyle Hamm by two different federal courts—could have been avoided if the state of Alabama had not acted so secretly and intransigently in delaying the production of his medical records for over six months and not disclosing the secret execution protocol for another five months.

Statement of the Facts

This case grows out of the tragic death of Patrick Cunningham in Cullman County, Alabama more than thirty years ago. On the night of January 24, 1987, Mr. Cunningham was working as the night clerk at the Anderson Motel and was fatally shot during the course of a robbery. Two individuals were initially found in the car used to commit the crime: Regina Roden and Douglas Roden. The Rodens claimed that they had been kidnapped by Mr. Hamm and held in captivity at gunpoint. After time in detention in the county jail, Regina and Douglas Roden changed their story and told the police that they were the unwitting accomplices to Doyle Hamm, whom they identified as the trigger-man.

At the guilt-phase trial, the state presented the accomplice testimony of

Regina and Douglas Roden, who both testified in exchange for lenience, and additionally a statement obtained from Doyle Hamm after lengthy interrogation. As the federal district court noted, "both of the Rodens entered into an agreement with the state whereby they would testify against appellant at trial, which they did, in exchange for being allowed to plead guilty to lesser offenses." *Hamm v. Allen,* No. 5:06-cv-00945-KOB, 2013 WL 1282129 (N.D. Ala. Mar. 27, 2013) (quoting *Hamm v. State*, 564 So.2d 453, 455-57). Apart from that, there was no direct, independent evidence, nor any physical evidence, as to who actually pulled the trigger. Doyle Hamm was nevertheless convicted of intentional capital murder during a robbery. Doyle Hamm was sentenced to death on the basis of two aggravating circumstances: (1) the prior convictions in Tennessee; and (2) the fact that the murder occurred during the course of a robbery, which was already included in the jury's guilt-phase verdict. *Hamm v. State*, 564 So.2d 453, 466 (Ala. Crim. App. 1989).

Doyle Hamm pursued state and federal post-conviction relief, but was denied relief despite the fact that the state court adopted the "PROPOSED MEMORANDUM OPINION," submitted to the court by the Alabama Attorney General, without even removing the word "PROPOSED" from the opinion. Since, every state appellate court and federal court has deferred to what was essentially the opinion written by the Alabama Attorney General.

During the course of federal habeas corpus, Doyle Hamm became afflicted with lymphatic cancer and carcinoma. It is as a result of his cancer and cancer treatments—and extensive medical history and old age—that Doyle Hamm has

severely compromised veins and ultimately brought this §1983 *as applied* lawsuit challenging the method of execution in his case.

REASONS FOR GRANTING THE WRIT

Well-intentioned federal judicial decisions crafting specialized protocols to protect sick, and often elderly, inmates will necessarily be made under the extreme pressure and anxiety of a pressing deadline: the death warrant. That places an extra burden on the lower federal courts, who are trying to protect sick inmates from botched executions, but have to do so under the strict constraints of a looming execution. And it creates extraordinary problems that this Court must now address.

The problems raised by judicially formulated, and often last-minute, specialized protocols are not unique to Doyle Hamm. These are questions that the lower courts have and will be wrestling with increasingly due to the aging population on death row, and for this reason this Court's guidance is necessary.

Doyle Hamm's case offers a unique and powerful lens to address these pressing problems and also the proper vehicle to address them. Every aspect of the decision-making process by the lower federal courts in Doyle Hamm's case was infected and debilitated by time pressures. With the courts creating two novel methods of lethal injection for Doyle Hamm, the first just three business days and the other just one business day before the scheduled execution, and refusing to allow an adversarial process to test their metal, a grant of certiorari is necessary to

determine if federal courts should be crafting these individualized lethal injection protocols, or rather simply granting or denying injunctive relief to permit the states to develop their own procedures.

I. THE LOWER FEDERAL COURTS ARE STRUGGLING TO UNDERSTAND THEIR PROPER ROLE IN *AS APPLIED* CHALLENGES TO LETHAL INJECTION PROTOCOLS IN CASES OF SICK AND INFIRM INMATES

District courts and appellate courts are increasingly confronted with the problem of protecting sick, and often now elderly, inmates from a botched execution. Lower federal courts have been forced to—in rushed, hurried timelines to comply with a death warrant—to attempt to learn state protocols and craft individualized ways around the dangers facing this segment of the death row population. What extent the federal courts should act or defer to states to revise their own protocols, where needed and as necessary, right now remains an unknown. But this Court has previously flagged that lower federal courts would one day require guidance on this very matter.

Justice Breyer has recently focused our attention on a disturbing trend in our death row populations in this country: because of the increasing length of time served on death row, the population of death row inmates is becoming increasingly old and infirm. *See Dunn v. Madison*, 138 S. Ct. 9, 12 (2017), (denying cert.) (Breyer, J., concurring). Given this trend, Justice Breyer emphasized, this Court "may face ever more instances of state efforts to execute prisoners suffering the diseases and infirmities of old age." *Id.*

In the face of this worsening dilemma, Justice Breyer was aware that lower courts would be increasingly asked to intervene and forced to wrestle with their role in the states' lethal injection protocols. He thus suggested a solution: The judiciary's attention should be steered away from "develop[ing] a constitutional jurisprudence that focuses upon the special circumstances of the aged," and towards "reconsider[ing] the root cause of the problem—the constitutionality of the death penalty itself." *Id.* Barring the latter course of action, though, these recent words suggest that it has come the time to develop better guidance for the lower federal courts regarding the special circumstances of the aged and infirm.

How often lower courts will have to wrestle with these *as applied* challenges, brought by infirm and aged death row inmates, cannot be understated. The aging population of inmates on death row, in large part attributed to the increasing period of confinement they face on death row awaiting an execution date, is today already problematic and will only become more so in the future. In 2017, there were 21 people executed in the United States who had been on death row for an average of 19 years.[5] But in 1987, the average time on death row was only 7 years; in 1997, the average 11 years; and, in 2007, the average 13 years. *See* Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2013—Statistical Tables 14 (rev. Dec. 19, 2014) (Table 10).

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[5] *See* Death Penalty Information Center, Execution List 2017, https://deathpenaltyinfo.org/node/78 https://deathpenaltyinfo.org/execution-list-2017 (visited Nov. 3, 2017).

This Court has previously expressed great concern about this trend. *See Lackey v. Texas*, 115 S.Ct. 1421, 1421-22 (1995) (Stevens, J., respecting denial of cert.) (noting whether after a prolonged period of confinement, here 17 years, there remains an "acceptable state interest in retribution" and "the additional deterrent effect…seems minimal"); *Knight v. Florida,* 120 S.Ct. 459, 462 (1999) (Breyer, J., dissenting) ("It is difficult to deny the suffering inherent in a prolonged wait for execution—a matter which courts and individuals have long recognized."); *In re Medley*, 134 U.S. 160, 172 (1890) (acknowledging, more than a century ago, that "horrible" effects on someone waiting for so long to be executed); *see also Knight*, 120 S.Ct. at 462 ("At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes.").

And what is now further evident is that states face significant issues in applying their lethal injection protocols to this infirm subset of death row inmates. At the end 2017, for instance, Ohio attempted to execute 69-year-old Alva Campbell. The state knew that Mr. Campbell suffered from severe chronic obstructive pulmonary disorder, was unable to walk on his own, relied on a colostomy bag, and required four breathing treatments per day. Like in Doyle Hamm's case, prison officials also knew that Mr. Campbell likely had no veins usable for lethal injection. Still, Ohio went forward with the execution. After numerous unsuccessful attempts to find a vein, the state was forced to call off the execution.

Other recent botched executions point to the problems that states have applying their typical lethal injection protocols to the elderly and infirm prison population. These examples include the attempted execution of 53-year-old Rommell Brown in 2009, where again the state could not find a usable vein for intravenous lethal injection but tried for nearly two hours; the execution of 53-year-old Dennis McGuire in 2014 who took 25 minutes to die and, according to witnesses, gasped several times for air; and the execution of 55-year-old Joseph Wood, who took two hours to die and, according to witnesses, gasped for breath 640 times.

What is now clear is that this increasing period of confinement prior to execution has resulted in a new problem for the lower courts: How or whether courts, when presented with *as applied* challenges from the growing subset of inform people on death row, should involve themselves in crafting individualized lethal injection protocols. This means, unfortunately, that Doyle Hamm's case is not now, and likely will not in the future be, unique in the terms of his age at the time of execution. As of 2003, there were about 110 people on death row across the United States that were 60 years or older.[6] This number is only likely to grow.

Thus, what should be more concerning and pressing for this Court are the questions that lower courts will now be consistently asked: What are the proper lethal injection protocols and methods for states to use to execute the elderly on death row in light of their many medical conditions arising, in large part, simply

[6] *See* Death Penalty Information Center, Growing Elderly Population on Death Row, https://deathpenaltyinfo.org/node/78 (last visited Feb. 22, 2018).

because of their age, and should the lower courts be the authoritative bodies crafting these individualized protocols?

II. THE ROLE OF THE LOWER FEDERAL COURTS IN CRAFTING INDIVIDUALIZED LETHAL INJECTION PROTOCOLS FOR INFIRM INMATES RAISES SIGNIFICANT CONCERNS ABOUT STATES' RIGHTS, COMITY, AND FEDERALISM

For the federal courts to involve themselves in rewriting lethal injection protocols for specific inmates treads dangerously on important values of states' rights, comity, and federalism. *See Younger v. Harris*, 401 U.S. 37 (1971) ("Our Federalism" entails a presumption that things work best "if the States and their institutions are left free to perform their separate functions in their separate ways."). This Court has long recognized "the seriousness of federal judicial interference." *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975); *see also Printz v. U.S.*, 521 U.S. 898, 919 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

This principle rings especially true in areas of traditional state functions, such as criminal proceedings, which encompass a state's decision to seek an execution and the methods by which the state plans to conduct the execution. "Pending state criminal proceedings have always been viewed as paradigm cases involving paramount state interests." *Judice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting). The guiding belief of comity thus demands "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*, 401 U.S. at 44; *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.").

This Court's previous statements expressing the need for federal courts to resist engaging too much with matters of clear state importance is aptly applied here. The detailed guidelines of a state's lethal injection protocol are developed by state officials with the requisite information and experience to do so. Novel variations of these lethal injection protocols, necessary to address the specific medical needs of infirm inmates, is then also properly left to these same state officials. As the comity doctrine counsels, "[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, 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 separate ways." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 112 (1981).

In Doyle Hamm's specific case, there was likely a certain amount of overreaching by the federal district court and federal appellate court in developing a an individualized (and never-done-before) method for Doyle Hamm and requiring

the state to implement it. Not only did the district court create "legs only" lethal injection but the appellate court went further to invent what one could call "legs, doctors, and ultrasound." The state, which had never used or attempted either of these novel methods, played no role in determining how best to individualize its protocol for Doyle Hamm's medical needs. This suggests another compelling reason for why this Court should grant certiorari and make clear what role the federal courts should have, particularly in relation to the states, in developing individualized lethal injection protocols for infirm inmates in state custody.

III. THE LOWER FEDERAL COURTS OFTEN MUST CONSIDER AND RESOLVE THESE MATTERS UNDER THE ANXIETY AND TIME PRESSURES ASSOCIATED WITH A SCHEDULED EXECUTION AND DEATH WARRANT.

The pressures of time can have extremely detrimental effects on the quality of the judicial fact-finding and decision-making. While last-minute action is generally not considered wise, this is most true in circumstances involving the question presented, when courts face the irreparable stakes involved in a impending execution. In these rushed conditions courts must not only learn the issues of the case and make findings, but they also must quickly become experts on the state's lethal injection protocol and learn about unfamiliar and complicated medical conditions. With a quickly developed result in hand, the courts then often are forced to decline to conduct the typical adversarial process, the foundation of our judicial system, in light of the expiring death warrant.

Here, under the pressure of a looming execution—only three business days

away—the district court announced, to the surprise of both parties involved, its creation of the "legs only" protocol. It then shut down the evidentiary hearing and barred Doyle Hamm from challenging the evidence. So, instead of allowing petitioner to, at minimum, review and test the independent doctor's assessment at the hearing, the district court refused to allow *any* evidence or testimony as to the risks posed by its newly created and implemented specialized protocol, despite having witnesses available at the *in camera* hearing.

That morning, at the *in camera hearing* on February 16, 2018, Doyle Hamm was prepared to present evidence to demonstrate that the district court's inventive "legs only" lethal injection protocol still raised significant risk of unnecessary pain and risk. Petitioner repeatedly requested that the court allow him the opportunity to present his evidence and be heard on this matter. The necessary witnesses were even present in the courtroom, including the Commissioner of the Department of Corrections, the Warden of Holman Prison, and the Associate Commissioner for Operations (and former Warden of Holman Prison), who as Warden of Holman administered over at least twenty lethal injections. But the district court summarily ended the hearing.

As a result of the rushed process, the district court itself did not have counsel to understand the medical report, and in consequence, misinterpreted it. As the Eleventh Circuit held, the district court's "order summarizes many of the medical examiner's findings, but in doing so it misstates certain key facts from the medical examiner's report." Slip Opinion of 02.22.18, at 5.

A number of adverse consequences resulted from the hurried and expedited process. The expedited process of crafting a novel protocol meant that the district court could not find a cardiac anesthesiologist with experience in placing catheters and performing central lines—the type of expert that both parties agreed was necessary and proposed. The court's independent expert simply did not have the right qualifications. (Those qualifications and his specialty are under seal because the district court also could not find a doctor who was willing to defend his or her report in public). Not only was it not the type of expert that both parties agreed was necessary, but it was not the type of expert that the district court in David Nelson's case, presenting questions of venous access similar to Doyle Hamm, had demanded: an anesthesiologist with regular experience in placing catheters and performing central lines. In the David Nelson case, the judge, the special master, and the parties all agreed that the qualified expert should be "a physician who is board certified in anesthesiology and is familiar with and practicing in cardiovascular anesthesiology." *See* Telephone Conference on 02-07-18, at 8-9.

The expedited process also meant that the district court could only find an expert who was unwilling to have her or his name known in public, and therefore unwilling to publicly defend her or his expert opinion before any other doctor or evaluator.

The expedited process also led the district court to do this all as cheaply as possible. The district court decided to cut out the special master to save money. "Because if we have a special master, somebody has got to pay him. And the court

doesn't have the money to do that." *Id.* at 12. The district court refused to use a UAB doctor because the court did not want to pay a hospital bill. *Id.* at 18. Both parties agreed on UAB anesthesiologists and provided a joint list in their joint status report. However, the district court looked elsewhere: "I have some other ideas about alternatives to UAB, primarily because of the expense of access to a hospital." *Id.* at 24.

"I intend to keep it as inexpensive as possible," the district court stated. *Id.* at 24. "I don't have any health insurance or Medicaid or anything else to cover anything that I order done for Mr. Hamm or an exam of Mr. Hamm. I don't want to have to pay a hospital bill." *Id.*, at 18. As early as February 14, 2018, when the district court had already identified its specialist, the judge stated that the doctor was a good alternative in part because "I wouldn't have to pay a hospital bill." *Id.* at 26. This was, in part, the direct result of the time pressures involved in having to resolve this litigation in less than three business days.

The expedited process also meant that Doyle Hamm has never been permitted to cross-examine the court's expert in any way. There is, for instance, no indication in the record and no reason to believe that the court's expert has placed a catheter in veins or performed a central venous line in the recent past. *See* In Camera Hearing on 02-16-18 at 14.

And the truncated process meant that Doyle Hamm was not allowed by the district court to take testimony from witnesses present at the hearing, including the

Commissioner of ADOC and the current and former Wardens of Holman, to ask about venous access through lower extremities. Counsel for Doyle Hamm emphasized that "we have all of the witnesses here to address many of the questions that I have raised. And I would ask that we actually have the opportunity to call them to ask whether there has ever been a lethal injection through the […] lower extremities. And what kind of training have been put in place in order to protect someone against cruel and unusual punishment under those conditions." *In Camera Hearing 02-16-18* at 31; *see also* 32, 37.

One might think that the harms of this expedited process due to the looming execution ended there. However, even on appellate review, Doyle Hamm was again denied the opportunity to be heard on this matter when the Eleventh Circuit required it to supplement the existing record with new facts to make a ruling. In its February 21, 2018, order, the Eleventh Circuit noted that "Appellees were not able to reach the technicians who place the intravenous lines to confirm that they are able, in fact to place an intravenous line through a great saphenous vein." Slip Op. 02.21.18 at 2. It also stated that the record created below did not "facilitate a complete and accurate review of Hamm's appeal." *Id.*

But even despite that acknowledgement, the Eleventh Circuit then asked respondents for affidavits to be provided in just a matter of hours that would provide the necessary facts—missing from the record below—to conduct an appropriate review of Doyle Hamm's appeal. *Id.* at 2–3. Doyle Hamm was then not permitted to respond, question, or contest the affidavits that were provided, which,

it turns out, represented practically empty statements that Petitioner had no opportunity to challenge, test, or rebut. "The ADOC is capable of administering an IV line though Mr. Hamm's veins in his lower extremities." *Affidavit of Warden Cynthia Stewart*, ¶6. Those are, factually, embarrassingly empty words; and yet, under the pressure of a looming execution, practically 24 hours before the lethal injection, they become *res judicata.*

When a claim is brought timely and is meritorious, the looming execution cannot be permitted to determine what adversarial process a death row inmate is owed. Here, even the Eleventh Circuit acknowledged "immense time pressure under which [the district court] was acting," resulting in misinterpretation of the medical report. Slip Opinion 02.22.18, at 6 n.3. These problems are at their peak when federal courts craft individualized protocols under these extreme pressure conditions. For these reasons, and due to these constraints on the judicial system, this Court's guidance on the role of lower federal courts in this area is ever more needed.

IV. THIS QUESTION ALSO RAISES IMPORTANT QUESTIONS ABOUT THIS COURT'S SUPERVISORY POWER OVER THE LOWER FEDERAL COURTS INSOFAR AS THE CRAFTING OF SPECIALIZED LETHAL INJECTION PROTOCOLS MAY DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The pressing nature of these cases has also pushed the lower federal courts to act in certain ways that may be out of step with the usual course of judicial

proceedings.

To be sure, the All Writs Act ensures that when extraordinary circumstances arise, the federal courts have the power to intervene 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 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).

When lower courts act in these cases, if it be to meet the hurried timeline or for any other reason, in ways that depart from its typical course of proceedings, and no longer consider the states' valid interests in formulating their own execution protocols, it may become this Court's duty to intervene and supervise proceedings to restore order.

In Doyle Hamm's case, for instance, the court of appeals pushed the limits of normal judicial practice. 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 turned itself into a factfinder, ordering the state to file three affidavits on the viability and safety of executing Doyle Hamm under its novel protocol and refusing to allow Doyle Hamm the opportunity to respond or contest the

findings in those affidavits. Therefore, rather than restricting itself, per what is the normal course of review, to the record from the lower court, 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—previously not found by the district court—from the respondents because, as the court of appeals specifically stated, the district court had failed to prepare a record that "facilitate[d] a complete and accurate review of Hamm's appeal." Slip Op. 02.21.18 at 2. Rather than abiding by the usual course of judicial proceedings, and determining that the record before it left serious questions about the constitutionality of this novel method of execution constitutional, the Eleventh Circuit took it upon itself to find the facts to conduct its review. Thus, the circuit court attempted to *on its own* remedy the situation by seeking additional facts.

It is not disputed that, confronted with the difficult and heart-wrenching facts and issues in Doyle Hamm's case, the Eleventh Circuit surely acted out of good will and compassion. But still this departure from the normal course of proceedings, requiring the state to lodge with the appellate court three new affidavits, was the Eleventh Circuit engaging in jarring factual-finding—unprecedented for an appellate court. Even the respondents, on behalf of the state of Alabama, agree that this course of proceedings was not in line with expected appellate review. Responding in perhaps a somewhat overly contemptuous manner,

but nevertheless not entirely unjustified manner, the respondents argued just this point: The Eleventh Circuit had perhaps overstepped its bounds along a number of dimensions, not just state's rights and federalism, but also in fact-finding. This prompted the state of Alabama to straighten its back:

> 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. *See* State's Objection to Court's Order, at 1.

The Eleventh Circuit's move away from what are the normal and expected judicial proceedings is an illustration of the problems inflicting the lower courts today. For this reason as well, certiorari is warranted.

V. THE LOWER FEDERAL COURTS MUST BE CAUTIONED FROM TAKING ON A MORE EXPANSIVE ROLE IN DETERMINING THE RIGHTS OF SICK AND INFIRM DEATH ROW INMATES SO AS TO AVOID IMMERSING THEMSELVES IN THE MINUTE DETAILS OF LETHAL INJECTION PROTOCOLS

If the lower federal courts are allowed to craft new variations on lethal injection protocols, especially without allowing the inmates to challenge or present evidence, then inmates will begin to ask, and should be entitled to, additional protections. Once lower federal courts begin to craft new variations on lethal injection protocols, it is hard to say where the line of the lower federal courts' involvement will be drawn.

In Doyle Hamm's case, for instance, the completely novel and untested nature of the specialized protocol, that the district court and appellate court ordered the Alabama Department of Corrections to use on Doyle Hamm, still presents a significant risk of a painful and unconstitutional execution to Doyle Hamm and thus may *also* require lower federal courts to implement safeguards to monitor and ensure that this novel method of execution is constitutional. After the novel "legs only" and then "legs, doctors, and ultrasound" protocols were implemented, Doyle Hamm requested below, and was denied, the right to have his counsel present during the attempt to achieve venous access, and to provide counsel with a telephone during the execution for purposes of accessing the courts during the execution in the event that the new specialized protocol was not followed or resulted in cruel and unusual punishment. These safeguards were directly tied to vindicating Doyle Hamm's Eighth Amendment rights, which continued to be at risk after the lower federal courts' involvement.

If the courts now craft new specialized protocols, counsel should be afforded the opportunity to ensure that these novel methods do not violate the Constitution in practice. Questions about the possibility of having counsel with their clients at the time of IV access and having the ability to communicate with the court if it does go wrong will constantly be raised before the lower federal courts. This is because a condemned inmate's Eighth Amendment right to be free from cruel and unusual punishment requires that he, through his counsel, have a meaningful way of protecting that constitutional right. In the exceptional circumstances of an

individualized protocol *as applied*, where the risk of a botched execution is exceptionally high and the methods often untested, that inmate may be entitled to additional protections.

This Court has long recognized that the efficacy of civil rights actions, which implicate important constitutional rights, "would be diluted if inmates . . . were unable to articulate their complaints to the courts." *Wolff v. McDonnell*, 418 U.S. 539, 578 (1974); *Bounds v. Smith*, 430 U.S. 817, 821 (1977); see also *Lewis v. Casey*, 518 343 (1996). This is especially true in the special circumstances of a sick or elderly inmate, where the crux of their constitutional claim is that there is a substantial likelihood of a botched execution during the venous access and execution. Because these Eighth Amendment rights "exist until his life is taken," inmates must also retain protections regarding his Eighth Amendment claim until the execution has been completed. Without counsel being able to view the venous access and communicate with the courts, these Eighth Amendment right "would be no right at all." *In re Kemmler*, 136 U.S. 436, 447; *McCray v. Sullivan*, 509 F.2d 1332, 1337 (5th Cir. 1975). Certiorari is, therefore, necessary to determine to what level of involvement lower federal courts, if permitted to craft individualized protocols for infirm death row inmates, must continue to resolve the long list of questions that will follow.

CONCLUSION

For the foregoing reasons, Doyle Hamm prays that this Court grant a writ of

certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bernard E. Harcourt, hereby certify that on February 21, 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 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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