

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

DOYLE LEE HAMM,)	
)	
Petitioner,)	
v.)	Case No. _____
)	
JEFFERSON S. DUNN, Commissioner,)	
Alabama Department of Corrections,)	
)	
Respondent.)	

**PETITION FOR WRIT OF HABEAS CORPUS
BY PRISONER IN STATE CUSTODY UNDER DEATH SENTENCE**



WITH POINTS AND AUTHORITIES ON JURISDICTION

(DEATH PENALTY CASE)

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Petitioner, Doyle Lee Hamm, currently confined on death row at Holman Correctional Facility, in Atmore, Alabama, by and through his undersigned counsel, files this Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C § 2254, and respectfully petitions this Court for relief from his now unconstitutional sentence of death.

INTRODUCTION

1. On Thursday night, February 22, 2018, the state of Alabama strapped Doyle Lee Hamm to the lethal injection gurney in the execution chamber at Holman Correctional Facility and began to execute him. From about the time that the United States Supreme Court denied his application for a stay, at about 8:45pm CST, to approximately 11:30pm CST when the execution was called off, the execution team inserted needles and catheters in his legs, ankles, and groin in an attempt to achieve venous access and end his life via lethal injection.

2. For seven months preceding the execution, counsel for Doyle Hamm had vehemently, repeatedly, diligently, and properly warned the state of Alabama, the Governor of Alabama, the Alabama Attorney General, the Commissioner of Corrections, the Wardens of both Donaldson and Holman Correctional Facilities, the Alabama Supreme Court, the federal District Court for the Northern District of Alabama, the Eleventh Circuit Court of Appeals in Atlanta, and the United States Supreme Court in Washington, D.C., that any attempt to access his veins would cause unnecessary pain and suffering in violation of the Eighth Amendment to the United States Constitution because of his medical condition. Counsel proposed an alternative method of execution—namely oral lethal injection—a method that would not attempt to access his veins and thus, counsel emphasized, avoid a botched, bloody, and cruel attempt at intravenous lethal injection.

3. The problem with venous access arose from the fact that Doyle Hamm, age 61, was diagnosed with lymphatic cancer and carcinoma in February 2014, and, as a result of his cancer, cancer treatment, and medical history, has two medical conditions that interfere with venous access for purposes of lethal injection: first, he has compromised peripheral veins on his upper and lower extremities (arms, hands, legs, and feet), and so any attempt to achieve peripheral intravenous access for purposes of a lethal intravenous injection will cause him severe and unnecessary pain and suffering; second, he has abnormal lymph nodes due to his lymphoma that will render central venous access a bloody, botched, and unnecessarily painful punishment.

4. Despite the repeated warnings and court filings in the Alabama Supreme Court, U.S. District Court, Eleventh Circuit, and U.S. Supreme Court, and despite the fact that the District Court's independent medical expert identified abnormal lymph nodes in Doyle Hamm's right groin, the state of Alabama went ahead with the execution of Doyle Hamm, strapped him to the execution gurney in the execution chamber, tried to achieve peripheral venous access multiple times in his legs and feet, and then tried multiple times to achieve central venous access in his right groin.

5. After multiple attempts and excruciating pain for Doyle Hamm, the state of Alabama halted and called off his execution at about 11:30pm CST. What resulted was a prolonged, exceedingly painful, bloody, and botched attempt to execute Doyle Hamm through his lower extremities and right groin. None of this was unforeseeable. To the contrary, through extensive litigation in state and federal courts, as well as in filed clemency petitions addressed to Governor Kay Ivey of Alabama, the state of Alabama was fully aware that Doyle Hamm had diagnosed cancer and serious medical conditions that caused him to

have inaccessible and unusable veins for intravenous access. Despite being entirely aware of these facts, and of the additional fact that he had abnormal lymph nodes in his right groin—and therefore, that the executioners should avoid his right groin, rather than *only* trying central venous access there—the state of Alabama nevertheless proceeded to execute Doyle Hamm on the night of February 22, 2018.

6. The fact that the execution failed was not the consequence of any accident. No equipment for the lethal injection malfunctioned. Upon information and belief, no member of the execution team failed in his or her duties. Nothing impeded the state's attempt to execute Doyle Hamm other than its refusal to take into account what counsel had documented for months leading up to February 22, 2018—namely, that to try to execute Doyle Hamm through intravenous lethal injection, rather than oral lethal injection, risked a cruel and unusual punishment in violation of the Eighth Amendment.

7. The excruciating experience that Doyle Hamm survived on February 22, 2018 exceeds what the U.S. Constitution tolerates as permissible punishment under the Eighth Amendment and Due Process clauses. Doyle Hamm experienced unbearable physical and psychological pain and torture. Physically, as he was strapped down to the lethal injection gurney in the execution chamber knowing that he was about to die, Doyle Hamm was jabbed multiple times with needles and catheters in his ankles, shin, and right groin. Psychologically, once again strapped to his death gurney, Doyle Hamm was so injured that he hoped the execution team would succeed so that it would be over with and he would be dead. Doyle Hamm watched as the execution team wiped blood off his legs and right groin, even replacing a blood-soaked pad covering his groin. Doyle Hamm experienced a constitutionally prohibited cruel, unnecessarily painful, slow, and lingering process to death.

8. Doyle Hamm was subjected to the deliberate infliction of cruel, unusual, and unnecessary physical and psychological pain. Not only did the state of Alabama have full notice that the execution would be bloody and botched, but the state of Alabama also deliberately attempted to gain access to his right groin, knowing that there were abnormal lymph nodes there. And even after the execution was halted, a member of the execution team insisted that he should be permitted to continue with this process of inflicting unnecessary pain on Doyle Hamm for purposes of obtaining a vein for lethal injection.

9. Doyle Hamm has been subjected to execution and to his death sentence. His execution began and only after hours, well into the execution process, did it end, when the state of Alabama halted the execution and called it off. Any further attempt to execute Doyle Hamm, by any means or method, would violate the prohibitions against cruel and unusual punishment and being twice placed in jeopardy. As such, Doyle Hamm brings this federal habeas corpus action under 28 U.S.C. § 2254, seeking to bar the state of Alabama from ever again trying to execute him by any means or methods for the same crime and conviction at issue. The events on February 22, 2018, make any further attempt to execute him unlawful and in violation of his constitutional rights.

10. Doyle Hamm is contemporaneously filing a Rule 32 state post-conviction petition in Cullman County, Alabama, raising state and federal challenges to his sentence of death. He respectfully asks this Court to hold these federal proceedings in abeyance under principles of comity and federalism. This would properly permit “the state[] the opportunity to ‘set its own house in order’ when the federal issue is already before a state tribunal,” *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 479 (1977), and protect against “premature interference with ongoing state proceedings,” *Maharaj v. Sec. for Dep’t of Corr.*,

304 F.3d 1345, 1347-47 (11th Cir. 2002). The United States Supreme Court has long recognized “the seriousness of federal judicial interference with state civil functions.” *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975). Comity, the Supreme Court has explained, is best achieved with a “proper respect for state functions.” *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) (counseling against concurrent federal proceedings where it would be duplicative of litigation occurring in state court). While Doyle Hamm will first pursue all possible remedies in the Alabama state courts, this request to hold these federal proceedings in abeyance is additionally made necessary by the legal arguments that the Alabama Attorney General made, separately, in the proceedings in Doyle Hamm’s separate §1983 lawsuit filed on December 13, 2017. *See Hamm v. Dunn, et al.*, Civil Action No. 2:17-cv-02083-KOB (N.D. Ala. Dec. 13, 2017), Doc. 1. For the past several months, the Alabama Attorney General has accused Doyle Hamm of delay in filing that federal §1983 action, and for this reason, out of an abundance of caution, and to prove that he is not causing delay, but is being diligent and acting in good faith, Doyle Hamm is filing this federal habeas corpus petition simultaneously now, and will respectfully ask that it be held in abeyance while he exhausts his state remedies. Under principles of comity and federalism, this Court should hold these proceedings in abeyance until Doyle Hamm has exhausted his state remedies.

11. Doyle Hamm respectfully requests, should the case then ripen properly before this Court, that it conduct an evidentiary hearing on his claims and grant him the right to conduct discovery to further support the claims raised herein.

PROCEDURAL HISTORY

A. Trial and Sentencing

12. On September 26, 1987, Doyle Hamm was convicted of the capital offense of murder during a robbery under § 13A-5-40 (a)(2), Code of Alabama (1975), in the Circuit Court of Cullman County.

13. On September 28, 1987, a sentencing hearing was conducted and the jury returned an advisory verdict in favor of death by a vote of 11 to 1.

14. The judge held a pre-sentence hearing on November 9, 1987, and sentenced Doyle Hamm to death in the electric chair on December 1, 1987.

B. Direct Appeal

15. The Court of Criminal Appeals affirmed the conviction and sentence on June 16, 1989. *Hamm v. State*, 564 So. 2d 453 (Ala. Cr. App. 1989).

16. That decision was affirmed by the Supreme Court of Alabama on March 23 1990. *Ex parte Hamm*, 564 So. 2d 469 (Ala. 1990).

17. The United States Supreme Court denied Doyle Hamm's petition for writ of certiorari to the Alabama Supreme Court on December 3, 1990. *Hamm v. Alabama*, 112 L.Ed. 2d 579 (1990).

C. Post-Conviction Relief Petition

18. In December 1990, Doyle Hamm obtained new counsel, Bernard E. Harcourt (current counsel), to represent him in state post-conviction challenge to his conviction and sentence of death.

19. A Rule 32 state post-conviction petition on behalf of Doyle Hamm was filed on December 3, 1991.

20. Pre-trial hearings on the Rule 32 petition were held on March 6, 1995, and January 8, 1996.

21. During this period, Doyle Hamm, through undersigned counsel, also challenged two prior convictions from the state of Tennessee that were used as aggravating circumstances at his Alabama death penalty sentencing hearing. That petition was denied by the Tennessee circuit court. In February 1997, the Tennessee Court of Criminal Appeals affirmed the denial of relief. Doyle Hamm's request to the Tennessee Supreme Court for discretionary review was denied in March 1997. On June 16, 1988, Doyle Hamm filed a petition for writ of habeas in federal district court in Tennessee. The petition was dismissed, and the Sixth Circuit affirmed and denied Doyle Hamm a certificate of appealability on March 17, 1999. The United States Supreme Court denied his petition for writ of certiorari.

22. On December 6, 1999, the court denied Doyle Hamm's Rule 32 petition in an 89-page proposed order had been filed with the court three days before by the Alabama Attorney General with the caption "PROPOSED MEMORANDUM OPINION." When the judge signed and issued the order, he made no changes to it, including leaving the caption "PROPOSED MEMORANDUM OPINION."

23. On February 1, 2002, the Alabama Court of Criminal Appeals affirmed the denial of Doyle Hamm's Rule 32 petition. *Doyle Lee Hamm v. State*, 913 So. 2d 460 (Ala. Cr. App. 2002).

24. On April 19, 2002, the Alabama Court of Criminal Appeals denied Doyle Hamm's application for rehearing. *Doyle Lee Hamm v. State*, 2002 Ala. Crim. App. LEXIS 3242 (2002).

25. The Alabama Supreme Court denied Doyle Hamm's timely filed certiorari petition on May 20, 2005.

D. Federal District Court

26. In May 2006, Doyle Hamm filed for federal habeas corpus. The district court denied the petition in full. *Hamm v. Allen*, 2013 WL 1282129 (N.D. Ala. 2013). The district court refused to grant a certificate of appealability on any issues.

E. Eleventh Circuit Affirms and Supreme Court Denies Certiorari

27. The Eleventh Circuit granted a certificate of appealability. Eight months after argument, the Eleventh Circuit affirmed. *Hamm v. Comm'r*, 620 F. App'x 752 (11th Cir. 2015).

28. The U.S. Supreme Court denied Doyle Hamm's petition for writ of certiorari. *Hamm v. Allen* 137 S.Ct. 39 (2016).

F. State's Motion to Set a Date of Execution for Doyle Hamm

29. On June 23, 2017, the State moved the Supreme Court of Alabama to set a date of execution for Doyle Hamm.

30. On August 25, 2017, the Alabama Supreme Court ordered the State to allow Doyle Hamm to undergo a medical examination by his medical expert, Dr. Mark Heath, to find out his venous condition. The Court also ordered that Doyle Hamm provide weekly status updates to the Court.

31. Doyle Hamm filed weekly status updates with the Alabama Supreme Court on September 1, 2017; September 8, 2017; September 15, 2017; September 22, 2017; September 29, 2017; and October 2, 2017. On October 2, 2017, Doyle Hamm also filed an answer with the Alabama Supreme Court addressing the question of the impossibility of Doyle Hamm's venous access.

32. The Alabama Supreme Court ordered the State to respond, which it did on October 10, 2017, and Doyle Hamm filed a supplemental response on October 11, 2017.

33. On December 13, 2017, the Supreme Court of Alabama entered an order, without having a hearing, authorizing Doyle Hamm's execution on February 22, 2018.

G. Doyle Hamm's § 1983 Suit

34. The same day that an execution date was set, Doyle Hamm filed his § 1983 complaint in the United States District Court for the Northern District of Alabama. *Hamm v. Dunn*, 2018 WL 723104 (N.D. Ala. Dec. 13, 2017), Doc. 1.

35. On January 31, 2018, after an evidentiary hearing, the District Court denied the state's motion for summary judgment and granted Doyle Hamm's motion for a stay of execution. *Hamm v. Dunn*, 2018 WL 723104 (N.D. Ala. Feb. 6, 2018), Doc. 30.

36. On February 13, 2018, the Eleventh Circuit reversed the stay. It ordered the District Court to move forward with the case, immediately appoint an independent medical expert to evaluate Doyle Hamm fully, and then make factual findings by Tuesday, February 20th. *Hamm v. Dunn*, No. 18-10473 (11th Cir. Feb. 13, 2018).

37. On February 19, 2018, the independent medical expert's report was distributed to the parties.

38. On February 20, 2018, the District Court denied Doyle Hamm's motion for a stay and permitted the execution to move forward. However, the judge conditioned this on defendants' agreement to not attempt peripheral venous access through Doyle Hamm's upper extremities. Defendants agreed to only attempt to obtain peripheral venous access through Doyle Hamm's lower extremities. *Hamm v. Dunn*, 2:17-cv-02083-KOB (N.D. Ala. Feb. 20, 2018).

39. On February 22, 2018, the Eleventh Circuit affirmed. *Hamm v. Comm'r*, 2018 WL 1020051 (11th Cir. Feb. 22, 2018).

40. On the evening of February 22, 2018, at around 8:45 PM, the U.S. Supreme Court denied Doyle Hamm's motion for a stay of execution and a petition for writ of certiorari. *See Hamm v. Dunn*, 583 U. S. ____ (Feb. 22, 2018).

H. State's Failed Attempt to Execute Doyle Hamm on February 22, 2018

41. On February 22, 2018, around 8:45pm CST, following the United States Supreme Court's denial of his application for a stay, the state of Alabama began the execution of Doyle Hamm via intravenous lethal injection at Holman Correctional Facility.

42. Prior to being brought to the execution chamber, Doyle Hamm had not been given his regular pain medication, Tylenol-Codeine No.3, at his regularly scheduled time. Normally, Doyle Hamm would receive three doses of his medication daily. On February 22, 2018, Doyle Hamm was not given his evening dose of medication, typically administered around 6:00pm. Not surprisingly, Doyle Hamm's usual pain resulting from his cancer became substantially worse before he entered the execution chamber that night.

43. After the U.S. Supreme Court lifted its temporary stay of execution, Doyle Hamm was taken into the execution chamber and strapped onto the lethal injection gurney. Two

members of the execution team entered the execution chamber and immediately began to work on Doyle Hamm below his knees on both the left and right sides. The two members of the execution team worked at the same time, each taking one side of Doyle Hamm's body, in an attempt to find a vein anywhere in his lower extremities for peripheral venous access.

44. The execution team inserted needles and/or catheters multiple times into his left and right legs and ankles, each time forcing the needles into his lower extremities. In at least two of these attempts, an execution team member inserted a needle into Doyle Hamm's leg and kept the needle in his leg for several minutes, moving it around in a painful and futile attempt to enter Doyle Hamm's veins. Throughout this process, Doyle Hamm felt painful stretching, pressure, and burning sensations. At one point, the execution team turned Doyle Hamm over onto his stomach on the gurney, slapping the back of his legs to try to generate a vein.

45. After multiple, repeated attempts at peripheral venous access, the execution personnel stated aloud that they could not establish access. With peripheral access unavailable, other execution team members next attempted central venous access. An unidentified man, wearing a business suit and no protective covering besides gloves, attempted the venous access, while an unidentified woman, also in a business suit and no protective covering besides gloves, operated the ultrasound machine.

46. The execution team used an ultrasound to locate veins before attempting access with needles and/or catheters. The staff only attempted central venous access in Doyle Hamm's right groin.

47. Multiple times, the execution team tried to insert a needle or catheter into Doyle Hamm's right groin, causing severe bleeding and pain. The staff put a pad on his groin to

absorb the blood and had to change the pad during the procedure when the pad became completely soaked with blood. The woman operating the ultrasound machine had to change her gloves several times because they were bloody.

48. Throughout these excruciating hours, Doyle Hamm experienced extreme fear and psychological distress. In addition to the already distressing situation of anticipating his own death, Doyle Hamm was subjected to not only physical agony but also psychological torture from the uncertainty and cruelty resulting from hours of attempted execution. While the execution team was working on the central line in his groin, Doyle Hamm was praying that the team would successfully establish access so that he would simply die and the pain would stop.

49. The execution was ultimately terminated at approximately 11:27pm CST, or at least that was when counsel was notified. However, even after it was announced in the execution chamber that the execution was terminated, the man attempting central line access insisted that he be allowed to continue. He suggested continuing with central venous access in Doyle Hamm's right groin, or trying elsewhere on his lower extremities, despite being told that the execution had been terminated and that he should cease any further attempts. Only after being repeatedly told that the execution could not continue did the man give up. A bandage was then taped to Doyle Hamm's right groin.

50. After the execution was terminated, Doyle Hamm was unstrapped and correctional officers lifted him up off the gurney. When his feet hit the floor, Doyle Hamm collapsed in agony. Unable to stand or walk on his own, Doyle Hamm had to be held up by the correctional officers and carried back to his cell.

51. Doyle Hamm was brought to the infirmary shortly after the execution was

terminated, where the bandage on his groin was replaced. Doyle Hamm told the doctor on staff that he was in excruciating pain, but he was not given any pain medication until around 3:00am or 4:00am CST.

52. After the botched execution, Doyle Hamm urinated blood. He reported painful and bloody urination during the hours and day after the execution, evidence that the IV team likely punctured his bladder while attempting central line access. *See* Appendix A (Preliminary Report of Doyle Hamm Examination by Dr. Mark Heath).

53. Since February 22, 2018, Doyle Hamm has suffered not only physically but also emotionally. He has had nightmares and flashbacks in which he pictures himself lying on the gurney again, being subjected again to the torturous pain that occurred on February 22, 2018. Doyle Hamm has been traumatized and lives in fear that ADOC will subject him to another painful and botched execution.

54. Just days after Doyle Hamm's botched execution, the medical personnel at Holman Correctional Facility determined that he has an infection in his lymphs in his right groin and armpit, and they have prescribed antibiotics.

I. Doyle Hamm's State Court and Other Litigation to Prevent Any Further Execution Attempts on Him by Any Means or Methods as Violative of the United States and Alabama Constitutions

55. On March 5, 2018, Doyle Hamm placed in FedEx for filing a state Rule 32 post-conviction petition in the Cullman County Circuit Court raising the same federal, but also state, constitutional challenges to any further attempt at execution.

56. Doyle Hamm also now raises herein, in this federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, the same federal constitutional claims that are being raised in the Cullman County Circuit Court in the state post-conviction petition.

THIS IS NOT A “SECOND OR SUCCESSIVE” PETITION

57. Under U.S. Supreme Court precedent, a second-in-time habeas application, challenging the same state court judgment at issue in an earlier habeas application, is not necessarily a “second or successive” petition under the Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) provisions set forth in 28 U.S.C § 2244(b). While § 2244(b) sets limitations on a petitioner’s ability to file a “second or successive” application, Congress did not define this phrase. *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000) (“The phrase ‘second or successive petition’ is a term of art given substance in our prior habeas corpus cases.”). Today, “it is well settled that the phrase does not simply ‘refe[r] to all § 2254 applications filed second or successively in time.’” *Magwood v. Patterson*, 130 S.Ct. 2788, 2796-97 (2010) (citing *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)); *see also Stewart v. U.S.*, 646 F.3d 856, 859 (11th Cir. 2011) (“But the Supreme Court has unequivocally explained that the phrase ‘second or successive’ is not self-defining and does not refer to all habeas applications filed second or successively in time.”).

58. A second-in-time habeas proceeding is *not* “second or successive” if it raises a claim that “the petitioner had no fair opportunity to raise” in the first habeas petition. *See, e.g., Magwood*, 561 U.S. at 346. This means that, when discovery of the factual predicate for the claims in the second-in-time petition could not have occurred at the time the first habeas petition was filed, a petitioner may raise the claims as soon as they have become ripe. *See, e.g., Panetti*, 551 U.S. at 943, 945 (interpreting AEDPA to permit a “§ 2254 application

raising a *Ford*-based incompetency claim filed as soon as that claim is ripe”); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) (holding that a second habeas application, premised on a previously unripe claim, was not successive); *Slack*, 529 U.S. at 478 (2000) (ruling that second habeas application, which was previously dismissed for failure to exhaust in state court, was not successive under § 2244(b)). Without this exception, a petitioner is otherwise forced to raise a claim in the first federal habeas application when it may be “premature.” *Panetti*, 551 U.S. at 945-46 (explaining that the opposite rule would mean “petitioners ‘run the risk’ ...of ‘forever losing their opportunity for any federal review of their unexhausted claims’”). Thus, the Supreme Court has authoritatively interpreted AEDPA to *not* apply to every application filed by a prisoner in custody pursuant to a state-court judgment simply because the prisoner has already challenged that same state-court judgment before.

59. The Eleventh Circuit has applied these very same principles. For instance in *Stewart v. U.S.*, the Eleventh Circuit determined that what the defendant sought to present in the second-in-time habeas petition did not exist until after the first-in-time petition was resolved; therefore, “it was not ‘second or successive’ as that term is understood in context of [AEDPA].” 646 F.3d 856, 857 (11th Cir. 2011); *see also Tompkins v. Sec., Dep’t of Corr.*, 557 F.3d 1257, 1260-61 (11th Cir. 2009) (a second-in-time habeas petition alleging that the delay in executing the petitioner violated the Eighth Amendment was not “second or successive” because the constitutional claim regarding the delay could not have arisen until after the first petition was resolved); *Insignares v. Sec., Fl. Dep’t of Corr.* 755 F.3d 1273 (11th Cir. 2014). The Eleventh Circuit has stated: “Particularly when a petitioner raises a claim that could not have been raised in prior habeas petition, courts have foregone a literal

reading of ‘second or successive.’” *Stewart*, 646 F.3d at 860. The court even cautioned against an contrary reading of the Act because this would “inundate district courts with meritless and unripe petitions” trying to preserve issues in case they were to later arise. *Id.* at 864-65.

60. Doyle Hamm’s second-in-time habeas application falls squarely within the scope of the prior applications that were not considered “second or successive” under § 2244(b). Doyle Hamm’s claims here were genuinely unripe until just two weeks ago. The very factual predicate for these claims, namely the execution of Doyle Hamm, did not arise until February 22, 2018, and therefore well after his first habeas petition was long completed.

61. Thus, Doyle Hamm had no “fair opportunity to raise” these claims, *see Magwood*, 561 U.S. at 346, since the very facts and events giving rise to this claim took place years after the completion of those first proceedings.

62. Doyle Hamm’s petition may, therefore, proceed in this court without seeking initial approval from the Eleventh Circuit.

EXHAUSTION OF STATE REMEDIES

63. Doyle Hamm is in the process of exhausting the state remedies that are available for the federal constitutional claims raised in this petition. Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, Doyle Hamm placed in FedEx for filing his Rule 32 petition for relief from sentence of death on March 5, 2018. His action in the Cullman County Circuit Court is pending. Doyle Hamm intends to pursue that action to completion there and, if necessary, in the state appellate courts and at the United States Supreme Court.

64. Under these circumstances, Doyle Hamm believes the proper procedure is for this Court to hold in abeyance this habeas petition until such time as he has completed exhausting

his state remedies. *See Connor v. Sec., Fl. Dep't of Corrs.*, 713 F.3d 609, 619 (11th Cir. 2013) (noting that “AEDPA does not deprive the district court of that authority”). Federal courts have long recognized that state courts should be given the first opportunity to address federal constitutional claims raised in a federal habeas petition, prior to the federal court conducting its review. *See Duckworth v. Serrano*, 454 U.S. 1, 304 (1981); *see also Rose v. Lundy*, 455 U.S. 509, 522 (1982) (noting that federal courts cannot typically review unexhausted claims in a habeas petition). Federal courts do still permit a prisoner who has not yet exhausted his state court remedies to file a “protective petition in federal court and ask the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted.” *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (citing *Rhines v. Weber*, 544 U.S. 269 (2005)). This request should be permitted so long as the prisoner can show good cause for any failure to exhaust previously and that the unexhausted claims are not “plainly meritless.” *Rhines*, 544 U.S. at 278.

STATUTE OF LIMITATIONS

65. This petition is timely under AEDPA’s one-year statute of limitations, as set forth in 28 U.S.C. § 2244(d). In § 2244(d)(1)(D), it clearly states that the one-year period of limitation runs from, pertinent in this case, “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” Moreover, § 2244(d)(2) provides for tolling while the petitioner is in state court:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

66. As such, Doyle Hamm’s claim is timely. The “factual predicate of the claim or claims presented” herein could only have been discovered on February 22, 2018, at the

earliest. By filing this petition on March 5, 2018, this petition is timely even without having to take into account the tolling periods for which Doyle Hamm would also be entitled under § 2244(d)(2).

JURISDICTION

67. Federal question jurisdiction over this matter arises under 28 U.S.C. § 2254 and 28 U.S.C. § 1331.

VENUE

68. Doyle Hamm was originally convicted and sentenced in Cullman County in Alabama. He spent 30 years on death row at Donaldson Correctional Facility in Bessemer, Alabama, and is currently temporarily housed at Holman Correction Facility in Atmore, Alabama. The Alabama Department of Corrections is located in Montgomery, Alabama. As such, under 28 U.S.C. § 2241(d), the proper venue for this action could be the United States District Court for the Southern District of Alabama, where Doyle Hamm is now temporarily located, or the United States District Court for the Northern District of Alabama, where Doyle Hamm was convicted and sentenced and has resided for 30 years, where his first federal habeas corpus was heard, and where he is already party to ongoing and active § 1983 litigation before Chief Judge Karon O. Bowdre. Because this petition for a writ of habeas corpus is related to that ongoing § 1983 civil action in the Northern District, and that § 1983 action involves the same parties and is based on the same or similar claims, this habeas petition is a related case and jurisdiction and venue over this federal habeas action should rest in the Northern District of Alabama before Chief Judge Bowdre.

FEDERAL CONSTITUTIONAL CLAIMS

Facts in Support of All Claims

69. No one in the history of capital punishment in the United States has gone through what Doyle Hamm was subjected to on February 22, 2018. No one in the history of the death penalty in this country has been led into the execution chamber, strapped onto the execution gurney in the execution chamber, had the execution team insert needles and catheters into his peripheral veins, had the execution team then insert needles and catheters into his central veins, and ultimately had the execution terminated and walked out of the execution chamber. No one has ever gone through this. Doyle Hamm is the only person in American history who has ever been subjected to execution by lethal intravenous injection of his peripheral and central veins, and lived.¹

¹ Since 1985, there have been 23 reported cases where states have used lethal injection to execute a person and the execution team struggled to find a usable vein. These cases include the executions of: Stephen Peter Morin (Texas, 1985); Randy Woolls (Texas, 1986); Elliot Rod Johnson (Texas, 1987); Rickey Ray Rector (Arkansas, 1992); Billy Wane White (Texas, 1992); Richard Townes, Jr. (Virginia, 1996); Tommie J. Smith (Indiana, 1996); Michael Eugene Elkins (South Carolina, 1997); Genara Ruiz Camacho (Texas, 1998); Roderick Abeyta (Nevada, 1998); Christina Marie Riggs (Arkansas, 2000); Bennie Demps (Florida, 2000); Claude Jones (Texas, 2000); Jose High (Georgia, 2001); Joseph Clark (Ohio, 2006); Christopher Newton (Ohio, 2007); John Hightower (Georgia, 2007); Curtis Osborne (Georgia, 2008); Romell Broom (Ohio, 2009); Brian Keith Terrell (Georgia, 2015); Brandon Jones (Georgia, 2016); Alva Campbell (Ohio, 2017); Doyle Lee Hamm (Alabama, 2018). See <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions>.

In 20 of those 23 cases, the execution team ultimately succeeded in finding a vein and completing the execution. In only 3 of those 23 cases—those of Romell Broom and Alva Campbell in Ohio, and now Doyle Hamm in Alabama—has the attempt to find a vein been so fruitless and the procedure so obviously brutal, that the state had to call off the execution.

While Doyle Hamm is one of only three people to survive an attempted execution via lethal injection, his case is even more unique. Unlike in the attempted executions of Mr. Broom and Mr. Campbell, during which Ohio only sought peripheral venous access and not central venous

70. But Doyle Hamm survived this ordeal only after being subjected to hours of prolonged unnecessary pain and a dangerous, bloody procedure to find a vein in his feet, ankles, shin, or groin, in what amounted to nothing less than the torture of Doyle Hamm.

71. The brutal consequences of what took place in the execution chamber in Holman Correctional Facility on February 22nd were entirely foreseeable to the state of Alabama. That the execution team would be unable to find a vein and that any attempt to find veins would lead to a painful and bloody process was all presented, documented, and proved to the state of Alabama for months leading up to the execution.

72. For at least seven months, Doyle Hamm had repeatedly explained to the state of Alabama that, as a result of his serious medical conditions, he lacks any usable veins for intravenous access for purposes of lethal injection. He warned the State that any attempt at execution requiring intravenous access would result in a risky, painful, and bloody procedure that would amount to cruel and unusual punishment.

73. Beginning in June 2017, when the State moved the Supreme Court of Alabama to set an execution date for Doyle Hamm, Mr. Hamm actively litigated the issues surrounding his medical conditions, specifically his venous access and cancer. The Alabama Supreme Court ordered the State to allow Doyle Hamm to undergo a medical evaluation in August 2017, and Doyle Hamm filed weekly status updates with the Alabama Supreme Court until October 2017.

access, the execution team in Doyle Hamm's case attempted to obtain *both* peripheral venous access *and then* central venous access. The state of Alabama had never before attempted to obtain central venous access for purposes of lethal injection, and the result was a prolonged, cruel, unnecessarily painful, and bloody attempt to execute Doyle Hamm.

In effect, Doyle Hamm is the only person in American history who has survived this extreme treatment involving *both* peripheral and central venous access for purposes of lethal IV injection.

74. On December 13, 2017, the same day that the Alabama Supreme Court set Doyle Hamm's execution date, Doyle Hamm filed a 42 U.S.C. § 1983 complaint in the District Court for the Northern District of Alabama, challenging the state of Alabama's method of execution, *as applied to him*, on Eighth Amendment grounds.

75. On February 6, 2018, the District Court for the Northern District of Alabama denied the defendants' motion for summary judgment and granted a stay of Doyle Hamm's execution. The Eleventh Circuit subsequently vacated the District Court's stay of execution and ordered the District Court to immediately arrange for a medical examination of Doyle Hamm.

76. The District Court promptly appointed an independent medical expert and arranged for a physical examination of Doyle Hamm's veins and potential lymphadenopathy, which occurred on February 16, 2018. Based on the results of the medical examination, the District Court determined that the defendants could proceed with the execution of Doyle Hamm, but required that the defendants stipulate to not attempting to access any peripheral veins in Doyle Hamm's upper extremities. Doyle Hamm appealed the District Court's decision to the Eleventh Circuit.

77. On February 21, 2018, before returning a decision, the Eleventh Circuit requested that the defendants provide affidavits, within six hours, stating that: (1) they agreed to follow the stipulation made to the District Court; (2) ultrasound technology and an "advanced level practitioner" would be present during the execution; and (3) they were in fact capable of administering an intravenous line through Doyle Hamm's veins in his legs. The defendants submitted one affidavit from Warden Cynthia Stewart confirming, in one-line answers, each item that the Eleventh Circuit requested.

78. On February 22, 2018, the day of Doyle Hamm's scheduled execution, the Eleventh Circuit affirmed the District Court's denial of Doyle Hamm's request for preliminary injunction, permitting the execution to go forward.

79. After the Eleventh Circuit's decision, Doyle Hamm filed a petition for writ of certiorari and an application for a stay of execution in the United States Supreme Court. The Court imposed a temporary stay of execution, which was lifted at approximately 8:45pm CST on February 22, 2018. The Court denied Doyle Hamm's petition for writ of certiorari and motion for stay of execution, with Justice Ginsburg and Justice Sotomayor dissenting. The execution was permitted to proceed.

80. On February 22, 2018, at approximately 11:30pm CST, the defendants terminated Doyle Hamm's execution after hours of attempting to establish venous access. The execution warrant subsequently expired at midnight.

81. These months of litigation put the defendants on notice that Mr. Hamm's medical conditions would make lethal injection particularly challenging and dangerous.

FIRST CLAIM FOR RELIEF

A SECOND ATTEMPT TO EXECUTE DOYLE HAMM BY ANY MEANS OR METHODS IS A VIOLATION OF THE U.S. CONSTITUTION'S EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

82. Doyle Hamm incorporates by reference all facts and allegations detailed throughout this Petition.

83. On February 22, 2018, Doyle Hamm was escorted out of the execution chamber around 11:30 PM. This was after he underwent hours of torturous pain while the state of Alabama's execution team used all permissible means to execute him.

84. Doyle Hamm bears no responsibility whatsoever for the executioners' failure. Throughout the attempt to execute him, Doyle Hamm remained cooperative and did nothing to obstruct the execution team.

85. Nor was the state of Alabama's failure to execute Doyle Hamm the result of an accident or an "isolated mishap." Instead, it was the consequence of a deliberate and intentional act to try to execute Doyle Hamm no matter what it took and how much unnecessary pain it caused—including going into the right groin even though the executioners knew from the District Court's independent medical examination that he has abnormal lymph nodes there and that the executioners should not attack his right groin. For seven months prior to the execution, the state of Alabama was aware that Doyle Hamm's medical conditions made his veins inaccessible or unusable for intravenous access for purposes of lethal injection.

86. Doyle Hamm repeatedly warned the state of Alabama—through state and federal litigation and through filed clemency applications with the Governor—that lethal injection would be impossible in light of his negligible venous access. For seven months, he repeatedly explained that his veins, as a result of his cancer, cancer treatment, age, and prior intravenous drug use, did not permit for the venous access necessary for lethal injection; and that his abnormal lymph nodes from his lymphoma would interfere with central venous access. He pleaded with the state of Alabama to not subject him to the dangerous, painful, and bloody execution that would take place if attempted.

87. Even after the court-appointed independent medical expert confirmed Doyle Hamm's claims that he had no peripheral venous access in his upper extremities and identified abnormal lymph nodes his right groin, the state still proceeded with lethal injection

targeting his right groin. It ignored the concerns of experts, who had reviewed the medical report and called for “further workup/comment” on the abnormal lymph nodes that were identified. *See* Supplemental Report from Dr. Charles Blanke and Supplemental Report from Dr. Mark Heath in *See Hamm v. Dunn, et al.*, Civil Action No. 2:17-cv-02083-KOB (N.D. Ala. Feb. 20, 2018), Doc. 62.

88. The state of Alabama guaranteed that it could succeed in executing Doyle Hamm using only peripheral intravenous access through Doyle Hamm’s lower extremities, despite evidence—and even an admission in court—that the Alabama Department of Corrections had *never* attempted an execution via this method in the history of Alabama’s lethal injection system, meaning, in particular, that the execution team had no practice or prior experience with this method.

89. Despite clear notice since the summer of 2017 that significant problems would result if lethal IV injection was attempted, the state of Alabama completely disregarded this information and the significant risk posed, choosing instead to proceed with the attempted execution of Doyle Hamm via lethal IV injection on February 22, 2018.

90. The evening of the execution, Doyle Hamm remained strapped to the execution gurney in the execution chamber while the execution team—for hours—unnecessarily painfully prodded and jabbed Doyle Hamm with needles in a fruitless attempt to find a vein.

91. When it was deemed impossible to obtain peripheral venous access, the execution team then turned to a second method of execution that the state of Alabama had never used before. It attempted to obtain central venous access through Doyle Hamm’s right groin. This decision to try for central venous access *only* in Doyle Hamm’s right groin was made despite the independent medical expert’s report that this was the very location that Doyle Hamm had

abnormal lymph nodes. Yet rather than avoid this area, the execution team deliberately attempted to obtain central venous access *only* through his right groin. Like peripheral access, the multiple attempts to obtain central venous access also failed, but only after it resulted in a bloody and unnecessarily painful procedure.

92. Though Doyle Hamm was strapped to the gurney for hours, in significant pain from the attempts to find a peripheral vein in his lower extremities and then an attempt to find a central vein in his right groin, the execution team had no intention of stopping. Rather, it sought to continue inflicting this unnecessarily painful and bloody procedure on Doyle Hamm. Even when the execution officially was called off, a member of the execution team held on to Doyle Hamm's right groin, and then his ankles, insisting that more attempts at forcing a needle into his flesh would finally be successful. This insistence to continue in attempting to execute Doyle Hamm can only be considered a purpose to inflict unnecessary pain and suffering on him.

93. Doyle Hamm, strapped to the execution gurney, lay in pain, a bloody mess from the waist down, as he faced the prospect of a slow, lingering death. The trauma inflicted upon Doyle Hamm cannot be measured.

94. The U.S. Supreme Court has previously described punishments to be unconstitutionally cruel "when they involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), or when they "involve the unnecessary and wanton infliction of pain," *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). It has also demanded that punishment accord with "the dignity of man." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). What was imposed on Doyle Hamm does not fall within this society's standards for a constitutional execution. See *Woodson v. North Carolina*, 428 U.S.

280, 288 (1976) (“The Eighth Amendment stands to assure that the State’s power to punish is ‘exercised within the limits of civilized standards.’”).

95. The U.S. Supreme Court has also previously stated that “a series of abortive attempts” at execution raise an Eighth Amendment claim. *Baze v. Rees*, 553 U.S. 35, 50 (2008); *see also Glass v. Louisiana*, 471 U.S. 1080, 1085-86 (1985) (noting the potential unconstitutionality that “would be presented...if the Court were confronted with ‘a series of abortive attempts’”).

96. To attempt a second execution in light of the torturous circumstances inflicted on Doyle Hamm during the first attempt would be unconstitutional. Precedent is clear that when “unnecessary and wanton infliction of pain” is inflicted, *Rhodes*, 452 U.S. at 346, or when the method of execution “involve[s] torture or a lingering death,” *In re Kemmler*, 136 U.S. at 447, the Eighth Amendment’s prohibition against cruel and unusual punishment is violated. It would, therefore, be unconstitutional to subject Doyle Hamm to a second attempted executed.

97. Previously, the U.S. Supreme Court has recognized only one exception to this well-established principle of constitutional law—namely, when the first execution is impossible to complete because of an “isolated mishap” or an accident. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (noting specifically that the “fact that an *unforeseeable accident* prevented the prompt consummation of sentence” does not bar a second execution) (emphasis added). However, Doyle Hamm’s case does not fall into that exception by any stretch of the imagination. The failed execution here was caused by the state’s deliberate decision to disregard the significant risk, raised for months prior to the execution, of a botched and bloody execution. The courts that have most recently considered

this issue agree: “To hold that Plaintiff’s claim is not plausible based on *Resweber* would thus be an erroneous application of case that has shown its age in at least one relevant, core aspect. Over sixty years after *Resweber*, another Supreme Court plurality recognized that under an Eighth Amendment analysis, a series of abortive execution attempts could potentially indeed present an unconstitutional violation.” *Broom v. Strickland*, 2010 WL 3447741, at *2 (S.D. Ohio Aug. 27, 2010) (citing *Baze*, 553 U.S. at 50) (noting, as well, that *Resweber*’s precedential value is in question because it was only a plurality decision).

98. Doyle Hamm’s case falls under the rule, not the exception, of *Resweber*, since his execution did not fail because of an accident or “isolated mishap.” Nothing unforeseeable impeded the state’s attempt to execute Doyle Hamm. Rather, the execution failed because the state decided to proceed by methods that it knew or should have known, based on the information provided by counsel months prior, would be unsuccessful. The state, therefore, chose to inflict significant physical and psychological unnecessary pain on Doyle Hamm.

99. Moreover, it is not even clear that the *Resweber* exception, decided by a plurality opinion in 1947, remains good law today. The U.S. Supreme Court has repeatedly stated that the meaning of the Eighth Amendment continues to evolve along with society’s current prevailing norms. What forms of cruel and unusual punishment it protects against, the Court has explained, “must change as the basic mores of society change” and is based on “the evolving standards of decency that mark the progress of a maturing society.” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *see also Trop v. Dulles*, 356 U.S. 86, 101 (1958). This determination, therefore, “necessarily embodies a moral judgment.” *Kennedy*, 554 U.S. at 420 (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)). Applying this analysis, it is likely that under society’s current prevailing norms, attempting a

second execution, particularly in light of a torturous first attempt, would violate the Eighth Amendment under all circumstances and, therefore, puts into question whether the *Resweber* exception, decided more than seventy years ago, remains a valid exception to what would otherwise be seen as a cruel series of abortive attempts inflicting a lingering death.

100. What was inflicted on Doyle Hamm was a form of torture. The circumstances of this case—the state’s prior notice that his veins were inaccessible for lethal injection, the state’s insistence to proceed with the execution, the state’s attack on his right groin where there were abnormal lymph nodes, the state’s use of two never-before-used methods of execution, and the execution team’s unwillingness to stop inflicting pain even after repeated failed attempts and the execution was called off—reflect a deliberate and intentional purpose to inflict pain upon Doyle Hamm.

101. To subject Doyle Hamm to a second execution would subject him to a torturous experience of physical and psychological unnecessary pain. Therefore, further attempts to execute Doyle Hamm by any means or methods would violate the Eighth and Fourteenth Amendments.

102. Doyle Hamm is entitled to a writ of habeas corpus under 28 U.S.C. § 2254, barring the state of Alabama from ever again trying to execute him by any means or method for the same crime and conviction at issue. The attempted execution of Doyle Hamm violated the Eighth Amendment. To subject him to additional attempts at execution would be cruel and unusual as proscribed by the U.S. Constitution. Doyle Hamm’s death sentence may no longer be carried out by any means or methods without violating his constitutional rights, and he must be removed from death row and placed in the Alabama prison system’s general population.

103. He is also entitled to such other legal and equitable relief as may be appropriate.

SECOND CLAIM FOR RELIEF

TO ATTEMPT A SECOND EXECUTION OF DOYLE HAMM WOULD VIOLATE THE DUE PROCESS CLAUSE'S PROHIBITION AGAINST DOUBLE JEOPARDY

104. Doyle Hamm hereby incorporates all facts and allegations made in this petition.

105. The Fifth Amendment, applied to the states through the Fourteenth Amendment, states that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” This clause guarantees Doyle Hamm protection against Double Jeopardy, including the right not to face a second attempted execution.

106. The U.S. Supreme Court has cautioned that “multiple punishments for the same offense” violates the Double Jeopardy Clause. *See U.S. v. Halper*, 490 U.S. 435, 441 (1989); *see also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds*. This protection, it explained, “has deep roots in our history and jurisprudence.” *Halper*, 490 U.S. at 440; *see Ex parte Lange*, 28 Wall. 163, 21 L.Ed. 872 (1874) (“If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.”).

107. There is no question that the state *already* placed Doyle Hamm “in jeopardy of his life or limb” on the evening of February 22, 2018. Under Doyle Hamm’s conviction and sentence to death, the state had the authority to proceed with the execution of Doyle Hamm (though the measures it took, in its attempt to execute him, went well beyond what is constitutional).

108. On the evening of February 22, 2018, the state brought Doyle Hamm into the execution chamber, where the entire process of execution was to take place. In the execution

chamber, Doyle Hamm was strapped onto the lethal injection gurney, where he lay for hours, had the execution team insert needles and catheters into his peripheral veins, had the execution team then insert needles and catheters into his central veins, and ultimately had the execution terminated and walked out the execution chamber. But for hours, the execution team executed Doyle Hamm. The execution process was well and fully underway.

109. A second attempt to execute Doyle Hamm, for the same conviction, would *again* place him “in jeopardy of life or limb.” This contravenes the very words and purpose of the Fifth Amendment Double Jeopardy Clause. *See Resweber*, 329 U.S. at 461-4.

110. The U.S. Supreme Court has permitted a second attempt at execution *only when* the first execution fails due to “an accident, with no suggestion of malevolence, prevent[ing] the consummation of a sentence.” *Resweber*, 329 U.S. at 463. It found in that specific case, where the result was unforeseeable, that a second execution does not implicate double jeopardy concerns.

111. The attempted execution of Doyle Hamm, however, did not fail as a result of accident. The State was repeatedly warned through litigation in state and federal court, as well as applications for clemency to the Governor, that intravenous access for purposes of lethal injection would be impossible and, more so, cruel.

112. Moreover, throughout the hours of the execution, none of the medical equipment necessary to complete the execution malfunctioned, nor in any way impeded the state’s execution. *Cf. Resweber*, 329 U.S. at 461 (noting that because of a “mechanical difficulty,” the electrocution chair failed and “death did not result”). Actually, the state of Alabama had additional equipment above and beyond the protocol—an ultrasound—in the execution chamber specifically for Doyle Hamm’s execution, and still the execution team could not

successfully execute him. This was not due to an accident of any sort. This was an attempt to execute someone, knowing it would inflict significant unnecessary pain and suffering, despite clear notice of the likely consequences.

113. Doyle Hamm is entitled to a writ of habeas corpus under 28 U.S.C. § 2254, barring the state of Alabama from ever again trying to execute him by any means or methods for the same crime and conviction. Though Doyle Hamm was initially sentenced to death, he faced that sentence when Alabama attempted to execute him on February 22, 2018. His life, for that offense, was put into jeopardy as he lay for hours in the execution chamber while the execution team tried to execute him. It would be unlawful and in violation of his constitutional rights for the State to seek again to carry out a death sentence on Doyle Hamm.

114. Doyle Hamm is also entitled to such other legal and equitable relief as may be appropriate.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays for this Court:

115. Permit Petitioner, who is indigent, to proceed *in forma pauperis*;

116. Enter a preliminary injunction barring Petitioner's execution pending final disposition of the allegation as contained in this petition to this Court;

117. Hold these proceedings in abeyance pending Doyle Hamm's exhaustion of state remedies;

118. Order the Respondent to provide the Court with a full and complete record of all proceedings which were held in state courts;

119. Grant Petitioner, who is indigent, sufficient funds to secure the expert testimony necessary to prove the facts as alleged in the petition to this Court, and appoint undersigned counsel as his appointed attorney;

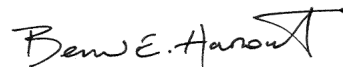
120. Grant Petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in the petition to this Court, and allow the Petitioner to conduct discovery;

121. Conduct a hearing at which proof may be offered concerning the allegations raised in the petition to this Court;

122. Issue a writ of habeas corpus to have Petitioner brought before this Court to the end that he may be discharged from his unconstitutional confinement and restraint;

123. Grant such other and further relief as may be appropriate and to dispose of the matter as law and justice require.

Respectfully submitted,



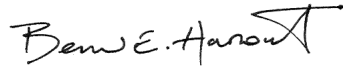
BERNARD E. HARCOURT
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435 West 116th Street
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Counsel for Doyle Lee Hamm

Dated: March 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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.

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

BERNARD E. HARCOURT
Counsel of Record

Appendix A

Preliminary report of Doyle Hamm examination
March 5, 2018
Mark. J. S. Heath, M.D.

My name is Mark J. S. Heath. I am a medical doctor with an active, licensed, full-time medical practice in New York State. I am board certified in anesthesiology. I practice daily at the New York-Presbyterian/Columbia Hospital in New York City, where I provide anesthesia for open-heart surgeries.

I examined Doyle Hamm on Sunday morning, February 25th, 2018, in a conference room adjacent to the Warden's office in Holman Correctional Facility.

Mr. Hamm was unshackled and seated in a chair. Some parts of the exam were conducted with him lying on a sheet on the conference table as no examining table was available.

Mr. Hamm was cooperative. I explained that the main purpose of the examination was to assess the extent of any injuries caused by the attempted execution on the night of February 22nd. I explained that the examination was voluntary, that he could end it at any time, and that he could decline any part of it at any time. He understood and consented to the examination. I explained that the results of the examination could, and likely would, be used in litigation that could, and likely would, be public. He understood and consented. I requested permission to create a photographic and video record of the exam, he consented to this also.

Also present in the room were Mr. Hamm's counsel Bernard Harcourt, his law associates Phoebe Wolfe and Nicola Cohen, and an officer from the ADOC. The Warden opened the door several times to check if anything was needed.

History:

Obtaining the history related to the execution attempt was interleaved with the conduct of the examination. Mr. Hamm stated that:

His standing dose of Norco had been switched to Tylenol No.3 when he arrived at Holman. On the day of the execution he was given T#3 at 2:30 AM and 10:00 AM, but the routine 6:00 PM dose was withheld. He stated that the T#3 was less effective at controlling his pain than the Norco.

He was taken from the holding cell to the execution chamber and strapped to the gurney. His arms were extended straight out on each side. There were approximately nine other people in the room, none of them were wearing surgical masks or hair covers. The room was brightly lit and there were multiple bright lights in the ceiling above the gurney.

Two men attempted IV access on his lower extremities, working simultaneously, one on each side. The men were wearing hospital scrubs and gloves, but no surgical masks or hair covers. Tourniquets were applied below the knees. They first attempted access in his ankles, then moved up to his calves. Mr. Hamm stated that each attempt involved one skin penetration but then multiple probing advances and withdrawals of the needle. The continued probing was painful. One of the probing needle advances was extremely painful and he felt that the “shin bone” in his right calf was reached by a needle. He estimates that the probing in his right calf persisted for about 10 minutes and states that he could feel them “rolling and mashing” the tissue in his leg. Overall he estimates that the two men spent about 30 minutes attempting IV access in his lower extremities. At no point did Mr. Hamm see them attach IV lines or hear them discussing attaching IV lines to test whether a catheter had been successfully inserted.

After approximately five attempts in his lower extremities the execution team members stated that they could not gain access. A few minutes later a man in a suit entered the room, accompanied by a woman with an ultrasound device. Mr. Hamm is of the understanding that the man is a doctor. The doctor was wearing a suit but no tie, he put on gloves but did not wear a gown or surgical mask or hair cover. He did not remove the suit jacket. The ultrasound device was plugged in, Mr. Hamm could not see the screen. EKG stickers were placed and leads attached.

The man stood by Mr. Hamm’s right groin, the woman stood by his left groin and reached over his pelvis to place and hold the ultrasound probe on his right groin. He could hear the machine making a swishing noise. The man washed the right groin with cold liquid, a drape was placed, and the woman began applying the probe to the right groin. Cold jelly was used between the probe and Mr. Hamm’s skin. They were saying “artery” and “vein” while manipulating the probe and they marked his groin with a marker.

The doctor advanced a needle into Mr. Hamm’s groin. Mr. Hamm felt multiple needle insertions, and with each insertion he felt multiple probing advance-withdrawal movements. It is not clear whether local anesthetic was administered. Mr. Hamm felt the needle penetrating deep into his groin and pelvis. Mr. Hamm stated that this probing was extremely painful. Twice during needle advancement he experienced sudden sharp deep retropubic pain. The doctor requested a new needle several times. During this time Mr. Hamm began to hope that the doctor would succeed in obtaining IV access so that Mr. Hamm could “get it over with” because he preferred to die rather than to continue to experience the ongoing severe pain. He was shivering and trembling from a combination of fear and the fact that the room was very cold. He states that the room was the coldest room he had ever experienced in either Donaldson or Holman prison.

At one point a large amount of blood began to accumulate in the region of Mr. Hamm’s groin. The blood soaked a pad or drape, and another one was applied. A man who had been watching from the foot of the gurney and talking on a cellphone

began frowning. This man left the room several times, each time returning after a few minutes. The final time this man entered the room he stated that the execution was over. The doctor stated that he wanted to keep attempting central access, and the man re-stated that the execution was over. The doctor applied a bandage to the groin but did not apply pressure or direct anybody to apply pressure. The doctor then moved to Mr. Hamm's feet and began examining them and palpating them, stating that he had not had an opportunity to attempt access in the feet. The man then told the doctor to "get out". The doctor and the woman who had been performing the ultrasound guidance were escorted from the room. The doctor did not apply pressure to the groin or provide wound care instructions before leaving the room.

Mr. Hamm was unstrapped and lifted off the gurney by several correctional officers. He was not able to support his own weight and almost collapsed, but was held off the floor by the officers. He was escorted back to the holding cell with officers supporting him by his arms because he was in too much pain to walk and support himself. At some point he was taken to the infirmary where a body chart was completed and band aids were applied to his legs.

Approximately one hour after he returned to the holding cell Mr. Hamm urinated and had gross hematuria. He described the urine as being bright red. He did not notice any clots. He has never previously noticed gross hematuria, including on the day prior to the execution. He had not ingested any food or liquid that was red colored, including beets. He had declined a "final meal" that evening, and had only eaten potato chips earlier that day. Over the following day, the next time he voided the urine was brown-yellow, the next time it was pale brown-yellow, and the next time (and subsequently) it was a normal yellow color.

Also approximately one hour after the execution Mr. Hamm developed a persistent irritating cough. The cough was in response to an irritation he felt in his upper chest, not in his throat. He could occasionally produce a small amount of white-yellow sputum. He denies any hemoptysis, fever, or chills. He did not experience any chest pain or shortness of breath during the execution.

Mr. Hamm's recollection was good, although I was mindful that he was recounting a long, complex, and stressful sequence of events he experienced.

I spoke with Mr. Hamm three times by phone after the examination. He has developed a "knot" in his right axilla that he describes as being the size of a grape and a golf ball. The mass is tender and he experiences a "stretching pain" in his upper right arm when he raises it. On 3/2/2018 he was seen in the prison clinic and told that he had infected lymph nodes in his right groin and right axilla. An oral antibiotic was prescribed.

Focused physical examination:

Oral temperature: 98.1
HR: 65 seated
BP: 121/77 (left arm, seated)
O2 saturation: ~95-98% (4 extremities)

Comfortable while seated but evincing pain when changing positions or climbing on/off the table. Spontaneous coughing multiple times during the exam. Walking slowly, stiffly, and with an asymmetric gait from pain.

Lower extremity puncture wounds (photo 1):
2 Left medial malleolus (photo 2)
2 Right leg, medial aspect, upper calf (photo 3)
1 Right medial malleolus (photo 4)

Right inguinal puncture wounds (photo 5):
There is a large tender hematoma/ecchymosis in the right inguinal region, with diffuse subcutaneous discoloration bordering the margins. The upper thigh and lower abdomen are tender.
There are approximately 6 puncture wounds approximately 2 cm inferior to the inguinal ligament. There is partial overlap of some of the puncture wounds making it difficult to determine precisely the number of separate needle penetration events. The femoral artery is pulsatile, with no appreciable enlargement.

Total of 11 lower extremities and right inguinal puncture wounds (photo 6)

Mental status: he states that he is stressed and is experiencing intrusive flashbacks to the execution. He is also experiencing nightmares. His sleep has been very poor, and is also disturbed by coughing. The flashbacks occur when he is alone, and involve imaging himself strapped to the gurney. He can feel his heart racing during the flashbacks. He is appreciative of the support of other death row prisoners who are asking what they can do to help him recover.

Assessment:

1 – large right inguinal hematoma from multiple failed femoral vein access attempts. This is typical of post-arterial puncture hemorrhage, but could possibly be caused by an unusually large leak from the femoral vein. The sudden bleeding that occurred during the procedure is more consistent with arterial puncture.

2 – gross hematuria is from penetration of a ureter, the bladder, the prostate gland, or the urethra. Bladder penetration is a rare but reported complication of femoral cannulation. The extent of the lower abdominal pain may be related to bladder or other visceral injury.

3 – new onset cough, etiology unclear.

4 – new onset tender axillary and inguinal adenopathy, attributed to infection. It is possible that the cough and adenopathy are caused by bacterial dissemination during or after the failed femoral cannulation. Bacteria may have been introduced into the circulatory system from the skin, from urogenital penetration, or from colon perforation.

5 – at risk for PTSD.

Note: when I spoke with Mr. Harcourt shortly after the execution I asked him to ask the staff to preserve and provide the execution log and any notes taken during the procedure, the needle and sharps disposal containers, and the used catheters and central line kits. I also asked to view the sheets, padding, and clothes worn by Mr. Hamm to help gauge the amount of blood loss. The Warden said that all preserved items had been taken to another location and were not available.

This report represents my preliminary findings resulting from my examination of Mr. Hamm on February 25, 2018. I reserve the right to amend this report in light of any additional information.



Mark J. S. Heath, M.D.
March 5, 2018



Photo 1: Lower extremity puncture wounds

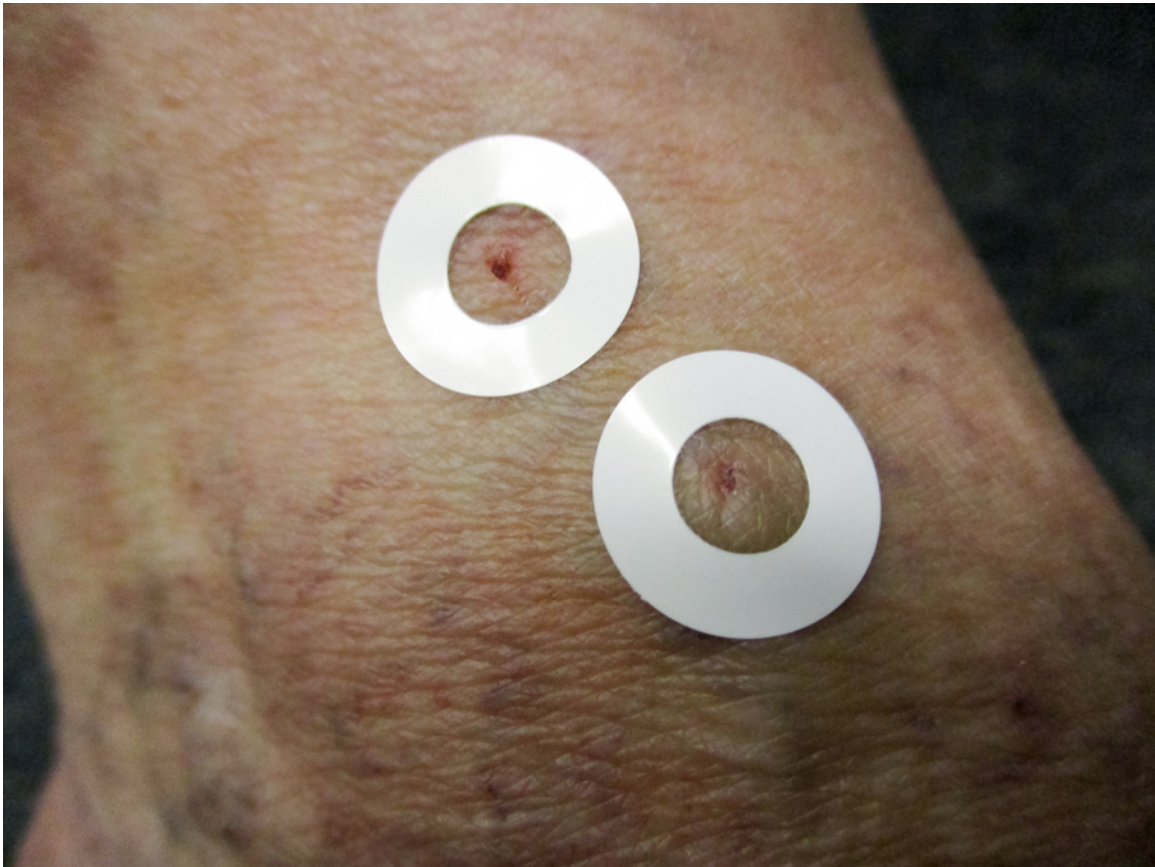


Photo 2: Left medial malleolus puncture wounds



Photo 3: Right leg, medial aspect, upper calf puncture wounds



Photo 4: Right medial malleolus puncture wound

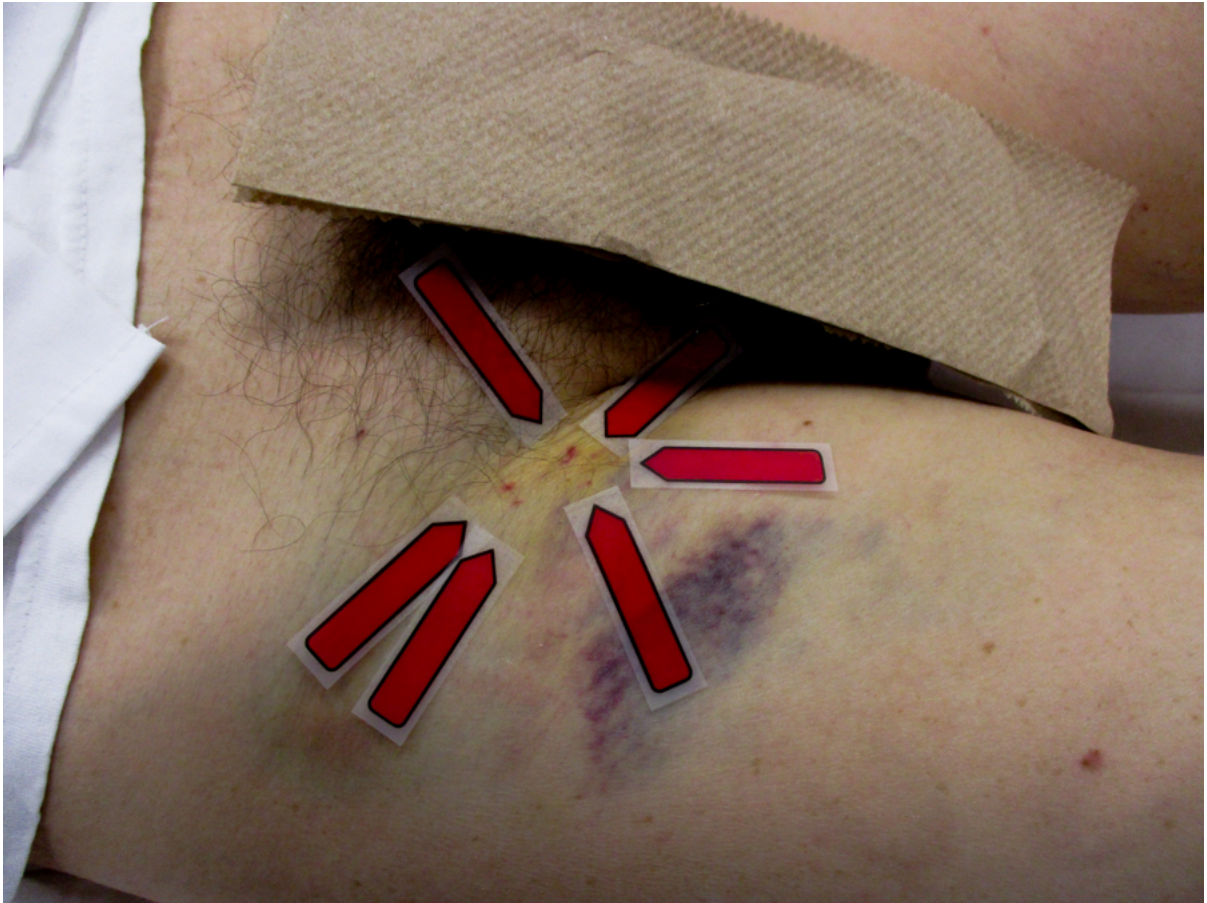


Photo 5: Right inguinal puncture wounds



Photo 6: lower extremities and right inguinal puncture wounds