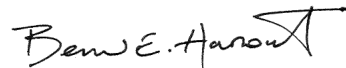


**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

DOYLE LEE HAMM)	Case No. _____
)	
Petitioner,)	
)	DEATH PENALTY CASE
v.)	
)	
JEFFERSON S. DUNN, Commissioner,)	PETITIONER’S MOTION TO STAY
Alabama Department of Corrections.))	AND HOLD PROCEEDINGS IN
)	ABEYANCE PENDING
Respondent.)	EXHAUSTION OF STATE REMEDIES,
)	AND MEMORANDUM IN SUPPORT
)	
)	

Petitioner, Doyle Lee Hamm, currently confined on death row at Holman Correctional Facility in Atmore, Alabama, by and through his undersigned counsel, hereby moves this Court to stay and hold the instant federal habeas corpus proceedings in abeyance until the Alabama state courts have issued all requisite rulings to exhaust the claims that are contained in Doyle Hamm’s federal habeas petition. A memorandum brief in support of this motion is attached and fully incorporate herein.



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MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO STAY AND HOLD PROCEEDINGS IN ABEYANCE PENDING EXHAUSTION OF STATE REMEDIES

INTRODUCTION AND PROCEDURAL POSTURE

Petitioner Doyle Lee Hamm filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 on March 5, 2018. Doyle Hamm seeks relief from his 1987 Alabama criminal judgment, which sentenced him to death for the murder of Patrick Cunningham, on the ground that the state of Alabama has already once executed him for that crime, during which it subjected him to torturous and unconstitutional methods on February 22, 2018 in violation of the U.S. Constitution. That the execution of Doyle Hamm failed was through no fault of Doyle Hamm's and due to no accident or unforeseen circumstances, and as a result, the state of Alabama is constitutionally prohibited from seeking another execution.

The state of Alabama had fair warning and foresight of the execution's failure in light of Doyle Hamm's repeated, diligent, and vehement warnings to 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. The cause of the execution's failure is solely Alabama's deliberate insistence to move forward with an unconstitutional method of execution despite the unnecessary pain and substantial risk Doyle Hamm would be subjected to.

To attempt a second execution of Doyle Hamm, by any means or methods, violates his constitutional rights for several reasons. First, Doyle Hamm has the constitutional right to be free from cruel and unusual punishments. Second, Doyle Hamm has the constitutional right not to be

subjected to double jeopardy, not to be “put in jeopardy of life” for a second time. Therefore, Doyle Hamm asserts, in his accompanying federal habeas petition, that any further attempt by the state of Alabama to try to execute him, by any means or methods, for the same crime or conviction, would violate the U.S. Constitution. See, e.g., *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005) (a §2254 petitioner “seeks invalidation (in whole or in part) of the judgment”).

Due to the unique circumstances of this case, it is not clear what, if any, state remedies exist in Alabama states courts for Doyle Hamm to seek relief for the federal constitutional violations that he has been and remains subjected to as long as he remains under a sentence of death; however, Doyle Hamm will pursue all avenues in state court first. In light of the unique circumstances, as discussed more fully below, this federal habeas court should stay and hold Doyle Hamm’s federal habeas corpus petition in abeyance pending exhaustion of state remedies, if any, that may exist for his federal constitutional claims.

LEGAL ARGUMENT

A. General Principles

Federal courts have long recognized and abided by the established principle that state courts should be given the first opportunity to address federal constitutional claims raised in a federal habeas petition; and only after, should federal courts conduct their review. See *Duckworth v. Serrano*, 454 U.S. 1, 304 (1981) (“It has been settled for nearly a century that a state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts.”); see also *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (noting that federal courts cannot typically review unexhausted claims in a habeas petition).

This guidance is based on the values of comity and federalism that underlie our judicial system. Repeatedly, the U.S. Supreme Court has reminded courts of “the seriousness of federal

judicial interference with state civil functions,” *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975), and the need for “proper respect for state functions,” *Younger v. Harris*, 401 U.S. 37, 44 (1971). As a result, federal courts typically refuse to consider a habeas petition with unexhausted claims. *See Duckworth*, 454 U.S. at 3 (“The exhaustion requirement...serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.”). This exhaustion requirement is now largely codified in 28 U.S.C. § 2254(b), requiring a petitioner to exhaust state court remedies, unless they are unavailable, prior to obtaining federal judicial review of the habeas petition.

There remain, however, certain narrow instances when federal courts retain the power to review unexhausted claims. This includes when there is no appropriate remedy at the state level or when the state process would frustrate the use of an available remedy. *See, e.g.*, 28 U.S.C. § 2254(b)(1)(B).

Federal courts 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.

B. This Court Should Stay Doyle Hamm’s Habeas Petition and Hold it in Abeyance

Applying the general principle to the case at hand, this Court should hold Doyle Hamm’s habeas petition in abeyance pending the disposition of his claims in Alabama state court. There is both good cause for failure to exhaust and his claims have merit.

a. There is Good Cause for Any Previous Lack of Exhaustion

There is good cause in light of the unique circumstances of Doyle Hamm's case for any prior failure to exhaust his state remedies. The factual predicate—more specifically, the events and activities that these claims stem from—did not arise until February 22, 2018. Prior to the attempted and failed execution of Doyle Hamm that day, the claims in this petition would not have been ripe. However, since then, Doyle Hamm has been and is diligently pressing his claims.

First, it is not even clear what remedies, if any, exist in Alabama based on the unique circumstances of Doyle Hamm's case. His claims—that a second attempt to execute him would violate his rights under the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution and the Alabama Constitution—have not been presented before in Alabama. Doyle Hamm is the first person in the history of Alabama's lethal injection system to survive an execution.

Second, Doyle Hamm has promptly presented his claims to the state courts. On March 5, 2018, only two weeks following the failed execution, Doyle Hamm placed in FedEx for filing a Rule 32 state post-conviction petition in Cullman County, Alabama, raising state and federal challenges to his sentence of death. On that same day, he filed an amended complaint, alleging these same state and federal constitutional challenges, in his ongoing and active § 1983 litigation before the U.S. District Court in the Northern District of Alabama.

As soon as the claims in this petition became ripe on February 22, 2018, Doyle Hamm promptly and diligently made efforts to file and begin post-conviction proceedings in the Alabama state courts. There is, therefore, reasonable ground for any failure to exhaust that has existed up until now. The Court has the discretion to stay Doyle Hamm's federal habeas petition and hold it in abeyance until Doyle Hamm can complete and exhaust state proceeding and seek remedies, if any, for these federal constitutional violations in the Alabama state courts.

b. Doyle Hamm's Claims that A Second Execution Would Violate His Rights Under the Fifth, Eighth, and Fourteenth Amendments Have Merit

The claims Doyle Hamm presents in his federal habeas petition have merit. Doyle Hamm alleges that any further attempt by the state of Alabama to try to execute him, by any means or methods, for the same criminal judgment and death sentence, would violate his federal constitutional rights against cruel and unusual punishment and to not be subjected to double jeopardy.

Doyle Hamm's case is unique. No one in the history of capital punishment in the United States has experienced what Doyle Hamm was subjected to on February 22, 2018, when he was brought into the execution chamber, strapped to the lethal injection gurney, had needles and catheters inserted by the execution team into his peripheral *and* central veins, and ultimately had the execution terminated and walked out of the execution chamber. This happened on Thursday night, February 22, 2018, 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 terminated. During those hours, with Doyle Hamm strapped to the lethal injection gurney in the execution chamber at Holman Correctional Facility, 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.

Doyle Hamm was subjected to the deliberate infliction of cruel, unusual, and unnecessary physical and psychological pain, far exceeding 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, leg, and

right groin. The execution team tried to obtain central venous access only in Doyle Hamm's right groin, despite a independent medical expert's report that this was the very location that Doyle Hamm had abnormal lymph nodes. 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 groin, even replacing a blood-soaked pad covering his groin. What resulted was a prolonged, exceedingly painful, bloody, and botched execution through his lower extremities and groin that Doyle Hamm survived.

As explained in Doyle Hamm's petition, none of this was unforeseeable or the result of any accident. For seven months preceding the execution, counsel for Doyle Hamm had repeatedly and diligently warned the state of Alabama—through extensive litigation in the state and federal courts and in filed clemency applications with Governor Kay Ivey of Alabama—that any attempt to access Doyle Hamm's veins would cause unnecessary pain and suffering in violation of the Eighth Amendment to the United States Constitution because of his medical condition. 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. Despite being entirely aware of these facts, and of the additional fact that he had abnormal lymph

nodes in his right groin, the state of Alabama nevertheless proceeded to execute Doyle Hamm on the night of February 22, 2018.

What Doyle Hamm experienced that evening—the excruciating physical and psychological pain—was in itself a violation of his constitutional rights, but a second attempt to execute him would be cruel and unusual. Having been put through the first attempted execution as a result of the state of Alabama’s complete disregard for his serious medical conditions and the risks those medical conditions posed to any attempt to execute him via lethal injection, a second attempt at execution by any means or methods would be akin to torture and proscribed by the Eighth Amendment.

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). The U.S. Supreme Court has also previously declared that “a series of abortive attempts” at execution raise an Eighth Amendment violation. *Baze v. Rees*, 128 S.Ct. 1520 (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’”). To therefore attempt a second execution, particularly in light of the torturous circumstances inflicted on Doyle Hamm during the first attempt, would be unconstitutional.

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. Doyle Hamm’s case falls under the rule, not the exception, of *Resweber*. 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.

To attempt to execute Doyle Hamm a second time would also violate his rights under the Fifth Amendment providing that he shall not “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.

The U.S. Supreme Court has cautioned that the Double Jeopardy Clause protects against “multiple punishments for the same offense.” *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.”). James Madison, tasked with drafting the Double Jeopardy Clause, even specifically focused on the issue of multiple punishment: “No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.” 1 *Annals of Cong.* 434 (1789-1791) (J. Gales ed. 1834). Years later, the Supreme Court expressed this

same sentiment: “The Double Jeopardy Clause,...‘prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.’” *Halper*, 490 U.S. at 442.

On the evening of February 22, 2018, the state brought Doyle Hamm into the execution chamber, strapped him 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. For hours, the execution team executed Doyle Hamm. The execution process was well and fully underway. 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.

In one case, the U.S. Supreme Court carved out an exception to this rule, but only because the execution in that case failed due to “an accident, with no suggestion of malevolence, prevent[ing] the consummation of a sentence.” *Resweber*, 329 U.S. at 463. With those specific facts in mind, the Court created a narrow exception, permitting a second attempt at execution *only when* the first execution fails due to “an accident.” The emphasis was particularly on the fact that the result there was entirely unforeseeable for the state, and therefore a second execution does not implicate double jeopardy concerns. By contrast, 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.

The attempted execution of Doyle Hamm 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.

Moreover, throughout the hours of the execution, none of the medical equipment

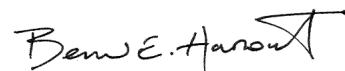
necessary to complete the execution malfunctioned, nor in any way impeded the state's execution. *Cf. Resweber*, 329 U.S. at 461 (noting that because of a "mechanical difficulty," the electrocution chair failed and "death did not result"). Actually, the state of Alabama had additional equipment above 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. The execution's failure was not due to an accident of any sort. Instead, it was an attempt to execute someone knowing it would inflict significant unnecessary pain and suffering, despite clear notice of these likely consequences. Any attempt to execute Doyle Hamm again will necessarily repeat the significant pain he has already endured, and that he can only be required to endure one time, thus punishing him twice for the same offense.

For these reasons, Doyle Hamm has clearly presented meritorious claims in his habeas petition.

CONCLUSION

For the reasons discussed above, and in the interest of justice, Doyle Hamm's motion should be granted. Comity and federalism—key principles guiding our system of dual sovereignties—are best served if these proceedings are stayed and held in abeyance until all proceedings in state court can be exhausted. To stay and hold these proceedings in abeyance will also avoid overlapping work by the judiciaries and ensure that finality is reached on these important and unique constitutional claims, only upon completion of any state court proceedings. The Court should stay these proceedings and hold Doyle Hamm's habeas case in abeyance until such time as any and all state remedies are exhausted.

Respectfully submitted,

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a prominent, stylized initial "B".

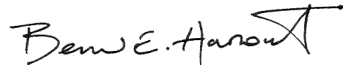
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Dated: March 5, 2018

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