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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

DOYLE LEE HAMM, Plaintiff, v. JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections; CYNTHIA STEWART, Warden, Holman Correctional Facility; LEON BOLLING, Warden, Donaldson Correctional Facility; OTHER UNKNOWN EMPLOYEES AND AGENTS, Alabama Department of Corrections; Defendants.	Civil Action No. 2:17-cv-02083-KOB **CAPITAL CASE**

SECOND AMENDED COMPLAINT

Plaintiff Doyle Lee Hamm, by and through his counsel, hereby files his Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), requesting this Court enforce his constitutional rights and issue declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983 and the Eighth, Fifth, and Fourteenth Amendments to the U.S. Constitution by ordering Defendants to not carry out their plan to execute him by lethal injection and by awarding Doyle Hamm appropriate compensatory and punitive damages for his unnecessary pain and suffering. Doyle Hamm brings four causes of action pursuant to 42 U.S.C. § 1983 and the Eighth Amendment to the U.S. Constitution. First, Doyle Hamm's unique medical conditions will almost certainly cause him

to suffer a painful, bloody, and prolonged execution in violation of the Eighth Amendment if the defendants attempt, for a second time, to execute Doyle Hamm by intravenous lethal injection. Second, the defendants' botched execution attempt on February 22, 2018 contributed additionally to the cruel and unusual punishment to which he has been subjected in violation of Doyle Hamm's Eighth Amendment rights. Third, in this *as applied* challenge under the *Baze/Glossip* standard to the method of execution, even if there is no statutorily authorized, readily available alternative, the Constitution nonetheless bars his sentence of death. Fourth, any further attempt to execute Doyle Hamm, by any means or methods, will violate his constitutional rights under the Eighth Amendment, the Fifth Amendment Double Jeopardy Clause, and the Due Process Clause of the U.S. Constitution.

INTRODUCTION

On February 22, 2018, Doyle Lee Hamm survived his execution. Despite months of fair warning regarding Doyle Hamm's serious medical condition, which includes severely compromised veins, a struggle with active lymphatic cancer, and lymphadenopathy, the defendants nonetheless attempted to execute Doyle Hamm by intravenous lethal injection. Around 11:30pm on February 22nd, Doyle Hamm's execution was terminated when the execution team admitted that they were unable to access any peripheral or central veins, but by then the damage had already been done. The Alabama Department of Corrections (ADOC) had already subjected Doyle Hamm to hours of physical and psychological torture, forcing needles into his lower extremities before attempting to establish a painful and bloody "central line" in the deep femoral vein of his right groin, where abnormal lymph nodes had previously been identified by this Court's independent medical expert. After the execution was terminated, Doyle Hamm was unable to stand on his own and collapsed as he was being taken off the gurney. He continues to suffer, physically and emotionally, as a result of the defendants' cruel and barbarous execution attempt.

In the months leading up to February 22, 2018, Doyle Hamm offered copious evidence that his serious medical condition would cause a botched and bloody execution. In this § 1983 suit, brought in December 2017, Doyle Hamm warned that his seriously compromised veins, in combination with his lymphatic cancer, created an unconstitutional risk that he would be subjected to cruel and unusual punishment in violation of the Eighth Amendment. On February 22, 2018, Doyle Hamm's warnings and fears were realized when the defendants failed to establish venous access and ultimately terminated Doyle Hamm's execution. Doyle Hamm now seeks to enforce his rights pursuant to the Eighth Amendment and Due Process Clause, both in connection to defendants' past infliction of cruel and unusual punishment upon Doyle Hamm and defendants' future plans to execute Doyle Hamm.

If the defendants attempt an intravenous lethal injection on Doyle Hamm again, there is an unacceptably high risk that he will, yet again, experience significant unnecessary pain and suffering in violation of the Eighth Amendment. Doyle Hamm is not here alleging that Alabama's lethal injection protocol is facially unconstitutional. He asserts only that the lethal injection protocol, *as applied to him*, will violate his rights because of his unique and serious medical conditions. Due to his lengthy medical history, cancer, cancer treatment, current medical condition, and age, Doyle Hamm's veins are severely compromised, making traditional peripheral intravenous access impossible; moreover, he suffers from abnormal lymph nodes that interfere with central venous access. As demonstrated by the botched execution on February 22, 2018, the ADOC is incapable of accessing Doyle Hamm's veins through either peripheral or central venous access. The defendants' attempt to access Doyle Hamm's central veins on February 22, 2018 confirms that the ADOC is not capable of establishing central venous access without excessive blood, pain, and suffering. If the ADOC again attempts to establish venous access for the purposes of lethal injection, there is a

"substantial risk of serious harm" that is "objectively intolerable," in violation of the Eighth Amendment. *Baze v. Rees*, 553 U.S. 35, 50 (2008).

In addition to establishing that Alabama's protocol for venous access for lethal injection poses an unconstitutional risk of harm *to him*, Doyle Hamm also offered an alternative method of lethal injection that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Baze*, 553 U.S. at 50. Doyle Hamm proposed that, instead of the intravenous method of lethal injection, the ADOC execute him by a ten-gram dose of secobarbital injected orally in four ounces of liquid or, alternatively, a drug cocktail known to doctors as "DDMP II," which is composed of 1 gram of diazepam, 50 milligrams of digoxin, 15 grams of morphine sulfate, and 2 grams of propranolol, injected orally. This alternative is permissible under Alabama law. *See Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016); *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853 (11th Cir., 2017); *Hamm v. Dunn*, No. 2:17-cv-02083-KOB (N.D. Ala. Feb. 6, 2018), Doc. 30. Alabama law currently authorizes two methods of execution: lethal injection and electrocution. *See* Ala. Code § 15-18-82.1(a). Doyle Hamm has waived the electrocution option, as he did not make the choice in writing within 30 days of the certificate of judgment, pursuant to § 15-18-82.1(b), so he is foreclosed from offering any alternative but lethal injection. However, an oral injection of a lethal drug constitutes an "injection," so such a method is allowed under current Alabama law. A ten-gram dose of secobarbital injected orally in four ounces of liquid or a drug cocktail of "DDMP II," injected orally, are readily implemented alternatives that will eliminate the significant likelihood of pain and suffering associated with an intravenous injection in Doyle Hamm's case. For these reasons, defendants should be enjoined from ever again attempting IV lethal injection.

Defendants also violated Doyle Hamm's Eighth Amendment rights when they inflicted

unnecessary and wanton pain upon him during the botched execution attempt of February 22, 2018. The defendants subjected Doyle Hamm to hours of painful attempts to access both his peripheral and central veins, resulting in a bloody and excruciating procedure that left Doyle Hamm physically and emotionally tortured. The defendants acted deliberately in the face of numerous and fair warnings when, after months of litigation that put the defendants on notice about Doyle Hamm's medical conditions, they nonetheless attempted and failed to accomplish intravenous lethal injection, thereby subjecting Doyle Hamm to several torturous and traumatic hours in the execution chamber. The defendants subjected Doyle Hamm to precisely the "unnecessary and wanton infliction of pain" that the Eighth Amendment was intended to prohibit. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

Moreover, the defendants persist in arguing that the ADOC cannot conduct an oral lethal injection. Whether or not this Court finds there exists a statutorily authorized alternative, the defendants should nonetheless be barred from carrying out an intravenous lethal injection on Doyle Hamm. Regardless of whether there is an alternative available under Alabama law, the state may *never* be permitted to carry out an unconstitutional execution. Therefore, under the Eighth Amendment, the defendants may not execute Doyle Hamm by intravenous lethal injection if he has proven that there exists a substantial risk of serious harm, *even if* this Court does not find that there is a statutorily authorized alternative available.

The defendants will also violate Doyle Hamm's constitutional rights under the Eighth and Fifth and Fourteenth Amendments if they attempt to execute Doyle Hamm again by any means or methods. To attempt another execution, particularly in light of the torturous circumstances inflicted on Doyle Hamm during the first attempt, would be cruel and unusual, and thus unconstitutional. Nothing unforeseeable—no accident—led to the failed execution attempt. Rather it was simply the defendants deliberate decision to proceed by methods it knew or should have known, based on the

information provided by counsel months prior, would be unsuccessful. Having deliberately chosen already to inflict significant physical and psychological pain on Doyle Hamm, a second attempt to do so would violate Doyle Hamm's Eighth Amendment rights. In addition, any further attempt to execute Doyle Hamm, by any means or methods, would violate his rights under the Double Jeopardy Clause guaranteed to him by the Fifth and Fourteenth Amendments. The U.S. Supreme Court has cautioned that "multiple punishments for the same offense" violates one's rights, and 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, when he lay strapped to the lethal injection gurney in the execution chamber for several hours as the execution team inserted needles and catheters into his peripheral and central veins.

JURISDICTION

1. Federal question jurisdiction over this matter arises under 42 U.S.C. § 1983, 28 U.S.C. § 1292, 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 1651, 28 U.S.C. § 2201, and 28 U.S.C. § 2202.

VENUE

2. Venue is appropriate in the Northern District of Alabama under 28 U.S.C. § 1391(b) as plaintiff Doyle Hamm was located in Donaldson Correctional Facility in Bessemer, Alabama, and is already a party to this ongoing and active § 1983 litigation before Chief Judge Karon O. Bowdre.

THE PARTIES

3. Plaintiff Doyle Lee Hamm is a United States citizen and resident of the State of Alabama. He is a death-sentenced prisoner currently being held in the custody of defendants at Holman Correctional Facility in Atmore, Alabama.

4. Defendant Jefferson S. Dunn is the Commissioner of the Alabama Department of Corrections, which is headquartered in Montgomery, Alabama. Mr. Dunn is responsible for overseeing operations at the Alabama Department of Corrections and has an obligation to ensure that all executions are carried out in compliance with the United States Constitution.

5. Defendant Cynthia Stewart is the Warden of Holman County Correctional Facility in Atmore, Alabama, where Alabama conducts its executions by lethal injection. Alabama statute requires the Warden of Holman Correctional Facility, or a designated employee, to administer the lethal injection. Ala. Code § 15-18-82. The Warden, or the designated employee, has a duty to carry out the lethal injection in compliance with the United States Constitution.

6. Defendant Leon Bolling is the Warden of Donaldson County Correctional Facility in Bessemer, Alabama, where Doyle Hamm was previously imprisoned. The Warden, or the designated employee, has a duty to carry out Doyle Hamm's punishment and incarceration in compliance with the United States Constitution.

7. Other Unknown Employees and Agents of the Alabama Department of Corrections are involved in the implementation of the Department's execution procedures. Doyle Hamm does not yet know the identity of these persons.

8. All defendants are being sued in their official capacities. The named defendants are United States citizens and residents of Alabama.

PROCEDURAL HISTORY

9. Doyle Hamm was convicted and sentenced to death by the Circuit Court of Cullman County in 1987. On direct appeal, the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Doyle Hamm's conviction and death sentence. *Hamm v. State*, 564 So. 2d 453 (Ala. Crim. App. 1989), *aff'd* 564 So. 2d 469 (Ala. 1990). The United States Supreme Court then denied Doyle Hamm's petition for writ of certiorari to the Alabama Supreme Court in 1990. *Hamm v. Alabama*, 498 U.S. 1008 (1990).

10. On December 3, 1991, Doyle Hamm filed a Rule 32 state post-conviction petition. In 1999, the trial court held an evidentiary hearing and subsequently denied the petition. Despite serious constitutional questions about the court's order denying the petition, the Alabama Court of Criminal Appeals affirmed the denial. *Hamm v. State*, 913 So. 2d 460 (Ala. Crim. App. 2002). Both the Alabama Supreme Court and the United States Supreme Court denied Doyle Hamm's petition for writ of certiorari.

11. Doyle Hamm then filed for federal habeas corpus in May 2006. The district court denied the petition on March 27, 2013. *Hamm v. Allen*, 2013 WL 1282129 (N.D. Ala., 2013). The Eleventh Circuit affirmed the denial of the habeas petition. *Hamm v. Comm'r*, 620 F. App'x 752 (11th Cir. 2015). The United States Supreme Court then denied Hamm's petition for writ of certiorari. *Hamm v. Allen*, 137 S. Ct. 39 (2016).

12. On June 23, 2017, the state of Alabama moved to set an execution date for Doyle Hamm in the Supreme Court of Alabama. On December 13, 2017, the Supreme Court of Alabama entered an order authorizing Doyle Hamm's execution on February 22, 2018.

13. On December 13, 2017, Doyle Hamm filed this 42 U.S.C. § 1983 action in the District Court for the Northern District of Alabama, challenging the state of Alabama's method of execution on Eighth Amendment grounds.

14. 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.

15. The District Court promptly appointed an independent medical expert and arranged for a physical examination of Doyle Hamm's veins and potential lymphadenopathy. The exam took place on February 15, 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.

16. 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.

17. 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.

18. 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.

19. 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.

FACTUAL BACKGROUND

20. Doyle Hamm has a long and complicated medical history, including cancer and severely compromised veins, which has been at the center of Doyle Hamm's litigation since June 2017. Doyle Hamm's medical condition has been aggravated by the defendants' failed execution on February 22, 2018.

Doyle Hamm's Medical History

21. Doyle Hamm's complicated medical history includes a number of serious conditions. Most recently, Doyle Hamm has been diagnosed with lymphatic cancer and carcinoma. Doyle Hamm also has Hepatitis C, a history of seizures and epilepsy, multiple significant head injuries, and severely compromised veins due to years of intravenous drug use.

Lymphatic Cancer, Abnormal Lymph Nodes, and Carcinoma

22. Doyle Hamm's lymphatic cancer was originally diagnosed in February 2014, when a pathology report identified a large tumor in the back of Doyle Hamm's left eye socket, where the nerves from the brain go to the eye, and found that this tumor protruded through the holes (superior and inferior orbital fissures) on both the brain and the eye side. *See* Doyle Hamm Donaldson

Medical Records, p. 189. The pathology reports indicated that these findings were consistent with a "B-cell lymphoma," a type of blood cancer in the lymph nodes. *See* Doyle Hamm Donaldson Medical Records, p. 165. This diagnosis was confirmed by an April 2014 CT scan by doctors at the Brookwood Cancer Center. *See* Brookwood Hamm Report from 2014, p. 10 (confirming a primary diagnosis of "[l]arge cell lymphoma").

23. In July 2014, Doyle Hamm underwent radiation therapy, specifically "IMRT to 40Gy over 20 fractions for orbital lymphoma completed on July 11, 2014." *See* Brookwood Hamm Report from 2014, p. 6. In the years following Doyle Hamm's radiation treatment, the cancerous mass in his left orbit appeared to improve. *See* Doyle Hamm Donaldson Medical Records, p. 629 (noting that "areas of abnormal enhancement are improved in appearance when compared with 3/10/2015 and markedly improved from 9/29/2014).

24. However, beginning in March 2017, his cancer appeared to come back and Doyle Hamm began experiencing lymphadenopathy associated with his earlier diagnosed and treated lymphatic cancer. In addition, at that time, Doyle Hamm was rediagnosed with carcinoma below his left eye. Doyle Hamm now has a lesion on his face that is the size of a quarter. On March 7, 2017, Doyle Hamm was complaining of "'knots' on my chest" and the medical team was reporting that "These feel like lymph nodes." *See* Doyle Hamm Donaldson Medical Records, p. 453. On March 2017, Doyle Hamm reported that he "Need[s] to see the doctor I have lumps in my chest." *See* Doyle Hamm Donaldson Medical Records, p. 472; see also *ibid.,* p. 470 ("lumps in chest").

25. A visual examination in August 2017 of Doyle Hamm revealed two abnormal lumps, one under his chin on the left side and one on the back right of his neck below his right ear. *See* Report by Nicola Cohen in Update No. 1 filed with the Alabama Supreme Court on September 1, 2017. As of this time, following the execution, Doyle Hamm currently is experiencing lymphadenopathy in

his right groin, right armpit, and recently in his neck, chest and abdomen, which is likely associated with worsening lymphoma cancer.

26. The independent medical expert appointed by this Court to examine Doyle Hamm on February 16, 2018 also noted the presence of two abnormal lymph nodes in Doyle Hamm's right groin. *See* District Court Order 2-20-18 at 11.

Severely Compromised Veins

27. As a result of a long and complicated medical history made worse by lymphatic cancer, cancer treatment, and old age, Doyle Hamm's peripheral veins are extremely damaged and inaccessible for purposes of intravenous lethal injection. Moreover, because of his lymphatic cancer, which has caused inflamed abnormal lymph nodes around his arteries and veins, accessing Doyle Hamm's central veins is particularly dangerous and difficult. Significant medical evidence, brought to light during the several months of litigation prior to Doyle Hamm's execution on February 22, 2018, confirmed just how severely Doyle Hamm's veins were damaged. Yet the most obvious confirmation of this fact occurred on February 22, 2018, when the ADOC terminated Doyle Hamm's execution after failing to gain access to Doyle Hamm's veins.

28. The defendants have known of the severely compromised nature of Doyle Hamm's veins for months. Dr. Mark Heath examined Doyle Hamm as early as September 23, 2017, five months before the scheduled execution date, and concluded that Doyle Hamm's veins were significantly damaged and inaccessible for purposes of lethal injection.

29. Dr. Mark Heath is a leading anesthesiologist in this country. He has almost 30 years of experience, and practices at one of the leading hospitals in the country, performing on a daily basis anesthesia for open-heart surgeries. Dr. Heath practices at the New York-Presbyterian/Columbia Hospital in New York City, where his duties include, on a daily basis, "obtaining both peripheral and

central intravenous (IV) access, the administration of large doses of anesthetic agents, and intensive monitoring to ensure that [his] patients are both safe and fully anesthetized." *See* Doc. 15, Appendix. A, Preliminary Report of Mark. J. S. Heath, M.D., ¶1. Dr. Heath has practiced anesthesiology for 29 years and is a professor of clinical anesthesiology at Columbia University in New York City. *See ibid.,* ¶1.

30. Dr. Heath also has experience with intravenous lethal injection procedures. Because of his expertise as an anesthesiologist, Dr. Heath has been "called upon to give expert medical opinion in a number of cases involving the use of lethal injection at both the federal and state level, including with the Federal Bureau of Prisons and in the correctional systems of California, Florida, Ohio, and Texas, among others." *Ibid.,* ¶2. Specifically, Dr. Heath was an expert in the Federal District Court litigation surrounding the lethal injection of inmate David Nelson in the State of Alabama, and was present when Mr. Nelson was examined by a cardiac anesthesiologist at Holman Prison in 2006.

31. On Saturday, September 23, 2017, Dr. Heath conducted an extensive medical examination, including a lengthy medical history interview and a substantial physical exam of Doyle Hamm. Dr. Heath concluded, based on his extensive experience obtaining venous access at one of the top-ranked hospitals in the country, that (1) Doyle Hamm's peripheral veins are damaged and will be extremely difficult to access for lethal injection; and (2) access to his central veins through his groin or neck is equally problematic because of Doyle Hamm's cancerous lymphadenopathy.

32. Dr. Heath found no usable veins on Doyle Hamm's left arm and hand, left leg and foot, right leg and foot, and right arm. Dr. Heath found one "small, tortuous vein" on his right hand "that is potentially accessible with a butterfly needle"; however, lethal injection requires a larger intravenous catheter, much larger than a butterfly needle. In a subsequent report on January 16, 2018, Dr. Heath emphasized that "It is very important to understand that it is easier and simpler to

insert a needle to draw blood than it is to insert an intravenous catheter." *See* Doc. 15, Appendix B, Report of Mark J.S. Heath, M.D., ¶ 9. Dr. Heath explained that this is because a butterfly needle is "thinner and sharper than an intravenous catheter, which consists of a needle surrounded by a plastic tube." *Ibid.* Inserting a catheter into the small tortuous vein on Doyle Hamm's right hand, Dr. Heath concluded, would be dangerous and challenging, if not impossible. *Ibid.* Dr. Heath therefore concluded: "Based on my knowledge of previous Alabama lethal injection procedures and protocols, this small, tortuous vein on his right hand would not provide reliable peripheral venous access." Doc. 15, Appendix. A, Preliminary Report of Mark. J. S. Heath, M.D., ¶7. In lay terms, Dr. Heath found no usable veins for lethal injection.

33. Dr. Heath also found that Doyle Hamm's lymphatic cancer would likely interfere with any attempt to access his central veins. As Dr. Heath explained, Doyle Hamm has "intermittent waxing and waning tumors on his chest, neck, and groins. This likely represents lymphadenopathy (swollen lymph nodes) related to his lymphatic malignancy." *Ibid.,* ¶8. This condition would likely interfere with accessing his central veins. Dr. Heath noted that "Lymphoma, like other cancers, is a progressive disease if not cured. At this point, there may be significant involvement and enlargement of lymph nodes in other areas of his body, including his neck, chest, and groin. If there are enlarged lymph nodes surrounding the veins in his neck, chest, or groin, it would likely complicate or thwart attempts to obtain central venous access." *Ibid.,* ¶14. As noted earlier, Doyle Hamm's medical records from Donaldson report a nurse or doctor finding knots that "feel like lymph nodes" and a visual inspection also observed lumps on Doyle Hamm's chin and neck. In addition, Dr. Heath reported, from his prior experiences in Alabama, that "To the best of my knowledge, Alabama has limited experience with obtaining central vein access for lethal injection procedures." *Ibid.,* ¶13. In lay terms, central venous access for Doyle Hamm is likely extremely difficult because of the

combination of Doyle Hamm's lymphatic cancer and the lack of a fully equipped hospital operation-room set up at Holman Prison.

34. Dr. Heath gave his expert opinion in conclusion: "I have not seen the exact protocol for venous access for lethal injection from the state of Alabama, but based on what I know from the David Nelson case, it is my opinion that the state is not equipped to achieve venous access in Doyle Hamm's case." *Ibid*., ¶16.

35. Dr. Heath provided testimony to this Court on January 31, 2018, further explaining his conclusions after being given a copy of Alabama's redacted lethal injection protocol. Dr. Heath confirmed that, in light of the specifics of the state's protocol, he found it highly unlikely that the ADOC would be able to establish either peripheral or central line access on Doyle Hamm and that, if they attempted to do so, the result would be painful, dangerous, and bloody. *See In Camera* Hearing 1-31-18 at 6. Dr. Heath also noted that Doyle Hamm's case is additionally complicated by the fact that he has Hepatitis C, which is easily transmitted by blood. A messy and potentially bloody attempt at peripheral or central venous access puts the ADOC staff at great risk of contracting Hepatitis C. *See In Camera* Hearing 1-31-18 at 20.

36. Over the past several months, the defendants asserted, over and over again, that they would be able to access Doyle Hamm's peripheral veins with no complications. Confronted with Doyle Hamm's numerous warnings over the past several months, the state of Alabama misrepresented the facts and simply told the federal courts that "there can be no dispute that Hamm has peripheral IV access, and thus, there is no substantial likelihood of establishing a 'substantial risk of serious harm,'" that "outside of pure speculation, there is no evidence establishing any likelihood, much less a substantial one, that Hamm's veins could not be accessed be a central line," and that "[b]ecause there is no actual evidence that Hamm's veins cannot be accessed by a central

line, Hamm resorts to more speculation, alleging that the presence of lymphadenopathy (swollen lymph nodes) may complicate the ability to access a central line." Appellants-Defendants' Brief to the Eleventh Circuit in *Dunn v. Hamm*, No. 18-10473 (11th Cir. Feb. 9, 2018), at 15, 20. These statements were all proven to be false and misleading.

37. In sum, as he has been arguing for over seven months, Doyle Hamm's veins are severely compromised and inaccessible for the purposes of intravenous lethal injection. Despite significant medical evidence proving that a lethal injection attempt would be arduous and excessively painful in violation of the Eighth Amendment, and despite the existence of a readily available and significantly less painful alternative, the defendants attempted intravenous lethal injection on Doyle Hamm anyway. On February 22, 2018, the defendants confirmed what Doyle Hamm has been arguing for months when they subjected Doyle Hamm to hours of torturous pricking before ultimately terminating the execution after being unable to establish venous access.

ADOC's Botched Execution Attempt on February 22, 2018

38. 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.

39. Prior to being brought to the execution chamber, Doyle Hamm had not been given his regular pain medication, Tylenol No.3, at his regularly scheduled time. *See* Appendix A, Report of Dr. Mark Heath 3-5-18 at 1. 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. *Id.* Not surprisingly, Doyle Hamm's usual pain behind his left eye, resulting from his cancer, became substantially worse before he entered the execution chamber that night. *Id.*

40. 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. *Id.* at 2.

41. 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. *Id.* In at least one 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. *Id.* Throughout this process, Doyle Hamm felt painful stretching, pressure, and burning sensations. *Id.* 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. In total, Doyle Hamm was left with approximately five (5) puncture wounds in Doyle Hamm's lower extremities, including two (2) wounds on his left ankle, two (2) wounds on his right calf, and one (1) wound on his right ankle. *Id.* at 4.

42. After multiple, repeated attempts at peripheral venous access, the execution personnel stated aloud that they could not establish access. *Id.* at 2. With peripheral access unavailable, other execution team members next attempted central venous access. *Id.* 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. *Id.*

43. The execution team used an ultrasound to locate veins before attempting access with

needles and/or catheters. *Id.* The staff only attempted central venous access in Doyle Hamm's right groin. *Id.* It is not clear whether the team administered any anaesethia before performing the procedure. *Id.*

44. Multiple times, the execution team tried to insert a needle or catheter into Doyle Hamm's right groin, causing severe bleeding and pain. *Id.* at 2-3. 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. *Id.* The woman operating the ultrasound machine had to change her gloves several times because they were bloody. It is possible that this sudden, gushing bleeding was caused by a puncturing of the femoral artery. *Id.* at 4. In total, Doyle Hamm was left with approximately six (6) puncture wounds on his right groin and severe bruising from the multiple failed attempts. *Id.*

45. 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. *Id*. at 2.

46. 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. *Id.* at 3. 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. *Id.* 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. *Id.*

47. 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. *Id.* 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. *Id.*

48. Doyle Hamm was brought to the infirmary shortly after the execution was terminated, where the bandage on his groin was replaced and band aids were applied to his legs. *Id*. 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.

49. After the botched execution, Doyle Hamm urinated blood. *Id.* 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. *Id.* at 4.

50. Approximately one hour after the execution, Doyle Hamm also developed an irritating chest cough that occasion produced phlegm. *Id.*

51. Just days after Doyle Hamm's botched execution, he developed a "knot" in his right armpit that he has described as being about the size of a grape or a golf ball. *Id*. The knot is tender and he has experienced a "stretching pain" in his upper right arm when he raises it. On March 2, 2018, the medical personnel at Holman Correctional Facility determined that he has an infection in his lymph nodes in his right groin and armpit, and they have prescribed antibiotics. *Id.* It is possible that the infection and his cough were caused by bacteria entering his bloodstream during the failed execution attempt. *Id.* at 5.

52. 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. *Id.* Doyle Hamm has been traumatized and lives in fear that ADOC will subject him to another painful and botched execution.

Alabama's Execution Protocol

53. The Alabama Code prescribes that "[a] death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." Ala. Code § 15-18-82.1(a). The choice to be executed by electrocution must be made "within 30 days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death." Ala. Code § 15-18-82.1(b). If the election for death by electrocution is not made within 30 days, the option is waived. *Id.* The statute contains no definition or required method of "lethal injection."

54. Alabama's current lethal injection protocol is not publicly available and defendants only provided a redacted copy of the protocol to Doyle Hamm's counsel on January 30, 2018, hours before the January 31, 2018 hearing before this Court.

55. There are several relevant and problematic features of Alabama's execution protocol, specifically as they apply to Doyle Hamm's case that should be noted here. Because the protocol is secret and covered by a confidentiality agreement, Doyle Hamm will summarize here only in vague terms the problems with the protocol *as applied to him*. Doyle Hamm is at risk, *as applied to him*, of the following:

(1) unlimited time and unlimited attempts at peripheral venous access;

(2) made worse by requirement of multiple points of venous access;

(3) and by ambiguity over how or who decides when peripheral access cannot be obtained;

(4) and by the risk of infiltration in Doyle Hamm's case;

(5) and the dangers associated with remote injection;

(6) and the risks associated with his abnormal lymph nodes;

(7) and the compounded problem of lymphadenopathy and infiltration as applied.

56. Doyle Hamm hereby incorporates fully and entirely, by reference, the sealed materials that flesh out in detail these seven risks regarding Alabama's secret protocol, that he filed with this Court under seal along with his Motion to File under Seal his Motion for Leave to Supplement his First Amended Complaint on February 15, 2018. *See* Doc. 50. Those sealed materials are part of this Second Amended Complaint by reference herein.

CAUSES OF ACTION

I. COUNT 1: THE STATE'S PROPOSED USE OF LETHAL INTRAVENOUS INJECTION TO EXECUTE DOYLE HAMM CREATES A SUBSTANTIAL RISK THAT DOYLE HAMM WILL EXPERIENCE SEVERE PAIN AND SUFFERING IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

57. Doyle Hamm incorporates by reference all facts and allegations detailed throughout this amended complaint.

58. The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." It is well established that a punishment, to be constitutional, must not be "incompatible with the evolving standards of decency that mark the progress of a maturing society" and may not "involve unnecessary or wanton infliction of pain." *Estelle v. Gamble*, 492 U.S. 97, 102 (1976); *see also In re Kemler*, 136 U.S. 436, 447 (1890) ("[P]unishments are cruel when they involve torture or a lingering death.").

59. To establish that a future harm will violate the Eighth Amendment, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and

give rise to 'sufficiently *imminent* dangers.'" *Baze*, 553 U.S. at 50 (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). In the context of lethal injection, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm,' that prevents prison officials from pleading that they were 'subjectively blameless for the purposes of the Eighth Amendment.'" *Id*. at 1531 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

60. In addition to showing a "substantial risk of serious harm," an inmate challenging a method of execution must also identify an alternative method that is "feasible, readily implemented, and [will] in fact significantly reduce a substantial risk of severe pain." *Id.* at 1532. If an inmate offers an alternative that meets the *Baze* criteria and "a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.*[1]

61. Doyle Hamm can make both of these showings.

A. The State's Use of Intravenous Lethal Injection to Execute Doyle Hamm is Sure to Result in the Experience of Severe Pain and Suffering.

62. There is a "substantial" and "objectively intolerable" risk that Doyle Hamm will experience severe pain and suffering if Alabama proceeds to execute him again by intravenous lethal injection, in violation of his Eighth Amendment rights. Doyle Hamm's serious and worsening cancer, compounded with his extensive prior medical history and compromised veins, create a

[1] Notably, this decision does not impose any requirement that the proffered alternative be allowed by statute. In fact, this language implies the exact opposite. *See Arthur v. Dunn*, *Comm'r, Alabama Dep't of Corr.*, 137 S.Ct. 725, 729 (2017) (Sotomayor, J., dissenting from denial of certiorari) ("The decision below turns this language [of *Baze*] on its head, holding that if the State *refuses* to adopt the alternative legislatively, the inquiry ends. That is an alarming misreading of *Baze*.").

considerable likelihood of unnecessary and excruciating pain during the administration of a lethal injection.

63. Because Doyle Hamm has severely compromised veins**,** it will be exceedingly difficult, if not impossible, for prison personnel to establish reliable peripheral intravenous access during the lethal injection procedure. On February 22, 2018, ADOC confirmed just how difficult establishing venous access in Doyle Hamm is: It is impossible. Despite repeated reassurances that they would easily be able to access Doyle Hamm's peripheral veins, the execution team was ultimately unable to find any usable peripheral veins at all, much less multiple veins. It is therefore a practical certainty that defendants will fail yet again to establish peripheral venous access if they are given another chance.

64. On February 22, 2018, defendants also failed to establish percutaneous central venous access. Central venous access is a difficult procedure that should be performed only by medical personnel who have experience establishing central lines. Alabama has never performed a central line in connection with lethal injection and the state's protocol gives no indication who will perform a central line. Moreover, in addition to the general risks that the technique poses, the procedure presents specific problems for Doyle Hamm, given his unique medical condition. As Dr. Heath concluded after examining Doyle Hamm, "there may be significant involvement and enlargement of lymph nodes in other areas of [Doyle Hamm's] body, including his neck, chest, and groin. If there are enlarged lymph nodes surrounding the veins in his neck, chest, or groin, it would likely complicate or thwart attempts to obtain central venous access." *See* Doc. 15, Appendix. A, Preliminary Report of Mark. J. S. Heath, M.D., ¶14. As such, central venous access for Doyle Hamm is likely to be extremely difficult, dangerous, and bloody because of the combination of Doyle Hamm's lymphatic cancer and the lack of a fully equipped hospital operation-room set up at Holman

Prison. Those risks played out, when on February 22, 2018, the execution team was unable to obtain central venous access, even with the assistance of an ultrasound machine.

65. The events of February 22, 2018 provide the clearest evidence that Doyle Hamm will be subjected to an unconstitutional amount of pain and suffering should the defendants be permitted to attempt intravenous lethal injection yet again. This risk is objectively intolerable and cannot be countenanced by the Eighth Amendment, particularly when there exist readily available and more humane alternatives.

B. An Oral Injection of a Lethal Drug Is a Feasible, Readily Implemented Alternative that Would Eliminate the Substantial Risk of Severe Pain Arising from Doyle Hamm's Unique Medical Conditions

66. As an alternative method of execution, Doyle Hamm proposes a ten-gram dose of secobarbital injected orally in four ounces of liquid; alternatively, Doyle Hamm proposes a drug cocktail known to doctors as "DDMP II," which is composed of 1 gram of diazepam, 50 milligrams of digoxin, 15 grams of morphine sulfate, and 2 grams of propranolol, injected orally. These oral forms of lethal injection are both "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain" associated with intravenous administration of the lethal injection in Doyle Hamm's case. *Baze*, 553 U.S. at 50. These alternative methods of execution are recommended by Dr. Charles David Blanke, an experienced physician who specializes in end-of-life care, specifically in medical-aid-in-dying (MAID). *See* Doc. 15, Appendix C, Affidavit of Dr. Charles David Blanke, ¶ 5, 6, 11.

67. Alabama law does not specify the method of lethal injection that the State is authorized to use and does not limit the mode of execution to solely intravenous injection. The statute states only that "[a] death sentence shall be executed by lethal injection." Ala. Code § 15-18-82.1(a). The definition of "injection" is not confined to only intravenous injections. The Oxford English

Dictionary defines "injection" as "[t]he action of forcing a fluid, etc. into a passage or cavity, as by means of a syringe, or by some impulsive force." An oral form of lethal injection is therefore authorized by Alabama statute and fulfills the Eleventh Circuit's requirement that the alternative method of execution be permitted by state law. *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016). In contrast to other states that explicitly narrow the term injection to venous injection, the Alabama statute clearly allows for other forms of injection, such as oral injection.[2] This Court has already deemed this alternative to be lawful. *See Hamm v. Dunn,* No. 2:17-cv-02083-KOB (N.D. Ala. Feb. 6, 2018), Doc. 30.

Feasible and Readily Implemented

68. An oral dose of a lethal drug or drug cocktail is feasible and readily implemented. In his affidavit, Dr. Blanke explains that the standard MAID medication used in Oregon is secobarbital or the drug cocktail DDMP II. *See* Doc. 15, Appendix C, Affidavit of Dr. Charles David Blank at ¶ 3. MAID was legalized in Oregon in 1997 through Oregon's Death with Dignity Act (DWDA). The DWDA "allows terminally-ill adult Oregonians to obtain and use prescriptions from their physicians for self-administered, lethal doses of medications." *See Death With Dignity Act Annual Reports.*[3] As a result, Oregon physicians have extensive experience using lethal drugs for end-of-life decisions.

69. Since MAID was legalized in Oregon in 1997, and as of January 23, 2017, 1,127 people had died after taking lethal medications prescribed under the DWDA. *See id*. at 5. Of the 1,127 people who died from taking lethal prescriptions between 1997 and January 23, 2017, 668 or 59.3%

[2] *See, e.g.,* Ark. Code Ann. § 5-4-617 ("The Department of Correction shall carry out the sentence of death by *intravenous* lethal injection") (emphasis added); Neb. Rev. Stat. § 83-964 ("A sentence of death shall be enforced by the *intravenous* injection of a substance.") (emphasis added); Utah Code Ann. § 77-18-5.5 ("[L]ethal *intravenous* injection is the method of execution") (emphasis added).

[3] Oregon Health Authority, *Death with Dignity Act Annual Reports* 4 (2017), http://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year19.pdf.

were prescribed secobarbital, while 17, or 1.5%, were prescribed a combination of lethal medications; and of the 133 people who died from taking lethal prescriptions in 2016, 86 or 64.7% were prescribed secobarbital, while 8, or 6%, were prescribed a combination of lethal medications. *See id.* at 10.

70. Of the 133 people who died from taking lethal prescriptions in 2016, the median range of minutes between ingestion and unconsciousness was 4 minutes; of the 1,127 people who died from taking lethal prescriptions between 1997 and January 23, 2017, the median range of minutes between ingestion and unconsciousness was 5 minutes. *See id.* at 11. Of the 133 people who died from taking lethal prescriptions in 2016, the median range of minutes between ingestion and death was 27 minutes; of the 1,127 people who died from taking lethal prescriptions between 1997 and January 23, 2017, the median range of minutes between ingestion and unconsciousness was 25 minutes. *See id.* at 11; *see also Guidelines for the Practice of Euthanasia and Physician-Assisted Suicide* (for details on exact procedures and protocols to ensure successful and painless death by medical-aid-in-dying medications)[4]; *The Oregon Death with Dignity Act: A Guidebook for Health Care Professionals* (for more information on how MAID medications are made available by pharmacies and prescribed by physicians in Oregon).[5]

71. An oral injection of lethal drugs would require less medical expertise, equipment, and risk on the part of ADOC personnel, making it much more feasible than an intravenous injection.

72. These drugs are also available to the ADOC, so the defendants will have no difficulty accessing these drugs for Doyle Hamm's execution. These drugs are available at pharmacies and are

[4] KNMG/KNMP, *Guidelines for the Practice of Euthanasia and Physician-Assisted Suicide* (Aug. 2012), http://www.camapcanada.ca/NetherlandsGuidelines.pdf.

[5] Task Force to Improve the Care of Terminally-Ill Oregonians et al., *The Oregon Death with Dignity Act: A Guidebook for Health Care Professionals* (2008), http://www.ohsu.edu/xd/education/continuing-education/center-for-ethics/ethics-outreach/upload/Oregon-Death-with-Dignity-Act-Guidebook.pdf.

not among the drugs that are restricted from sale to prisons by pharmaceutical companies. In particular, secobarbital is a common barbiturate drug that is frequently used as a sedative prior to surgery. *See Encyclopedia of Psychopharmacology*.[6] Moreover, all of the components of Doyle Hamm's second alternative proposed method, the DDMP II cocktail, are available in pharmacies in Alabama. All of the components of the DDMP II cocktail are also covered by the Alabama Blue Cross Blue Shield insurance policy.[7] *See* Doc. 14, Ex.W.

73. In fact, these proposed drugs are likely more easily accessible to ADOC than midazolam, one of the current drugs used in the state's execution protocol. As an exhibit to their motion for summary judgment, the defendants revealed that they intend to use midazolam manufactured by Akorn, Inc. However, Akorn's policy clearly states that their products are not intended for use in lethal injections. *See Akorn Adopts Comprehensive Policy to Support the Use of Its Products to Promote Health.*[8]

74. In 2015, Akorn, Inc. put into a place a policy that condemned the use of its products in lethal injections. The policy restricted the sale of their drugs to wholesalers who would not supply their drugs to prisons:

> Akorn strongly objects to the use of its products to conduct or support capital punishment through lethal injection or other means. To prevent the use of our products in capital punishment, Akorn will not sell any product directly to any prison or other correctional institution and we will restrict the sale of known components of lethal injection protocols to a select group of wholesalers who agree to use their best efforts to keep these products out of

[6] Childs, E. (2010) Secobarbital *in* Stolerman (ed.), *Encyclopedia of Psychopharmacology* at 1187.

[7] Blue Cross and Blue Shield of Alabama, *Generics Plus Drug Guide* (Oct. 2017), https://www.myprime.com/content/dam/prime/memberportal/forms/2017/FullyQualified/Other/ALL/BCBSAL/COMMERCIAL/ALGENPLDRG/ALGP_Prescription_Drug_Guide.pdf; diazepam on p. 34, digoxin on p. 26, morphine sulfate on p. 43, and propranolol on p. 22.

[8] *Akorn Adopts Comprehensive Policy to Support the Use of its Products to Promote Health*, http://investors.akorn.com/phoenix.zhtml?c=78132&p=irol-newsArticle&ID=2022522.

correctional institutions. *Id.*

75. Akorn also sent letters "to the attorneys general and heads of departments of correction of the states that currently execute inmates or have prisoners on death row along with the United States Attorney General, the United States Secretary of Defense, the Director of the Federal Bureau of Prisons and the Chairman of the Department of Defense Corrections Council reiterating the company's policy on the appropriate use of its products." In addition, Akorn stated it "is seeking the return of any the company's products that may have been inappropriately purchased to aid in the execution process." *Id.; see also Drug-Maker Akorn Bans Sedative Midazolam For Executions.*[9]

76. The Akorn midazolam label that the defendants provided as Exhibit H also states clearly that "Intravenous midazolam should be used only in hospital or ambulatory care settings, including physicians' and dental offices, that provide for continuous monitoring of respiratory and cardiac function." *See* Doc. 12 Ex. H p. 1. From this, it is clear that the defendants do not actually follow the FDA's approved uses of midazolam and obtain and use drugs as they wish.

77. In 2016, Anne Hill, a lawyer for the Department of Corrections, stated in a deposition that Alabama last bought midazolam in 2015. *See Alabama's Execution Drugs May Be Close to Expiring.*[10] Since 2015, Akorn's policies prohibit its drugs to be sold to entities that would use the drugs or sell the drugs for use in lethal injections and the shelf life of midazolam is 24 months. *See Public Assessment Report of the Medicines Evaluation Board in the Netherlands.*[11] Therefore any drugs that ADOC bought prior to 2015 have since expired. Clearly, then, the state of Alabama has

[9] NBC News, *Drug-Maker Akorn Bans Sedative Midazolam For Executions* (Feb. 20, 2015), https://www.nbcnews.com/storyline/lethal-injection/drug-maker-akorn-bans-sedative-midazolam-executions-n309191.

[10] The Anniston Star, *Alabama's Execution Drugs May Be Close to Expiring*, (June 24, 2017), https://www.annistonstar.com/free/alabama-s-execution-drugs-may-be-close-to-expiring/article_db530a64-5920-11e7-9999-8ba8c52a886b.html.

[11] *Public Assessment Report of the Medicines Evaluation Board in the Netherlands* 4, https://db.cbg-meb.nl/Pars/h100485.pdf.

been able to access midazolam, despite nearly every pharmaceutical company banning the use of their products in lethal injections.[12] There is no doubt that the defendants have ways to obtain the drugs they use in their lethal injection protocol, and will similarly be able to obtain secobarbital or the components of the DDMP cocktail.

Significantly Reduce the Risk of Serious Harm

78. An oral dose of a lethal drug or drug cocktail will significantly reduce the risk of serious harm to Doyle Hamm.

79. The method used in Oregon and recommended by Dr. Blanke reduces the risk of serious harm—namely a botched execution—from 7.12% to about 0.6% for generally healthy prisoners. *See infra.* Most botched executions are unsuccessful due to difficulty finding veins and errors on the part of the execution staff. In fact, lethal injection has the highest rate of botched executions among all methods of execution (including hanging, electrocution, lethal gas, and firing squad). *See Death Penalty Information Center*[13]; *How Often Are Executions Botched?*[14] A reduction from a 7.12% chance of a botched execution to a 0.6% chance is a significant reduction in risk. In Doyle Hamm's case, the risk is even more dramatically reduced because the possibility of a botched execution by intravenous lethal injection in his case is nearly certain. Thus, an oral dose of lethal drugs reduces the risk of a botched execution in Doyle Hamm's case from nearly 100% to 0.6%.

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[12] *See, e.g.,* Pfizer, *Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment* (Sept. 2017), https://www.pfizer.com/files/b2b/Global_Policy_Paper_Lethal_Injection_Sept_2017.pdf; *see also* Reprieve, *Industry Statements and Action on Execution Drugs* (Feb. 9, 2017), http://reprieve.org/2017/02/09/industry-statements-and-action-on-execution-drugs/ for a full list of policy statements by pharmaceutical companies banning the use of their drugs in lethal injections.

[13] Death Penalty Information Center, *Botched Executions*, https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions (citing Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty*, Stanford Univ. Press (2014)).

[14] Mona Chalabi, *How Often Are Executions Botched?*, FiveThirtyEight (Apr. 30, 2014), https://fivethirtyeight.com/features/how-often-are-executions-botched/.

80. The Royal Dutch Pharmaceutical Association (KNMP) issued a guide to physicians in 1987, revised in 1994 and then again in 1998, which included their recommendation for the drugs that physicians should prescribe, and the protocols that they should follow when prescribing MAID medications. *See Clinical Problems with the Performance of Euthanasia and Physician-Assisted Suicide in The Netherlands*.[15] In the guide, they recommend that physicians prescribe 9 grams of secobarbital or pentobarbital in a 100-milliliter solution. This method has been shown to "cause a comatose state, followed by a decrease of cardiac output and finally a respiratory arrest." *Id.* at 80.

81. In August 2012, the KNMP and the Royal Dutch Medical Association (KNMG) released an updated guide. *See Guidelines for the Practice of Euthanasia and Physician-Assisted Suicide*.[16] In the case of medical-aid-in-dying, the KNMP/KNMG recommends that the physician prescribe 15 grams of a barbiturate (pentobarbital or secobarbital) in the form of a drink (mixture of non-therapeutics). *Id.* at 17. The guide describes the exact mixture to be used, advising the use of either secobarbital or pentobarbital in addition to alcohol, purified water, propylene glycol, saccharin sodium, syrup simplex, and star anise oil. *See id*. at 41. It also describes the preparation and gives directions for proper storage of the mixture. The patient is advised to take the lethal cocktail orally, and to be sitting up and be in a bed when he or she takes the cocktail. *See id.* at 17.

82. The use of medical-aid-in-dying medications would result in a significantly lower risk of severe pain than the state of Alabama's present lethal-injection protocol. In Oregon, for example, an analysis of the drug effectiveness and complications of patients who had ingested MAID medications since 1998 showed that "[t]he medications were relatively devoid of unexpected toxic effects. Vomiting was unusual (24 patients, 2.4%). Six patients awakened, giving the medications an

[15] Groenewoud JH, et al., *Clinical Problems with the Performance of Euthanasia and Physician-Assisted Suicide in The Netherlands*, New England Journal of Medicine, 551-666 (2000).
[16] KNMG/KNMP, Guidelines for the Practice of Euthanasia and Physician-Assisted Suicide 17 (Aug. 2012), http://www.camapcanada.ca/NetherlandsGuidelines.pdf.

efficacy rate of 99.4%." *See Characterizing 18 Years of the Death With Dignity Act in Oregon*[17]; *see also Oregon's Death With Dignity Act: 20 Years of Experience to Inform the Debate*.[18] This stands in stark contrast to the 7.12% rate at which lethal injections are botched generally and the nearly certain risk of a botched execution in Doyle Hamm's case. Moreover, inefficacy in the MAID context does not result in mutilation and excessive pain as in the case of a botched intravenous lethal injection.

83. Reducing the risk of a botched execution not only protects Doyle Hamm from experiencing excruciating pain but also shields ADOC staff from the risk of Hepatitis C transmission in the event of a bloody execution.

II. COUNT 2: THE DEFENDANTS' BOTCHED EXECUTION OF DOYLE HAMM ADDS TO THE CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT, THAT DOYLE HAMM HAS ALREADY BEEN SUBJECTED TO

84. Doyle Hamm incorporates by reference all facts and allegations detailed throughout this amended complaint.

85. The botched execution that occurred on February 22, 2018 subjected Doyle Hamm to cruel and unusual punishment in violation of the Eighth Amendment. At the defendants' hands, Doyle Hamm was subjected to precisely the "unnecessary and wanton infliction of pain," and "lingering death" that the Eighth Amendment was intended to prohibit. *Wilson v. Seiter*, 501 US. 294, 297 (1991); *In re Kemmler*, 136 U.S. 436 (1890). The defendants acted deliberately in the face of fair warnings after months of litigation that put the defendants on notice about Doyle Hamm's serious medical conditions; despite all that, they nonetheless attempted intravenous lethal injection, thereby subjecting Doyle Hamm to several torturous and traumatic hours in the execution chamber.

[17] C. Blanke, et al., *Characterizing 18 Years of the Death with Dignity Act in Oregon*, JAMA Oncol. 1403-06 (2017).
[18] K. Hedberg, et al., *Oregon's Death with Dignity Act: 20 Years of Experience to Inform the Debate*, Ann. Intern Med. 2 (2017).

86. The Eighth Amendment prohibits punishments that are "incompatible with the evolving standards of decency that mark the progress of a maturing society" or that "involve the unnecessary and wanton infliction of pain." *Estelle* at 103. It is well established that "the infliction of unnecessary pain in the execution of the death sentence" is prohibited by the Eighth Amendment, *Louisiana ex rel. Francis v. Resweber*, 392 U.S. 459 (1947), and "punishments of torture…and all others in the same line of unnecessary cruelty, are forbidden." *Wilkerson v. Utah*, 99 U.S. 130 (1879).

87. The Eighth Amendment therefore forbids both subjecting a person to "circumstance[s] of degradation," *Weems v. United States*, 217 U.S. 349, 366 (1910), and "circumstances of terror, pain, or disgrace superadded" to a sentence of death, *id.* at 370. Accordingly, "[t]here may be involved no physical mistreatment, no primitive torture," and a "fate of ever-increasing fear and distress" offends the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101-102 (1958) (condemning punitive denationalization); *see also Hudson v. McMillian*, 503 U.S. 1, 26 (1992) ("That is not to say that the injury [violating the Eighth Amendment] must be, or always will be, physical.") (Thomas, J., dissenting); *Weems*, 217 U.S. at 372 ("[I]t must have come to [framers of the Eighth Amendment] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.").

88. Through their actions, defendants acted with "deliberate indifference to a substantial risk of serious harm" to Doyle Hamm, thereby violating his Eighth Amendment rights. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Prison officials are liable under the Eighth Amendment for acting with "deliberate indifference" to an inmate's health or safety when the official has knowledge that an inmate "face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer* at 828-29. To establish an Eighth Amendment violation, an inmate "need not show that a prison official acted or failed to act believing that a harm actually

would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer* at 842.

89. The defendants had knowledge of the serious risks presented by Doyle Hamm's medical condition, even before any litigation took place. There are hundreds of pages of medical records detailing Doyle Hamm's medical conditions, and the physical manifestations of his cancer—including inflamed lymph nodes in his neck and chest and a growing lesion on his face that has been eating into his cheek—are immediately obvious to anyone who sees him. The medical staff at Donaldson Correctional Facility and at Holman Correctional Facility have also had significant difficulty accessing Doyle Hamm's veins in the past, as detailed in the medical records, so they were aware of the compromised nature of Doyle Hamm's veins.

90. Once litigation commenced in June 2017, after the state of Alabama moved to set an execution date for Doyle Hamm, the defendants were explicitly put on notice that there were serious medical issues at play in Doyle Hamm's case. For months, in both state and federal court, Doyle Hamm litigated his claim regarding venous access, providing substantial evidence that his veins were compromised and that his execution would be much more challenging than the ordinary prisoner's. This Court's independent medical expert identified only two accessible peripheral veins in Doyle Hamm's legs, both of which he noted were affected by "venous stasis" and "vascular insufficiency," conditions that can significantly affect venous access. And this Court's determination that the ADOC could only attempt peripheral access in his legs confirmed that Doyle Hamm's veins were indeed severely damaged. The Eleventh Circuit, too, acknowledged that accessing Doyle Hamm's veins would be difficult, which is why it required that the defendants provide an affidavit confirming that they would have certain safeguards in place, including having a doctor present and ultrasound equipment available. Warden Stewart provided the affidavit, stating that the medical staff

was capable of establishing venous access in Doyle Hamm's legs, without providing any information about who she consulted with or how she came to her conclusion. All of this litigation and all of the information provided in the record clearly put the defendants on notice that Doyle Hamm's venous access would be more difficult than the average prisoner's and that there was indeed a "substantial risk of serious harm."

91. Despite knowledge of the risk in Doyle Hamm's case, the defendants failed to take the steps necessary to abate the risk of a botched execution. Instead, the defendants simply stated, over and over again, that they would be able to access Doyle Hamm's veins. In essence, defendants ignored the substantial risk of a botched execution that Doyle Hamm has been flagging for the past several months, and did nothing to protect Doyle Hamm against these risks. The defendants repeatedly dismissed Doyle Hamm's warnings and misrepresented the facts of this case, telling the courts that there was "no dispute that Hamm has peripheral IV access" and that Doyle Hamm's allegations were mere "speculation." Appellants-Defendants' Brief to the Eleventh Circuit in *Dunn v. Hamm*, No. 18-10473 (11th Cir. Feb. 9, 2018) at 15, 20. On February 22, 2018, these statements were all proven to be false and misleading.

92. Rather than taking the extra care and preparation necessary to ensure that Doyle Hamm was not subjected to unnecessary and wanton infliction of pain during his execution, the defendants ignored the countless red flags Doyle Hamm raised and pursued an execution that was guaranteed to fail. Several of defendants' actions provide evidence of their deliberate indifference to the substantial risk of a botched, painful execution in Doyle Hamm's case:

a. During the litigation prior to Doyle Hamm's execution, the defendants failed to take seriously the possibility of a botched execution and made claims that were ultimately belied by their inability to access Doyle Hamm's veins during the execution attempt. In

particular, Warden Stewart's affidavit to the Eleventh Circuit affirming that the medical staff would be capable of accessing Doyle Hamm's veins was quite obviously not based on any serious evaluation or discussion about whether staff would actually be able to access Doyle Hamm's veins. Warden Stewart's one-line assertion that the staff would be capable of accessing Doyle Hamm's veins, without any reference to the source of her conclusions, represents just how little weight the defendants were deliberately giving to the risks present in Doyle Hamm's case. The defendants' repeated assertions that were ultimately proven false by the reality of the botched execution amounted to deliberate indifference to the serious risks posed by Doyle Hamm's medical conditions.

b. Prior to the execution, the defendants did not give Doyle Hamm his regularly scheduled pain medication the evening of the execution, despite there being no evidence that medication would in any way interfere with the lethal injection drugs.

c. During the attempted execution, the execution team who attempted peripheral venous access in Doyle Hamm's legs repeatedly stuck Doyle Hamm with needles and/or catheters, and kept those needles and/or catheters inserted in him for several minutes while they painfully dug around in his leg trying to access a vein. The execution team attempted venous access for a prolonged period of time despite it becoming evident that peripheral venous access would not be possible.

d. The execution team that attempted a central line *only* in Doyle Hamm's right groin, the same area in which this Court's independent medical expert identified abnormal lymph nodes. This suggests either that the defendants did not inform the execution team about the doctor's findings and the risk of abnormal lymph nodes in the groin, or that the doctor knew of the risk and intended it. Either situation arises to

deliberate indifference to the substantial risk that enlarged lymph nodes would interfere with the central line procedure.

e. The execution team attempted approximately six times to access the femoral vein in Doyle Hamm's groin, resulting in significant bruising and swelling in Doyle Hamm's groin. In the process, they apparently pierced Doyle Hamm's bladder, as Doyle Hamm was urinating blood in the hours and day following the execution attempt. The execution team also likely punctured Doyle Hamm's femoral artery, given the significant amount of blood that Doyle Hamm lost during the attempt. Doyle Hamm was unable to stand on his own after the execution was terminated, and he continues to experience significant pain between his lower abdomen and upper thigh. He is limping badly and is terribly sore.

f. The execution team did not want to stop attempting venous access after the execution was terminated. Despite being told repeatedly that the execution would not proceed, the execution team insisted that he could try again to gain access in Doyle Hamm's right groin or in his lower extremities.

g. The defendants did not provide Doyle Hamm with any pain medication following the execution, even though he discussed his pain with the doctor at the infirmary at Holman. Doyle Hamm was not given his normal pain medication until around 3:00am or 4:00am CST, the typical scheduled time for receiving medication in the morning.

h. Just days after the botched execution, medical personnel at Holman Correctional Facility have prescribed antibiotics for an infection in Doyle Hamm's lymph nodes in his right groin and right axilla, likely arising from the execution.

93. The defendants violated Doyle Hamm's Eighth Amendment right to be free from cruel and unusual punishment and acted with deliberate indifference when, with knowledge of the serious

risks presented by Doyle Hamm's medical condition, they nonetheless pursued an execution by intravenous lethal injection and ultimately botched his execution, subjecting Doyle Hamm to substantial physical and psychological torture.

94. While the defendants' botched execution attempt on February 22, 2018 alone constituted cruel and unusual punishment in violation of the Eighth Amendment, several other conditions of his confinement augmented the "circumstances of terror, pain, or disgrace superadded" to his death sentence. *Weems* at 366. First, Doyle Hamm has been suffering on death row, where he has been subjected to particularly degrading conditions, for thirty years, practically twice the average amount of time that prisoners spend on death row awaiting execution. Second, as Doyle Hamm has awaited his execution for thirty years, his health has progressively deteriorated. Despite knowledge of Mr. Hamm's worsening cancer and deteriorating health, the defendants have deliberately and mercilessly pursued his execution. Third, as Doyle Hamm's condition has deteriorated, the defendants have failed to provide him adequate treatment and care. The defendants have never provided any treatment for his lymphatic cancer condition, other than radiation for his cancerous mass in his left orbit, and have failed to permit Doyle Hamm to undergo surgery for the cancerous lesion under his left eye, despite numerous recommendations for surgery by his doctors. In fact, on December 13, 2017, Doyle Hamm was scheduled to undergo surgery for the lesion on his left cheek, but instead Warden Leon Bolling cancelled the medical visit in order to read Doyle Hamm his death warrant. Fourth, the defendants have acted deliberately in pursuing Doyle Hamm's execution by IV lethal injection, despite knowledge that his veins are severely compromised, and despite the availability of more humane alternatives. Fifth, the defendants have engaged in a pattern of deliberately ignoring Doyle Hamm's serious medical condition by repeatedly attempting to draw blood from his already compromised veins. These five factors, combined with the torturous effects of the botched execution

on February 22, 2018, have caused Doyle Hamm to suffer severe physical and mental anguish, constituting a "great increase" of Doyle Hamm's punishment, in violation of his Eighth Amendment rights. *In re Medley*, 134 U.S. 160, 172 (1890).

III. COUNT 3: EVEN IF THERE EXISTS NO STATUTORILY AUTHORIZED ALTERNATIVE, DEFENDANTS SHOULD BE BARRED FROM CARRYING OUT AN UNCONSTITUTIONAL EXECUTION.

95. Doyle Hamm incorporates by reference all facts and allegations detailed throughout this amended complaint.

96. Even if this Court finds, under the *Baze/Glossip* standard, that there is no feasible, readily implemented alternative that would substantially reduce the risk of pain to Doyle Hamm *and* that is currently authorized by statute, the defendants should nonetheless be barred from carrying out intravenous lethal injection. To permit intravenous lethal injection on Doyle Hamm, in light of the substantial risk and harm that this method poses to him, simply because there is no statutorily authorized alternative, is in itself unconstitutional.

97. The Eighth Amendment categorically prohibits states from carrying out cruel and unusual punishment. If Doyle Hamm presents evidence establishing that intravenous lethal injection will constitute cruel and unusual punishment, Alabama may not carry out an execution by intravenous lethal injection. Therefore, regardless of whether an inmate presents a viable alternative, the state may not carry out this unconstitutional method of punishment.

98. This is especially true in an *as-applied* case, like Doyle Hamm's, in which the only statutorily authorized form of execution is "lethal injection." Although Alabama's lethal injection statute does not limit lethal injection to intravenous lethal injection, and an oral injection should be considered a lethal injection under the text of this statute, the defendants have insisted that oral injection is *not* an authorized alternative under Alabama statute. But, *even if* this Court were to

accept defendants' argument and reject an oral injection as an alternative means of lethal injection, the state of Alabama still may *not* execute Doyle Hamm by intravenous lethal injection because he has established that he would face an unconstitutional risk of substantial pain and suffering from that method of execution.

99. Alabama law currently authorizes two methods of execution: lethal injection and electrocution. *See* Ala. Code § 15-18-82.1(a). Doyle Hamm has waived the electrocution option, as he did not make the choice in writing within 30 days of the certificate of judgment, pursuant to § 15-18-82.1(b), so he is foreclosed from offering any alternative but lethal injection. *See Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016) (requiring the proffered alternative to be authorized by statute); *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853 (11th Cir., 2017).

100. If this Court determines that "lethal injection" is confined only to intravenous lethal injection, Doyle Hamm will be foreclosed from offering any other statutorily authorized alternative because *every* form of intravenous lethal injection poses the same unconstitutional risk of substantial pain and suffering for Doyle Hamm.

101. This is precisely the situation that Justice Sotomayor and Justice Breyer anticipated in their dissent from the U.S. Supreme Court's denial of certiorari in *Arthur v. Dunn, Comm'r , Alabama Dep't of Corr.*, 137 S.Ct. 725 (2017). Justice Sotomayor expressed grave concern that, under the Eleventh Circuit's "alarming misreading" of Supreme Court precedent, "even if a prisoner can prove that the State plans to kill him in an intolerably cruel manner, and even if he can prove that there is a feasible alternative, all a State has to do to execute him through an unconstitutional method is to pass a statute declining to authorize any alternative method." *Id*. at 729

102. In two cases brought before the Eleventh Circuit last year, Judge Wilson has continued to argue that *Arthur* was wrongly decided—an argument that has now gained traction with other Eleventh Circuit judges. *See Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 878-79 (11th Cir. 2017) (Wilson, J., concurring) ("[O]ur decision in *Arthur* promulgated a startling holding: that state legislation can thwart constitutional claims for relief from cruel and unusual punishment. In my view, that holding is deeply flawed and *Arthur* was wrongly decided."); *Ledford v. Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1327 (11th Cir. 2017) (Wilson, J., dissenting) (joined by Judges Martin, Rosenbaum, and Pryor (who also authored a separate dissent)) ("Our decision in *Arthur*, however, has all but overturned the Framers' determination. Under *Arthur*, even if a death row prisoner in Florida, Georgia, or Alabama faces an inhumane execution, the prisoner has no real recourse."). Other courts have also expressed their concern with the *Arthur* holding. *See McGehee v. Hutchinson*, No. 17-00179, 2017 WL 1399554 at *39 (E.D. Ark., Apr. 15, 2017), *vacated on other grounds by McGehee v. Hutchinson* (*McGehee II*), 854 F.3d 488 (8th Cir. 2017) (en banc) (finding still though that the "Eleventh Circuit's limitation of alternative methods to those presently permitted under state law finds no textual basis in *Baze* and *Glossip*"); *In re Ohio Execution Protocol*, 860 F.3d 881, 910 (6th Cir. 2017) (Stranch, J., concurring in the dissent) (citing Justice Sotomayor's dissent in *Arthur v. Dunn*).

103. Doyle Hamm therefore maintains that the state of Alabama may not implement a method of execution that is cruel and unusual, even if it finds there is no feasible, statutorily authorized alternative method of execution. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (punishment *must not* be excessive in violation of the Eighth Amendment).

IV. COUNT 4: ANY FURTHER ATTEMPT, BY ANY MEANS OR METHOD, TO EXECUTE DOYLE HAMM WOULD VIOLATE HIS CONSTITUTIONAL RIGHTS GUARANTEEING HIM PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AND DOUBLE JEOPARDY

104. Doyle Hamm incorporates by reference all facts and allegations detailed throughout this amended complaint.

A Second Attempt to Execute Doyle Hamm Would Violate the Eighth Amendment

105. 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.

106. 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.

107. 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.

108. 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.

109. 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* Doc. 62, Supplemental Report from Dr. Charles Blanke and Supplemental Report from Dr. Mark Heath.

110. 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.

111. 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.

112. 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.

113. 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.

114. 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.

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

116. 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.").

117. 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'").

118. 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.

119. 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).

120. 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.

121. 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)). In light of this analysis, it is entirely unclear, more than seventy years after *Resweber*, whether the *Resweber* exception remains a valid exception anyways to the clearly

established rule against cruel and unusual punishment in the case of a series of abortive attempts and lingering death.

122. 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.

123. 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.

124. Doyle Hamm is entitled relief under 42 U.S.C. § 1983 and the Eighth Amendment 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.

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

A Second Attempt to Execute Doyle Hamm Will Violate the Fifth and Fourteenth Amendments

126. 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.

127. 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.").

128. 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).

129. 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.

130. 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.

131. 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.

132. 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.

133. 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.

134. Doyle Hamm is entitled to relief under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments 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.

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

JURY DEMAND

136. Doyle Hamm respectfully requests a jury trial pursuant to Fed. R. Civ. P. 38 and the Seventh Amendment to the Constitution.

CONCLUSION

Doyle Hamm respectfully submits that he has met his burden in this case to show that Alabama's planned use of intravenous lethal injection will cause him excruciating pain, in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. First, Doyle Hamm has established a "substantial risk of serious harm," as applied specifically to him due to his serious medical conditions, given that peripheral and central venous access was impossible, despite the torturous attempts made, on February 22, 2018, when the state first attempted to execute him, and will continue to be impossible. *Baze*, 552 U.S. at 50. Second, Doyle Hamm has provided an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain"— namely an oral injection of a lethal drug cocktail, which will cause a quick and painless death for Doyle Hamm. *Id.* at 1532. Doyle Hamm has also met his burden in showing that the defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by subjecting him to unnecessary and wanton pain and suffering when they botched his execution on

February 22, 2018. In addition, Doyle Hamm submits that the defendants should be barred from attempting an execution via intravenous lethal injection, in light of the substantial risk of harm he faces, even if this Court were to find no feasible and statutorily authorized alternative. Lastly, any further attempt to execute Doyle Hamm, by any means or methods, would violate his constitutional rights protecting him against cruel and unusual punishment and double jeopardy. Doyle Hamm has met his burden and, as such, respectfully requests that this Court grant relief.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiff Doyle Lee Hamm respectfully requests that this Court:

A. Enter a declaratory judgment, first, that defendants' plans to execute Doyle Hamm by intravenous lethal injection violate Doyle Hamm's right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution; and second, that defendants' plans to execute Doyle Hamm by any method violate Doyle Hamm's right to be free from cruel and unusual punishment and double jeopardy under the Eighth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution;

B. Grant injunctive relief to enjoin the defendants from proceeding with the execution of Doyle Hamm by an intravenous lethal injection, which will cause Doyle Hamm cruel and needless pain, in violation of the Eighth Amendment; or by any other means, which would violate Doyle Hamm's right to be free from cruel and unusual punishment and double jeopardy under the Eighth Amendment and Due Process Clause to the United States Constitution;

C. Award Doyle Hamm appropriate compensatory damages of at least $20, in an amount to be determined at trial.

D. Award Doyle Hamm appropriate punitive damages in an amount to be determined at trial.

E. Grant any further relief as it deems just and proper.

This, the 5th day of March 2018.

Respectfully submitted,

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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.

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

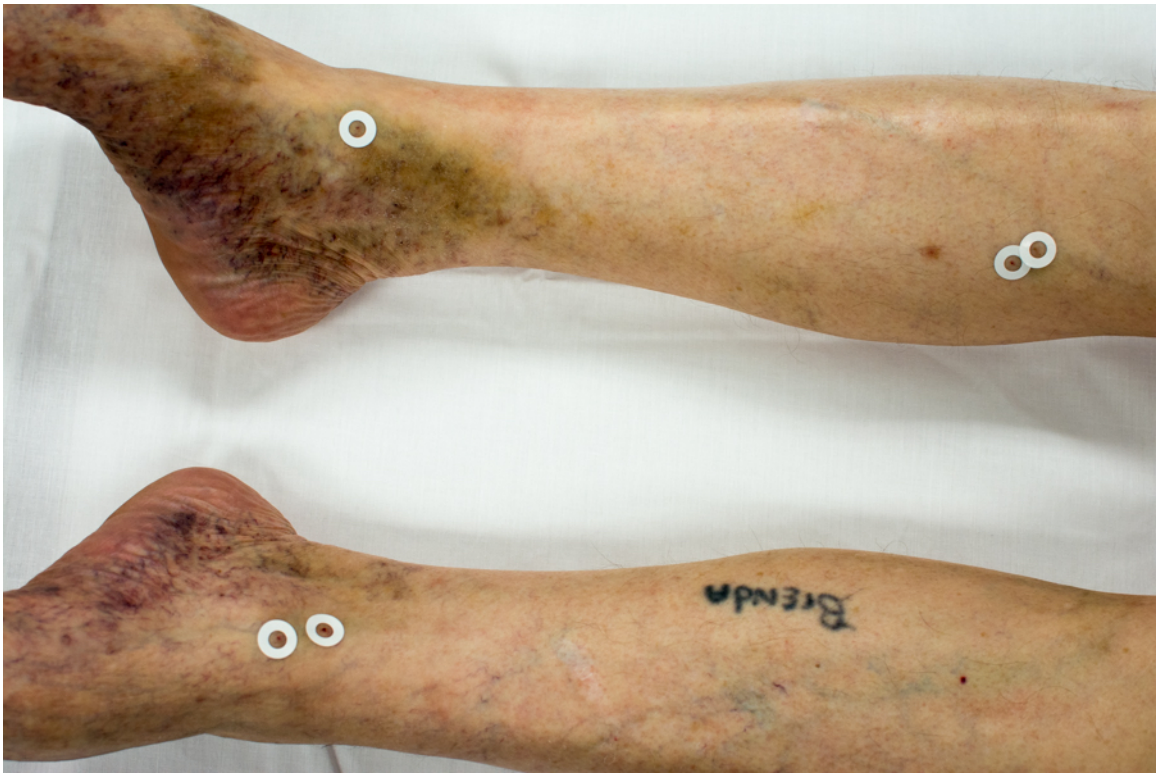

Photo 1: Lower extremity puncture wounds

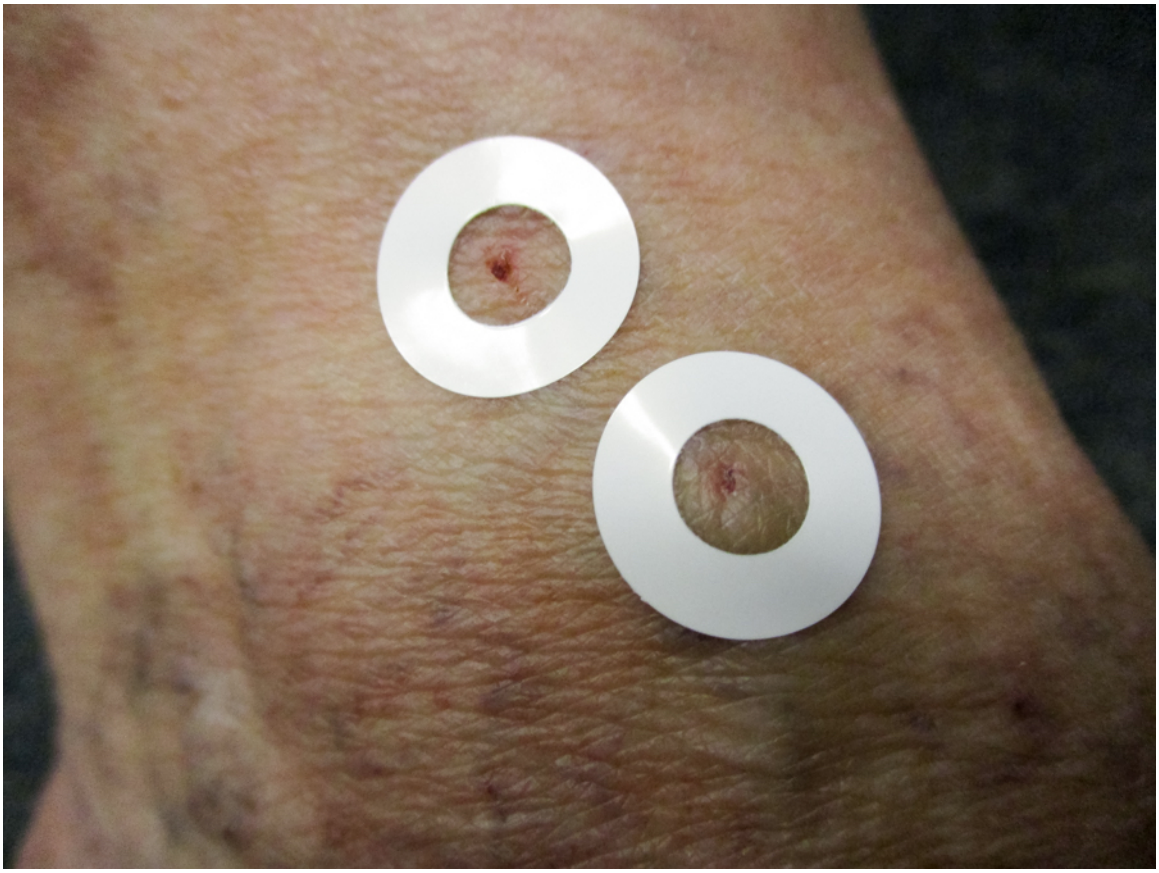

Photo 2: Left medial malleolus puncture wounds

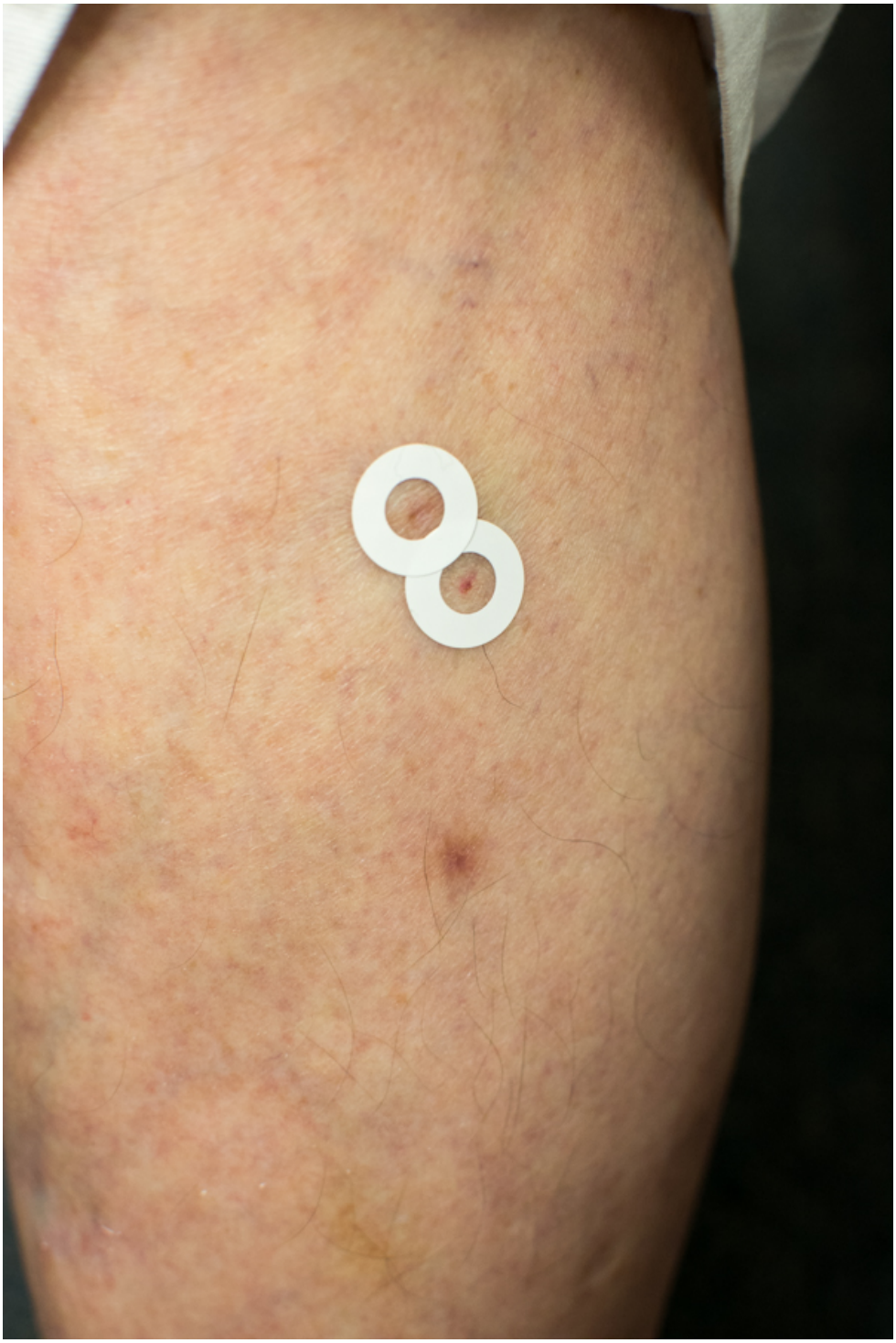

Photo 3: Right leg, medial aspect, upper calf puncture wounds

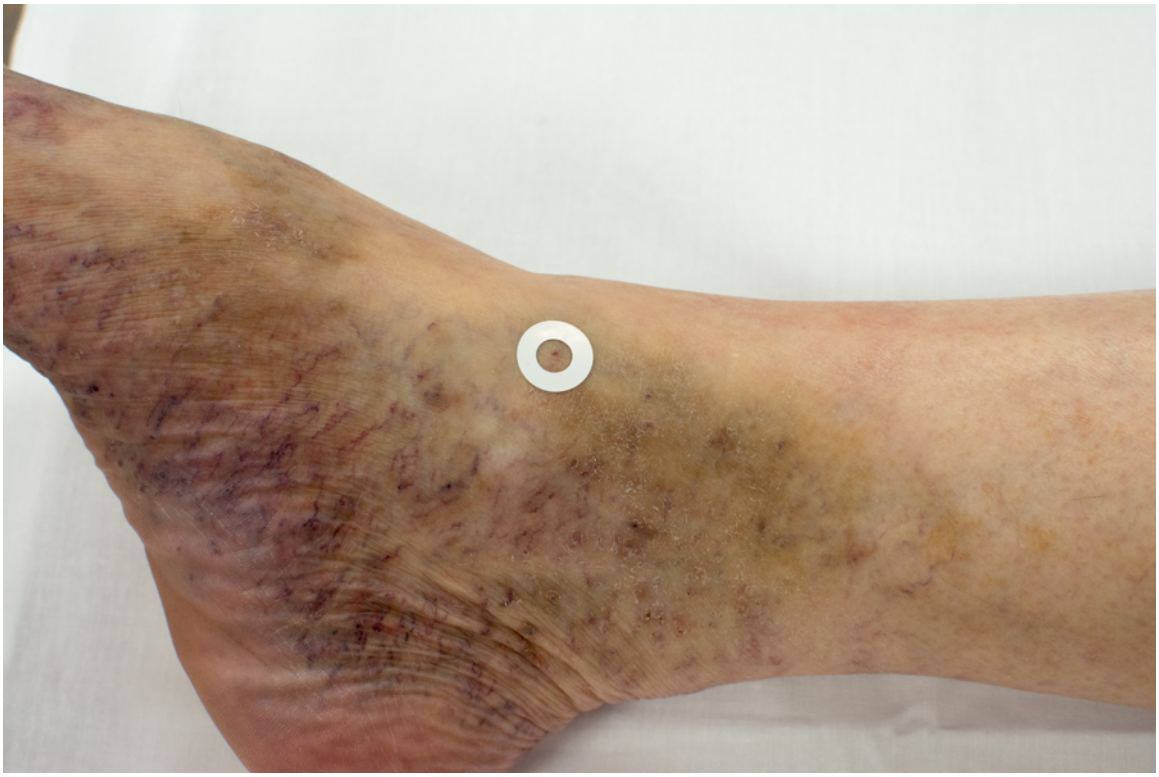

Photo 4: Right medial malleolus puncture wound

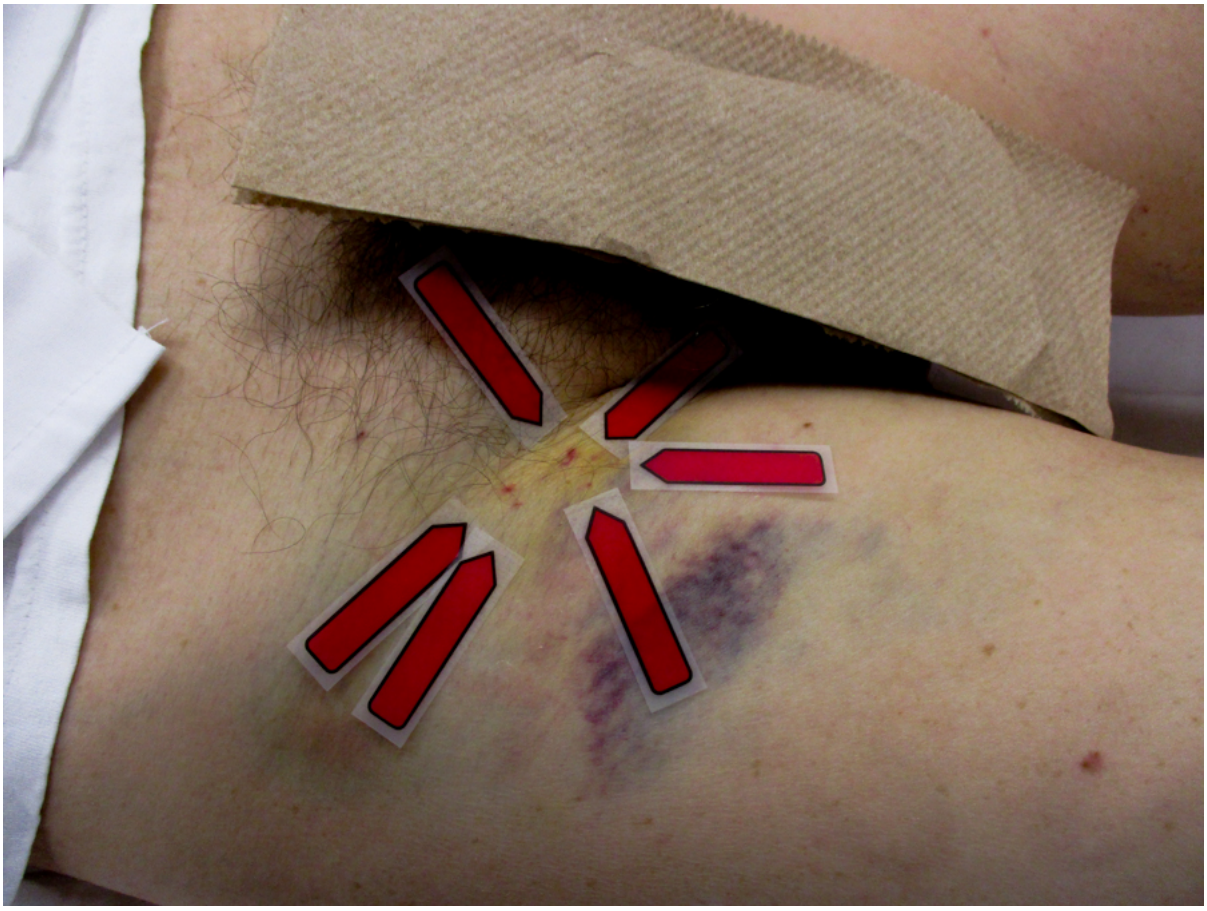

Photo 5: Right inguinal puncture wounds

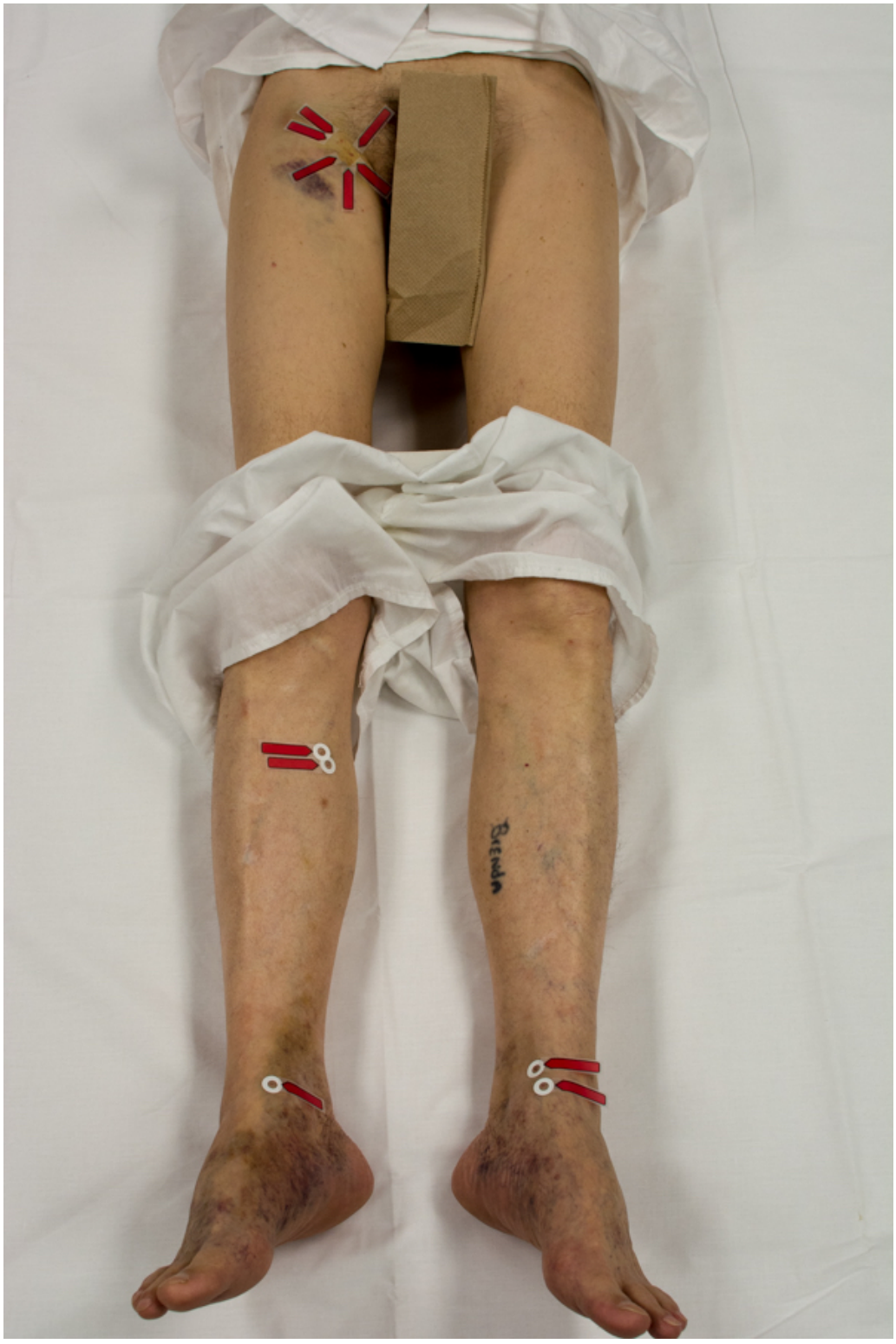

Photo 6: lower extremities and right inguinal puncture wounds