

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

IN RE: ALABAMA LETHAL INJECTION)
PROTOCOL LITIGATION)
) CIVIL ACTION NO.
) 2:12-cv-316-WKW

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR
CONTINUED PRESERVATION OF EVIDENCE FROM DOYLE HAMM'S
ABORTED EXECUTION**

COME NOW Defendants Jefferson S. Dunn, Commissioner, and Cynthia Stewart, Warden (“the Defendants”), and respond to Plaintiffs’ motion for continued preservation of evidence from Doyle Lee Hamm’s aborted execution¹ as follows:

1. Hamm was scheduled to be executed on February 22, 2018. Prior to his execution, Hamm filed a complaint pursuant to 42 U.S.C. § 1983 raising an as-applied Eighth Amendment claim based on his alleged unique medical conditions—to wit, compromised veins. After a court-ordered independent medical evaluation, Defendants agreed not to attempt to obtain venous access through Hamm’s arms.²

2. On February 22, the Supreme Court of the United States entered a temporary stay of execution, which was not lifted until approximately 9:00 PM.³

1. Doc. 393.

2. See Memorandum Opinion and Order at 4, Hamm v. Dunn, 2:17-cv-02083 (N.D. Ala. Feb. 20, 2018), Doc. 58.

3. Lawrence Specker, *Execution of Alabama Inmate Doyle Lee Hamm Called Off*, AL.COM (Feb. 22, 2018; updated Feb. 26, 2018), goo.gl/voDyMy.

Defendants then authorized the execution team to begin preparations for Hamm's imminent execution, in accordance with the protocol. At approximately 11:15 PM, with the midnight deadline of the warrant looming, Defendants called off the execution due to time constraints.⁴

3. The next day, the district court for the Northern District of Alabama scheduled a hearing in Hamm's case. Defendants were ordered to preserve "all evidence that could be relevant to the hearing, including the clothing Mr. Hamm was wearing at the aborted execution."⁵

4. In accordance with that order, Defendants have preserved all available evidence, which consists of bedsheets and the shirt, pants, and boxers Hamm wore on the night of February 22.⁶ Defendants have no intention of discarding these items.

5. The clothes and sheets preserved in Hamm's case, however, are of absolutely no relevance to this litigation. Plaintiffs have alleged, among other things, that Defendants' lethal injection protocol violates the Eighth Amendment because midazolam does not act reliably as an anesthetic, and that Defendants have no protocol for stopping an execution if the condemned is still conscious after the

4. *Id.*

5. Order Granting in Part and Denying in Part Plaintiff's Emergency Motion for a Hearing Today at 2, Hamm v. Dunn, 2:17-cv-02083 (N.D. Ala. Feb. 23, 2018), Doc. 78.

6. *See* Affidavit of Cynthia Stewart, Ex. A.

administration of a full gram of midazolam.⁷ Hamm's aborted execution has no bearing on those claims, as Hamm was never administered any drug. His execution was called off due to the late hour before it could begin. Moreover, Hamm's Eighth Amendment claims concerning his execution were due to his venous idiosyncrasies, an allegation made by none of the Plaintiffs in this litigation.

6. Plaintiffs further allege that Defendants have made false representations to two federal courts.⁸ This is simply untrue. First, Defendants attempted to execute Hamm because the medical evidence as a whole, including *the independent medical examiner selected and appointed by the Northern District*, stated that Hamm had accessible veins. However, because the Supreme Court prevented Defendants from beginning preparations until a mere three hours before the execution warrant was set to expire, time ran out for Defendants and necessitated aborting the execution. Second, whether Ronald Bert Smith coughed before or after his consciousness assessments has little bearing on whether he was, in fact, conscious, as coughing is not necessarily a voluntary reaction requiring consciousness. Indeed, there is simply no evidence that Smith's cough was a reaction to the consciousness assessment. Contrary to Plaintiffs' unfounded insinuation, this is not evidence of mendacity on the part of Defendants.

7. Doc. 348 at 10–12, 24–34.

8. Doc. 393 at 2–3.

CONCLUSION

As the evidence retained from the aborted Hamm execution is irrelevant to this litigation, Plaintiffs' motion is due to be denied.

Respectfully submitted,

STEVE MARSHALL
ALABAMA ATTORNEY GENERAL

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

OF COUNSEL:
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
(334) 353-3637 Fax
Email: tgovan@ago.state.al.us

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of March 2018, a copy of the foregoing has been served by electronic mail and by United States mail to: **John Palombi and Spencer Hahn.**

s/ Thomas R. Govan, Jr.

Thomas R. Govan, Jr.
Deputy Attorney General
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
(334) 353-3637 Fax
Email: tgovan@ago.state.al.us

EXHIBIT A

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

IN RE: ALABAMA LETHAL INJECTION)
PROTOCOL LITIGATION,)
)
)
)
)
)

CIVIL ACTION NO.
2:12-cv-316-WKW

AFFIDAVIT OF CYNTHIA STEWART

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

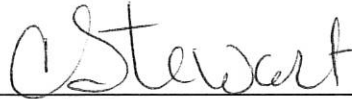
1. My name is Cynthia Stewart, and I am the Warden of Holman Correctional Facility in Atmore, Alabama. I am over nineteen years of age, the age of majority in Alabama, and I give this statement based on my personal knowledge of the facts and information contained herein.

2. On February 23, 2018, I was ordered by the Federal District Court for the Northern District of Alabama to retain certain items relating to inmate Doyle Hamm.

3. In compliance with that order, I have preserved all available items of evidence, which consist of the following: bedsheets, a pair of pants, a shirt, and a pair of boxers. Those items will continue to be maintained pursuant to the February 23 order.

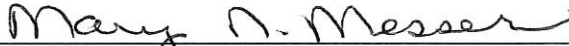
Further affiant sayeth not.

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



Cynthia Stewart
Warden, Holman Correctional Facility

Sworn to and subscribed before me on this 29 day of March, 2018.



NOTARY PUBLIC
My Commission Expires: My Commission Expires 03-27-19