TABLE OF CONTENTS

Appendix A – Albuterol Inhaler Medical Records 2

Appendix B – Tuberculosis Medical Records 6

Appendix C – Light Sensitivity Medical Records 14

Appendix D – Hearing on oral injection on January 31, 2018 48

Appendix E – Court order on oral injection alternative (J. Karon Bowdre) 200

Appendix A

ASTHMA INHALER FLOW SHEET

NAME: Wilson, David POD M

DATE	TIME	INHALER TYPE	C/O SIGNATURE
2-14-08	2038	ALBUTEROL	[signature]

ASTHMA INHALER FLOW SHEET

NAME: Wilson, David POD M

DATE	TIME	INHALER TYPE	C/O SIGNATURE
2/12/18	12:00	Albuterol	D. Cook

ASTHMA INHALER FLOW SHEET

NAME: Wilson David POD M

DATE	TIME	INHALER TYPE	C/O SIGNATURE
18Oct	1745	Albuterol	Armstrong

Appendix B

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORIZON

T.B. Screening Form

Skin Test Positive Date: 4-26-11 MM Reading: 10 Today's Date: 4-1-13

Any Symptoms of:	Yes	No
Loss of Appetite		/
Fever / Chills		
Hoarseness		/
Chest Pain		
Weight Loss		/

Usual Weight 225

Present Weight 221

Night Sweats		/
Excessive Fatigue		/
Dyspnea		
Productive Cough (more than 3 weeks)		/

IF YES:
Sputum Production _____ Color _____

Consistency _____

Hemoptysis _____

HIV Positive _____

Nurse Signature eGray RN Date 4-1-13

*Refer to MD or Mid-Level Provider if any YES answers.

INMATE NAME	INMATE #	D.O.B.	FACILITY
Wilson, David	Z-748	3-7-84	Holman

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

DEDICATED PEOPLE MAKING A DIFFERENCE
Correctional Medical Services

T.B. SCREENING FORM

Skin Test Positive Date 4-26-11 10 mm Today's Date 4.10.12

Any Symptoms of:	Yes	No
Loss of Appetite	____	X
Fever/Chills	____	X
Hoarseness	____	X
Chest Pain	____	X
Weight Loss	____	X
Usual Weight 230		
Present Weight 228		
Night Sweats	____	X
Excessive Fatique	____	X
Dyspnea	____	X
Productive Cough (more than 3 weeks)	____	X

IF YES:
Sputum Production _____ Color _____

Consistency _____

Hemoptysis _____

HIV Positive _____

Nurse Signature B. Davidson RN Date 4/10/12

*Refer to MD or Mid-Level Provider if any YES answers.

INMATE NAME	AIS #	D.O.B.	FACILITY
Wilson, David	Z-748	3-7-84	Holman

0512-AL

CMS
DEDICATED PEOPLE MAKING A DIFFERENCE
Correctional Medical Services

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Chronic Disease Clinic Follow-Up

Inmate Name: Wilson David	
Number: 2748	Institution: Delano

List chronic diseases:

1) LTBI (Completed 2/7/12)	3)	5)
2)	4)	6)

Attach pharmacy profile or list current medications: ϕ

Subjective:

Asthma: # attacks in last month?_____ # short acting beta agonist canisters in last month?_____ # times awakening with asthma symptoms per week?_____	Seizure disorder: # seizures since last visit?_____ Diabetes mellitus: # of hypoglycemic reactions since last visit?_____ Weight loss/gain ↓ (↑) ___ #lbs
CV/hypertension (Y/N): Chest pain?_____ SOB?_____ Palpitations?_____ Ankle edema?_____	
HIV/HCV (Y/N): Nausea/vomiting?_____ Abdominal pain/swelling?_____ Diarrhea?_____ Rashes/lesions?_____	

For all diseases, since last visit, describe new symptoms:

NO Complaints
Headache resolving w/ INH

RSat 97% RA
BMI 32.5
Ht 5'11"

Patient adherence (Y/N): with medications? Y with diet? Y with exercise? Y

Vital signs: Temp 98.2 BP 140/76 Pulse 105 Resp 18 Wt 232 PEFR_____ INR_____
Labs: Hgb A1C_____ HIV VL_____ CD4_____ Total Chol_____ LDL_____ HDL_____ Trig_____
Range of fingerstick glucose/BP monitoring:

PE:

HEENT/neck:	AT/NL	Extremities:	FROM/E
Heart:	RRR	Neurological:	CN 2-12
Lungs:	CTAB	GU/rectal:	ϕ
Abdomen:	NT/ND	Other:	ϕ

Assessment:

	Degree of Control				Clinical Status			
	G	F	P	NA	I	S	W	NA
1 LTBI	☐	☒	☐	☐	☐	☒	☐	☐
2	☐	☐	☐	☐	☐	☐	☐	☐
3	☐	☐	☐	☐	☐	☐	☐	☐
4	☐	☐	☐	☐	☐	☐	☐	☐

Plan:
Medication changes: Continue ϕ meds
Diagnostics: none
Labs: per protocol

Reviewed Lab/Procedures/Reports with pt. ☒ YES ☐ NO ☐ N/A Indicated Treatment Plan changes discussed ☒ YES ☐ NO ☐ N/A
Monitoring: BP:_____X day/week/month Glucose:_____X day/week/month Peak flow:_____ Other:_____
Education provided: ☒ Nutrition ☒ Exercise ☒ Smoking ☒ Test results ☒ Medication management ☐ Other:_____
Referral (list type): Specialist:_____ Chronic care program:_____
days to next visit? ☐ 90 ☐ 60 ☐ 30 ☐ Other: Next Flu Discharged from CCC: [name]_____

Advance Level Provider Signature:	Date: 2/28/12

CMS
DEDICATED PEOPLE MAKING A DIFFERENCE
Correctional Medical Services

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Chronic Disease Clinic Follow-Up

Inmate Name: Wilson David	
Number: 2748	Institution: Dolores

List chronic diseases:

1) INH	3)	5)
2)	4)	6)

Attach pharmacy profile or list current medications: INH 300mg (3) q Tue + Fri, Vit B6 25mg + q Tue + Fri

Subjective:

Asthma: # attacks in last month?_____	Seizure disorder: # seizures since last visit?_____
# short acting beta agonist canisters in last month?_____	Diabetes mellitus: # of hypoglycemic reactions since last visit?_____
# times awakening with asthma symptoms per week?_____	Weight loss/gain ↓02 #lbs
CV/hypertension (Y/N): Chest pain?_____ SOB?_____	Palpitations?_____ Ankle edema?_____
HIV/HCV (Y/N): Nausea/vomiting?_____ Abdominal pain/swelling?_____	Diarrhea?_____ Rashes/lesions?_____

For all diseases, since last visit, describe new symptoms:

NO Complaints

O2Sat 98% RA
BMI 30.5
Ht 5'11"

Patient adherence (Y/N): with medications? Y with diet? Y with exercise? Y

Vital signs: Temp 98.3 BP 124/88 Pulse 84 Resp 18 Wt 294 PEFR_____ INR_____
Labs: Hgb A1C_____ HIV VL_____ CD4_____ Total Chol_____ LDL_____ HDL_____ Trig_____
Range of fingerstick glucose/BP monitoring:

PE:

HEENT/neck:	AT/NC	Extremities:	CCE
Heart:	RRR	Neurological:	CN 2-12
Lungs:	CTAB	GU/rectal:	Q
Abdomen:	NT/ND	Other:	Q

Assessment:

	Degree of Control				Clinical Status			
	G	F	P	NA	I	S	W	NA
1 INH	☐	☒	☐	☐	☐	☒	☐	☐
2	☐	☐	☐	☐	☐	☐	☐	☐
3	☐	☐	☐	☐	☐	☐	☐	☐
4	☐	☐	☐	☐	☐	☐	☐	☐

Plan:
Medication changes: no change
Diagnostics: none
Labs: per protocol

Reviewed Lab/Procedures/Reports with pt. ☒ YES ☐ NO ☐ N/A Indicated Treatment Plan changes discussed ☒ YES ☐ NO ☐ N/A
Monitoring: BP:_____X day/week/month Glucose:_____X day/week/month Peak flow:_____ Other:_____
Education provided: ☒ Nutrition ☒ Exercise ☒ Smoking ☒ Test results ☒ Medication management ☐ Other:_____
Referral (list type): Specialist:_____ Chronic care program:_____
days to next visit? ☒ 90 ☐ 60 ☐ 30 ☐ Other:_____ Discharged from CCC: [name]_____

Advance Level Provider Signature:	Date: 11/21/2014

CMS
DEDICATED PEOPLE MAKING A DIFFERENCE
Correctional Medical Services

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Chronic Disease Clinic Follow-Up

Inmate Name: Wilson David	
Number: 2748	Institution: Holman

List chronic diseases:

1) INH	3)	5)
2)	4)	6)

Attach pharmacy profile or list current medications: INH 300mg(3) q Tue & Thu, Vit B6 25mg ÷ q Tue & Thu

Subjective:

Asthma: # attacks in last month?_____ # short acting beta agonist canisters in last month?_____ # times awakening with asthma symptoms per week?_____	Seizure disorder: # seizures since last visit?_____ Diabetes mellitus: # of hypoglycemic reactions since last visit?_____ Weight loss/gain ⓘ↑ 15 #lbs
CV/hypertension (Y/N): Chest pain?_____ SOB?_____ Palpitations?_____ Ankle edema?_____	
HIV/HCV (Y/N): Nausea/vomiting?_____ Abdominal pain/swelling?_____ Diarrhea?_____ Rashes/lesions?_____	

For all diseases, since last visit, describe new symptoms:_____

NO Complaints

Ox Sat 97% RA
BMI 30
Ht 5'11"

Patient adherence (Y/N): with medications? Y with diet? Y with exercise? Y

Vital signs: Temp 98' BP 124/92 Pulse 82 Resp 18 Wt 214# PEFR_____ INR_____
Labs: Hgb A1C_____ HIV VL_____ CD4_____ Total Chol_____ LDL_____ HDL_____ Trig_____
Range of fingerstick glucose/BP monitoring:_____

PE:

HEENT/neck:	AT/NC	Extremities:	ø C/C/E
Heart:	RRR	Neurological:	CN 2-12
Lungs:	CTAB	GU/rectal:	ø
Abdomen:	NT/ND	Other:	ø

Assessment:

	Degree of Control				Clinical Status			
	G	F	P	NA	I	S	W	NA
1 INH	☐	☒	☐	☐	☐	☒	☐	☐
2	☐	☐	☐	☐	☐	☐	☐	☐
3	☐	☐	☐	☐	☐	☐	☐	☐
4	☐	☐	☐	☐	☐	☐	☐	☐

Plan:
Medication changes: Continue Current meds
Diagnostics: None
Labs: per protocol
Reviewed Lab/Procedures/Reports with pt. ☒YES ☐NO ☐N/A Indicated Treatment Plan changes discussed ☒YES ☐NO ☐N/A
Monitoring: BP:_____X day/week/month Glucose:_____X day/week/month Peak flow:_____ Other:_____
Education provided: ☒Nutrition ☒Exercise ☒Smoking ☒Test results ☒Medication management ☐Other:_____
Referral (list type): Specialist:_____ Chronic care program:_____
days to next visit? ☒90 ☐60 ☐30 ☐Other:_____ Discharged from CCC: [name]_____

Advance Level Provider Signature: P Bellamy	Date: 8/26/2017

CMS
DEDICATED PEOPLE MAKING A DIFFERENCE
Correctional Medical Services

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Chronic Disease Clinic Follow-Up

Inmate Name: Wilson David	
Number: 2748	Institution: Holman

List chronic diseases:

1) INH	3)	5)
2)	4)	6)

Attach pharmacy profile or list current medications: INH 900mg twice weekly and Vitamin B6 25mg twice weekly

Subjective:

Asthma: # attacks in last month? 0	Seizure disorder: # seizures since last visit? 0
# short acting beta agonist canisters in last month? 0	Diabetes mellitus: # of hypoglycemic reactions since last visit? 0
# times awakening with asthma symptoms per week? 0	Weight loss/gain ↓ ↑ —— #lbs
CV/hypertension (Y/N): Chest pain? N SOB? N Palpitations? N Ankle edema? N	
HIV/HCV (Y/N): Nausea/vomiting? N Abdominal pain/swelling? N Diarrhea? N Rashes/lesions? N	

For all diseases, since last visit, describe new symptoms:

No Complaints

Patient adherence (Y/N): with medications? Y with diet? Y with exercise? Y

O2Sat 98% RA

Vital signs: Temp 98 BP 128/86 Pulse 84 Resp 18 Wt 227 PEFR _____ INR _____
Labs: Hgb A1C _____ HIV VL _____ CD4 _____ Total Chol _____ LDL _____ HDL _____ Trig _____
Range of fingerstick glucose/BP monitoring: _____

PE:

HEENT/neck: AT/NC	Extremities: PCICE
Heart: RRR	Neurological: CN2-12
Lungs: CTAB	GU/rectal: Ø
Abdomen: NT/NS	Other: Ø

Assessment:

	Degree of Control				Clinical Status			
	G	F	P	NA	I	S	W	NA
1 INH	☐	☒	☐	☐	☐	☒	☐	☐
2	☐	☐	☐	☐	☐	☐	☐	☐
3	☐	☐	☐	☐	☐	☐	☐	☐
4	☐	☐	☐	☐	☐	☐	☐	☐

Appt 8/26/11

Plan:
Medication changes: Continue INH
Diagnostics: None
Labs: Monthly Liver profile
Monitoring: BP: _____ X day/week/month Glucose: _____ X day/week/month Peak flow: _____ Other: _____
Education provided: ☐ Nutrition ☒ Exercise ☐ Smoking ☒ Test results ☒ Medication management ☐ Other: _____
Referral (list type): Specialist: _____ Chronic care program: _____
days to next visit? ☐ 90 ☐ 60 ☒ 30 ☐ Other: _____ Discharged from CCC: [name] _____

Advance Level Provider Signature: PA Barber	Date: 5/9/11

Appendix C

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Alabama Department of Corrections
Inmate Periodic Health Assessment – Form E-4-(a)

Date / Time:	Notes
4/24/1 1330	(10) "The only thing I'm having is when I go outside & sunglasses, I get migraines. It's no problem if I have sunglasses on, but I can't seem to get a profile. They say it's not medically needed even though it gives me migraines."
4/7/14	(10) "I've been having back pain and it knee pain." PT referral to sic

Inmate Name:_____ AIS#_____ D.O.B._____

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 6/23/11
Time Received: 0230

Print Name: David Wilson **Date of Request:** 6-22-11

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see a specialist to determan if I should wear sunglass or not To keep me from getting migrains and stop the pressure and sharp pain in my left eye & when Im Out side in the bright light. I have a pair of sunglass that I wear I consent to be treated by health staff for the condition described. out side right now and I need a profile to beable to continue to wear them. when I wear them I don't have any problems with Pressure or Sharp Pain in my left eye and I don't get migrains. If Im unable to continue to wear the sunglass I won't be able to do outdoor exercise;

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: SH Initials **Referred to:** (Circle ONE) (NSC) Mid-level SC Physician SC MH Dental Other: _____

HEALTH CARE DOCUMENTATION

Subjective: S/c cancelled. Dr Barber is NOT going to issue Sunglasses

Objective: BP _____ T profile P Not RS he Wt _____

going to go to a Specialist

Assessment:

Plan:

☒ Inmate education handout reviewed with and given to the patient.

Refer to: (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: Stricklan Date: 6/23/11 Time: 1410

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: RECEIVED JUN
Time Received:
BY:

Print Name: David wilson **Date of Request:** 6-19-11

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see a specialist To determan whether I need to wear Sunglass. Ive asked for a profile to wear sunglass on numerous occasions. And all Ive gotten From Dr Bradford is your medical not needed and from Dr Barber is No. I need to see somebody who Has more then general knowle

I consent to be treated by health staff for the condition described. When I go out side I will get migrains due to it being realy bright out side. My left eye will get a sharp Pain and what feels like pressure and after a while my whole head will start hurting It gets to the point where the only thing I can do is lay down. I need the Profile inorder to beable to keep The sunglass I wear outside without them I will be unable to go outside to Exercise

SIGNATURE David wilson

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

If This Issue is not delt with it could get worse or cause Intury.

DO NOT WRITE BELOW THIS AREA

Triaged by: IV (Initials) **Referred to:** (Circle ONE) (NSC) Mid-level SC Physician SC MH Dental
Other:

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP T P R Wt

Assessment:

Plan: S/C not needed due to MD will not order sunglasses

YO Inmate education handout reviewed with and given to the patient.

r to : (Circle any applicable) Mid-level Physician MH Dental Other:

ure & Title: R Teller Jr. Date: 6/20/11 Time: 1445

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 6/1/11
Time Received: 03W

Print Name: David wilson **Date of Request:** 5-30-11

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see a specialist to determan whether or not I need To wear Sunglass when I go outside because when I don't wear Sunglass outside I will get migrains. Ive had problemes with head aches since Middle School and since then it has gotten worse I started getting migrains all the time. I started wearing Sunglass in 2002. Ive tryed 7 times with Dr Barber and 4 times with Dr Bradford To get a Profile to wear Sunglass and there both ignoreing ~~that~~ the fact that I Should wear Sunglass and stop the migrains from recurring and keep them from getting worse. Ive asked for the Profile because its Cheaper. without The Profile wont be able to go outside if my Sunglass are taken away from me. when I get migrains I starts ~~to~~ behind my left eye with a sharp pain and pressure and the spreads to the rest of my head.

I consent to be treated by health staff for the condition described.
David wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: ____ Initials **Referred to:** (Circle ONE) NSC Mid-level SC Physician SC MH Dental
Other: _____

HEALTH CARE DOCUMENTATION

Subjective: Dr. Barber reviewed S/C request and is not going to order the Sunglasses profile and she is not going to send out to Specialist. S/C cancelled

Objective: BP _____ T _____ P _____ R _____ Wt _____

Assessment:

Plan:

Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: Stickdale Date: 6-1-11 Time: 1535

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 4/10/11
Time Received: 0330

Print Name: David Wilson **Date of Request:** 4-9-11

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see Dr Bradford To get a profile for sunglass If Im outside with out sunglass Ill get a migrain. I have a pair of sunglass I Just need a profile when I get a migrain It starts behind my left eye there is pressure and a sharp pain I consent to be treated by health staff for the condition described. Then It Spreads To my whole head when That happens I get to the point where I can't eat, sleep or do anything I have to turn out the lights, and Darken my cell and Plug my ears from the noise and try to get to the lowest spot I can.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: RN **Referred to:** (Circle ONE)
Initials
NSC Mid-level SC Physician SC MH Dental
Other: _____

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP _____ T _____ P _____ R _____ Wt _____

Refused SC

Assessment:

Plan:

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: RN Jeffries Date: 4/10/11 Time: 1615

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 3/29/11
Time Received: 0900

Print Name: David Wilson **Date of Request:** 3-28-11

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to get something for my headace Ive been having. and I need To see DR Barber To get a profile for sunglass, IF I don't wear sunglass out side I get migrans from It being to bright out. my migrans start with pain and pressure behind my left eye then the front of my hea starts hurting and after a while my whole head hurts with thob Pain I have to Blacking my cell out and lay down, and cover my ears little noises are too loud can't eat can't do anythins That's how bad They get

I consent to be treated by health staff for the condition described.

Dard Wils
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: dp (Initials) **Referred to:** (Circle ONE) NSC Mid-level SC Physician SC MH Dental Other: _____

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP 128/84 T 97.4 P 105 R 20 Wt 227 O2 100%.

Assessment:

Plan: See assessment

☒ Inmate education handout reviewed with and given to the patient.

Refer to: (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: RN Jelley Date: 3/29/11 Time: 1730

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name Wilson David	ID# Z748	Date 3/29/11

"I get headaches in the afternoon and I don't have anything to take for it and I wrote a grievance for sunglasses and they told me to tell you to put it in front of MD"

Subjective:

This 27 year old ☒ Male ☐ Female
Presents with a chief complaint of headaches
Date of onset: 20 yrs.
Previous history? ☒ Yes ☐ NO If yes explain ____
C/O headache? ☒ Yes ☐ No If yes any change in frequency, duration or severity compared to previous headaches?
☐ Yes ☒ No If yes explain ____
Previous treatment? ☒ Yes ☐ No If yes explain ____
Result of an injury? ☐ Yes ☒ No If yes explain ____

Associated complaints of :
Pain: ☒ Yes ☐ No Burning: ☐ Yes ☒ No Itching: ☐ Yes ☒ No Blurred vision: ☐ Yes ☒ No
Vertigo / dizziness: ☐ Yes ☒ No Other ☐ Yes ☐ No Explain any Yes responses:

Objective:
Vital Signs BP 128/84 T 97.4 P 105 R 20 Wt 227 O² 100%.

Eye ☐ Not applicable to complaint
Vision change? ☐ Yes ☒ No If yes explain ____
Foreign body? ☐ Yes ☒ No If yes explain ____
Conjunctiva normal ☒ Yes ☐ No If yes explain ____
PERLA WNL ☒ Yes ☐ No If yes explain ____
Sclera normal ☒ Yes ☐ No If yes explain ____
Visual acuity: Pre-treatment RT____LT____ Post-treatment RT____LT____

Ear ☒ Not applicable to complaint
Both external ears normal ☐ Yes ☐ No Both ear canals normal ☐ Yes ☐ No
Both tympanic membranes Visualize ☐ Yes ☐ No Erythema ☐ Yes ☐ No Bulging ☐ Yes ☐ No
Able to hear fingers rubbed together or watch ticking ☐ Yes ☐ No
Explain any abnormal

Nose ☒ Not applicable to complaint
Active bleeding ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No

Throat ☒ Not applicable to complaint
Enlarged tonsils ☐ Yes ☐ No Inflamed, red throat ☐ Yes ☐ No Exudate ☐ Yes ☐ No

Mouth ☒ Not applicable to complaint
Swollen gums ☐ Yes ☐ No Broken tooth / teeth ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No
Condition of teeth ☐ poor ☐ fair ☐ good

Cervical Lymph Nodes ☒ Not applicable to complaint
Enlarged ☐ Yes ☐ No Tender ☐ es ☐ No

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Assessment (Check applicable boxes)

☒ **Alteration in comfort** ☐ **Potential for altered sensory perception**

Related to

☐ Earache ☐ Excess ear wax ☒ Headache ☐ Dental pain
☐ Nosebleed ☐ Sore throat ☐ Eye injury or problem

Plan (Check applicable boxes)

☐ Physician contacted for same for same day treatment and orders

☒ Referred to Physician/Mid-level due to:
☐ Mechanism of injury suggesting additional trauma ☒ Condition not responding to protocol
☐ Impaired eye status ☐ Impaired ear status ☐ Signs of infection

☐ Referred to dentist due to
☐ Dental pain/problem

The following nursing interventions were completed (Check applicable boxes)

☒ Medication allergies and other contraindications to medications reviewed & pregnancy ruled out prior to treatment
☐ OTC ear wax softener instilled in _____ear(s)
☐ OTC ear wax softener issued to inmate with instructions for use
☐ Ear irrigation completed
☐ Inmate to return in _____days for ear irrigation
☐ Eyes flushed with_____ X _____ minutes
☐ Foreign body removed
☐ Eye patch applied/ issued
☐ Acetaminophen 325mg ____tabs ___times/day for ____days ☐ Issued ___tabs for KOP
☒ Ibuprofen 200mg 3 tabs 2 times/day for 7 days ☐ Issued ____tabs for KOP
☐ Aspirin 325mg ____tabs ____times/day for ____days ☐ Issued ____tabs for KOP
☐ Carbamide Peroxide (Debrox)
15ml bottle _____drops _____Ear ____ times/day for _____days ☐ Issued ____bottle for KOP
☐ Throat Lozenges take _____tabs, q 2 hrs, for _____days ☐ issued ____tabs for KOP
☒ Education: Patient education provided
☐ Activity restriction: ☐ Not indicated ☐ Yes x_____ days and security notified

Follow up:

☐ Return to clinic in _____ days for ear irrigation
☒ Sick call if signs and symptoms of infection develop or symptoms do not subside
☐ Physician/Midlevel referral if indicated

Additional Comments Pt requesting for a profile to wear sunglasses
Referred to MD

Reviewed 3/30/2011 R Williams

Signature / Title	Date	Time
R Williams	3/29/11	1730

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 12-20-10
Time Received: 0300

Print Name: David wilson **Date of Request:** 12-18-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to get a profile for sunglasses I need to wear sunglass out side to keep from getting a migrain because of it being to bright out side for my eyes

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: RN Initials **Referred to:** (Circle ONE) NSC Mid-level SC Physician SC MH Dental
Other:

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP 120/80 T 97.5 P 88 R 20 Wt 225 O²98'.

Assessment:

Plan:

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other:

Signature & Title: R Kelley Jr. Date: 12/20/10 Time: 1650

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name	Wilson David	ID#	Z748	Date	12-20-10

Subjective: "I need to get a profile for sunglasses to be able to keep them; I tried twice before and I couldn't; I wear the outside to keep from getting migraines"

This 26 year old ☒Male ☐Female
Presents with a chief complaint of Sunglasses profile
Date of onset: Chronic
Previous history? ☒Yes ☐NO If yes explain 11-30-10 seen on s/c eye MD denied eye glasses 7-14-10
C/O headache? ☒Yes ☐No If yes any change in frequency, duration or severity compared to previous headaches? ☒Yes ☐No If yes explain Sunlight causes migraines
Previous treatment? ☐Yes ☒No If yes explain
Result of an injury? ☐Yes ☒No If yes explain

Associated complaints of :
Pain: ☐Yes ☒No Burning: ☐Yes ☒No Itching: ☐Yes ☒No Blurred vision: ☐Yes ☒No
Vertigo / dizziness: ☐Yes ☒No Other ☐Yes ☐No Explain any Yes responses:

Objective:
Vital Signs BP 120/80 T 97.5 P 88 R 20 Wt 225 O² 98%

Eye ☐ Not applicable to complaint
Vision change? ☐Yes ☒No If yes explain
Foreign body? ☐Yes ☒No If yes explain
Conjunctiva normal ☒Yes ☐No If yes explain
PERLA WNL ☒Yes ☐No If yes explain
Sclera normal ☒Yes ☐No If yes explain
Visual acuity: Pre-treatment RT_____LT_____ Post-treatment RT_____LT_____

Ear ☒Not applicable to complaint
Both external ears normal ☐Yes ☐No Both ear canals normal ☐Yes ☐No
Both tympanic membranes Visualize ☐Yes ☐No Erythema ☐Yes ☐No Bulging ☐Yes ☐No
Able to hear fingers rubbed together or watch ticking ☐Yes ☐No
Explain any abnormal

Nose ☒Not applicable to complaint
Active bleeding ☐Yes ☐No Signs of trauma ☐Yes ☐No

Throat ☒Not applicable to complaint
Enlarged tonsils ☐Yes ☐No Inflamed, red throat ☐Yes ☐No Exudate ☐Yes ☐No

Mouth ☒Not applicable to complaint
Swollen gums ☐Yes ☐No Broken tooth / teeth ☐Yes ☐No Signs of trauma ☐Yes ☐No
Condition of teeth ☐poor ☐fair ☐good

Cervical Lymph Nodes ☒Not applicable to complaint
Enlarged ☐Yes ☐No Tender ☐es ☐No

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 12-8-10
Time Received: 0300

Print Name: David Wilson **Date of Request:** 12-7-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to get a profile or be profiled To have sunglasses So I can wear them outside without them being Taken from me. I need To wear them To keep from geting migraines. If my sunglasses get taken away I won't be able to go out side It will be To bright for my eyes my eyes will start To hurt Then I'll get a head ace then It will turn into a migraine

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: RN Initials **Referred to:** (Circle ONE) NSC Mid-level SC Physician SC MH Dental
Other:

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP 130/86 T 98.2 P 94 R 18 Wt 225 lbs

Assessment:

Plan: X David Wilson

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other:

Signature & Title: [signature] Date: 12/8/10 Time: 16:42

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information
Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name Wilson, David	ID# Z-748	Date 12/8/10

Subjective:

This 26 year old ☒ Male ☐ Female
Presents with a chief complaint of requesting sunglasses for Migraines
Date of onset: _____
Previous history? ☒ Yes ☐ NO If yes explain Seen by MD Eye Dr. in August
C/O headache? ☒ Yes ☐ No If yes any change in frequency, duration or severity compared to previous headaches?
☒ Yes ☐ No If yes explain "I only get headaches when I go outside"
Previous treatment? ☒ Yes ☐ No If yes explain Motrin
Result of an injury? ☐ Yes ☒ No If yes explain _____

Associated complaints of :
Pain: ☐ Yes ☒ No Burning: ☐ Yes ☒ No Itching: ☐ Yes ☒ No Blurred vision: ☐ Yes ☒ No
Vertigo / dizziness: ☐ Yes ☒ No Other ☒ Yes ☐ No Explain any Yes responses:
"pressure to Rt eye"

Objective:
Vital Signs BP 130 / 86 T 98.2 P 94 R 18 wt 225 lbs

Eye ☐ Not applicable to complaint
Vision change? ☐ Yes ☑ No If yes explain _____
Foreign body? ☐ Yes ☑ No If yes explain _____
Conjunctiva normal ☑ Yes ☐ No If yes explain _____
PERLA WNL ☑ Yes ☐ No If yes explain _____
Sclera normal ☑ Yes ☐ No If yes explain _____
Visual acuity: Pre-treatment RT_____LT_____ Post-treatment RT_____LT_____

Ear ☑ Not applicable to complaint
Both external ears normal ☐ Yes ☐ No Both ear canals normal ☐ Yes ☐ No
Both tympanic membranes Visualize ☐ Yes ☐ No Erythema ☐ Yes ☐ No Bulging ☐ Yes ☐ No
Able to hear fingers rubbed together or watch ticking ☐ Yes ☐ No
Explain any abnormal

Nose ☑ Not applicable to complaint
Active bleeding ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No

Throat ☑ Not applicable to complaint
Enlarged tonsils ☐ Yes ☐ No Inflamed, red throat ☐ Yes ☐ No Exudate ☐ Yes ☐ No

Mouth ☑ Not applicable to complaint
Swollen gums ☐ Yes ☐ No Broken tooth / teeth ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No
Condition of teeth ☐ poor ☐ fair ☐ good

Cervical Lymph Nodes ☑ Not applicable to complaint
Enlarged ☐ Yes ☐ No Tender ☐ es ☐ No

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name	ID#	Date
Wilson, David	Z-748	11/30/10

Subjective:

This 26 year old ☑ Male ☐ Female
Presents with a chief complaint of "I need a sunglasses profile because when I'm outside for awhile the sunlight gives me migranes."
Date of onset: 14 years ago
Previous history? ☑ Yes ☐ No If yes explain hx of migranes
C/O headache? ☑ Yes ☐ No If yes any change in frequency, duration or severity compared to previous headaches?
☑ Yes ☐ No If yes explain "They only get worse if I go outside & any sunglasses on."
Previous treatment? ☑ Yes ☐ No If yes explain motrin and sunglasses
Result of an injury? ☐ Yes ☑ No If yes explain

Associated complaints of:
Pain: ☐ Yes ☑ No Burning: ☐ Yes ☑ No Itching: ☐ Yes ☑ No Blurred vision: ☐ Yes ☑ No
Vertigo / dizziness: ☐ Yes ☑ No Other ☑ Yes ☐ No Explain any Yes responses: "When it starts I get pressure in my ⓡ eye."

Objective:
Vital Signs BP 110 / 74 T 97.8 P 88 R 18 wt 222lbs
O2 sat 98%

Eye ☐ Not applicable to complaint
Vision change? ☐ Yes ☑ No If yes explain
Foreign body? ☐ Yes ☑ No If yes explain
Conjunctiva normal ☑ Yes ☐ No If yes explain
PERLA WNL ☑ Yes ☐ No If yes explain
Sclera normal ☑ Yes ☐ No If yes explain
Visual acuity: Pre-treatment RT_____LT_____ Post-treatment RT_____LT_____

Ear ☑ Not applicable to complaint
Both external ears normal ☐ Yes ☐ No Both ear canals normal ☐ Yes ☐ No
Both tympanic membranes Visualize ☐ Yes ☐ No Erythema ☐ Yes ☐ No Bulging ☐ Yes ☐ No
Able to hear fingers rubbed together or watch ticking ☐ Yes ☐ No
Explain any abnormal

Nose ☑ Not applicable to complaint
Active bleeding ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No

Throat ☑ Not applicable to complaint
Enlarged tonsils ☐ Yes ☐ No Inflamed, red throat ☐ Yes ☐ No Exudate ☐ Yes ☐ No

Mouth ☑ Not applicable to complaint
Swollen gums ☐ Yes ☐ No Broken tooth / teeth ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No
Condition of teeth ☐ poor ☐ fair ☐ good

Cervical Lymph Nodes ☑ Not applicable to complaint
Enlarged ☐ Yes ☐ No Tender ☐ es ☐ No

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 11/30/10
Time Received: 0300

Print Name: David Wilson **Date of Request:** 11-29-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see the Doctor not the eye doctor I need a profile for Sunglasses so I can wear them without them being taken I have to wear them out side because Ill get a migraine if I don't ~~wear~~ wear them

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: RC Initials **Referred to:** (Circle ONE) (NSC) Mid-level SC Physician SC MH Dental Other: _____

HEALTH CARE DOCUMENTATION

Subjective: NP! Will not give Sunglasses profile 12/1/2010

Objective: BP 110/74 T 97.8 P 88 R 18 Wt 222 lbs
O2 sat 98%

Assessment:

Plan: See Net Tool

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: R. Cawley LPN Date: 11/30/10 Time: 1630

Correctional Medical Services, Inc.

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Nursing Protocols 2008
Minor HEENT Problems

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name	ID#	Date
Wilson, David	2748	8/7/10

Subjective: "If I don't have on my sunglasses when I go out, my migraines will start"

This 26 year old ☒ Male ☐ Female
Presents with a chief complaint of request for sunglasses
Date of onset: 5 wks
Previous history? ☒ Yes ☐ NO If yes explain 6/26, 7-17
C/O headache? ☒ Yes ☐ No If yes any change in frequency, duration or severity compared to previous headaches?
☐ Yes ☐ No If yes explain hx of migraines
Previous treatment? ☐ Yes ☒ No If yes explain
Result of an injury? ☐ Yes ☒ No If yes explain

Associated complaints of :
Pain: ☒ Yes ☐ No Burning: ☐ Yes ☒ No Itching: ☐ Yes ☒ No Blurred vision: ☐ Yes ☒ No
Vertigo / dizziness: ☐ Yes ☒ No Other ☐ Yes ☐ No Explain any Yes responses:

Objective:
Vital Signs BP 122 / 84 T 98.1 P 96 R 20

Eye ☒ Not applicable to complaint
Vision change? ☐ Yes ☒ No If yes explain
Foreign body? ☐ Yes ☒ No If yes explain
Conjunctiva normal ☒ Yes ☐ No If yes explain
PERLA WNL ☒ Yes ☐ No If yes explain
Sclera normal ☒ Yes ☐ No If yes explain
Visual acuity: Pre-treatment RT_____LT_____ Post-treatment RT_____LT_____

Ear ☒ Not applicable to complaint
Both external ears normal ☐ Yes ☐ No Both ear canals normal ☐ Yes ☐ No
Both tympanic membranes Visualize ☐ Yes ☐ No Erythema ☐ Yes ☐ No Bulging ☐ Yes ☐ No
Able to hear fingers rubbed together or watch ticking ☐ Yes ☐ No
Explain any abnormal

Nose ☒ Not applicable to complaint
Active bleeding ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No

Throat ☒ Not applicable to complaint
Enlarged tonsils ☐ Yes ☐ No Inflamed, red throat ☐ Yes ☐ No Exudate ☐ Yes ☐ No

Mouth ☒ Not applicable to complaint
Swollen gums ☐ Yes ☐ No Broken tooth / teeth ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No
Condition of teeth ☐ poor ☐ fair ☐ good

Cervical Lymph Nodes ☒ Not applicable to complaint
Enlarged ☐ Yes ☐ No Tender ☐ es ☐ No

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Assessment (Check applicable boxes)

☒ **Alteration in comfort** ☐ **Potential for altered sensory perception**

Related to

☐ Earache ☐ Excess ear wax ☒ Headache ☐ Dental pain
☐ Nosebleed ☐ Sore throat ☐ Eye injury or problem

Plan (Check applicable boxes)

☒ Physician contacted for same for same day treatment and orders

☐ Referred to Physician/Mid-level due to:
☐ Mechanism of injury suggesting additional trauma ☐ Condition not responding to protocol
☐ Impaired eye status ☐ Impaired ear status ☐ Signs of infection

☐ Referred to dentist due to
☐ Dental pain/problem

The following nursing interventions were completed (Check applicable boxes)

☒ Medication allergies and other contraindications to medications reviewed & pregnancy ruled out prior to treatment
☐ OTC ear wax softener instilled in _____ear(s)
☐ OTC ear wax softener issued to inmate with instructions for use
☐ Ear irrigation completed
☐ Inmate to return in _____days for ear irrigation
☐ Eyes flushed with_____ X _____ minutes
☐ Foreign body removed
☐ Eye patch applied/ issued
☐ Acetaminophen 325mg _____tabs ____times/day for ____days ☐ Issued ___tabs for KOP
☐ Ibuprofen 200mg _____tabs ____times/day for____ days ☐ Issued ___tabs for KOP
☐ Aspirin 325mg _____tabs ____times/day for ____days ☐ Issued ____tabs for KOP
☐ Carbamide Peroxide (Debrox)
15ml bottle _____drops _____Ear ____ times/day for _____days ☐ Issued ____bottle for KOP
☐ Throat Lozenges take _____tabs, q 2 hrs, for _____days ☐ issued ____tabs for KOP
☒ Education: Patient education provided
☐ Activity restriction: ☐ Not indicated ☐ Yes x_____ days and security notified

Follow up:

☐ Return to clinic in _____ days for ear irrigation
☒ Sick call if signs and symptoms of infection develop or symptoms do not subside
☐ Physician/Midlevel referral if indicated

Additional Comments

Pt requesting a profile for sunglasses to wear on the outside. C/O migraine when being in sunlight c sunglasses. Pt states he has been denied but they denied him sunglasses. He also states he has never had a problem c sunglasses until now. Explained to pt. that they would be referred to MD appt made for 8-19-10

Signature / Title	Date	Time
JMilton LPN	8/7/10	1635

CONFIDENTIAL & PRIVILEGED
Protected Health Information
CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 8/7/10
Time Received: 0300

Print Name: David Wilson **Date of Request:** 8-6-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need a profile for Sunglasses so I can go out side and not get migrains if I don't wear sunglass outside I will get migrains because it is bright outside or I need migraine medication for the same reason

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: UM (Initials) **Referred to:** (Circle ONE)
NSC Mid-level SC Physician SC MH Dental
Other: _____

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP _____ T _____ P _____ R _____ Wt _____

Assessment:

Plan:

X David Wilson

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: H. Mutton APN Date: 8/7/10 Time: 1635

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 8-1-10
Time Received: 0530

Print Name: David Wilson **Date of Request:** ~~8-1-10~~ 7-31-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see a Doctor about getting a profile for Sunglasses to wear ~~Sunglass~~ outside, because I will get migrains if I don't wear them I haven't been out side in 5 weeks, Ive worn sunglasses for over 2 years I was told 5 weeks ago I needed a profile in order to wear them

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: KN (Initials) **Referred to:** (Circle ~~ONE~~) (NSC) Mid-level SC Physician SC MH Dental
Other: _____

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP _____ T _____ P _____ R _____ Wt _____

Assessment:

Plan:

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: RN Pettaway Date: 8-1-10 Time: 1715

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name Wilson David	ID# Z748	Date 8-1-10

"I need to see the MD to get a sunglass profile because when I go outside I sunglasses it brings on my migraines

Subjective:

This 26 year old ☒Male ☐Female
Presents with a chief complaint of sunglass request
Date of onset: 5wks
Previous history? ☒Yes ☐NO If yes explain 6/26, 7-17,
C/O headache? ☒Yes ☒No If yes any change in frequency, duration or severity compared to previous headaches?
☐Yes ☐No If yes explain Not @ this time
Previous treatment? ☐Yes ☒No If yes explain
Result of an injury? ☐Yes ☒No If yes explain

Associated complaints of :
Pain: ☐Yes ☒No Burning: ☐Yes ☒No Itching: ☐Yes ☒No Blurred vision: ☐Yes ☒No
Vertigo / dizziness: ☐Yes ☒No Other ☐Yes ☐No Explain any Yes responses:

Objective:
Vital Signs BP 118 / 82 T 98.6 P 75 R 20 Wt 225 O² 97%

Eye ☐ Not applicable to complaint

Vision change?	☐Yes	☒No	If yes explain
Foreign body?	☐Yes	☒No	If yes explain
Conjunctiva normal	☒Yes	☐No	If yes explain
PERLA WNL	☒Yes	☐No	If yes explain
Sclera normal	☒Yes	☐No	If yes explain

Visual acuity: Pre-treatment RT_____LT_____ Post-treatment RT_____LT_____

Ear ☒Not applicable to complaint
Both external ears normal ☐Yes ☐No Both ear canals normal ☐Yes ☐No
Both tympanic membranes Visualize ☐Yes ☐No Erythema ☐Yes ☐No Bulging ☐Yes ☐No
Able to hear fingers rubbed together or watch ticking ☐Yes ☐No
Explain any abnormal

David

Nose ☒Not applicable to complaint
Active bleeding ☐Yes ☐No Signs of trauma ☐Yes ☐No

Throat ☒Not applicable to complaint
Enlarged tonsils ☐Yes ☐No Inflamed, red throat ☐Yes ☐No Exudate ☐Yes ☐No

Mouth ☒Not applicable to complaint
Swollen gums ☐Yes ☐No Broken tooth / teeth ☐Yes ☐No Signs of trauma ☐Yes ☐No
Condition of teeth ☐poor ☐fair ☐ good

Cervical Lymph Nodes ☒Not applicable to complaint
Enlarged ☐Yes ☐No Tender ☐es ☐No

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Assessment (Check applicable boxes)

☒ **Alteration in comfort** ☐ **Potential for altered sensory perception**

Related to

☐ Earache ☐ Excess ear wax ☒ Headache ☐ Dental pain
☐ Nosebleed ☐ Sore throat ☐ Eye injury or problem

Plan (Check applicable boxes)

☐ Physician contacted for same for same day treatment and orders

☒ Referred to Physician/Mid-level due to:
☐ Mechanism of injury suggesting additional trauma ☐ Condition not responding to protocol
☒ Impaired eye status ☐ Impaired ear status ☐ Signs of infection

☐ Referred to dentist due to
☐ Dental pain/problem

The following nursing interventions were completed (Check applicable boxes)

☒ Medication allergies and other contraindications to medications reviewed & pregnancy ruled out prior to treatment
☐ OTC ear wax softener instilled in ________ear(s)
☐ OTC ear wax softener issued to inmate with instructions for use
☐ Ear irrigation completed
☐ Inmate to return in _______days for ear irrigation
☐ Eyes flushed with________________________________ X ____________ minutes
☐ Foreign body removed
☐ Eye patch applied/ issued
☐ Acetaminophen 325mg _____tabs ____times/day for ____days ☐ Issued ___tabs for KOP
☐ Ibuprofen 200mg _____tabs.____times/day for____ days ☐ Issued ____tabs for KOP
☐ Aspirin 325mg _____tabs ____times/day for ____days ☐ Issued ____tabs for KOP
☐ Carbamide Peroxide (Debrox)
15ml bottle _____drops _____Ear ____ times/day for _____days ☐ Issued ____bottle for KOP
☐ Throat Lozenges take ___________tabs, q 2 hrs, for _____days ☐ issued ____tabs for KOP
☒ Education: Patient education provided
☐ Activity restriction: ☐ Not indicated ☐ Yes x_____ days and security notified

Follow up:
☐ Return to clinic in ________ days for ear irrigation
☒ Sick call if signs and symptoms of infection develop or symptoms do not subside
☐ Physician/Midlevel referral if indicated

Additional Comments Pt requesting profile to be able to wear his sunglasses when on th outside, Pt states he has been at this camp for 2yrs+ and didn't have a problem c̄ sunglasses until 5wks ago when a DOC officer told him he ha[d] to have a profile for this. Pt saw eye MD and he didn't write the profil[e] So he was told to sign back up for s/c. Pt states the sunlight brings on the migraines which he has had most of his life. Nurse voiced to pt that this matter will be referred to MD for review.

Signature / Title [signature]	Date 8-1-10	Time 1715

CMS 7835 NP-HEENT-Documentation Form Issue 4 created 1997, Revised 2003, Reviewed 2004, Revised 2005, Revised 2008

CONFIDENTIAL & PRIVILEGED
Improvement Information

FOR MEDICAL USE ONLY
Date Received: 7/17/10
Time Received: 0230

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

Print Name: David Wilson **Date of Request:** 7-16-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to see a Doctor for a sunglasses profile so I'll be able to go outside with out getting migrains everyday due to it beeing to bright for me

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: CP Initials **Referred to:** (Circle ONE)
NSC Mid-level SC Physician SC MH Dental
Other: _____

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP _____ T _____ P _____ R _____ Wt _____

Assessment:

Plan:

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: Debra Rendleton Date: 7-17-10 Time: 1915

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name Wilson David	ID# 2748	Date 7-17-10

Subjective: I have sunglasses in my belongings, but I NEED a doctor profile to make them to wear

This 26 year old ☒ Male ☐ Female
Presents with a chief complaint of _____
Date of onset: _____
Previous history? ☐ Yes ☒ NO If yes explain _____
C/O headache? ☐ Yes ☒ No If yes any change in frequency, duration or severity compared to previous headaches?
☐ Yes ☐ No If yes explain _____
Previous treatment? ☐ Yes ☒ No If yes explain _____
Result of an injury? ☐ Yes ☒ No If yes explain _____

Associated complaints of :
Pain: ☐ Yes ☐ No Burning: ☐ Yes ☐ No Itching: ☐ Yes ☐ No Blurred vision: ☐ Yes ☐ No
Vertigo / dizziness: ☐ Yes ☐ No Other ☐ Yes ☐ No Explain any Yes responses:

Objective:
Vital Signs BP 120 / 90 T 98.5 P 64 R 20 wt 242

Eye ☐ Not applicable to complaint
Vision change? ☐ Yes ☑ No If yes explain _____
Foreign body? ☐ Yes ☑ No If yes explain _____
Conjunctiva normal ☑ Yes ☐ No If yes explain _____
PERLA WNL ☑ Yes ☐ No If yes explain _____
Sclera normal ☑ Yes ☐ No If yes explain _____
Visual acuity: Pre-treatment RT _____ LT _____ Post-treatment RT _____ LT _____

Ear ☑ Not applicable to complaint
Both external ears normal ☐ Yes ☐ No Both ear canals normal ☐ Yes ☐ No
Both tympanic membranes Visualize ☐ Yes ☐ No Erythema ☐ Yes ☐ No Bulging ☐ Yes ☐ No
Able to hear fingers rubbed together or watch ticking ☐ Yes ☐ No
Explain any abnormal

Nose ☑ Not applicable to complaint
Active bleeding ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No

Throat ☑ Not applicable to complaint
Enlarged tonsils ☐ Yes ☐ No Inflamed, red throat ☐ Yes ☐ No Exudate ☐ Yes ☐ No

Mouth ☑ Not applicable to complaint
Swollen gums ☐ Yes ☐ No Broken tooth / teeth ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No
Condition of teeth ☐ poor ☐ fair ☐ good

Cervical Lymph Nodes ☑ Not applicable to complaint
Enlarged ☐ Yes ☐ No Tender ☐ es ☐ No

CMS 7835 NP-HEENT-Documentation Form Issue 4 created 1997, Revised 2003, Reviewed 2004, Revised 2005, Revised 2008

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Assessment (Check applicable boxes)

☑ **Alteration in comfort** ☐ **Potential for altered sensory perception**

Related to

☐ Earache ☐ Excess ear wax ☐ Headache ☐ Dental pain
☐ Nosebleed ☐ Sore throat ☑ Eye injury or problem

Plan (Check applicable boxes)

☐ Physician contacted for same for same day treatment and orders

☑ Referred to Physician/Mid-level due to:
☐ Mechanism of injury suggesting additional trauma ☑ Condition not responding to protocol
☐ Impaired eye status ☐ Impaired ear status ☐ Signs of infection

☐ Referred to dentist due to
☐ Dental pain/problem

The following nursing interventions were completed (Check applicable boxes)

☐ Medication allergies and other contraindications to medications reviewed & pregnancy ruled out prior to treatment
☐ OTC ear wax softener instilled in _____ear(s)
☐ OTC ear wax softener issued to inmate with instructions for use
☐ Ear irrigation completed
☐ Inmate to return in _____days for ear irrigation
☐ Eyes flushed with_____ X _____ minutes
☐ Foreign body removed
☐ Eye patch applied/ issued
☐ Acetaminophen 325mg _____tabs ____times/day for ____days ☐ Issued ___tabs for KOP
☐ Ibuprofen 200mg _____tabs ____times/day for____ days ☐ Issued ____tabs for KOP
☐ Aspirin 325mg _____tabs ____times/day for ____days ☐ Issued ____tabs for KOP
☐ Carbamide Peroxide (Debrox)
15ml bottle _____drops _____Ear ____ times/day for _____days ☐ Issued ____bottle for KOP
☐ Throat Lozenges take _____tabs, q 2 hrs, for _____days ☐ issued ____tabs for KOP
☐ Education: Patient education provided
☐ Activity restriction: ☐ Not indicated ☐ Yes x_____ days and security notified

Follow up:

☐ Return to clinic in _____ days for ear irrigation
☐ Sick call if signs and symptoms of infection develop or symptoms do not subside
☐ Physician/Midlevel referral if indicated

Additional Comments Pt states have a hx of migraine ha, if he do not wear sunglasses will have migraine ha. Hx of migraine ha in free world. Will let MD ~~NEW~~ review pt. jacket

Signature / Title	Date	Time
Debra Poindexter	7-17-10	1915

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Nursing Protocol Documentation
Minor HEENT Complaints

Inmate Name	ID#	Date
Wilson David	2748	6/26/12

Subjective: "I get HA from brightlight" "I had some sunglasses for 2 years but Doc took them away from me" "Can I have some order"

This 26 year old ☑ Male ☐ Female
Presents with a chief complaint of HA R/T the sun/Brightlight
Date of onset: 2003
Previous history? ☑ Yes ☐ NO If yes explain wore sunglasses
C/O headache? ☑ Yes ☐ No If yes any change in frequency, duration or severity compared to previous headaches?
☑ Yes ☐ No If yes explain migrain ~~HA~~ migrane
Previous treatment? ☐ Yes ☑ No If yes explain
Result of an injury? ☐ Yes ☑ No If yes explain

Associated complaints of :
Pain: ☑ Yes ☐ No Burning: ☐ Yes ☑ No Itching: ☐ Yes ☑ No Blurred vision: ☐ Yes ☑ No
Vertigo / dizziness: ☐ Yes ☑ No Other ☐ Yes ☑ No Explain any Yes responses:

Objective:
Vital Signs BP 128 / 96 T 98.6 P 74 R 18 02 97% wt 237

Eye ☐ Not applicable to complaint
Vision change? ☐ Yes ☑ No If yes explain
Foreign body? ☐ Yes ☑ No If yes explain
Conjunctiva normal ☑ Yes ☐ No If yes explain
PERLA WNL ☑ Yes ☐ No If yes explain
Sclera normal ☑ Yes ☐ No If yes explain
Visual acuity: Pre-treatment RT N/A LT Post-treatment RT LT

Ear ☑ Not applicable to complaint
Both external ears normal ☐ Yes ☐ No Both ear canals normal ☐ Yes ☐ No
Both tympanic membranes Visualize ☐ Yes ☐ No Erythema ☐ Yes ☐ No Bulging ☐ Yes ☐ No
Able to hear fingers rubbed together or watch ticking ☐ Yes ☐ No
Explain any abnormal

Nose ☑ Not applicable to complaint
Active bleeding ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No

Throat ☑ Not applicable to complaint
Enlarged tonsils ☑ Yes ☐ No Inflamed, red throat ☐ Yes ☐ No Exudate ☐ Yes ☐ No

Mouth ☑ Not applicable to complaint
Swollen gums ☐ Yes ☐ No Broken tooth / teeth ☐ Yes ☐ No Signs of trauma ☐ Yes ☐ No
Condition of teeth ☐ poor ☐ fair ☑ good

Cervical Lymph Nodes ☑ Not applicable to complaint
Enlarged ☐ Yes ☐ No Tender ☐ es ☐ No

Correctional Medical Services, Inc.
Nursing Protocols 2008
Minor HEENT Problems

Assessment (Check applicable boxes)

☐ **Alteration in comfort** ☐ **Potential for altered sensory perception**

Related to

☐ Earache ☐ Excess ear wax ☑ Headache ☐ Dental pain
☐ Nosebleed ☐ Sore throat ☐ Eye injury or problem

Plan (Check applicable boxes)

☐ Physician contacted for same for same day treatment and orders

☐ Referred to Physician/Mid-level due to:
☐ Mechanism of injury suggesting additional trauma ☐ Condition not responding to protocol
☐ Impaired eye status ☐ Impaired ear status ☐ Signs of infection

☐ Referred to dentist due to
☐ Dental pain/problem

The following nursing interventions were completed (Check applicable boxes)

☑ Medication allergies and other contraindications to medications reviewed & pregnancy ruled out prior to treatment
☐ OTC ear wax softener instilled in _____ear(s)
☐ OTC ear wax softener issued to inmate with instructions for use
☐ Ear irrigation completed
☐ Inmate to return in _____days for ear irrigation
☐ Eyes flushed with_____ X _____ minutes
☐ Foreign body removed
☐ Eye patch applied/ issued
☐ Acetaminophen 325mg _____tabs ____times/day for ____days ☐ Issued ___tabs for KOP
☐ Ibuprofen 200mg _____tabs ____times/day for____ days ☐ Issued ____tabs for KOP
☐ Aspirin 325mg _____tabs ____times/day for ____days ☐ Issued ____tabs for KOP
☐ Carbamide Peroxide (Debrox)
15ml bottle _____drops _____Ear ____ times/day for _____days ☐ Issued ____bottle for KOP
☐ Throat Lozenges take _____tabs, q 2 hrs, for _____days ☐ issued ____tabs for KOP
☑ Education: Patient education provided
☐ Activity restriction: ☐ Not indicated ☐ Yes x_____ days and security notified

Follow up:

☑ Return to clinic in _____ days for ear irrigation
☐ Sick call if signs and symptoms of infection develop or symptoms do not subside
☐ Physician/Midlevel referral if indicated

Additional Comments: Pt wants Sunglasses for Eyes. He stated he was sensitive to light which causes HA. He takes

Signature / Title	Date	Time
[signature]	6/26/10	1500

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

CORRECTIONAL MEDICAL SERVICES
HEALTH SERVICES REQUEST FORM

FOR MEDICAL USE ONLY
Date Received: 6/26/10
Time Received: 0930

Print Name: David Wilson **Date of Request:** 6-25-10

ID #: Z-748 Date of Birth: 3-7-84 Housing Location: I-15

Nature of problem or request: I need to get a profile or something To be able To wear sunglass's out side If I don't wear Them I get bad Migrains

I consent to be treated by health staff for the condition described.

David Wilson
SIGNATURE

PLACE THIS SLIP IN MEDICAL REQUEST BOX OR DESIGNATED AREA

DO NOT WRITE BELOW THIS AREA

Triaged by: _____ **Referred to:** (Circle ONE)
Initials NSC Mid-level SC Physician SC MH Dental
Other: _____

HEALTH CARE DOCUMENTATION

Subjective:

Objective: BP _____ T _____ P _____ R _____ Wt _____

Assessment:

Plan:

☐ Inmate education handout reviewed with and given to the patient.

Refer to : (Circle any applicable) Mid-level Physician MH Dental Other: _____

Signature & Title: _____ Date: _____ Time: _____

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

EYE EXAMINATION SHEET

Facility: Holman Date of Request: 4-10-11

Subjective: I need to see the eye MD to get some sunglasses

Past History: Seen 3-23-11

CONSULTATION REPORT

		W/Glasses	W/O Glasses
Snelling:	OD		20/50
	OS		20/70

OPHTH & EXT:
Dilated Eye Exam
YES **NO**
(circle one)

30 c 60/WK

Mydriatic solution 1 to 2 gts per eye.

Optometrist Signature

Nurse Signature

New RX:
OD -1.00 - 0.50 x 050 / FTW
OS -1.25 075 150 65

52/18/145

Glaucoma: YES NO
(circle one)

IOP: _____
Details:

SUNGLASSES NOT MEDICALLY NECESSARY

Cataracts: YES NO
(circle one)

Details:

Frame:
Size:
Color:
Seg Ht:

5/4/11
Optometrist Signature/Date

Last Name	First	Middle	DOB	R/S	AIS Number
Wilson	David	27	3-7-84	WM	2748

INSTITUTIONAL EYE CARE

P.O. Box 390
Lewisburg, PA 17837
(570) 523-3493
FAX (570) 524-2817

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

PLIANCE FORM

Z748
(Doc#)

PATIENT			DATE	
WILSON, DAVID			3/28/2011	
NUMBER			INSTITUTION	
Z748	HOLM		HOLMAN PRISON UNIT 3700	

	SPHERE	CYLINDER	AXIS	PRISM	BASE
OD	-1.50	-0.50	55	0	
OS	-1.25	-0.75	146	0	
	ADD	HEIGHT	DIST PD	NEAR PD	
OD	0.00	0	66	0	
OS	0.00	0	0	0	

LENS COLOR/COATINGS: Clear

FRAME	STYLE	FRAME COLOR
NICK		GREY

EYE SIZE	DROP BALL\FINAL INSPECTION	FAX FILENAME
52		

LENSES:	$9.75
FRAME:	$3.75
OVERSIZE:	$0.00
TINT/PGX:	
POLYCARB:	$0.00
DIOPTERS:	$0.00
PRISM:	$0.00
CASE:	
OTHER:	
S/H:	$2.10
TOTAL DUE ($):	$15.60

Dan Wilson

-11

11

362992

VISION SAFETY NOTICE:
- Your lenses meet or exceed American National Standard Z80.1 and FDA requirement 21CFR Sec 801.410 for impact resistance but are not unbreakeble or shatterproof. Of all the materials that lenses can be made from polycarbonate is the most impact resistant.

- If struck with sufficient force, the lenses can break into sharp pieces that can cause serious injury to the eye, or blindness. Evan if the lenses do not break, the force of impact may cause the lenses or spectecle frame to contact the eye or surrounding area causing injury.

- The continued impact resistance of your lenses depends on how well you protect them from physical shocks and abuse. For your own protection, scratched or pitted lenses should be replaced immediately.

-If your occupational or recreational activities expose you to the risk of flying objects or physical impacts, your eye safety requires special safety spectacles with safety lenses, side shields, goggles and/or a full face shield.

INMATE NAME (LAST, FIRST, MIDDLE)	DOC#	DOB	R/S	FAC.
Wilson David	Z748	3-7-84	w/m	Holman

ADOC AL-70005-CMS Receipt of Medical Equipment (White – Medical File, Yellow – Security Property Officer)

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

EYE EXAMINATION SHEET

Facility: Holman Date of Request:

Subjective: Request for sunglass profile

Past History: Last seen 7-14-10

CONSULTATION REPORT

		W/Glasses	W/O Glasses
Snelling:	OD		20/50
	OS		20/70

OPHTH & EXT:
Dilated Eye Exam
YES NO
(circle one)

20/c/D/WNL

Mydriatic solution 1 to 2 gts per eye.

Optometrist Signature

Nurse Signature

New RX: OD -1.50 -.50 x 055 / 146/FW
OS -1.25 -.75 66

52/18/145

Glaucoma: YES NO
(circle one)

IOP: _____
Details:

Cataracts: YES NO
(circle one)

Details:

Frame:
Size:
Color:
Seg Ht:

3/23/11
Optometrist Signature/Date

Last Name	First	Middle	DOB	R/S	AIS Number
Wilson,	David		3-7-84	WM	2-748

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

EYE EXAMINATION SHEET

Facility: Holman Date of Request: 12-20-10

Subjective: Request for sun glass profile

Past History: Last seen 7-14-10

CONSULTATION REPORT

		W/Glasses	W/O Glasses
Snelling:	OD		20/50
	OS		20/70

OPHTH & EXT:
Dilated Eye Exam
YES **NO**
(circle one)

Mydriatic solution 1 to 2 gts per eye.

Optometrist Signature

Nurse Signature

New RX: OD

OS

AT COURT

Glaucoma: YES NO
(circle one)

IOP: _____
Details:

Cataracts: YES NO
(circle one)
Details:

Frame:
Size:
Color:
Seg Ht:

Optometrist Signature/Date 12/20/11

Last Name	First	Middle	DOB	R/S	AIS Number
Wilson	David		3-7-84	WM	Z748

INSTITUTIONAL EYE CARE

P.O. Box 390
Lewisburg, PA 17837
(570) 523-3493
FAX (570) 524-2817

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

PATIENT	DATE
WILSON, DAVID	7/22/2010
NUMBER	**INSTITUTION**
Z-748 HOLM	HOLMAN PRISON UNIT 3700

	SPHERE	CYLINDER	AXIS	PRISM	BASE
OD	-1.00	-0.50	47	0	
OS	-0.75	-0.75	152	0	
	ADD	**HEIGHT**	**DIST PD**	**NEAR PD**	
OD	0.00	0	65	0	
OS	0.00	0	0	0	

LENS COLOR/COATINGS Clear

FRAME	STYLE	FRAME COLOR
NICK		GREY

EYE SIZE	DROP BALL\FINAL INSPECTION	FAX FILENAME
52		

LENSES:	$9.75
FRAME:	$3.75
OVERSIZE:	$0.00
TINT/PGX:	
POLYCARB:	$0.00
DIOPTERS:	$0.00
PRISM:	$0.00
CASE:	
OTHER:	
S/H:	$2.10
TOTAL DUE ($):	$15.60

* 3 3 8 6 9 1 *

VISION SAFETY NOTICE:
- Your lenses meet or exceed American National Standard Z80.1 and FDA requirement 21CFR Sec 801.410 for impact resistance but are not unbreakable or shatterproof. Of all the materials that lenses can be made from polycarbonate is the most impact resistant.

- If struck with sufficient force, the lenses can break into sharp pieces that can cause serious injury to the eye, or blindness. Even if the lenses do not break, the force of impact may cause the lenses or spectacle frame to contact the eye or surrounding area causing injury.

- The continued impact resistance of your lenses depends on how well you protect them from physical shocks and abuse. For your own protection, scratched or pitted lenses should be replaced immediately.

-If your occupational or recreational activities expose you to the risk of flying objects or physical impacts, your eye safety requires special safety spectacles with safety lenses, side shields, goggles and/or a full face shield.

LIANCE FORM

Z748
(Doc#)

27-16

INMATE NAME (LAST, FIRST, MIDDLE)	DOC#	DOB	R/S	FAC.
Wilson David	Z748			Holman

ADOC AL-70005-CMS Receipt of Medical Equipment (White – Medical File, Yellow – Security Property Officer)

CONFIDENTIAL & PRIVILEGED
Quality Improvement Information

EYE EXAMINATION SHEET

Facility: Holman Date of Request: 6/28/10

Subjective: per Dr. Judd (please evaluate for HA + need for syn glasses)?

Past History:

CONSULTATION REPORT

		W/Glasses	W/O Glasses
Snelling:	OD	~~20t~~	20/50
	OS	~~20/70~~	20/70

OPHTH & EXT:
Dilated Eye Exam
YES **NO**
(circle one)

10% c60/Wa

Mydriatic solution 1 to 2 gts per eye.

Optometrist Signature

Nurse Signature

New RX:
OD -100 050 047
OS -075 075 x 152 / 24 / 65

Glaucoma: YES NO
(circle one)

IOP:
Details:

52/18/145

Cataracts: YES NO
(circle one)

Details:

SUNGLASSES NO?

MEDICALLY NECESSARY

Frame:
Size:
Color:
Seg Ht:

MJ 7/19/10
Optometrist Signature/Date

Wilson	David		3/7/84		2-748
Last Name	First	Middle	DOB	R/S	AIS Number

26

INMATE REQUEST FORM

INMATE NUMBER: 35745 INMATE NAME: David Wilson

DATE: 2-22-11 POD/CELL LOCATION: J-6 DEPUTY RECEIVING: Hagler

TO: RECORDS & DOCKET / MEDICAL / COMMISSARY / SUPV. ON DUTY / PROPERTY / CHAPLAIN

RECORDS / DOCKET (INFORMATION NEEDED):

[ ] JUDGE NAME _____

[ ] ATTORNEY NAME _____

[ ] ATTORNEY ADDRESS _____

[ ] ATTORNEY PHONE # _____

[ ] CITY / STATE / ZIP _____

[ ] COURT DATE(S) _____

[ ] CASE NUMBERS(S) _____

_____

_____

[ ] OTHER: _____

_____

COMMISSARY (INFORMATION NEEDED):

[ ] ACCOUNT BALANCE _____

[ ] ACCOUNT SUMMARY _____

[ ] AMOUNT OWED _____

[ ] OTHER INFORMATION _____

_____

_____

MEDICAL SERVICES: (BE SPECIFIC)

I need to see the Nurse about me getting headaces because of The bright lights and migrains From it being to bright outside for my eyes

PROPERTY SERVICES: (BE SPECIFIC)

_____

_____

_____

CHAPLAIN SERVICES: (BE SPECIFIC)

_____

_____

_____

_____

_____

OTHER SERVICES NEEDED: CIRCLE

FINGERNAIL CLIPPERS

LAW LIBRARY: IF NOT ON LOCKDOWN

APPLYING FOR INMATE WORKER STATUS

OTHER: _____

_____

DDITIONAL ACTION TAKEN: _____

_____

_____

_____

Revised 01/2011

INMATE REQUEST FORM

INMATE NUMBER: 55745 INMATE NAME: David Wilson

DATE: 2-17-11 POD/CELL LOCATION: J-6 DEPUTY RECEIVING: Russell

TO: RECORDS & DOCKET / MEDICAL / COMMISSARY / SUPV. ON DUTY / PROPERTY / CHAPLAIN

RECORDS / DOCKET (INFORMATION NEEDED):

[ ] JUDGE NAME _____

[ ] ATTORNEY NAME _____

[ ] ATTORNEY ADDRESS _____

[ ] ATTORNEY PHONE # _____

[ ] CITY / STATE / ZIP _____

[ ] COURT DATE(S) _____

[ ] CASE NUMBERS(S) _____

_____

_____

[ ] OTHER: _____

_____

COMMISSARY (INFORMATION NEEDED):

[ ] ACCOUNT BALANCE _____

[ ] ACCOUNT SUMMARY _____

[ ] AMOUNT OWED _____

[ ] OTHER INFORMATION _____

_____

_____

MEDICAL SERVICES: (BE SPECIFIC)

I need to see The Doctor about me having migrains When exposed to Bright lights

PROPERTY SERVICES: (BE SPECIFIC)

_____

_____

_____

CHAPLAIN SERVICES: (BE SPECIFIC)

_____

_____

_____

_____

_____

OTHER SERVICES NEEDED: CIRCLE

FINGERNAIL CLIPPERS

LAW LIBRARY: IF NOT ON LOCKDOWN

APPLYING FOR INMATE WORKER STATUS

OTHER: _____

_____

ADDITIONAL ACTION TAKEN: _____

_____

_____

_____

Revised 01/2011

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DOYLE LEE HAMM, Plaintiff,

vs.

JEFFERSON S. DUNN, ET AL., Defendant.

CV-17-KOB-2083-S

January 31, 2018

Birmingham, Alabama

9:00 a.m.

* *

REPORTER'S OFFICIAL TRANSCRIPT OF HEARING

BEFORE THE HONORABLE KARON O. BOWDRE
UNITED STATES CHIEF DISTRICT JUDGE

COURT REPORTER:
Teresa Roberson, RMR
Federal Official Court Reporter
1729 Fifth Avenue North
Birmingham, Alabama 35203

* * * * *

A P P E A R A N C E S

* * * * *

FOR THE PLAINTIFF:

Bernard E. Harcourt
Columbia Law School
435 West 116th Street
Suite 603
New York, NY 10025

FOR THE DEFENDANT:

Thomas Govan, Jr.
Beth Jackson Hughes
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130

* * * * *

P R O C E E D I N G S

* * * * *

THE COURT: Good morning. We're here on the matter of Doyle Hamm vs. Jefferson Dunn, Commissioner of the Alabama Department of Corrections.

As you know, Mr. Hamm has filed an amended complaint seeking preliminary injunctive relief as to the manner of the execution that has been set for February 22nd. His complaint is the kind that's referred to as an as-applied challenge to the method of execution.

Preliminarily, we have to address the defendant's motion to dismiss or alternatively for summary judgment because evidentiary materials were submitted in support of that motion, I notified counsel that we would be converting that to a motion for summary judgment and gave counsel for both sides the opportunity to submit all evidence that they wish considered on the motion for summary judgment.

The motion basically challenges the timeliness of Mr. Hamm's complaint, so that will be the first thing that we take up today.

For purposes of the record, I want to note that I am treating all of the exhibits that were offered in support of or objection to the motion for summary judgment as admitted for purposes of the summary judgment hearing only.

At this time, if counsel would like to, I will give you an opportunity to make a little preliminary statement.

As I explained to counsel, I have got lots of questions and that's where the focus will be for most of the morning.

I guess since it is the Department of Corrections' motion, Mr. Govan, you in this case would be the one to make the first statement, if you would like to.

MR. GOVAN: Yes, Your Honor. Thank you. Thomas Govan on behalf of the Department of Corrections.

As we set out in our motion for dismiss and alternative summary judgment motion, the grounds that -- legal grounds that, even assuming the facts as true, demonstrate that we're entitled to summary judgment in this case for two -- interrelated but different reasons. The first is unreasonable delay based on laches.

Based on the facts of this case, the delay with which Mr. Hamm filed his 1983 complaint falls straight under precedent from the Eleventh Circuit affirming dismissals and denials of stays of execution based on unreasonable delay.

The facts of this case is Mr. Hamm's federal habeas petition was denied in October of 2016, when the Eleventh Circuit has held that an inmate who has a reasonable regard for his rights to know that it would be

likely an execution date would be set, Mr. Hamm did not file a 1983 challenge then.

When the State moved to set an execution date in June of 2017, Mr. Hamm still did not file a 1983 complaint and waited until December 13th, the day the Alabama Supreme Court set his execution date.

And courts have held, from the Eleventh Circuit as well, that those situations justify a dismissal based on laches.

To the extent he has alleged that his medical conditions may have caused him to -- is a justification for delay, again, assuming the facts and the allegations that -- the factual allegations in the complaint as true, he has alleged that this problem with his intravenous access is based on a long-standing medical condition, and there is no evidence in the record that any changes occurred recently that would justify his delay in this case.

The second is statute of limitations. And the Eleventh Circuit in McNair has set out the standard for that, that an accrual for 1983 claim accrues when direct review is complete or when an execution protocol is subjected to a substantial change.

Well, for practical purposes, Alabama has been employing lethal injection since 2002. So, Mr. Hamm has been aware since then that that would require venous access

in this particular case.

And the evidence in his complaint, attached with it Dr. Heath's affidavit, where Mr. Hamm reported that he had allegedly had difficulty obtaining venous access since 2014. And there's no evidence in the record that a substantial change has occurred in the execution protocol or that there had been recent developments in his health from any medical records or medical testimony that would show how anything has changed in the past two years in his condition, much less since 2002.

For all of those reasons, Your Honor, even assuming the facts in the light most favorable to the plaintiff, the defendants would be entitled to summary judgment based on laches and statute of limitations grounds.

Thank you.

THE COURT: Thank you. Mr. Harcourt.

MR. HARCOURT: Thank you, Your Honor. As the Court correctly stated, this is an as-applied challenge. And in part, that's a very important aspect of this case.

There's been a lot of litigation about the use of lethal injection, there has been a lot of lethal injection litigation. This is not that kind of a case. Those kind of cases have been going on across the country, and also in Alabama, but this is a completely different case because it is as-applied and raises particular issues about, centrally,

about Mr. Hamm's venous access.

Now, as the Court correctly noted in its orders, there are really two questions this morning: The first is a question on the substance, whether there are genuine issues of material fact concerning any legal claims.

There are lots of twos in this case. That's the first real question. And there are two claims here. The claim regarding venous access and then the claim regarding the Eighth Amendment cruel and unusual punishment as a whole.

In that first claim, in the first count, there are also two prongs to that, which is the first, risk of substantial harm; and then second, an alternative.

Now, I would say that on that whole cluster of issues involving kind of the substance of the two claims, that there -- that there are -- I believe, clearly, central issues in dispute.

The most key issue being that basically my expert believes, based on his expert opinion, that it would be practically impossible to put a catheter in the one small tortuous vein that Doyle Hamm has. And, on the other hand, one of the witnesses for the State of Alabama seems to indicate that Doyle Hamm has many veins that would be accessible.

So, I think that brings us then to the second

issue for us this morning which has to do with the timing of the case which was what Counsel Thomas Govan raised which has to do with the laches precedent.

On that claim, what I would like to suggest is that this case is somewhat sui generis and completely different than all of those other decisions that have addressed the question of laches and equitable remedies.

And it's sui generis and completely different because the Alabama Supreme Court initiated a process of review and essentially took the case under its -- under its jurisdiction, under its control, under its wing entering orders for me to be allowed to have a medical expert, asking me to file weekly updates, weekly updates, I filed six weekly updates. And in that sense the case was rightfully in front of the Alabama Supreme Court.

Now -- and I say rightfully because they're the Court that signs the execution warrant. And we were rightfully in front of them asking for the protocol. I was asking the Alabama Supreme Court -- well, I asked counsel for the defendants, who were not willing to turn it over to me, I asked for orders from the Alabama Supreme Court for the protocol.

I got an order for a medical examination. I asked for the Alabama Supreme Court to appoint a special master to kind of review what's going on in this case.

I asked them for an independent medical examination so that it wouldn't just be my doctor. And so -- and so the Alabama Supreme Court was completely on top of the case.

In fact, one pleading I filed where I tried to explain Doyle Hamm's situation, and we'll come to it when we go through the exhibits, the Alabama Supreme Court sua sponte treated, as a second motion for an extension of time, an enlargement of time to respond to them, sua sponte.

So it was clear that the case was in front of the Alabama Supreme Court where -- which is the right -- which is the rightful court to be hearing this case. They are the ones who set the execution date.

So, there's something -- there's -- this case is sui generis on those equitable principles and was perfectly before the Alabama Supreme Court until they decided to set an execution date on December 13th, whereupon, I immediately, the same day, filed in federal court.

I believe, and I will argue later, that it would have been a violation of principles of comity, principles of federalism to simply file in federal court when the Alabama Supreme Court was handling the case.

And I have some cases that I would like to discuss.

When we have -- when -- in response to the Court's

questions, perhaps I'll go through the exact time line. I realize we're trying to keep our introductions very short.

I have just a few kind of slides that show the time line, and I can go through those as soon as the Court would like to ask those kinds of questions.

Thank you, Your Honor.

THE COURT: All right. Thank you. I do want to state for the record that this morning we're going to be talking just about the timeliness issue. There is some overlap between allegations in the complaint and evidence offered in support of it and in opposition to the timeliness motion that touches on issues that are involved in the merits that we have to at least consider while discussing whether the complaint should be dismissed based upon unreasonable delay or a statute of limitations argument.

But as much as we can, I want to keep us kind of focused on that timeliness at this initial session.

I would like to set out what I have found to be basic undisputed facts that bear upon the decision of timeliness. And, of course, I think we all know that the summary judgment standard is whether the movant has established that there are no genuine issues of material fact and, if no material issues of fact, is the movant entitled to judgment as a matter of law. In this case, would the defense be entitled to dismissal of the case based

upon laches or statute of limitations.

So, although in brief the commissioner argues that there are quite a few undisputed facts, I have found that many of those are disputed. So these are the ones that I have found to be undisputed that are relevant to the issues here this morning.

First, it's undisputed that Mr. Hamm was convicted of capital murder and sentenced to death in 1987. His sentence became final in 1990.

In 2002, Alabama adopted its current method of execution by lethal injection.

In 2014, Mr. Hamm was diagnosed with B-cell lymphoma and particularly had -- would we call it a tumor behind his left eye? Is that the appropriate term?

MR. HARCOURT: Yes, Your Honor.

THE COURT: Don't ever hesitate to correct me on medical issues or statements today.

That tumor was treated. And while the defendant asserts correctly that there is no certain evidence that Mr. Hamm's lymphoma is still active, there also is no certain evidence that Mr. Hamm's lymphoma is not still active.

And I note for that purpose the medical scans and reports from 2014 and 2015 regarding lymph nodes in the chest and abdomen that never were tested or treated.

We also have Dr. Roddam's affidavit saying he examined Mr. Hamm on January 2nd, 2018, and found no evidence of lymphadenopathy in the cervical supraclavicle or axillary areas of Mr. Hamm's body.

But we don't have any evidence about an examination below the clavicle or in the abdomen where nodes -- where knots were noted in March of 2017.

We've got a series of affidavits from nurses at the prison facility about the dates on which they attempted to draw blood and were either successful or unsuccessful and how many pricks or sticks were necessary.

But we also have Mr. Hamm's affidavit that doesn't dispute that those efforts were made, but disputes the number of sticks that were necessary before blood could be drawn.

We do have, as undisputed, that on December 13th, 2017, the Alabama Supreme Court set Mr. Hamm's execution date for February 22nd, 2018, and on that same date Mr. Hamm filed this 1983 suit.

Also undisputed, but not particularly listed in the undisputed facts by the defendants, is that Mr. Hamm contested the setting of the execution date in the Alabama Supreme Court for the same or similar reasons to those asserted in his 1983 action here.

I do think that there are some significant

disputes of fact or disputed facts that may or may not be determinative of the issue today of the timeliness but I do think it's important to note some of those.

While the defendants assert that Mr. Hamm's cancer went into remission in March of 2016, I may have missed in the voluminous submissions medical evidence of an oncologist so declaring, so that's one thing that, if you can point it to me, I would love to see.

The plaintiff asserts, however, that the cancer is not in remission, that aspects of his lymphoma were not treated when noted in 2014 and 2015, particularly the lymph nodes in the chest and abdomen area.

Also, Dr. Heath's October 2017 affidavit states that Mr. Hamm has active B-cell lymphoma. I would like to know at some point how that determination is made when there have not been any scans or examinations by an oncologist since, I believe it was, March of 2015. Dr. Blanke does state that it's impossible to state with any degree of certainty whether or not he has active lymphoma overall. So those are factual issues.

As I noted previously, none of the medical records that I saw revealed any treatment of the noted issues with nodules in the chest and abdomen that were made in 2014 and 2015 in the scans.

So, I do think that there are a lot of questions

about Mr. Hamm's current medical condition. Those may or may not affect the timeliness issue but they are disputes that I find.

Mr. Hamm says in his affidavit that beginning in March of 2017, the cancer -- I'm sorry, this is from the amended complaint, says that the cancer has returned and he's been experiencing lymphadenopathy associated with earlier diagnosis.

So I have some questions about how the plaintiff can assert affirmatively that the cancer is back, again, without any scans or anything to affirmatively support that.

And I guess this is as good a time as any for me to begin with some of the questions that I have about these medical records and medical conditions.

And these may not necessarily be questions that can be answered today, but they do raise for me some real issues about what is going on with Mr. Hamm.

I noted previously Dr. Roddam's affidavit about his examination of Mr. Hamm on January 2nd and that he found no evidence of lymphadenopathy in the cervical supraclavicle or axillary areas of Mr. Hamm's body. So that covers his neck, above the collar bone and his armpits. What about the other areas of Mr. Hamm's body and how do these areas relate to the areas where Mr. Hamm complained about having lumps or feeling knots in his chest and abdomen in March of 2017?

I guess I raise that more as one of those questions that doesn't have to be answered at this time, but it's a question that kept coming into my head.

Also, this I do believe, Mr. Govan, you can answer for me, is Dr. Roddam an oncologist?

MR. GOVAN: No, Your Honor.

THE COURT: Okay. Do you know when the last time was that the Department of Corrections had an oncologist examine Mr. Hamm?

MR. GOVAN: Your Honor, I am not sure of the exact last date.

However, I will say that there is evidence in the record from -- and this is at Exhibit 1 from the evidence that we submitted, Bates stamp 331 which is a report from Brookwood Cancer Care Center of March of 2016. And in the report, I believe it notes that the diagnosis was that he was stable, follow up, but there were no new symptoms in regard to the orbital lymphoma.

I'm sorry, 331 of this -- this is in the -- Mr. Hamm's medical records --

MR. HARCOURT: Document 23 of 31?

MR. GOVAN: No. This is actually in Defendant's Exhibit Number 1 for the evidence that we submitted last week.

THE COURT: What was the page number?

MR. GOVAN: 331.

MS. HUGHES: Bates stamp 331.

MR. GOVAN: It is a March 2016 --

THE COURT: Okay.

MR. HARCOURT: Is it this (indicating)?

MR. GOVAN: Yes. And I will note that from this document it appears it was a follow up from the orbital lymphoma that was operated on -- excuse me, radiation was conducted on, this follow up was dated March 15th, 2016. At the bottom, stable with no new symptoms. He'll be seen again in six months with a follow up MRI if approved by the prison system.

Judge, one of the things that you had a question on was the lymphadenopathy. And I have several arguments on that. But I just wanted to note in particular the lymphatic -- it says, there are no palpable nodes in the cervical supraclavicle axillary or inguinal areas. I may be mispronouncing that.

THE COURT: Okay. I know what the first three areas are. What is inguinal?

MR. GOVAN: Your Honor, I do not know standing here at this moment.

THE COURT: Okay. So that is the only difference from Dr. Roddam's affidavit.

So, is this the basis for the defense argument

that he's been in remission since March of 2016?

MR. GOVAN: Partly, Your Honor. But there's other reasons as well that there -- number one, there has been no other report that I'm aware of where anybody has found anything suggesting that he -- that it has returned.

And there are -- littered throughout his medical records are statements that the left orbital lymphoma is in remission.

And I can --

THE COURT: Right. But that would be in his head area.

MR. GOVAN: Correct.

THE COURT: Right? And in March of 2017, he began complaining about -- I'm trying to remember exactly the word that he used, lumps or knots in his chest and abdominal areas. And those were confirmed in the medical records by, I think it may have been perhaps a nurse practitioner who had examined him at that time.

MR. GOVAN: Your Honor, if I can respond, this is at Page 146 of Defendant's Exhibit 1. And this appears to be a note from the records about Mr. Hamm's complaint about the knots in his chest. And I know it's hard to read, but it appears to say chest X-ray, I think, normal. The fourth line down from the bottom.

THE COURT: Right.

MR. GOVAN: Just more of a global point, Your Honor, whether or not -- even assuming as true that Mr. Hamm may have had knots in his chest, that is not relevant to his ultimate claim, or at least we have not seen any allegation in his complaint about how that will be relevant to whether he has venous access, particularly in arms, in legs. And there has been no allegation -- for example, assuming that there are lymph nodes on his chest. Mr. Hamm has not made an allegation of how that would be relevant to establishing venous access.

He has made an allegation that potentially, if there was some around his neck, that it might impact applying a central venous line, but that fact that he's alleging right there regarding his chest would not impact his neck.

And there have been no allegations why, even assuming it's true that there are lymph nodes that occurred in his chest, how that would have any relation to the ability for him -- venous access in his arms, legs, anywhere else on his body.

He has never asserted that venous access would be done by inserting an IV in his chest. And for our understanding, that would not be a procedure either.

So we would --

THE COURT: All right. But I was viewing that as

more of potential indication of issues with the lymphatic system that could be beyond those that were palpated in his chest and abdomen.

If there are, in fact, impacts on the lymphatic system, could that also impact the ability to access veins that could be impacted by the problem with the lymphatic system?

MR. GOVAN: Two points on that, Your Honor. From what I understand about lymphadenopathy, that can be caused by many different things. And lymphatic cancer may or may not be one of them. But that can be caused by things that have nothing to do with cancer.

In fact, if you look at Mr. Hamm's medical records, some of the medical records that he is seeking to submit today shows he's complained about lymphadenopathy for many, many years.

Of course, that would fall into our timeliness arguments. But also there has been no allegation that I'm aware of from his complaint that even assuming that there was some lymphatic cancer that had returned, even assuming that that has a relationship to the complaints of the knots in his chest, that would affect his peripheral venous access. They appear to be two separate issues.

Now, Dr. Heath, the only allegation that I can see from his affidavit is that if there were swollen lymph nodes

in his neck, that that could affect one potential place where a central line could be done.

But absent that, I'm not aware of any allegation that would relate to how, even assuming the lymphatic cancer has returned, which there is no evidence of that, even assuming that he has -- currently has lymph nodes on his chest that are enlarged, again, he reported that in March, that wouldn't have any relation to the ability to obtain venous access on Mr. Hamm.

THE COURT: Well, that gets to a lot of the unknowns. And I certainly do not even pretend to understand medicine. But, I noted that a chest X-ray was done, but is an X-ray the appropriate diagnostic tool for determining whether there is any cancerous lesions or nodules in the chest area?

I mean, I don't know if that would show up on an X-ray.

MR. GOVAN: I don't know the answer to that question, Your Honor. I think, again, it was -- again, for the complaint from the medical records in that particular -- there was no -- at that point, does not appear the complaint was about cancer. It was about knots on his chest. And it appears from the medical records that the X-ray was taken in regards to that problem, not -- there was no allegation even from Mr. Hamm that I can see in that medical record that he

is saying that the cancer has returned. He was complaining about the knots on his chest.

Again, even -- I'm not sure of the answer ultimately how that would be diagnosed, we would contend the ultimate issue is, regardless, there is no nexus to how that would relate to gaining peripheral IV access on Mr. Hamm.

THE COURT: Mr. Harcourt, how does the potential presence of knots in Mr. Hamm's chest affect peripheral access?

MR. HARCOURT: Thank you, Your Honor. So, Your Honor, you're correct that there are two health conditions that are interfering with a potential lethal injection.

One has to do with his veins and whether it's even possible to put a catheter in his peripheral veins which would be arms, hands, legs and feet. And that addresses the question of peripheral access.

There are some important issues here regarding the lethal injection protocol that we're not going to get into about -- in public, is my understanding, because there is a confidentiality agreement surrounding that. But I received the lethal injection protocol yesterday afternoon under the confidentiality agreement. And I would say that having reviewed that it raises enormous constitutional questions, which we can address separately, involving the questions of both access to his veins. And we can perhaps do that in

camera.

So, there's one issue of peripheral access and there's another issue of possible central venous access.

Central venous access is a very -- it requires operating room and sonograms to determine where the veins are so you don't hit an artery. This is not something you do in your garage.

Central venous access requires anesthesiologists who could anesthetize someone and then, using sonograms, tilting, et cetera, where they are going in, possibly find a central vein which is further in our bodies.

And that raises the second major question which has multiple dimensions, not just those that go to the protocol itself, which we will address in camera, but central questions about how then would lymphatic cancer potentially affect that.

THE COURT: All right. So let me stop you there just briefly.

So it is not your contention that any possible lymphatic cancer would impact the peripheral venous access but could affect the potential central venous access if that were necessary; is that the argument?

MR. HARCOURT: Let me make a slight modification on that. The lymphatic cancer was a key contributing factor -- was a key contributing factor to the deterioration

of his health leading gradually over the course of many years to a point where it is practically impossible to draw blood from the one remaining small tortuous vein on his right hand.

And you will note that this isn't from my exhibits, it's in the defendant's, in the defendant's exhibits, that when they have been trying to get venous access to draw blood, which is very different from inserting a thick catheter, they have been repeatedly, even failing, after failure, going to that one small tortuous vein on the right hand.

And if you look at the affidavit of Ms. Kelley McDonald, who is the nurse who was trying to get access to his veins with a butterfly needle, tiny needle, to draw blood, we're not trying to put in a robust catheter here. She goes -- October 3rd she goes to the vein in the right hand and there are five attempts in the course of that little affidavit that she relates. She first goes on October 3rd into the right hand, she couldn't draw blood. This was the first time, apparently, she -- from the affidavit, it seems that she begins working there in October, I'm not entirely sure, we haven't been able to depose witnesses or anything, but it seems it says she starts working in the lab at Donaldson in October 2017.

And she -- the first place she tries to draw

blood -- and I assume, I know when you are trying to draw blood, you're trying to find the best place. She zeros in, like a V-line into this little vein on the hand and couldn't draw blood on October 3rd. This would have been with a needle. Two sticks. She tries twice into the right hand.

Now, she tries a second time into that little vein after she hasn't been able to get in, assuming if you are not able to get into that little vein the first time, you might look somewhere else since, apparently, according to their experts, he has veins all over that would be accessible for a large catheter.

October 31st, she tries again, the right hand, two times. Now, she had had problems before and she's -- I won't go over that testimony, but she goes about five times, every single time trying to stick the same place having problems not going elsewhere. That is a reflection --

THE COURT: So the argument is that the lymphatic cancer that he had in 2014 may have been in remission in March of 2016, may be perhaps back or we cannot emphatically say one way or the other without tests, that its impact was over the course of time accelerating or affecting the deterioration of the peripheral veins that had been going on for some time because of all of his history of drug use and Hepatitis C and all those other kinds of things.

MR. HARCOURT: Let me add a few things to that

because that's a piece of the picture but it's not all of it.

THE COURT: I'm trying to make sure I understand what impact you say the lymphatic cancer has on peripheral access.

MR. HARCOURT: Yes. So, there is the fact that the lymphatic cancer is itself a health deterioration which, along with the other elements, age, of course, but prior medical history, prior drug use also, intravenous drug use, and also the treatment, all of the cancer treatment. In other words, you get pricked a lot and veins and they're putting a lot of contrast into your veins for all of the treatment, and that also has an affect on the health of your veins.

So, on the venous access, it is a question of a long history compounded by the lymphatic cancer and the treatments for the lympathic cancer, trying to get in. And I believe in 2014, they were able to get in in that right vein in 2014 for some of the contrast or something like that, but -- and I'm not a doctor and this is where medical expertise would seem very important, getting into a vein once or twice or -- veins don't last -- that harms the vein, actually, and as a result of that repeated use, et cetera, the veins get damaged. As a result of putting in contrast, the veins get damaged, et cetera.

So we have the lymphatic cancer which itself is deteriorating his body, but then we also have the treatments, et cetera.

Now, on the lymphatic cancer, though, and you had a lengthy back and forth with defendant's counsel, Mr. Govan, I would like to say a few things about his lymphatic cancer.

I would -- it's difficult -- it's practically impossible on the state of the medical examinations that have been done, because the proper examinations have not been done, to determine whether or not Doyle Hamm has -- whether or not his lymphatic cancer, which was diagnosed, I mean, clearly he had a huge mass in his skull, back in his eye, it was radiated, so he has had lymphatic cancer, it's practically impossible because we don't have the right medical workup to know what's going on in his body right now. That's the God's honest truth.

We can tell --

THE COURT: I think I noted that as a disputed issue of fact because we don't have complete medical information because there has not been an exam by an oncologist, there has not been any scans to determine.

MR. HARCOURT: We do know for sure, and we can observe -- I would state for the record, I would like the record to reflect that Doyle Hamm has a huge lesion on his

cheek underneath his eye, his left eye, and the massive cancer was behind his left eye and he still has a large quarter-size lesion on his cheek indented. It goes back like six centimeters.

THE COURT: Hasn't that been diagnosed as --

MR. HARCOURT: It was diagnosed in 2014 as carcinoma, in 2014, in February of 2014. And in Defendant's Exhibit -- Plaintiff's Exhibits --

THE COURT: I think it's undisputed that that carcinoma has not been removed.

MR. HARCOURT: That is undisputed.

THE COURT: So that may also impact his overall health condition.

MR. HARCOURT: Yes, Your Honor. It's been biopsied three times. This is in Plaintiff's Exhibit 7.

THE COURT: All right. I think what we need to be focusing on now, though, is --

MR. HARCOURT: Sorry. The lymphatic --

THE COURT: What we need to be focusing on now are the questions that go to the timeliness. And his medical condition is a big unknown because there have not been tests that would definitively address whether he has lymphatic cancer now, what impact that may have on venous access and things of that nature.

I'm fully aware of those unknowns and those

questions.

But what I'm trying to get to is actually a response to Mr. Govan's argument that there's not been any linkage of these potential health risks to peripheral access. And you have now explained that they go to the continuing process of deterioration of Mr. Hamm's veins, peripheral veins.

And I'm assuming also, based upon Dr. Heath's affidavit, that if there are, in fact -- if there is, in fact, lymphatic cancer, that could affect lymph nodes and other things in the various areas of Mr. Hamm's body into which central venous access might be tried as an alternative.

So, all of those issues, as I see them, are disputed factual questions.

But the issue as to timeliness really is more when could Mr. Hamm have known that these unknown health issues could affect the constitutionality of lethal injection as administered by the Department of Corrections as to Mr. Hamm.

MR. HARCOURT: Yes, Your Honor.

THE COURT: That is kind of a long way of getting around to that issue. But that's the issue that we have to focus on this morning.

MR. HARCOURT: Yes, Your Honor. Let me try to be

as brief as possible to get right to that question. And to do that, I am going to lay two foundations.

One which goes back to the question of lymphatic cancer. So the first quick foundation, because there was a lot of discussion about that, and I think this is important. The best way to determine whether he has lymphatic cancer or not would be, and I'm not a doctor, but from consulting some oncologists, would be a PET scan and a bone marrow, I think it's a biopsy, some kind of way of testing the bone marrow. Okay. And those were actually suggested by the doctors at Brookwood.

So, if you look in Defendant's Exhibit -- no, Plaintiff's, I have got them marked in Plaintiff's Exhibits from Donaldson, on Page 152, Bates Page 152, this is Exhibit 8, it's a separate binder, it's Plaintiff's Exhibit 8 which is a seven hundred seventy-seven page document.

MR. GOVAN: What Bates stamp?

MR. HARCOURT: Page 152 and 135, Bates stamped on the bottom right-hand side of defendant's -- and this is Exhibit 8. I provided the Court with two binders, there is a separate binder for medical Exhibit 8.

THE COURT: What was that number again?

MR. HARCOURT: I'm going to Page 152, right-hand side. It's a CT just contrast and there's a big paragraph in the middle where they talk about a PET study may be of

benefit for further evaluation depending on the clinical situation. A PET study, P-E-T.

On Page 135 as well, on Page 135 of that document, which are the Donaldson records that have come in both by defendants and by the plaintiff, 135, there's a big paragraph there, history of lymphoma. At the end of it, it would be best to have a PET scan, this can't be done, CT scans haven't been found -- that's at early stage.

Basically, my understanding is, proper -- kind of proper reasonable care in this condition where he has a bulging thing would be to try and get a PET scan because that's the real way to figure out whether someone has lymphoma or marrow. It's never been done in this case.

One of the issues in this case is -- goes to count two, but I think it fuses this whole situation is whether he has received adequate care.

And I think that if -- and I'm going to quickly end my first point on lymphatic cancer, and the fact that he's here four years later with this lesion on his face that has been biopsied three times and ordered to be removed by the doctors, but never removed, indicates that we have issues about the medical care that he's received that results in the fact that I'm without -- I do not have the scans, et cetera, to show that all of these suspicions of the lymph node problems all over his body are actually

continuing. So that is one thing about that.

THE COURT: Maybe I wasn't clear. But I thought I had recognized that as being a major problem. And I have a lot of questions about what his condition is today. And it does seem to me that the Department of Corrections controls Mr. Hamm's access to medical care, the Department of Corrections controls decisions as to whether PET scans or CT scans or any other kind of scans are done to determine his medical condition.

And it does seem to me when we're talking more in line with equitable issues that the entity that controls the only method of determining whether someone's health condition has deteriorated to the state where it could impact the ability to access veins for intravenous injection, that it seems to me to cut against the equitable argument of laches when the Department of Corrections has not done those things that could put to rest Mr. Hamm's allegations or could bring into play the need for a different approach to execution of Mr. Hamm's sentence. And I recognize that.

But I do want to spend as much time as we can talking about the things that we do know. Okay. And I'm with you completely on this inability of Mr. Hamm to definitively state today what is going on, what is the scenario, what are the problems, if any, in accessing

peripheral and central veins for purpose of the injection.

So I don't think we need to talk much more about that. I have got it.

MR. HARCOURT: Thank you, Your Honor. Thank you. And I'm not going to talk anymore about that then. Except for this footnote that they recommended an MRI in this last one and it hasn't been done.

So on the question of timing. On the question of timing, that's where the timing engages both the health conditions affecting, on one hand, peripheral access and, on the other hand, the possibility of lymphadenopathy interfering with a central line.

So, in 2014, there was clearly evidence of lymphatic cancer, lymphatic cancer treatment in 2014, but I don't think there was an indication at that time that there were these problems with venous access.

The question in this case on the timing is when does everything come together such that it presents a constitutional problem.

And I would say that only with hindsight today, actually, can I suggest that on my reading of all of these records, the kind of storm came together at some point in the spring of 2017.

Now -- and, again, I don't -- and again, it's not something that I think was necessarily clearly visible even

at that time.

He did respond somewhat well to the radiation in 2014. And so there was --

THE COURT: But that radiation was in the head area.

MR. HARCOURT: Yes, Your Honor, skull.

THE COURT: We're not talking about any kind of access to veins in the skull for execution.

MR. HARCOURT: Thank God, Your Honor.

THE COURT: Right.

MR. HARCOURT: Right.

THE COURT: I think we really need to be focusing more on access to the veins that would be used in execution.

MR. HARCOURT: Correct.

THE COURT: And the change there. And I have got some more questions I would like to get to. I really do understand your argument about the lack of medical evidence to specifically say when these issues came about.

But what records we do have indicate that in March of 2017 he complained about lumps in his chest. And perhaps an X-ray was done, but no scan, no MRI, nothing else to determine that.

I also know he's got the lesion on his face that's been diagnosed as being carcinoma, and I know what can happen when one does not get treated for skin cancer.

We also have the records of the nurses who attempted, sometimes successfully, sometimes unsuccessfully, in the last three or four months to access the vein, I've got that. Okay.

I want to move on to some other areas, if that's okay.

MR. HARCOURT: I think the issue is the timing or your -- the question about the timing of when this -- when I found out or -- and what I did; is that the question, Your Honor?

THE COURT: No. I don't have a question on the table for you now.

I want to get to also the statute of limitations argument because I do think they're intertwined with the laches argument.

McNair, of course, advises that when there is a facial challenge to a method of execution, that it accrues on the later of either the date when State review is complete or the date when the capital litigant becomes subject to a new or substantially changed execution protocol.

So, the commissioner has argued that Mr. Hamm should have filed his case no later than 2004, two years after the 2002 lethal injection protocol.

My question for you, Mr. Govan, is how the heck

could he have filed an as-applied challenge in 2004 when he's not challenging the method of lethal injection generally but is saying that in this case, because of his unique health situation, the deterioration of his peripheral veins, the fact that he has, in fact, had lymphoma and may have it now, would make access to those veins more difficult, how could he have possibly have filed his claim on an as-applied basis in 2004, as you say he should have done, when he didn't even get diagnosed with lymphoma until 2014?

MR. GOVAN: Yes, Your Honor. Couple of responses to that.

First, just on the McNair standard and, again, you're right, that was -- that particular case was a facial challenge. But --

THE COURT: Has that standard ever been applied in an as-applied case? That really was a bad sentence.

Has the McNair triggering of the statute of limitations standard been used in a case involving an as-applied challenge to method of execution?

MR. GOVAN: Yes, Your Honor. And what we cited in our brief was the Gissendaner case from the Eleventh Circuit, I believe it's a 2015 case. And that really is really the more relevant case to look at because it took the McNair standard and applied it to an as-applied claim, and

that particular case was a Georgia inmate.

And Georgia also had a two-year statute of limitations just like Alabama does.

And what the Court focused on is that the allegations that -- also about venous access for different reasons, some similar, did not pertain to any recent developments that from the record appeared to have occurred within the past two years. And that --

THE COURT: Right. Because in that case the plaintiff had always had those conditions, if I'm not mistaken. If I've got the right one. She'd always been female, she was obese and there was one other reason that she was arguing that as-applied to her was unconstitutional, but the Court found that those things -- there was nothing that had changed; right?

MR. GOVAN: Correct.

THE COURT: But here we've got things that have changed --

MR. GOVAN: Well, Your Honor --

THE COURT: Or the plaintiff alleges that they have changed. And for the purpose here I have to accept that.

MR. GOVAN: Your Honor, that's correct. In looking at the summary judgment, though, even assuming -- that is exactly the point for two reasons.

Number one, in his initial complaint, he was alleging that the problems with the venous access were because of long-standing health issues, his cancer, which occurred more than two years before the filing of the complaint, his intravenous drug use, which occurred well before -- many, many years ago, and the whole gist of his claim were these were long-standing issues that contributed to intravenous access.

Secondly, there is no evidence in the record to support his contention that somehow his veins have become substantially more compromised in the past year or even the past two years.

He alleges -- in fact, the opposite. He alleges, by including the affidavit from Mr. Heath, that there was problems or difficulty achieving venous access in 2014, again, more than two years ago.

Now, he has --

THE COURT: But we also have the affidavits from your nurses reflecting that while they sometimes were able to access veins, they could not always access veins, and it often took more than one or two tries to do that. That, coupled with Mr. Hamm's affidavit that the nurses have had more trouble recently, and I don't remember the exact words, access those veins.

So, if we look at a process that is a process,

we're -- the plaintiff is not arguing that on this specific date, this specific event occurred and, as a result, my veins, all of a sudden, became compromised and difficult to access.

He's alleging that this was a process that occurred over time as a result of all of those medical conditions that he's dealt with and that it's been getting worse.

But clearly he could not have made that argument in 2004.

MR. GOVAN: Your Honor, I know that's what he's alleging, but there's no evidence supporting that he couldn't. There is no definitive evidence saying that -- and I agree, yes, Your Honor, he was not diagnosed with cancer before 2004.

But there --

THE COURT: So let's put that aside then. He could not have filed this as-applied claim in 2004.

MR. GOVAN: Your Honor, I don't know if that is true or not, because he has not presented evidence -- the evidence that he has presented in opposition to summary judgment does not show that his veins today or two years ago or in 2004 were significantly different.

Again, he's kind of arguing one side thing or the other and he's complaining about the right hand, but the

nurses were pricking him, but that's exactly the same hand that he says to Dr. Heath in Dr. Heath's report there was difficulty accessing in 2014.

THE COURT: But --

MR. GOVAN: There's nothing --

THE COURT: -- he says it has gotten more difficult.

MR. GOVAN: Your Honor. He says that, that is correct.

THE COURT: You make an argument in your brief, you say that there is no iota of evidence to support his claim. And then you go on to say that he has a self-serving affidavit.

MR. GOVAN: Correct.

THE COURT: In essence, saying that the Court shouldn't consider that self-serving affidavit as creating any genuine issue of material fact.

But hasn't Chief Judge Carnes himself told us that a self-serving affidavit by a plaintiff can be sufficient to create a genuine issue of material fact. He said that in the Feliciano case -- I'm doing good to remember that name of a case, and that's as far as I can go right now.

But don't I have to, at summary judgment, take Mr. Hamm's self-serving affidavit as evidence so that there is at least an iota or perhaps even a scintilla or, under

the Feliciano standard, sufficient evidence to raise a question at least as to whether, beginning in the spring of 2017, his veins became more difficult to access.

And here is the Feliciano case, Feliciano vs. City of Miami Beach, a 2013 decision by Judge Carnes, where he says, Feliciano's sworn statements are self-serving, but that alone does not permit us to disregard them at the summary judgment stage.

So I cannot ignore his affidavit, as much as you may think that it is not credible or should be ignored, I cannot do that at this stage.

So we have to take into account the evidence that is presented through his affidavit and cannot ignore it.

MR. GOVAN: I understand, Your Honor. And our point in arguing that was -- I understand the Court's ruling.

But we cited a case in our brief at Page 17 regarding evidence that can be presented, the Van Junkins case, where the party gives clear answers and then produces something -- an issue to create a material issue of fact, that does not prevent summary judgment.

What we were pointing to is that, again, in his complaint, he has alleged that these are -- that the venous access was a long-standing issue, and he cited Dr. Heath's report, mentioned the same exact problems he's alleging from

the same exact vein in the same exact hand in 2014 that he alleged in 2017.

So, our point is this: You can't have it both ways. You can't turn around and say, oh, this is something that I have been having a problem with for a long time, and then to avoid summary judgment on timeliness issue, try to say that this is a more recent development.

But even if --

THE COURT: Can there not be situations that get worse over time?

MR. GOVAN: I'm sure there are, Your Honor. I just -- there is no evidence in this, other than his affidavit suggesting that.

THE COURT: Which I have to accept.

MR. GOVAN: I guess in regards to the summary judgment, Your Honor, if that's your ruling, again, we would contend there is reason, there is case law for you not to accept that, but even if that is the case in the statute of limitations issue, that would not have any affect on his unreasonable delay on the first prong -- that let's -- let's accept that fact as true, in March of 2017, he is claiming that things have gotten worse.

Now, again, they have been able to draw blood since then at Donaldson which would kind of refute that, but at that point, even assuming that's true, he delayed for

another nine to ten months to file his 1983 complaint, and that's the problem under laches.

THE COURT: Let's get then to the issue that Mr. Harcourt raised in his opening and that is the litigation that was going on in the Alabama Supreme Court after the request had been made for setting an execution date. And you argue that he didn't have to do that. He didn't have to participate in the state court.

But was he not ordered by the Supreme Court to respond to the request to set an execution date?

MR. GOVAN: Yes, because that is what he requested. All those things that he's referring to are things that he asked for. I mean, he asked for more time to respond. He asked for a chance to be able to go get his evaluation.

THE COURT: And the Alabama Supreme Court actually ordered, did it not, that he be allowed to have a medical examination conducted by Dr. Heath for Mr. Hamm?

MR. GOVAN: I don't believe they ordered an examination. They ordered that he be allowed to undergo his medical evaluation by a certain date.

THE COURT: Okay. So that allowed him to do that. Let me get to the crux of the matter.

This case is brought as a Section 1983 case, right?

MR. GOVAN: Correct.

THE COURT: Okay. In the Supreme Court decision of Nelson vs. Campbell, Justice O'Conner noted that the Prison Litigation Reform Act also would apply to this case, to a 1983 case challenging the method of execution, and that the PLRA requires that inmates exhaust available state administrative remedies before bringing a Section 1983 action challenging the conditions of their confinement.

She had made the analogy that a challenge to the method of execution in that case, in the Nelson case, was similar to arguing indifference to medical needs that would fall within Section 1983.

So, under the reasoning of Nelson, did not Mr. Hamm have to present his case and litigate these arguments before the Alabama Supreme Court before filing his case here?

MR. GOVAN: Absolutely not, for a whole host of reasons.

Number one, a 1983, as the Court held, in the United States Supreme Court in Hill, is a claim about a method of execution. That is a separate claim about a challenge to his conviction or sentence. And the proper vehicle for that is in a federal -- to challenge -- make a federal claim, it is in a federal 1983 action.

The Alabama Supreme Court is an appellate court.

It's not an administrative place to raise -- there's not an administrative process to raise challenges of confinement in the Alabama Supreme Court. There would just be no jurisdiction for that. It's not a court for taking evidence.

The only reason --

THE COURT: All right. Well, in other Section 1983 cases, does not the federal court have to wait until the state court has ruled on those issues before the federal court can weigh in?

MR. GOVAN: No, Your Honor. Again, like, for example, several reasons to that.

First, number one, look at the Hallford case and the Grayson case that were cited in our briefs. In those cases, the Eleventh Circuit held that those cases were untimely, even though no execution date had even been set by the Supreme Court. And that's because --

THE COURT: Right. But those were all challenges, were they not, to the method of execution on its face, facial challenges as opposed to as-applied.

MR. GOVAN: Yes, they were.

THE COURT: Let's look at Seibert. Well, that one I don't think dealt with any kind of exhaustion. But that dealt with an as-applied challenge, right?

MR. GOVAN: I believe so, Your Honor, yes.

THE COURT: In Seibert, the Court -- actually, there had been two challenges. He had originally filed a facial challenge, but while that facial challenge was pending in federal court, he was then diagnosed with pancreatic cancer and hepatitis C. And the district court dismissed his initial facial challenge as being untimely, but found that his as-applied case was timely because it was filed as soon as he could have brought it which was after the diagnosis.

So is there not a different standard that applies to as-applied challenges versus facial challenges?

MR. GOVAN: On laches, Your Honor?

THE COURT: Yes.

MR. GOVAN: No, I'm not aware of any case holding that.

Seibert was different factually. Because the Court noted that the hepatitis C diagnosis occurred -- they filed his amended complaint, his as-applied claim one week after being diagnosed with cancer. That's factually why Seibert is different on laches, an as-applied claim, than this.

Second --

THE COURT: But my point is that you're arguing on laches that he could have and should have filed it years ago, right?

MR. GOVAN: Correct. Or even nine months ago. We can accept the best case for him.

THE COURT: We'll get to the nine months again in just a minute.

But clearly under Seibert, which says that the diagnosis, in essence, is what triggered his right to file an as-applied claim.

MR. GOVAN: Your Honor, no, that was not -- in that particular case on that ground, in that particular fact scenario, that's what it was. I would contend again the fact scenario here is different.

The claim in Seibert was specifically about hepatitis C and how that would affect -- that's not the same -- it's not a blanket slate for a triggering date.

He is arguing things --

THE COURT: But his facial challenge was untimely but his as-applied was not.

So you have to look at different things to determine the timeliness of a facial challenge versus the timeliness of an as-applied challenge.

MR. GOVAN: Your Honor, I don't know -- there's not a case stating that it's improper to look at the same kind of things in an as-applied case versus a facial.

Again, for example --

THE COURT: But the facial was untimely because

there had not been anything that changed in the protocol or the method of execution. So it was untimely.

But then he gets diagnosed with a medical condition that gives rise to his as-applied challenge. And because of that medical condition, his as-applied challenge was not untimely. Will you agree with me?

MR. GOVAN: In Seibert, yes.

THE COURT: So, here we have not a facial challenge to the method of execution, but an as-applied, saying that because of my medical condition that has deteriorated since all these things that contributed to the compromise of the veins have come together and it's gotten worse since 2014 when he was diagnosed with lymphatic cancer, so we somehow have to figure out, and on the record in front of me, I can't say when it was that all those things coalesced to make access to his veins more difficult and more problematic, if at all.

But that is his allegation and his affidavit says that things have gotten worse. And without the kind of medical information, I think we would all like to see, that's the best I have. Plus the affidavits from the nurses about their difficulty in accessing that vein.

But I do want to get back to the question of exhaustion. And I have got a question for you, Mr. Harcourt.

In your reply brief on Page 19, you cite or you argue that his claim was not ripe until he exhausted the legal claim before the Alabama Supreme Court and you go on on several pages to discuss that.

But I did not see any citation to any authority that that was, one, required; or two, the appropriate exhaustion.

You do cite generally to Younger and Colorado River, but I did not see any more specific citations regarding the Section 1983 challenge to execution.

MR. HARCOURT: Yes, Your Honor. So, on the laches claim, putting aside for a moment the issues of statute of limitations --

THE COURT: Okay. Maybe you didn't understand my question.

I want to know if there is any authority to support your exhaustion argument that the claim was not ripe until after you had fully litigated it in the Alabama Supreme Court in response to the request to set an execution date.

MR. HARCOURT: So, what makes the claim not ripe and not really properly before the Court until the Alabama Supreme Court has adjudicated it are these issues of comity and federalism that are in cases such as -- in the kind of -- in the following of Younger.

And I think that if you -- and that was the reason, I apologize that I was talking about equity and that I was talking about laches, because these notions of exhaustion are integrally linked to these notions of allowing the state process to have its review and not interfering.

Now -- so there are a couple --

THE COURT: So is your answer no, you don't have any case authority to support your argument that in a 1983 challenged execution an inmate must pursue remedies within the state system to avoid the setting of an execution date or to litigate there the issues that he's raising in an as-applied challenge before bringing it in federal court?

MR. HARCOURT: Correct, Your Honor. I do not believe, I mean, on the quick research that we have done so far, Your Honor, I do not believe that there is a case that would preclude or kind of bar a 1983 lawsuit on those grounds.

So, in other words, it's not a question of a bar in the same context -- as in some other context.

THE COURT: All right. I certainly think that your argument based on Younger and Colorado River and the principles asserted in those cases and its progeny make sense. It certainly seems logical to me that if the Alabama Supreme Court has to decide whether it's appropriate to set

an execution date, that presenting your arguments there, before bringing it in federal court, certainly makes sense to me.

Mr. Govan, do you take the position that Mr. Hamm should not have tried to convince the Alabama Supreme Court that lethal intravenous injection would be cruel and unusual punishment as-applied to him before it set an execution date?

MR. GOVAN: Yes, Your Honor. I mean, that specific claim is a method of execution claim that is appropriate in a 1983.

Because, again, for two reasons. Again -- going all the way back to Hill --

THE COURT: So he should never have presented this argument to the Alabama Supreme Court?

MR. GOVAN: He --

THE COURT: And just let them go on and set an execution date and then -- or file his 1983 case at that time so that you have the simultaneous things going on.

MR. GOVAN: He certainly could have done that and he did. But that is a different question whether that was proper to do and whether, under a laches argument, that act somehow tolls the time, which it doesn't.

Again, because again, if you look back to all the case law we have, Williams vs. Allen, someone is looking to

reasonable proof regard for the rights we know that once your federal habeas petition is done, the last obstacle is setting an execution date.

And if you want to pursue a federal method of execution challenge in 1983, the place to go is to federal court.

And just as a practical matter, pretty much every execution date that is set or that is litigated in the Alabama Supreme Court when you file a motion, there is corresponding 1983 actions that are going on either before, during or after. It's two separate issues.

And looking at the Alabama Supreme Court, the only reason why that's the Court that would set the execution date, is under Rule 8 of the Alabama Rules of Appellate Procedure, that's the Court that lifts the stay from an execution at the appropriate time. And the appropriate time is when all the traditional appeals are exhausted.

Method of execution claim, even as-applied, is a separate thing. It's not challenging the conviction or sentence, which an Alabama Court is looking at. It's asserting a federal constitutional claim about an as-applied challenge that should be brought in federal court.

And the fact that he litigated that or tried to litigate it in the Alabama Supreme Court is more example of the fact that he could have brought that in federal court

where it belongs, because it's not a challenge to a conviction or sentence, allegedly --

THE COURT: But it's a challenge to the execution, is it not? Or the execution as-applied by the Department of Corrections?

MR. GOVAN: Well, if he -- as I understand it, by bringing this claim in a 1983, the whole purpose of a 1983 is he is not challenging the sentence. He cannot bar the sentence.

THE COURT: Right. I didn't express that correctly. It's challenging the implementation of the execution at a particular time.

MR. GOVAN: That's correct.

THE COURT: Right? And was he not asking for an opportunity to explore the medical condition of Mr. Hamm before setting a date for execution?

MR. GOVAN: He was certainly asking for that, but whether that was proper or the Alabama Supreme Court could do something about it, for instance -- that is --

THE COURT: Well, let me ask you this: If it wasn't proper, why did the Alabama Supreme Court give him more time and why did the Alabama Supreme Court, whatever it did, allowing the examination by Dr. Heath of Mr. Hamm?

If that was improper for the Alabama Supreme Court, why didn't it just say, huh-uh, forget it, we're not

going to even consider your arguments.

MR. GOVAN: I don't know -- they didn't give a reasoning for that. I just know from their past practices, inmates, when motions for execution dates are set, inmates routinely ask for additional time for a variety of reasons and the Alabama Supreme Court grants them. That's not unusual.

Again, the fact is that -- and another thing, too, why it would be -- if that's what he's saying, there would be no -- the Alabama Supreme Court can't take evidence, it's a fact-finding court. There is nothing pending in any state court that they could even remand to or grant a stay for, so there's no mechanism they could have really done anything to address these specific claims. And that's because these specific claims are not something that would come up in a typical state post-conviction proceeding.

These are as-applied method of execution claims that are routinely and always brought as a 1983 in federal court. That's why it should have been brought earlier. That's why the fact that he was filing things in the Alabama Supreme Court has nothing to do with the unreasonable delay in filing the federal court action.

THE COURT: All right. Well, if we're looking at the question of unreasonable delay, and we're talking about a delay of six months or so, I think you may say nine

months, but I'm not sure when it was clear and that's something that I think still raises question of fact, but some time in the spring, let's say it became questionable as to whether he would have any veins that would support, not a small butterfly needle, but a large gauge catheter, and here we have an argument that that delay, for equitable reasons, trumps or thwarts any equitable considerations of making sure that the execution that will go forward at some time in some method is not going to be an unconstitutional one, that it's not going to produce unnecessary pain and suffering so as to rise to the level of cruel and unusual punishment.

I recognize that the Courts have emphasized that the State does have a significant interest in carrying out its sentence, but we're talking about thirty years on death row and you're making a big deal about a delay of possibly nine months.

So where do the equities really shake out there, Mr. Govan?

MR. GOVAN: Your Honor, the equities would lie in favor of the State. The fact that he has been on death row for thirty years weighs in favor of the State's right to be able to carry out a lawful execution for the victims of this crime, for the administration of justice, that fact lies in favor of the State.

And the fact that, again, his federal habeas

litigation was pending until October of last year, State moved in June -- excuse me, October of 2016, the State moved in June of 2017 to set his execution date, and if this, as the Courts have noted, these types of cases, they don't have to, but they tend to take a long time. And the fact that those cases could take up to a year weighs in favor of the State, when a stay is at issue or a last minute lawsuit is filed, and the equitable reasons that allow that lawsuit to continue to go on.

So nine months does make a big difference if you're trying to litigate this.

Again, when we say nine months, that's the best case scenario for Mr. Hamm.

Again, we point out in our brief, there's a lot -- his own allegations support that this could be something that he could have brought earlier.

When we're talking about the length of delay, the long thirty years that the victims of his crimes have waited or the State has waited to carry out this lawful sentence, yes, nine months does matter, because this will delay this case for years.

And the best example of that is the Nelson case that Mr. Hamm cites all over in his brief. The lawsuit was initially filed in 2003. The U.S. Supreme Court decided in 2004. Five years later, that litigation was still going on

when Mr. Nelson finally died in 2009. That is an extremely cautionary tale of the lengths of -- delay in this case. And --

THE COURT: Well, let me allay those fears. If I deny your motion and if I allow this case to go forward, it will not be a five year delay. It will be a prompt resolution of the medical issues and protocol issues.

It will be my highest priority to see that it is done promptly and not a five year delay.

MR. GOVAN: Thank you, Your Honor. And I appreciate that very much. And I'm sure the victims of Mr. Hamm's crime appreciate that as well. I understand the importance of this.

We would just contend that even any delay, his execution has been set by the Alabama Supreme Court, any delay would weigh against Hamm and in favor of the State in granting the motion for summary judgment and the denial of the stay.

THE COURT: Let me ask you about another equitable consideration.

You have argued that Mr. Hamm has no certain medical evidence to support his allegations. Who controls access to medical care for Mr. Hamm?

MR. GOVAN: Obviously the Department of Corrections.

THE COURT: Okay. Who controls whether he can get some type of scan, a PET scan, CT scan, MRI, whatever?

MR. GOVAN: The Department of Corrections would.

THE COURT: Okay.

MR. GOVAN: I would say, based on a lot of times like evidence in this case, but what referring physicians in the past have requested, and again, there's PET scans and CT scans, there's nothing recent that would suggest that any outside physicians or oncologists have suggested that is a necessary thing in Mr. Hamm's case.

THE COURT: Well, there is evidence that in 2014, in 2015, the doctors requested or suggested a PET scan and that was never done.

And I think medical evidence would support a finding that that is the most determinative test that can be done to address questions of cancer.

But, my next question is, who controls access to Mr. Hamm's medical records?

MR. GOVAN: The Department of Corrections.

THE COURT: Okay. And Mr. Harcourt requested those medical records in January of 2017, correct?

MR. GOVAN: I believe that is -- is that correct? I believe that's correct.

THE COURT: I think we have an affidavit to that affect in the record.

And the Department of Corrections -- and there were repeated efforts to get those. The Department of Corrections didn't provide those to him until July of 2017.

So we have a six, six-and-a-half month delay by the Department of Corrections in providing Mr. Harcourt with records that he needed to assess his client's condition. And shouldn't I take into account in balancing the equities that the Department itself may have some responsibility for the delay in the filing of this suit?

MR. GOVAN: Your Honor, that would be certainly something you would need to weigh. But even when weighing that, that still falls down on against Mr. Hamm.

Let's assume that it took, for a variety of reasons, number one, let's assume that -- and it's not even clear that the fault for how long it took is the Department of Corrections' fault. I know he has made these allegations it's taken this long. I don't know in the record if it's clear that he followed all the proper channels to get them.

Second, assuming that it happened in July, that's still almost six months until he files his 1983 action.

And third --

THE COURT: And did he not start shortly thereafter trying to get access to his client for Dr. Heath to do an examination?

MR. GOVAN: I don't know when -- I'm not sure

there is evidence in the record of when he specifically started -- other than in the -- I think his August 8th filing in the Supreme Court he mentioned he was trying. But I don't know --

THE COURT: Yes, which was within a month after receiving the medical records he began that process.

MR. GOVAN: Correct. And he produced a preliminary report from Dr. Heath at that point. And clearly, without a shadow of doubt at that point, if he's trying to raise claims, which he did, about venous access in his filings in the Alabama Supreme Court, he certainly could have filed a challenge in federal district court, even before he conducted the actual evaluation.

THE COURT: Well, then there would have been an argument, like you're making now, that there is absolutely no medical evidence to support his claim.

And if I'm not mistaken, Dr. Heath did his exam and his report in September, am I correct on that date, Mr. Harcourt?

MR. HARCOURT: Yes, Your Honor. September 23rd was the examination and October 1 was when the report was filed, was written and filed.

THE COURT: Okay. So the report was October the 1st?

MR. HARCOURT: October 4th is the date of the

report, yes.

THE COURT: Okay. So we have got a report October 4th. Then that gets us closer to December 23rd when this case was filed.

MR. GOVAN: December 13th, Your Honor.

THE COURT: December 13th. So we're talking about two months now.

MR. GOVAN: That's correct. If I could back up --

THE COURT: Two months from the time when Mr. Hamm had some medical evidence to support his allegation that his veins had deteriorated to the point where there was only one tiny vein in his right hand that could be accessed for a butterfly needle.

MR. GOVAN: Your Honor, that's when he filed his report, but that's still not evidence that it could not have been done earlier. Because, again, the whole reason he was asking for the evaluation in the first place in August was because he claimed that a review of the medical records supported the fact, in a preliminary statement from Dr. Heath, that there was substantial concerns about his peripheral venous access.

So, again, he had that knowledge even before Dr. Heath's report, enough to be able to file a complaint with a good faith allegation and seek discovery which might be an evaluation of Mr. Hamm -- that would have been enough

to raise a good faith allegation in just general pleading -- in a 1983 action, that certainly could have been raised before.

Back to the medical records, Your Honor. I think the fact that, the larger point I think you mentioned that we made the argument there's nothing in the record showing that there is venous access problems or some nexus between cancer and the venous access problems, that further supports the fact that -- why it took until July to get the medical records was not an impediment to filing a lawsuit because there is nothing in those records that really bolster that. All that is coming from this are his self reports, Mr. Hamm's self reports to Dr. Heath about things that happened in 2014, self reports in his affidavit about it being more difficult in March of this past year, but there's nothing in those medical records that really support that.

So in weighing the equities in this case, the fact that he had the medical records in July is enough but didn't inhibit him from filing a lawsuit on good faith allegations.

THE COURT: I beg to differ. I think there is at least the initial examination in March that confirmed that there were palpable knots in his chest and abdomen area, if I'm not mistaken.

I have actually, I think, asked most of the questions I have regarding the question of the timeliness of

this case.

Let me just quickly look back and make sure.

(Brief pause)

THE COURT: I think I have covered my questions. Is there anything else that either of you would like to say on the issue of timeliness?

MR. HARCOURT: Your Honor, may I respond to some of the points? There was a lot covered. And I just wanted to quickly touch on a few points.

On this question of 1983 and the equitable considerations and laches, I would like to say that, I mean, this is kind of turning the whole history of the 1983 statutes in a federal civil rights kind of upside-down.

The history of Section 1983 is to give federal courts the avenue where state courts fail to uphold federal rights. It's not intended to be a way to avoid state courts. It's not intended to be a way to bypass -- it's suppose to treat state courts as, respectfully, equally to allow them to address these issues.

And if -- it's kind of like, if that doesn't happen, then one can go to federal court under Section 1983. It's where the state courts fail. And that's what happened in this case.

And there is comity and there are issues of federalism under Younger and a number of cases following

Younger that would militate against intervening.

In fact, even in habeas corpus, you know, you can move the federal court to hold a case in abeyance while you have to litigate a state issue because, for instance, there might be a state issue where the state courts have to decide. And I've done that. I did that in 1992. We held a case in abeyance in federal court because it was a state issue.

So, these issues are -- it seems to be flying in the face and entirely disrespectful of the relationship between the federal and the state judiciary to say you immediately have to file a 1983 lawsuit in federal court and not care about what the states are doing.

So I would -- I wanted to quickly say that.

In terms of the delays, we did speak a little bit about my request on January 19th, 2017 to get the records, which took until July 20th. I have a quick slide on this.

THE COURT: I'm with you on that.

MR. HARCOURT: Another one is the protocol, Your Honor, and that's another very big delay.

THE COURT: Which I have not had a chance to read at all and I want to look at that.

MR. HARCOURT: We got it yesterday as well. Let me just state, Your Honor, in terms of that delay, I originally asked for the -- now -- well, actually, I would

like to very quickly go over a little bit of the timing and some of the steps that were not explicitly discussed by the defendants in this case because -- and the request for the lethal injection protocol is a big piece of that.

But just to correct something that was said. When I filed my first motion to respond to the Alabama Supreme Court on July 11, 2017, and this in the plaintiff's exhibits, which is Exhibit 11, Plaintiff's Exhibit 11, it's in the one that's got the forty-four exhibits.

THE COURT: Okay.

MR. HARCOURT: Exhibit 11 -- I mean, to go very quickly over the timing here.

I had requested the records on January 19th, that's Plaintiff's Exhibit 9, and followed through a few times. Ultimately feeling that I needed some documentation of this, I sent an email on June 29th saying --

THE COURT: I follow all that. I've got that. I'm with you on that.

MR. HARCOURT: When I originally asked for more time, I did not know what the venous condition was. And it's clear from the first page, undersign counsel has requested -- hold up, it's not possible to assess the multiple risks that Mr. Hamm faces within execution. It's not as if -- it takes the records to know what the risks are in a case like this, with an individual who has had a

lengthy medical history, et cetera.

THE COURT: But then, if that individual has not received recommended follow-up treatment or recommended evaluations, it makes it even more difficult, does it not?

MR. HARCOURT: Yes, Your Honor. I mean, in other words, first I needed the records. Then -- and they're not complete in the sense that I'm not able to actually draw on them because of missing PET scans, et cetera, to make my case.

But I needed, first, to get the records in order to understand how his condition would interfere with a possible lethal injection.

And this was going very fast, Your Honor. That was filed on July 11th asking to get the records. I didn't get the records until July 20th.

On August 6th, I had a one-hour telephone consultation with Dr. Heath, it was on a Sunday. Dr. Heath is in the operating room every day of the week. This is on a Sunday, October 6th. That is in the record on Page --

THE COURT: Yeah. And I'm aware of those delays and the reason for them.

MR. HARCOURT: I originally asked for the lethal injection protocol from counsel for the defendants on August -- excuse me, on -- I had written all this down, August 28th. And it's exhibit --

THE COURT: And you received those today.

MR. HARCOURT: Exhibit 16. I asked for --

THE COURT: You received them yesterday, not today. I got them today.

MR. HARCOURT: Yes, you're right. August 28th. The response was that I was not entitled to them, that's Exhibit 18.

On September 7th, I received a letter from counsel for the defendants, Exhibit 18, saying, on September 7th that I'm not entitled to the lethal injection protocol.

I followed that up with a letter on September 11th, Exhibit 20, saying I don't understand why. I'm an officer of the court. I will do anything, confidentially, we have now signed a confidentiality agreement. I specifically said, I will, of course, retain the protocol as confidential, privilege document, it's not given to -- I won't give it to anyone. I'm understanding that as counsel for an inmate who is going to be executed, I should have access to the protocol.

I also don't understand why the protocol actually isn't a public document. I believe it's a public document in every other state. But in any event, it was withheld from me. September 11th. I specifically asked the Court, the Alabama Supreme Court, to order that I -- that I receive the protocol. And that was on -- that's Exhibit 22,

Paragraph 2. These are my weekly updates. I'm filing -- Alabama Supreme Court has asked me to file weekly updates. I'm updating them on everything I'm doing.

On the fourth weekly update, on September 22, Paragraph 2, I specifically say, to date, undersigned counsel has still not received any information about the protocol. Undersigned counsel renewed its request, therefore, it would be necessary to -- discuss, to discuss these issues.

In my pleading with the Alabama Supreme Court filed on October 2nd, which is Exhibit 25, which was basically my, you know, my response in which I included Dr. Heath's report and a few other things. I specifically asked them for the kind of process that would be appropriate in a case like this. The kind of process that would make it possible even for me to know whether there's a constitutional violation under the protocol.

And I asked -- so, this is Exhibit 25, Page 17, actually Page 16 -- actually, Your Honor, Page 15 of Exhibit 25. I apologize. Where I say, first, the Court should order the Attorney General to confidentially disclose to undersigned counsel the exact protocol for venous access, the list of medical equipment that will be used. Those are things that are absolutely necessary in this case, Your Honor.

If the State believes that it's going to be doing central venous access -- we'll go into -- we'll go into these in camera, but it would be very normal for a counselor in any litigation of this type to ask for the protocol, to ask for the list of medical equipment that is actually going to be used so that the attorney can have some idea of what's going to happen, including the gauge and length of the catheters and the needles. And I haven't received anything.

I needed that in order -- I actually, Your Honor, it's almost as if this case is not ripe until yesterday when I received the lethal injection protocol.

It's probably, I would say, that under principles of Younger and equitable laches, it's only yesterday that I can prove my case.

I also asked the Court to appoint a special master to ensure that it would be a good protocol. And I'm addressing the Alabama Supreme Court here. They are the ones who are setting an execution date. They are the ones who, in the State of Alabama, is going to be the one who -- the second most harmed entity in the event of a botched execution.

Because if, in fact, there is not venous access, which is something we're going to have to prove, although I believe that it's pretty well established, but that would be for an evidentiary hearing, if that's the case, what happens

in other states when there are these botched executions like this because of a catheter going into flesh rather than a vein and infiltrating the skin is that executions are shut down in the state.

So, I am speaking to the Alabama Supreme Court here. I ask them for an opportunity to be heard so that we could put together a protocol that would be acceptable to all parties and that wouldn't violate -- and wouldn't be cruel and unusual punishment.

As you see Exhibit 26, the Court orders a response from the State of Alabama on that.

So -- and on and on. I did not -- I did not receive the protocol until yesterday. So there's a time there that also I believe from an equitable laches perspective is relevant.

Then finally, the last point is, I have also been trying to always update and get all of the most recent medical records. In the litigation at the Alabama Supreme Court, when I filed my response on October 2nd, counsel for the State, so my response was 25, I don't think I have the State's response, but in Exhibit 27, which was my response to the defendant's response, it's clear, they all of a sudden were putting in new records of things that had happened since I had gotten my records out of nowhere. Okay? In fact, I think, somewhat misleadingly, they were

saying that a physician with the Department of Corrections had indicated, this is footnote one on Page 2, that a physician for the Department of Corrections indicated that there's no evidence of ocular lymphoma, et cetera, and there had been work and there had been medical work that had been done since I had gotten the records that haven't been turned over to me, I didn't have access to any of these medical records that were being done while this was going on. And, you know, something about a physician, it's not even a physician, it was some practitioner, I don't know. In any event, they were conducting examinations that were then being turned over to counsel that were then being introduced to the Alabama Supreme Court without me -- without me being able to in any way examine, in any way get those records.

So, I have been always trying to have the most recent records. I will -- my interest is that everything is in front of the Court, all the records are in front of the Court. I have desperately tried to get his records since what I got in July 20th. And --

THE COURT: Mr. Harcourt, maybe I can cut this short by telling you that I'm going to deny the motion, if you'll give me time to do it.

MR. HARCOURT: Yes, Your Honor.

THE COURT: As I stated earlier, the standard for summary judgment, which is what the defendants seek here, is

whether there are any genuine issues of material fact.

I find that there are quite a few genuine issues of material fact that go to the question of the timeliness of Mr. Hamm's complaint.

The biggest issue in my opinion is whether, as Mr. Hamm claims in his affidavit, which I have to accept as true at summary judgment stage for purposes of summary judgment, he claims that his access to his veins worsened in the spring of 2017.

If that is, in fact, true, then that would be when the statute of limitations would begin to run for filing of his as-applied challenge to the method of execution.

So, the statute of limitations argument would be barred, and that's based upon my reading of the Seibert case that in essence recognize that his as-applied claim arose when the medical condition was diagnosed that raised questions about the constitutionality of that execution.

I also note that there is no way that he could have filed this case in 2004 within two years of the adoption of the lethal injection standard because he's not challenging lethal injection as itself being unconstitutional.

There are issues of timeliness involving laches, and I know that that time period can be shorter than a statute of limitations time period.

But assuming that the plaintiff's medical condition became worse in the spring of 2017, the question then is whether the plaintiff unreasonably delayed in filing this Section 1983 claim.

I think the Nelson case gives some support to the argument made by Mr. Harcourt that State remedies should be exhausted before filing a 1983 claim challenging the method of execution.

Exactly what that means, I don't think has been fleshed out in subsequent cases, but it does seem reasonable to me for plaintiff's counsel to have believed that raising these issues in front of the Alabama Supreme Court was an appropriate step before filing the case here.

So I find that belief, whether legally correct, to be a reasonable one and to defeat the argument that Mr. Hamm unreasonably delayed or was dilatory in filing the 1983 action.

Also, when looking at the equities involved, I do think that I have to consider the fact that plaintiff's counsel diligently tried, since January of this year, to obtain medical records and did not obtain them until July, so -- I'm sorry, I don't think a plaintiff should waltz in to court making allegations about a medical condition without having at least reviewed medical records to support that kind of claim. And the efforts to obtain them were

delayed, I'm not putting fault either place, but recognizing that there was a delay and that additional records have been produced subsequent to July that bear upon Mr. Hamm's condition.

These genuine issues of fact play into my determination that there was not undue delay that would justify application of laches here.

I recognize that Courts have recognized the equitable interest of the State in carrying out the execution in a timely fashion, but I cannot say that that outweighs the mandate of this Court to apply the Constitution of the United States equally and appropriately.

And I think the equities in this case lie in favor of exploring the plaintiff's claim and making sure that the execution, which will happen at some point, does not violate his constitutional right to be free from cruel and unusual punishment.

So, as I mentioned to y'all in chambers, I will try to get a written order to that affect out within the next week or so, but that's my ruling on it.

We will then take up the merits of the request for a preliminary injunction, although I think it's really more important or more appropriate this time to evaluate whether a stay would be appropriate, even though not specifically requested, there's authority for the Court in doing that, so

that we can get some of these questions answered and move forward as promptly as possible.

We will take that issue up at, I said we would reconvene at 1:30, I'm going to be out of the office for a while and I need to review those protocols before we get into that issue.

So let's meet back here then at 2:00 o'clock to start the second phase. Okay. Does that work?

MR. GOVAN: Yes, Your Honor.

MR. HARCOURT: Yes, Your Honor.

THE COURT: Okay.

(Lunch recess)

(Sealed in camera conference held)

(Open court)

THE COURT: You may proceed.

MR. GOVAN: We call Mark Heath.

MARK HEATH, SWORN

THE CLERK: State your first and last name for the court.

THE WITNESS: My first name is Mark, M-A-R-K, Heath, H-E-A-T-H.

THE COURT: Just for the record, Dr. Heath, we're going to make that oath retroactive to your prior testimony,

okay?

THE WITNESS: Yes.

THE COURT: All right. You may proceed. Let me state for those who are in the courtroom, we have not taken an extremely long lunch hour. We have been working for the last several hours on issues related to the Department of Corrections' protocol for lethal injection execution that is a confidential document so, therefore, the information regarding that had to be maintained confidential.

I just wanted you to know we have been working while you have been wondering where we were.

You may proceed.

MR. GOVAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GOVAN:

Q Dr. Heath, I'm Thomas Govan from the Attorney General's Office.

Do you have your reports in front of you?

A I do not.

Q Okay.

MR. GOVAN: Your Honor, if it would be -- if it's okay, I would like to provide him with a copy of his report so we can reference that, I have some questions to ask him.

THE COURT: That is certainly fine.

MR. GOVAN: For the record, I'm going to be giving

Dr. Heath his preliminary report and follow-up report which are Exhibits 1 and 2 in plaintiff's exhibit list.

Q Dr. Heath, you mentioned that your daily practice involves obtaining both peripheral and central intravenous access, correct?

A Correct.

Q And just to make sure we're on the same terms, peripheral -- in laymen's terms, peripheral intravenous access means inserting an IV catheter into a peripheral vein on a person's extremities that is usually visible or palpable or something to that effect.

A Yes.

Q Okay. And you mentioned you do that for the purpose of administering anesthetic agents to induce general anesthesia.

A Usually sometimes to give fluid or blood or other purposes, but usually for inducing anesthesia and then it gets used for many other things during the operation.

Q But for all those things would be intravenous administration of fluids or agents; is that correct?

A Yes.

Q You would agree with me, while you're an anesthesiologist, you do not need to be an anesthesiologist to be able to insert or establish an IV line?

A That's correct.

Q You could be a nurse?
A Correct.
Q EMT?
A Correct.
Q Physician's assistant?
A Correct. The important thing is one has had the training and experience to know how to do it.
Q And you would agree with me that twenty to twenty-two gauge catheters are sufficient to establish an IV line; is that correct?
A Depends for what purpose.
Q For administering medicinal agents, intravenous agents.
A Again, it depends on the -- on what the volume is going to be administered and how quickly it needs to be administered.

A twenty-two gauge IV is a very small IV. I think if you look in Dr. Bagley's report, he has some discussion about the sizes and twenty-two gauge is smaller than I prefer to use. Sometimes I need to use them.

Q So you have used a twenty-two gauge IV catheter to establish IV lines in the past?
A Yes, many times.
Q You would agree with me also that a butterfly needle can be used to establish an IV line?

A It can be, but that is an inferior way of doing it.
Q What size of butterfly needles can be used to establish an intravenous line?
A Any size that's smaller than the vein can be used. It depends on what the purpose is, what it's going to be used for.
Q Can you give me some examples of sizes?
A In general, in general, the larger the better, you can give volume and drugs more quickly. I don't ever use butterflies for injecting drugs. I can't think of ever having done that in over twenty thousand cases.
Q You have never used that?
A I don't believe I have ever used a butterfly for injecting drugs.
Q You agree it's possible to use that to inject drugs intravenously?
A Yes.
Q You examined Mr. Hamm on September 23rd, 2017, at Donaldson Correctional Facility?
A That sounds right, yes.
Q Based on your examination, you would agree with me that Mr. Hamm does have some peripheral venous access?
A Yes.
Q You found a vein at the dorsum of Mr. Hamm's right hand that you said could be accessible.

A It's potentially accessible. I would consider myself fortunate to establish a functioning IV in it.

Q And you would agree with me that the dorsum of a hand is a place that can be used clinically to establish an IV line, correct?

A Yes.

Q You said in your report that inserting an IV catheter into this vein in Mr. Hamm's case would be challenging, but would you agree with me that if you used a butterfly IV needle that that would present less of a challenge of establishing an IV line in that particular vein?

A It would be a very inferior IV access point. I don't think most anesthesiologists would want to use that.

Q But that would be a possibility -- that is a possibility for establishing an IV line, correct?

A Technically, yes. But the access would be of such poor quality that one would be extremely reluctant to use it.

Q Okay. Dr. Heath, you mentioned that you examined, I think on Page 3 of your report, Mr. Hamm's hands and arms for venous access.

What did you specifically do to examine his arms?

A I had him bare his arms because he had his shirt on. I would normally use a tourniquet to make the veins distend, but we weren't allowed to bring -- I wasn't allowed to bring

any medical equipment of any kind or really bring anything into the examining -- into the prison. And so I used a tie as a tourniquet and put that around his upper arm, and then carefully went over by visual and palpation, visual inspection and palpation looking for evidence of veins.

Q What about on his feet, what did you do?

A Same thing. Well, tourniquet was on his legs, but the same.

Q Where did you place the tie as a tourniquet on his leg?

A I don't recall exactly, but I would normally place it up on the calf, up near the knee.

Q You stated in your report, I believe, when referring to Mr. Hamm's legs and feet that you stated -- that he related that all of his veins on those extremities were, quote, used up by chronic intravenous drug use.

Do you recall that from your report?

A It sounds familiar, but can you point me to where it says that?

Q I believe it's on Page 3, Paragraph 7.

A My Page 3 doesn't have paragraph numbers.

Q Yes. So, it's -- paragraph of the previous page, three lines down on Page 3. This is on Exhibit Number 1 of plaintiff's exhibits.

A I see what you're talking about.

Q Is that -- is that something that Mr. Hamm directly told you?

A I spent a number of minutes going -- asking him questions about his intravenous drug history. I don't remember whether I asked him about it or whether, you know, in the flow of conversation whether it was something he told me he volunteered or whether I explicitly asked.

But I was asking a lot of questions about the sites that he -- the specific sites in his body that he used for injecting drugs.

Q And what were those specific sites?

A Really everywhere. It's a tragic thing when people are compellingly addicted to substances and they inject everywhere where they can find access. In addition to all the normal places in the hands and the arms and feet and legs, he described injecting into his neck, into his mouth, into his penis, basically everywhere you could imagine.

Q Those other places don't have an affect necessarily on peripheral IV veins, correct?

A Those are all peripheral IV lines.

Q Talking about heads and things of that nature, mouth, that's not related to peripheral IV access, correct?

A No. Those are all peripheral veins that he was injecting into, so they are peripheral IV access.

Q Did you review Mr. Hamm's medical records in

preparation for your evaluation?
A Partially, yes.
Q Did you --
A I'm sorry. I have been sent a lot of medical records. I reviewed them when I was sent them and then also some of them in preparation for this hearing.
Q Did you find any records confirming that he had compromised veins?
A I did not see anything in the records explicitly showing that. In talking with him, he told me about IV access that had been obtained during procedures that were referred to in the records and I could corroborate what he told me with what they did. For example, in 2014, with difficulty they were able to get a catheter into his right hand.
Q I want to follow back up on that in a minute.

But outside of what he told you, you saw nothing in the medical records that established -- that confirmed that he had difficulty establishing IV veins in any procedures?
A Only in the affidavits that I received later, but not in the actual medical records.
Q Okay. You mentioned a procedure in 2014. And you're aware that a biopsy was conducted in 2014 of what turned out to be orbital -- left orbital lymphoma?

A Yes.
Q And in that procedure you would agree that the report from the UAB medical staff indicated they achieved general anesthesia for that without any difficulty?
A That was my sense, I don't remember them saying without any difficulty, but that was my sense that the procedure had gone smoothly.
Q So at least in that procedure there was no difficulty achieving intravenous access, correct?
A No. Based on what Mr. Hamm told me, there was difficulty achieving access, but they did achieve it and were able to successfully induce and maintain anesthesia.
MR. GOVAN: I have Exhibit 8 from Petitioner's exhibits or Bates stamp 163. I would like to approach the witness to show this or put it up on the elmo, if that's possible.
THE COURT: We've got an elmo. It's not hooked up. It may take a minute to get ready. Do you want to show that to him?
MR. GOVAN: Yes, Your Honor, if that's okay. I'd like to approach.
THE COURT: Okay.
Q (By Mr. Govan) Dr. Heath, this is from Plaintiff's Exhibit Number 8, Bates stamp 163, it's a UAB medicine report. And if you look, I can come around.

A Sure.
Q And if you look, it states, type of anesthesia, general. And if you look down at summary, operation, says, patient arrived in operating room, stable condition, general anesthesia was achieved with no difficulty. Do you see that?
A Yes, that's standard surgical language. They are not aware of -- the difficulties don't arise to their attention.
Q So wouldn't that refute the idea that there was difficulty, from what Mr. Hamm said, there was difficulty achieving IV access?
A Not at all. I don't think there is a surgeon on earth that would include challenging access as part of the -- of their surgical note. That's a -- just proforma language that they put in to indicate that there was no major events such as cardiac arrest or difficult intubation or anything at the start of the case.
Q So if there was a problem in achieving IV access, you're saying that the standard medical practice is to not denote that in a report?
A The surgeon probably wouldn't even have been present or almost certainly wasn't present during that part of the process. And I would not be noting that on their surgical note, which is what that is.
Q You stated in your January -- this will be

Plaintiff's Exhibit 2, your January 16th report.

THE COURT: Before we leave that, could I ask a question about that? Is whether there's difficulty obtaining an IV line different based upon whose perspective is being given?

THE WITNESS: Yes, yes, absolutely. We might struggle for a while to get IV access and when we get it, we induce anesthesia, the nurses call the surgeon, they come in and do the checklist and stuff and we're underway. I wouldn't -- I probably wouldn't even mention it. If they were saying, complaining, why did it take so long to get started, I'd say I had a hard time with the IV. But they wouldn't -- probably wouldn't know about it.

THE COURT: From the perspective of the person being stuck, if it takes more than one try, perhaps, or two tries, perhaps, would it be unusual for that person being stuck to think that there was difficulty with anesthesia or obtaining an IV, whereas the person doing the sticking may not think that two or three tries was a big deal?

THE WITNESS: Well, it's definitely a bigger deal for the patient than it is for the person doing it.

I think it depends on the individual, if they have an expectation -- if they've had medical encounters before where it always went in the first time, then they're going to say, oh, I had a bad doctor or nurse today, they had to

try three times. Other people are used to the fact that multiple attempts are often necessary on them.

THE COURT: All right.

Q (By Mr. Govan) One more question on that, Dr. Heath, you mentioned the notation about achieving general anesthesia without great difficulty.

Would you agree with me that in your clinical world if it took one or two sticks to establish an IV line, from a clinician's perspective, that would not be a great difficulty in establishing an IV line?

A Yes. I think if you get it on the second try, then that would not be -- that would not be notable.

Q You stated in your January 16th, 2018, report that multiple --

THE COURT: But that would be from the anesthesiologist's standpoint, right?

THE WITNESS: Yes.

THE COURT: You already said that this note that we're looking at in the medical records was the surgeon's note.

THE WITNESS: Yes. Again, that's very standard language and it would refer to some significant event or calamity that was relevant to the subsequent surgical narrative.

THE COURT: For example, if something happened

when the patient was being placed under anesthesia, heart rate dropped, blood pressure dropped and the procedure had to be stopped, that would be noted in the surgical note?

THE WITNESS: They would note that. And if those things happen -- very significant, blood pressure, hemodynamic problems like you're talking about occurred and when the surgeon came in, I would say, hey, Mike, everything is fine, but we had -- has had a couple of scary moments there but everything is fine, I think you can go ahead. There might be a conversation like that. And I don't think the surgeon -- the surgeon might note that in the note or not.

THE COURT: But the surgeon isn't concerned with how many times it took to get a successful stick.

THE WITNESS: They're only concerned if it's holding the OR up.

MR. HARCOURT: Your Honor, I just wanted to discuss the time for a split second. I don't know if I could request perhaps special -- his plane is at 6:45. And I think it only takes about fifteen minutes to get to the airport. I think we're okay. But I just want to make sure that he doesn't miss his plane because he's got to be in the OR tomorrow.

THE COURT: Right. I think if he's out of here by 5:30 he should be good. Do you have your luggage with you?

THE WITNESS: Yes.

THE COURT: Okay.

Q (By Mr. Govan) Dr. Heath, in your January 16th, 2018 report, which is Plaintiff's Exhibit 2, you say that multiple factors such as hydration status, temperature, tissue edema and medications can affect the visibility and palpability of veins over time, correct?

A Yes.

Q Did you have any conversations with Mr. Hamm prior to your September 23rd evaluation about his hydration prior to your evaluation of his veins?

A I never spoke with or met him or anything before encountering him in the prison.

Q Did you have any conversations with Mr. Hamm's attorney prior to your September 23rd evaluation about Mr. Hamm's hydration prior to your evaluation?

A No.

Q So you did not encourage Mr. Hamm to be fully hydrated before your evaluation of his veins?

A No.

Q Would you agree with me if he had been -- let me back up.

You don't know his hydration status, what his hydration status was when you evaluated him on September 23rd?

A I know that he wasn't greatly dehydrated. He had none of the signs of dehydration. He wasn't asking for -- saying he was very thirsty or anything like that.

Q But you don't know how much he had --

A He actually got a drink but put it in his pocket, he didn't open it. All the things suggested he was in a state of normal hydration.

Q You don't know how much he had -- prior to -- the twenty-four hours prior to September 23rd, you don't know how much he had to drink in that twenty-four hour period, correct?

A That's correct.

Q Would you agree with me that if perhaps he had been more hydrated on September 23rd, that may have affected your ability to feel or see other peripheral IV veins?

A Possibly, yes.

Q In your report, I think you talked about this, too, that Mr. Hamm told you there was some difficulty in 2014 prior to his cancer treatments to establish an IV access, peripheral IV access.

A Yes.

Q I think we covered this, but this information came solely from self reporting from Mr. Hamm?

A Correct.

Q You would agree with me while there was some initial

difficulty in each of those procedures in 2014, even, assuming what Mr. Hamm says is true, the medical providers were ultimately able to achieve IV access in those procedures?

A Yes.

Q You mentioned also in your report that -- this is Page 4, I think, of your initial report -- Mr. Hamm relates that he has intermittent waxing and waning tumors on his chest, neck and groin.

A Yes.

Q Again, this was self reported by Mr. Hamm, correct?

A Correct.

Q And you actually felt those areas during your examination, correct?

A Correct.

Q And you did not detect any palpable lymph nodes?

A Correct.

Q In your report on Page 4, Paragraph 8, second sentence, you said that these waxing and waning tumors in his chest, neck and groin, this likely represents lymphadenopathy, swollen lymph nodes, related to his lymphatic malignancy.

But you would agree with me there's -- you did not personally feel any swollen lymph nodes during your examination, correct?

A Correct.
Q And you are aware that Mr. Hamm's medical records do not indicate that he is currently diagnosed or being treated for lymphadenopathy?
A Well, he has -- still has, as of his last scans, there's evidence of internal lymph nodes. He's not being treated for those. Now, they have not been evaluated in terms of what they represent.
Q Last scans, what are you referring to?
A His, I believe, CT or MRI shows lesions in his lungs and chest. And I think also in his abdomen.
Q You would agree with me that lesions in your chest and abdomen would not have relevance to whether peripheral IV access could be achieved, correct?
A They themselves wouldn't impede peripheral access, but it relates to whether he has ongoing disease now or not. And I don't believe he's been effectively evaluated or formally evaluated to determine whether -- the status of his lymphoma.
Q Whether -- I'm talking about lymphadenopathy at this point. You would agree with me whether he has been effectively treated or not, there are no medical records stating he's currently being diagnosed or treated for lymphadenopathy?
A Well, he's being treated but he hasn't been cleared.

Q Currently.
A Correct.
Q So, you would agree with me your statement that these -- his complaints of swollen lymph nodes represents lymphadenopathy related to his lympathic malignancy, that's not an accurate statement --
A I don't know what they were. They would need to be biopsied. The only way to know what those lesions are is to biopsy one. It may be some scans that provide some information also. But they need to be biopsied.
Q You stated you don't know what they are, but you still said in your report that they are likely lymphadenopathy?
A In the context of his having lymphoma or at least, the very least, recently been treated for lymphoma without being cleared from that, that would be the number one thing that would come to mind to say to a doctor, you have got a patient who was treated for lymphoma a couple years ago and now he has lesions popping up on his chest or wherever, he would be like, oh, sounds like lymphoma is coming back.
Q You would agree with me that enlarged lymph nodes can occur for many reasons that have nothing to do with lymphoma?
A I say it right there. There are many other possible causes of lymphadenopathy and the only way to determine the

actual cause would be to biopsy one of these lesions. It's the next sentence.

Q And you mentioned in that sentence related to his -- you say this likely represents lymphadenopathy related to his lymphatic malignancy.

You would agree with me that his medical records indicate that he is currently in remission for the orbital lymphoma from which he received radiation in 2014.

A When those records were written, yes, the ones that I got before visiting him. Remission means that the disease can come back.

Q Certainly anything is possible, but there is no -- you have not evaluated him for whether the orbital lymphoma has returned, correct?

A Well, the scans have. The scans have evaluated him about the orbital lymphoma. Lymphoma is a systemic disease. It can affect lymph nodes anywhere. The cells can travel anywhere in the body. That's why I'm saying that lesions in the abdomen or chest, while they don't specifically impede obtaining central access or peripheral access --

Q Okay.

A -- it's part of the picture. And as clinicians, we look at the entire picture. That's the relevance of them.

Q You would agree with me whether or not he has orbital lymphoma, whether that has returned, would not have an

impact on it necessarily achieving peripheral IV access?
A Yes. I don't see a way that a lesion that was confined to his eye and brain area could affect his arm.
Q Okay. You also noted in your report that Mr. Hamm has a facial defect under his left eye in Paragraph 10.
A Yes.
Q And you would agree with me that a facial defect in or around or underneath the eye would not have an impact on whether peripheral IV access could be achieved?
A Yes.
Q In Paragraph 14 you noted that he has active B-cell lymphoma, a form of cancer that involves the lymph nodes.
You would agree with me when he was diagnosed it was confined to orbital lymphoma, behind his eye, the actual lymphoma that was treated with radiation in 2014?
A His orbital and also extending into his skull and into -- toward -- into the area where the brain is, the calvarium.
Q And you would agree with me that the medical records, current medical records in 2017 indicate that he is in remission for the orbital lymphoma?
A Yes.
Q You stated this, too, I just want to be clear. Whether someone suffers from orbital lymphoma would not have an affect on obtaining peripheral IV access in a person's

hands, arms or feet?

A If it's confined to the head, yes, that's correct.

Q You stated in your January 16, 2018 report that it is easier to insert a needle into a vein to withdraw blood than it is to insert an intravenous catheter, because you said that blood -- a blood draw needle is thinner than a needle you would use to establish an IV catheter for intravenous access.

A If you can show me where -- what I meant is the needle for the catheter, when you have a catheter, it's surrounding a needle, so the combination of the needle plus the catheter is a substantially larger diameter than the needle alone.

Q I'm referring to Paragraph 9 on Page 2 of your -- which is Plaintiff's Exhibit 2 -- of your joint January 16th report, second sentence says, this is because a blood drawn needle is thinner and sharper than an intravenous catheter.

A If you keep reading. Which consists of a needle surrounded by a plastic tube.

Q Correct. Would you also agree with me that typically when you need to draw blood you actually sometimes need to use a larger catheter than you would be in establishing an IV line because blood can be thicker or bigger than the agents you'd be administering in an IV line?

A I don't agree with that.

Q You don't agree with that statement?
A No. You use a very, very thin needle to get blood out and I'm not sure you're talking about in terms of thickness of blood. Do you mean viscosity or -- I'm not sure what you mean by that, but it's not true. You can draw blood out of a very small needle.
Q You can use --
A Just comes out more slowly.
Q You could use a butterfly needle to withdraw blood?
A Yes, as the staff in the prison have attempted to do, yes. Butterfly needle is appropriate for drawing blood, absolutely.
Q And you could also use an IV needle as well, regular IV needle?
A You have to be careful, if you flushed IV fluid through it, then any laboratory values you obtain from that might be diluted by the fluid or the ions and other things in the fluid that you have given, so you have to be careful doing that.
Q Dr. Heath, I just have a few more just general questions about your background.

In Paragraph 2 of your initial report you stated that you have given expert opinion in a number of cases involving the use of lethal injection.

How many total have you testified in?

A Do you include open court testimony like I'm doing here now or depositions or providing a sworn affidavit? I'm not sure what --

Q How many times have you been retained in a lethal injection method of execution challenge as an expert?

A Very, very proximate but I'd say in the realm of fifty to one hundred.

Q How many times have you testified in those type of cases?

A Any kind of testimony including submitting an affidavit?

Q Yes. Deposition testimony, affidavit testimony, in court testimony.

A Fifty to seventy-five. Again, these are very, very proximate numbers.

Q And in those cases -- all those cases have been on behalf of the inmate challenging his method of execution?

A Correct.

Q I think I have seen this in the record in this case, but from prior cases, I have seen your CV and you have given over twenty-four different lectures on problems arising, in your opinion, with lethal injection.

A Talk about the problems and ethical issues with physicians in a variety of aspects of it, yes.

Q And you have testified -- you would agree with me

that you have been lecturing and testifying on these issues since approximately 2002?

A That sounds about -- maybe 2003, something like that.

Q And you have testified against a variety of states' lethal injection protocols?

A Yes. Well, testified about them, and I'm not sure against is the right word, but testified about them and also the federal government.

Q I'm sorry. You have testified on behalf of a plaintiff --

A Yes.

Q -- challenging a state's or federal government's lethal injection protocol?

A Correct.

Q Involving many different types of protocols?

A Yes.

MR. GOVAN: That's all the questions we have at this time.

THE COURT: All right. Mr. Harcourt.

DIRECT EXAMINATION

BY MR. HARCOURT:

Q Dr. Heath, Mr. Govan was asking you about your qualifications in terms of having been involved in numerous questions about lethal injection.

Have you declined to testify in any cases or to

testify in cases?
A Yes. I've denied some cases, yes.
Q Have you declined to testify in cases in Georgia?
A Yes.
Q Have you declined to testify in cases in Missouri?
A Yes.
Q Have you declined to testify in cases in Texas?
A I think so, yes.
Q Have there been occasions when attorneys have asked you to be an expert witness and to assist them in a case where you've told them that there was no problem with the case?
A Basically, yes. When you say decline, basically there is usually a preliminary discussion, they send me protocol and stuff like that, and then we'll talk. And some states are doing things in a way that has very minimal level of risk in my opinion and I tell the attorneys that I don't think that I would be able to say anything that would be helpful to their client and they have always agreed with me and not retained me.
Q And are you opposed to the death penalty in all cases?
A I grapple with that one, and I have gone back and forth. Currently I'm in a phase where I'm okay with it.
Q Okay. You have been qualified as an expert in

Alabama federal court, correct?

A Correct.

Q That was on the David Nelson case?

A I'm not sure if there was ever a hearing that I testified in in that case.

But in the Arthur case, I was. A couple of cases, yes, but I don't think the Nelson case, I'm not sure.

Q And have you ever been excluded as an expert?

A No.

Q Very quickly. In response to Mr. Govan's questions, you said that issues of knots and such, and I think it was in the report, would intuitively or you would say one would think it might be related to the lymphoma because he has been diagnosed with lymphatic cancer; is that right?

A That would be the number one fear, yes.

Q May I quickly show Defendant's Exhibit 8, Bates stamp 151. This is a CT scan of the neck, I believe, Page 151.

Does that report indicate that there were abnormal lymph nodes found in that -- on that scan?

A Yes. It says enlarged lymph nodes consistent with reactive lymph nodes is seen, should say are seen.

Q Did the pathologist who looked at that report immediately say thereafter that it could -- it probably is related or -- I don't have the language in front of me, probably related to lymphatic cancer?

A I don't recall what you're talking about.

MR. HARCOURT: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

MR. HARCOURT: (Indicating) may I ask whether the --

A Yeah. Findings are consistent with orbital lymphoma and then it says enlargement consistent with reactive lymph nodes is seen.

Q So, let me turn the page to another CT scan of the chest.

THE COURT: Before you leave that, would you make clear for the record what the date of that examination is, please?

MR. HARCOURT: Yes, Your Honor. This is an examination from April 18, 2014.

Q On the back, the next page, Page 152, a scan from also April 18, 2014, the question is just about the inferences that one might make regarding abnormal lymph nodes in his case.

Did the doctor -- now, this -- so this is an old scan from 2014, not -- I'm not suggesting it's current, but did the doctor or the pathologist in that case also immediately leap to the suggestion that it's -- that because there are abnormalities in the lymph nodes that it could

very well be related to the lymphoma?
A Yes.
MR. GOVAN: I object on leading and speculation.
THE COURT: I sustain.
A Basically saying that the CT shows adenopathy in the mediastinum, that's the middle of the chest, around the heart, at the core of the chest, basically. And then he goes, he or she goes on to say, certainly any of these areas could be due to lymphoma given the history supplied. PET study may be of benefit for further evaluation.
Q Okay. Thank you.
Let me show you Defendant's Exhibit 8, Page 470.
THE COURT: Is this defendant or plaintiff's exhibits?
MR. HARCOURT: Sorry. Plaintiff's Exhibit 8, Bates stamp 470. The date on that, I'm sorry, Your Honor, the date on that would be March 5th, 2017, I believe.
Q I would like to ask you what they found there (indicating) on that date in that report.
A Talks about right clavicle above right nipple, right side above naval, left armpit, and I'm not sure if -- then it says 2R, I don't know what that means. This is in regard to lumps on his chest.
Q Okay. Let me quickly ask you about two other documents, these are from defendant's records, so this is

Exhibit 1 from the defendant's Donaldson records and Bates stamp 279 and 293. I believe these are dated --

THE COURT: Perhaps the witness could tell us.

Q (By Mr. Harcourt) Tell us when that's dated and what was found.

A It's actually hard to read. Something 31-17, maybe 8-31-17, it's actually hard for me to read it.

Q Okay.

A 8-30-17.

Q August 2017 then.

A Okay.

Q And what was found? What was --

A Small hard nodule, somewhere in the area of the clavicle -- it's hard to read. Small hard nodule of the right clavicle or next to the right clavicle.

Q Okay. That's fine.

A It's hard. Something about six months. Not a good copy and not good handwriting.

Q Thank you.

THE COURT: In that second line where you are reading, does it say something about measures, centimeters?

THE WITNESS: I think so, maybe it says two centimeters, but there is a scribble in front of the two. So I'm not sure if that's right. Definitely says is hard, definitely says clavicle, right clavicle. I think you're

right, it says measures and maybe two centimeters. And below that it says he has something fifteen in six months.

MR. HARCOURT: Okay. I'll stop there, Your Honor.

THE COURT: Okay.

MR. GOVAN: If I could ask one question on recross.

RECROSS-EXAMINATION

BY MR. GOVAN:

Q This is from -- do you still have any exhibits up there?

A Yes, just my two affidavits.

Q 470, I think this was from your exhibit, Number 8. And I just want to be clear. Mr. Harcourt asked you some questions about this and noted that there was notations about something above the clavicle or right clavicle -- do you see that?

A Yes.

Q A lump on chest. And just to be clear, it's not exactly clear what this is referring to, but assuming there was a lump on a chest, that would not have an effect necessarily on the ability to obtain a peripheral IV access on arms, hands and feet.

A Correct.

MR. GOVAN: Thank you.

THE COURT: Would it be relevant to any of the

issues involved in this case?

THE WITNESS: Yes. If -- there's several documents regarding hard nodules -- the big concern is is he cured or is there still lingering cancer. And seeing bumps on his skin and/or in scans makes you worried about that.

THE COURT: Why would that be relevant to the question of lethal injection as to Mr. Hamm?

THE WITNESS: Specifically to Mr. Hamm, if he has at the time they -- if he requires central access, which I think is likely, if he has ongoing disease now, that raises the concern that he will have significant disease impeding obtaining central access when an execution is attempted.

THE COURT: And that would be because of the reasons you told me earlier, the possibility of lymphadenopathy and the effects that those swollen lymph nodes could have on the vessels that were in the three areas where the central line would be started?

THE WITNESS: Yes. They can distort the anatomy so the vessels are occluded or moved, shifted over, or in -- they can be deeper in the tissue making them harder to access. There could be more bleeding from the nodes.

THE COURT: I may have opened another can of worms. Any questions in response to mine?

Okay. Hearing none, I'll assume there are none. You may step down and you may be excused. Thank you,

Dr. Heath.

What's next?

MR. GOVAN: We'd like to call Dr. Blanke, just very briefly.

THE COURT: Okay.

MR. HARCOURT: Okay. That's fine. Do that next?

THE COURT: Yes.

CHARLES BLANKE, SWORN

THE CLERK: Say and spell your first and last name for the Court, please.

THE WITNESS: Charles David Blanke, C-H-A-R-L-E-S, B-L-A-N-K-E.

CROSS-EXAMINATION

BY MR. GOVAN:

Q Good afternoon, Dr. Blanke, I'm Thomas Govan from the Alabama Attorney General's office. Just have a few questions from me.

You are not Mr. Hamm's physician, correct?

A That is correct.

Q And you have not personally examined him before?

A That's correct.

Q And you haven't -- I'm assuming you haven't seen him until today in court?

A Live, that is correct.

Q Am I correct the extent of your involvement in this

case is reviewing his medical records?
A Yes.
Q Okay. You stated in your report that it's impossible to state whether or not he has active lymphatic cancer.
A Yes.
Q You would agree with me that the lymphoma that was originally diagnosed was located in his left orbital area, correct?
A No. I would state that we know for sure he had lymphoma behind his left eye, he had other suspicious areas. We know for sure he had massive cancer cells behind his left eye that were biopsy proven and that were treated.

He had other suspicious areas on imaging that were not assessed. And he had other areas that we would routinely work up in a patient with lymphoma that were not assessed.

Q You would confirm that these other areas were not confirmed to be lymphoma?
A Yes.
Q And he received radiation treatment for this lymphoma, correct?
A He received radiation treatment to the areas that we know were involved, yes.
Q And you would agree --

THE COURT: To be to his head area?

THE WITNESS: Exactly right.

Q (By Mr. Govan) You would agree the records indicate at many points that the orbital -- in the left orbital region the lymphoma is in remission?

A To be honest, as an oncologist, I wouldn't phrase it that way. When we talk about a cancer, we usually talk about its overall status, which, of course, again is not known.

What I would absolutely and unequivocally state is the tumor behind his eye responded to therapy.

But remission, again, means that all of his known lymphoma went away or all of his lymphoma went away, and since he wasn't assessed, I would never be able to use that term with him without further assessment. Then or now.

Q I think you noted, I think, that there were other abnormal places picked up initially in some of the scans in 2014 related to lymph nodes; is that correct?

A That is correct.

Q But you would agree with me that in Mr. Hamm's follow-up reports, for example, in March of 2016, that it was documented after finishing his treatment there were no palpable lymph nodes noted?

A Palpable -- I have his report, may I take a peak at it for a second?

Q I'm sorry?

A I actually have his physical exam. May I take a peak at it?
Q What are you referring to?
A And I'll give you the date after I find it.
Q Okay.
A I have an exam from Brookwood from March 16th and follow up that does state he has no palpable nodes.
Q Okay, thank you. Would you agree --
THE COURT: Does that mean that the lymphatic cancer is in remission?
THE WITNESS: Your Honor, I still wouldn't use that term. Those weren't the suspicious areas to begin with. The nodes that were suspicious were internal and, again, we can't comment on them because they were noted to be abnormal once and never followed up upon.
THE COURT: So the nodes that were questioned in I think 2014 and 2015 you say were internal. So does that mean they could not be palpated?
THE WITNESS: Yes, they could not be palpated.
Q (By Mr. Govan) You would agree with me that you cannot state to a medical degree of certainty that Mr. Hamm currently has active lymphatic cancer?
A That's correct. We do not know.
Q You would also agree with me that lymphatic cancer is not determinative of the issue of peripheral IV access?

A That one is a little bit more challenging. Some of the reports, of course, that suggested the nodes above the clavicle or in the chest, my concern would be they would be the tip of the iceberg which is why I would like to assess his overall node status. I have used, obviously, IVs in my practice, I'm not an anesthesiologist, I would be concerned that, for example, nodes in the underarm of the axilla or the central chest could impede -- well, certainly central venous access, as you heard, I think they could have some affect on peripheral access, but that should be fairly obvious from the examination of the veins themselves.

Q And there's certainly nothing in his medical records that you reviewed that state that there's any impediment to those regions currently for IV access?

A Except for the fact that it appears his doesn't have good peripheral access, but I don't think that we can state it's because of internal adenopathy, we don't know.

Q You didn't examine his veins yourself personally?

A Correct.

Q You are not expressing an opinion specifically about his venous access?

A Only what I read.

Q One last question on that topic. You mentioned that since 2014 Mr. Hamm has had a lesion under his left eye.

A That is correct. It was present for awhile before

that and the best I can tell it hasn't been treated.
Q You would agree with me that the -- whether that lesion exists or not does not impact on whether he has accessible veins for IV access?
A Only if they were going, for some reason, going to use veins in the head or neck, so yes, except for that.
Q A lesion under his eye would affect the ability to obtain IV on his neck?
A The drainage there is to the nodes behind the ear and potentially even in the neck on that side.
THE COURT: I'm sorry, I didn't --
THE WITNESS: The lymph node drainage from a tumor like that would be lymph nodes on the left side of the face and possibly even the neck.
Q (By Mr. Govan) You have no way -- that is just a general concern, you have no idea whether that actually applies to Mr. Hamm or not?
A That is correct.
Q You also stated in your January 16th affidavit that you specialize in medical-aid-in-dying in Oregon.
A Yes.
Q Is that correct?
A That is correct.
Q And you stated, I think, in your report the types of medication that you prescribe in Oregon, one of them you use

was -- you prescribe was secobarbital?
A Correct.
Q And you stated that that medication is taken by mouth in four ounces of liquid. Did I get that correct?
A You did.
Q And so that is taken in a liquid form as a drink?
A Yes, the majority of the time.
Q And the person who was doing that was using it to end their life, typically is self-administering that drink or drinking that themselves?
A Yes, that's actually required by Oregon law.
MR. GOVAN: Your Honor, I don't have any further questions of this witness. I'm sorry. One moment, Your Honor.
(Brief pause)
A I'm sorry, I apologize. I didn't finish my answer to that last question, if you'd like to hear the rest, about the drinking.
Q That's fine. I have a different follow-up question.
You mentioned that the lesion under the eye, the left eye that you indicated that Mr. Hamm has, that would not have an affect on any lymph nodes in other areas such as the right side of his neck or lymph nodes in other areas of his body, correct?
A Yes.

Q I'm sorry. Yes, you agree with that?
A Yes, you're correct.
Q Thank you.
THE COURT: Is there any concern about, I think this lesion was diagnosed as a carcinoma?
THE WITNESS: Yes, as a basal cell carcinoma.
THE COURT: Is there any risk associated with allowing basal cell carcinoma to go untreated?
THE WITNESS: Yes. Unlike the usual worry with cancer, which of course can spread to your liver, your lungs and be fatal, these type of tumors tend to be locally invasive, they burrow in where they are so they could invade into the face and eventually even into the skull and deeper than that. That would be the major concern.
THE COURT: All right. But no concern with a basal cell carcinoma becoming melanoma?
THE WITNESS: No, they are different types of tumors, Your Honor.
THE COURT: I'm glad to hear that.

DIRECT EXAMINATION

BY MR. HARCOURT:
Q Thank you, Dr. Blanke. So, very quickly on these questions of medical-aid-in-dying.
You indicated that your patients voluntarily drink the drugs; is that correct?

A So that was actually the second part of my answer. They do have to do it voluntarily; that's absolute. The majority of them drink, every once in a while we get somebody, say, with thyroid cancer or a big mass in their neck that prohibits swallowing, they cannot swallow, and we actually have to put a tube through their nose into their stomach, and then they have to self-inject the medication into that tube.

Q Okay. And so the -- so the tube, the tube is placed -- could you describe how that would be done exactly?

A Sure. It could be --

Q What are the different options for placing a tube in an individual in order to inject fluid into their system?

A Right. So, it's called an NG for nasogastric or nose and stomach tube. It's probably slightly smaller than my pinky, it's made out of soft rubber. You can spray something in the nose to numb it up and fairly easily thread the tube through the nose, down the throat, into the stomach. It's a very common procedure done for a lot of other reasons as well. It can be done at the patient's home. They do not have to be in the hospital to have it done.

Q And are there other ways to get a tube -- can you go through the mouth as well?

A You can do an OG tube for orogastric as well.

Q How does that work?
A It's similar, except you go through the mouth instead of through the nose. And there actually have been some reports -- you could put a tube directly into the stomach, but that's a little bit more of a surgical procedure.
Q And in -- I take it in Oregon it would be necessary that the individual who would have a tube inserted into their nose or mouth would be the person who would inject the fluid themselves?
A That's correct. That's an absolute requirement.
Q But that's not a physical requirement?
A Correct. It's very easy to do.
Q Okay. How much fluid are we talking about exactly?
A It's about four ounces.
Q What's four ounces?
A May I show you?
THE COURT: Okay.
THE WITNESS: So, I'm guessing this cup itself is probably six ounces, it would be full to about here (indicating).
MR. HARCOURT: So let the record reflect Dr. Blanke has an ordinary --
THE COURT: A six ounce cup that he filled to the four ounce area. Got it.
Q (By Mr. Harcourt) And that's the whole quantity of

all the liquid that needs to be injected into an individual orally for them to pass away?

A That's correct, regardless of which prescription we give them. The volume of liquid is always the same.

Q Just four ounces?

A Correct.

Q And how much -- how many times have you -- how much experience have you had with this?

A A lot. I didn't track it when I first started doing it until I became more specialized. The state reports, which collects this information, the highest number performed is eighty-five. I believe I'm somewhere between fifty and a hundred. I might be the eighty-five, I'm just not sure. But certainly more than fifty.

Q Over how many -- how much time?

A I started doing it in 1998, one year after the act was passed.

Q Okay. And how reliable is this?

A It's incredibly reliable. If the patient takes the medication, and I always tell them this in advance, because we have to counsel them at multiple steps that they can change their mind, but I tell them, once they drink it, they cannot change their mind. It's unbelievably fast and it's unbelievably effective. The chance of them dying, if they drink these formulas, is ninety-nine point four percent.

Q Okay. And how long with these formulas does it take before generally the person becomes unconscious?

A So, the data that has been collected is cross the board for all the formulations, but they're mostly similar. The average person is asleep in five minutes, asleep to the point where they can't respond, they're essentially comatose. And that range is between one minute and sixty minutes and then the average person dies in twenty-five minutes.

Q And let me ask you, when you talk about the average person, you're speaking about an average healthy person?

A Well, so, to qualify for death with dignify they have to have a terminal illness, so it's a little bit hard for me to use that term. But I have had people who had problems, say, pancreatic cancer that's localized and they have been otherwise healthy. So it's a spectrum.

Q On the feasibility question, you have done this many times?

A Yes.

Q In cases of voluntary in Oregon. On the question of the accessibility of the drugs, are these drugs difficult to get?

A No. They are all prescription drugs. But they're not particularly fancy or special. They should be available anywhere in the United States.

Q And on the -- I think you referred to it as a DDMPII cocktail; is that --

A Right. So, other counsel asked about the secobarbital, I believe, or perhaps I falsely remembered that, but there is also a cocktail that is a combination of two drugs that slow the heart, as well as Valium, which is a bit of a sedative, and Morphine, which I'm sure you're all familiar with, and that's the DDMPII cocktail.

Q So, basically, that's made, you said, with Morphine; is that readily available?

A Yes.

Q Do you know -- actually, most prison systems have Morphine.

A And I think it's on formulary for Blue Cross in Alabama, if I remember correctly.

Q Okay. I'm referring here to Defendant's Exhibit 1, which are the Alabama Department of Correction records, and I'm looking at pages Bates stamped starting about 492, yes, so Defendant's Exhibit 1, Bates stamp 492.

Can you tell me whether this -- well, what this prescription is for?

A This is a prescription for oral morphine sulfate which is one of the four drugs of DDMPII.

Q Who was it administered to?

A Looks like Mr. Doyle Lee Hamm.

Q Okay. Let me ask you, Page 494.

THE COURT: Can you tell me the date of that?

THE WITNESS: Looks like March 19th of 2015, Your Honor, start time, and then they have a stop time of April 17th.

And then the second medication or second sheet you handed me is also for morphine sulfate.

THE COURT: What is that number? Page number?

THE WITNESS: 493 is the second. The first one that we just talked about is 492. The second one is also morphine sulfate from February 17th of 2015, also for Mr. Hamm.

Q (By Mr. Harcourt) And let me show you Bates stamp 495 and 497.

A Same drug. This one is dated January 21st of 2015. Same patient, Mr. Hamm. And we have morphine, Page 497, December 28th of 2014, Mr. Hamm.

Q Can you tell me -- so, some of the other drugs that are used, can you -- another -- is another one, am I correct you said was valium?

A It's just common valium, diazepam.

Q Do you know if valium is a drug that should be available in the State of Alabama?

A Yes, it should be available easily in the State of Alabama.

Q Okay. What are the other two drugs that you mentioned?

A They are two drugs used in patients with heart disorders, digoxin and propranolol, also extraordinary common drugs.

Q Okay. And you said they are --

A They're extraordinarily common in usage.

Q I'm not a doctor, I have never heard of them before. What does that mean "extraordinarily common"?

A It means a lot of patients with heart disease will need these drugs and get these drugs.

Q Okay. Let me show you what is Plaintiff's Exhibit 36 (indicating). And let me ask you what that exhibit is.

A This is the drug guide from Blue Cross and Blue Shield of Alabama. It looks like it's dated October 17.

Q Okay. And can you tell me if the drugs that you are discussing are covered by Blue Cross Blue Shield of Alabama?

A It does look like all --

MR. GOVAN: Your Honor, I'm going to object to this, I guess, I mean, commenting on a document, I don't know if he has personal knowledge to -- if the document is going to be admitted, that's one thing. But for him to comment on what is or is allowed under Blue Cross Blue Shield of Alabama --

THE COURT: Can you tell me whether these drugs

that you have discussed today are listed on the drug chart in document 36?

THE WITNESS: If this is document 36, all four drugs are listed.

Q (By Mr. Harcourt) Could you refer to the pages, perhaps?

A I could. On Page 22, there are a variety of formulations of propranolol, which is one of the heart drugs that I discussed.

On Page 26, digoxin, two different formulations, also a heart drug.

On Page 34, there are three different preparations of valium listed by its generic name diazepam and valium, it's brand name.

And on Page 43, there are a whole host of varieties, meaning dosages of morphine sulfate.

Q Thank you. Have you, yourself --

THE COURT: While we're on that page, what about the first drug that you mentioned that was a single dosage?

THE WITNESS: The secobarbital?

THE COURT: Yes.

THE WITNESS: I would have to look through this whole thing and I'm happy to do so.

I don't believe that seco is on those four pages that we pulled.

THE COURT: Is it used for anything other than in the main process?

THE WITNESS: Yes, Your Honor, it's a sleeping pill. That's it's main usage.

THE COURT: All right. Thank you. Is it generally available in your experience, secobarbital?

THE WITNESS: There are definitely newer sleeping pills available, so it has to be ordered. By that I mean there's just a one or two delay in Oregon and yes, it's easily available.

Q (By Mr. Harcourt) May I ask, have studies been done on the effectiveness of death with dignity medications?

A Yes.

Q Have you yourself conducted some of those studies or looked at the data and written reports?

A Yes.

Q I would like to show you Exhibit 33, Plaintiff's Exhibit 33. Will you identify that?

A This was an article published in JAMA Oncology entitled Characterizing Eighteen Years of the Death With Dignity Act in Oregon. I was the lead author in this paper.

Q What did you find there in terms of the feasibility and reliability of the drug experiments with death with dignity drugs in Oregon?

A So, some of that was the data I quoted earlier, in

terms of the drugs working quickly, in terms of putting people into a coma and causing their death, as well as the overall chance of actually leading to death.

Q There is some question as to whether I asked what you found in your study about how long it takes for someone to pass away.

A Okay. So the state's data from -- this might have been an eighteen year period, it wasn't quite twenty years yet, but the state found, and we reviewed this, that the average time to coma is five minutes; the average time to death is twenty-five minutes; and the effectiveness rate, the chance of dying if you take the medication is ninety-nine point four percent.

MR. HARCOURT: I think that's all my questions, Your Honor.

THE COURT: All right. I have some questions, which counsel should not be surprised at this stage.

Dr. Blanke, you talked about self-administering these drugs and you talked about the possible use of an NG or OG tube.

Can you tell me how the medicine could get from that cup of four ounces in to the patient's tube and in to their stomach?

THE WITNESS: It would be put into a syringe, just like you would give a shot to somebody, and they would push

the plunger down.

THE COURT: Okay. And what would one refer to pushing the plunger as?

THE WITNESS: I would consider it to be an injection.

THE COURT: Okay. That was what I was getting at. Does the term "injection" in a medical context mean only intravenous injection?

THE WITNESS: Oh, no. Basically it would be -- you can include injections into skin, into muscle, into body cavities, into joints. It's basically --

THE COURT: But those would all include a needle.

THE WITNESS: The ones I listed --

THE COURT: Except, perhaps, body cavity.

THE WITNESS: That's true. But even if we -- I'm trying to think of a good example. If we talk about injecting fluid into people's ears for other purposes or into their mouth, we still consider that to be an injection.

It's the pushing of the fluid, the needle really isn't part of the medical definition in any way.

THE COURT: Thank you. Any further questions from either counsel?

MR. GOVAN: I have a couple.

RECROSS-EXAMINATION

BY MR. GOVAN:

Q Dr. Blanke, a couple of questions for you.

You mentioned some of the drugs that are used in the Oregon -- in Oregon in the medical-aid-in-dying context are available commercially and so forth; is that correct?

A Yes.

Q And you gave an example of valium. And I think you said that was something that was kind of available and normal in the market, correct?

A Yes.

Q Would you agree that midazolam is also a drug that is commonly used in the market?

A In a different -- first of all, yes, in a different way. I would say that midazolam is much more commonly used and administered by professionals, whereas valium is often taken at home by patients. But otherwise, yes.

Q And I'm assuming that drug companies that have provided -- that manufacture these drugs have not raised objections to the drugs being used in the medical-aid-in-dying context in Oregon?

A I honestly don't know. But I haven't seen or heard any objection.

Q Okay. Are you aware of the fact that in execution context, lethal injection context, that many drug companies have enacted restrictions on the distribution of their drugs for drugs that are used in lethal injections and executions?

MR. HARCOURT: Your Honor, I would like to somehow object, I'm sorry, I'd like to object. We're going into a line of reasoning that I don't think Dr. Blanke is an expert on, which is the --

THE COURT: I think the question was merely if he was aware. And I think he can answer that. And if he's aware, he can say so. If he's not aware, he can say he's not. We'll find out.

A Would you mind repeating the question, please?

Q (By Mr. Govan) Sure. Are you aware that many pharmaceutical companies have created distribution restrictions to attempt to prevent their drugs from being used in lethal injections in different executions?

A I actually did not know that.

Q Okay. Are you aware that --

THE COURT: That takes care of it, right, Mr. Harcourt?

MR. HARCOURT: Yes, Your Honor.

THE COURT: Thank you.

Q (By Mr. Govan) Another question. Were you aware that also pharmaceutical companies are restricting certain drugs that are provided specifically to departments of corrections that carry out executions in different states?

A Was I aware they were restricting?

Q Yes.

A No. To give you a complete answer, from Google, I know that they -- this is my own private non-professional opinion, I know they don't like the use of their drugs, but I have no idea what they have done to limit use of their drugs.

Q Okay. You are certainly not opining on the ability of a department of corrections to obtain some of the drugs you've mentioned in the context of an execution?

A Can you say that one more time?

Q I'll rephrase.

You're not opining that these drugs that you mentioned, like secobarbital and Valium, you're not opining about the ability of a department of corrections to acquire those drugs if they were going to be used to carry out an execution?

A Not specifically, no.

Q Okay. You are not specifically aware of it, would you agree with me that if a pharmaceutical company placed restrictions on their drugs being used in executions that that would potentially raise a difficulty in the ability to acquire those drugs -- for a department of corrections?

A That goes back to my previous answer. I don't know how much they can limit that sort of use, so I honestly don't know.

Q Okay. And so when you're speaking about -- when

you're saying drugs are commercially available and things, kind of generally, you're just talking generally in your professional experience and in the context of the drugs that are used in medical-aid-in-dying in Oregon alone?

A I am saying they are widely used, they are not specially produced for this purpose. They are definitely used for other purposes in Alabama.

Q Okay. Did you ever use the drug pentobarbital in your practice before?

A Yes.

Q Do you still use that now?

A No.

Q Okay. Is that available to you now?

A No.

Q You mentioned as well some questions from the judge about the term "injection."

Is there an official, like medical journal or something that defines specifically what "injection" means?

A I am relatively sure if we went to a medical dictionary it would be in there, but I did not look it up for today's purposes.

Q Okay.

THE COURT: Wait a minute. I did. Just a minute. I think it was Tabor's Medical Dictionary. Are you familiar with it?

THE WITNESS: Yes, Your Honor.

THE COURT: Tabor's Medical Dictionary defines injection as the forcing of a fluid into a vessel, tissue or cavity.

THE WITNESS: Exactly how I would have defined it.

THE COURT: I think it's pretty close to how you defined it.

Q (By Mr. Govan) Are you aware of any state that is currently using this process that you described in Oregon, the medical-aid-in-dying process, to carry out an execution, a judicial execution?

A No.

MR. GOVAN: Okay. No further questions, Your Honor. Thank you.

THE COURT: Anything further, Mr. Harcourt?

MR. HARCOURT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. HARCOURT:

Q I come from a slightly different discipline, I apologize.

But I would like to show you the definition of injection from the Oxford English Dictionary. It's not a medical dictionary, but common usage dictionary.

THE COURT: I have read that one as well.

MR. HARCOURT: And it could be relevant to how an

ordinary legislator would use the term injection.

MR. GOVAN: I object to that. That's purely speculative.

THE COURT: And it's argument, not question. I got it.

MR. HARCOURT: My apologies.

Q Could you please read the definition from the Oxford English Dictionary?

A On Page 24, the Oxford English Dictionary defines injection as the action of forcing of fluid, et cetera, into a passage or cavity as by means of a syringe or by some impulsive force, especially the introduction in this way of a liquid or other substance into the vessels or cavities of the body, either for medicinal purposes or in a dead body or portion of one in order to exhibit the structure or preserve the tissues.

Q And would you agree that that -- does that definition -- would you agree that that is a good definition of injection?

A Yes.

Q Okay. You have been asked a lot of questions about lethal injection. And I realize you're not an expert on lethal injection.

Do you know that some states include lethal intravenous injection in their statutes and other states

include only lethal injection in their statutes?
A I did know that.
Q You did?
A Yes.
Q Thank you. Let me show you what is document 20-19 which I'm -- is the Defendant's Exhibit 11. Defendant's Exhibit 11. And I apologize, I can't find it.
Can I show the witness --
THE COURT: Do you want to use this one (indicating)?
MR. HARCOURT: (Indicating).
Q This is Defendant's Exhibit 11. Can you tell me what that is exactly?
A It's a description of the drug including its chemical structure, its clinical pharmacology, I haven't gone through all this, I'm sure it's fairly typical in terms of usage, indications and usage, when you shouldn't use it and it has a warning section as these usually do.
Q Does that kind of --
THE COURT: What is the drug at issue there, please?
THE WITNESS: This is the midazolam, midazolam hydrochloride.
Q (By Mr. Harcourt) And is that what's called kind of a label or --

A I don't know if this is the specific label, looks exactly like the label would look.
Q Okay. And can you tell who manufactures that midazolam?
A If I'm reading this correctly, looks like Acorn, Incorporated.
Q Who is Acorn, Incorporated?
A I actually don't know. I assume it's a company that manufactures benzodiazepine.
Q That's another name for midazolam?
A It's the class it belongs to, just like valium.
Q Okay. So, I suspect you might not be aware then that Acorn, Inc., has put in place regulations to prevent the use of their drug in lethal injection since -- okay. Well, okay. You're not -- you don't know Acorn, Inc.?
A No, I do not.
MR. HARCOURT: No further questions. Anything further, Mr. Govan?
MR. GOVAN: No, Your Honor.
THE COURT: Thank you, Dr. Blanke. You may step down.
THE WITNESS: Thank you, Your Honor.
THE COURT: Unless I hear an objection, you may be excused.
Anything else we need to take up from an

evidentiary standpoint?

MR. HARCOURT: Could I have a brief moment to collect my thoughts? Maybe three minutes?

THE COURT: We'll take a three minute recess. We'll come back at 6:19.

(Brief recess taken)

MR. HARCOURT: One small administrative task is to actually get these exhibits admitted either to the Court or into the record.

THE COURT: Okay. I have the original of the plaintiff's exhibits and -- I did forget to make that announcement at the beginning today that all of the -- all the exhibits that were offered regarding the summary judgment motion are already in evidence, I don't know how many additional ones, but you can certainly have these millions of pages into the record.

MR. HARCOURT: We might have some objection to some exhibits.

MR. GOVAN: You're talking to defendant's exhibits or my objections --

MR. HARCOURT: I have no objections to any of yours.

MR. GOVAN: Your Honor, how would you like us to -- sort of formally move to introduce the plaintiff's exhibits and I can state our objections?

THE COURT: That would probably be a good way to approach it.

MR. HARCOURT: I believe there are no objections through --

THE COURT: Why don't you just move to offer all of the exhibits that you produced today in these two binders, unless there's some you don't want introduced.

MR. HARCOURT: The only thing I would want to do is, we have agreed that instead of introducing a Conway's affidavit, which is Number 43, I believe, we're going to replace that with a small set of documents which I don't know if we can make that 43 or 45. I'm not sure how it's done.

THE COURT: Exhibit 43 is withdrawn?

MR. HARCOURT: Yes, Your Honor.

THE COURT: And 45 is then added and it is what? How would we describe that?

MR. HARCOURT: Those would be documents -- prior records from the federal habeas record --

THE COURT: Do you have those documents? Are those medical records that are not included in Plaintiff's Exhibit 8?

MR. HARCOURT: These are the originals of what the Court has. I provided --

THE COURT: I don't have Exhibit 45 to look at to

know whether it is the same medical records that are part of these other exhibits.

MR. HARCOURT: No, Your Honor.

THE COURT: We've got your Exhibit 8 and we've got Defendant's Exhibit 1, both of which are extensive medical records. And I don't know that we have got anything that reflects what the dates are that those records cover.

MR. HARCOURT: Right. So, Exhibit 45 is our -- a few medical records and then other records including some -- all of them predate and none of them are included in the Donaldson medical records that have been provided to the Court.

For instance, these are medical records from his much younger time, from like 1981 before he was in the Alabama Department of Corrections or from Mississippi and -- and all of this is from the post-conviction record and includes, for instance --

THE COURT: Well, this also includes -- this is not medical records, some of it may be, but it includes school records and a whole wide range of a variety of things that, frankly, I don't see how it's relevant to the issues that we're facing today which is whether his medical condition, as of the spring of 2017, makes the method of lethal injection as applied to him unconstitutional.

MR. HARCOURT: The argument regarding his current

medical condition --

THE COURT: I know, the argument is that it's cumulative. But I don't see what his school record has anything to do with that.

MR. HARCOURT: So, part of my argument, Your Honor, is that the poly drug abuse was related in part to earlier issues of seizures and use of anti-seizure medications, that those seizures were the result in part of head damage -- head injuries that he received as a child and, therefore, that there's a connection between all of the health pieces that lead to his becoming, for instance, a poly drug user --

THE COURT: I don't care what the reason was that he used drugs. That's not relevant to the issues before me today. And I see no need to go through these records that do not shed light on his current medical condition.

So I am going to, on my own motion, exclude Exhibit 45 as not being relevant.

MR. HARCOURT: And I would only say, Your Honor, that, for instance, his intravenous drug use would have been a component of the fact that his veins today aren't --

THE COURT: I agree. And I have taken that into consideration. There's no dispute of fact as far as I know that he was an intravenous drug user for a significant amount of time. Do you dispute that?

MR. GOVAN: We have nothing to factually dispute that, no.

THE COURT: Okay. So we don't need that. With the withdrawal of that one, does the defendant have any objection to any of the other exhibits offered by plaintiff?

MR. GOVAN: A few. This is spelled out in our motion or objection we filed, document twenty-seven.

But we object to Exhibit 35, which is entitled Public Assessment Report on Midazolam of the Medicines Evaluation Board in the Netherlands for several reasons. First, it's inadmissible under Rule 802. It contains hearsay, apparently statements and findings from this board. It's also irrelevant to the current proceedings.

THE COURT: Because there's not a challenge to the use of the midazolam in this case, right?

MR. GOVAN: Correct, Your Honor.

MR. HARCOURT: Your Honor, we're not challenging the use of midazolam. The relevance to this case and we have -- we did file a small response addressing some of these questions. The relevance to this case is that a defense that the defendants are raising is that they wouldn't have access to, say, Valium or the other drugs in this cocktail because the drug companies wouldn't want their drugs associated with --

THE COURT: But they have not presented any

evidence to that affect.

MR. HARCOURT: No, Your Honor.

THE COURT: I think that's one of the things that we have yet to do discovery on.

MR. HARCOURT: Yes, Your Honor. But I was just trying to show that even when there are objections by, for instance, Acorn, Inc., which put in place restrictions on sales so that none of their products in 2015 could be sold for lethal injections, that the shelf life on that is two years, so here we are apparently continuing to use Acorn's product. That doesn't stop -- that doesn't stop the State.

THE COURT: I don't see that it is -- it is hearsay and I see no reason to find an exception to it for the purposes here when the use of this drug is not at issue.

MR. GOVAN: The next objections are Exhibit 39 and 40 which are printouts of 2014 articles from the website New Republic. And similar reasons that those articles are classic hearsay statements and to be -- and inadmissible under rules of evidence. And particularly these things, if you look in the actual documents themselves, they are unverified statements about what occurred in executions.

Many times they are not even quoting anybody, it's not clear where the statements are coming from. It's double hearsay, apparently, in these articles.

THE COURT: Far be it for me to accuse them of

being fake news, but I don't think that they're admissible in this case. I'll sustain the objection to those as well.

MR. HARCOURT: May I make a proffer of why they would be admissible?

THE COURT: How do you get around hearsay?

MR. HARCOURT: So, I'm introducing them mostly for the photographs which are -- which are official photographs, suggesting on a preliminary injunction, preliminary hearing, that this is something that I will be able to bring in later when we -- when I get some discovery to show what the significant risk is. These photographs show explicitly what the significant risk is in this case. One of them shows infiltration. The other shows repeated pricking of the body. Those -- and so I --

THE COURT: Okay. I don't want you to get dangerously close to a method of execution across-the-board argument, it's got to be tied to Mr. Hamm. And there's nothing linking these photographs in these instances to someone with the kind of health condition that Mr. Hamm may be dealing with that would make the as-applied argument here.

So, for this purpose, I am sustaining the objection. Anything else?

MR. GOVAN: The final one, Your Honor, that we object to Exhibit 44 which is the affidavit from Nicola

Cohen summarizing her efforts to obtain Hamm's medical records.

While I think Your Honor discussed that in the context of the motion for summary judgment, here at this point in deciding whether there's a substantial likelihood of success on the merits on the Eighth Amendment claims, what happened in accumulating records doesn't relate necessarily to the two Eighth Amendment claims that he has alleged in his amended complaint.

THE COURT: It relates to the timeliness argument that you're making in terms of whether granting a stay is the appropriate equitable action for me to take, does it not?

MR. GOVAN: We would contend it is not. And --

THE COURT: I would contend that it is. I'm going to overrule the objection to that affidavit.

MR. GOVAN: That's the final objection.

THE COURT: Okay. So Plaintiff's Exhibits 1 through 34 are admitted. Exhibit 36, 37, 38 is admitted. 41, 42 and 44 are admitted. Okay. Also, as I stated earlier, all the exhibits that were offered as part of the summary judgment motion are previously accepted as well. Defense?

MR. GOVAN: Your Honor, we would ask to admit Defendant's Exhibits 1 through 11. And we have the

originals here to provide to the Court.

THE COURT: Okay. Because neither Dr. Roddam or Butler testified, do you want to withdraw Exhibits 2 and 3, their CVs that were offered in the event they were called to testify?

MR. GOVAN: We can still include them in the record just to provide their background information. I know they didn't testify. But we can still leave them in the record for a full understanding of their background.

THE COURT: Okay. I understand, Mr. Harcourt, that there are no objections to the defendant's exhibits; is that correct?

MR. HARCOURT: Correct, Your Honor.

THE COURT: So Defendant's Exhibits 1 through 11 are admitted for purposes of the hearing here today.

Okay. Anything else?

MR. GOVAN: As far as evidentiary matters, no, Your Honor, not from the defendants.

THE COURT: Okay.

MR. HARCOURT: No, Your Honor.

THE COURT: All right. I'm not going to take the time to go back and organize my thoughts in to some brilliant ruling that I'm dictating into the record in the interest of time. I'm sure that Mr. Hamm and his transport team are glad to hear that.

But I do want to make sure that I cover for the record that I'm overruling the defendant's motion for summary judgment as to count one, the claim of constitutional challenge to the as-applied use of lethal injection as provided in the protocols that were submitted for in camera review today.

I think that there are too many genuine issues of material fact that cannot be resolved on the record before the Court and that discovery is necessary on those issues.

I really have not addressed and nor have I allowed y'all to go into today the new claim that was added in the amended complaint of deliberate indifference to medical care. I figured the most important thing we need to be dealing with in the most efficient time possible is the question of the challenge to the execution as it is applied to Mr. Hamm. So that's what I have really been looking at.

And I'm not at this point addressing the motion for summary judgment as it may apply to that claim. We'll deal with it later.

I have also considered the fact that with the claim going forward that there is a need for discovery and for full litigation of Mr. Hamm's claim. There is a huge need in my opinion for an independent evaluation of Mr. Hamm before I can be confident in terms of what his medical condition is, how it may or may not affect peripheral venous

access, how it may or may not affect central venous access, and that needs to be addressed as soon as possible, and we'll talk about how to do that later.

But there's no way that I see that we can resolve these issues by February 22nd. I have considered the various equities involved as set out by numerous of the Eleventh Circuit cases and I'm not going to go line by line what those are today. I will issue an opinion that will.

But I find that the equities weigh in this case in favor of a stay of execution only pending the resolution of the question of whether the as-applied challenge will survive.

I do find that the plaintiff has pled sufficiently that there is an alternative to intravenous injection of drugs and for the purpose at this stage where there has been no discovery, that the pleading and the proffer are sufficient on those.

Alabama statute specifically provides for lethal injection, but does not limit that in terms of intravenous only. And I can only assume, because I have to assume, that had the legislature wanted to limit it to intravenous lethal injection, it could have and would have said so.

As Dr. Blanke testified and as the Tabor Medical Dictionary describes injection, it doesn't require a needle or a vein, and so I find that the statute does not on its

face prohibit the oral injection of lethal drugs for execution purposes.

I also note that the statute does not require specific drugs that are used, that's part of the protocol established by the Department of Corrections, so there's no statutory prohibition.

We will explore whether these drugs are, in fact, available for purchase to the Department of Corrections, that will be part of what we do in discovery.

But I don't even know, and this is something that we can really talk about in a more informal fashion, I really don't know if we need to get there until we first determine what Mr. Hamm's medical condition is and whether it will affect the intravenous method.

So we can talk later. And I know everybody needs to get home. So we'll set up a conference call in the near future to really come up with how we want to go about addressing the many issues that are involved in this case.

I think we can certainly put the Department of Corrections on notice, Mr. Govan, that I expect that we will have a prompt determination of who an independent medical exam will be conducted by and he will be made available for that in a timely fashion.

Did I say I am granting a stay pending the resolution of those issues?

Any questions or even suggestions in terms of how we best proceed?

And I will get an order out on this as soon as I can possibly do. As I told you, I'm going to be out of town next week with the GSA; that's all I'm going to say.

MR. HARCOURT: Your Honor, I would say that I'm happy to do everything I can to work, telephone conferencing and coming down here, to do all that.

The only footnote I suppose is that it would probably be helpful for Doyle Hamm to remain in the jurisdiction of the Court in terms of his availability to be available to the Court or for the medical, whatever.

THE COURT: Okay.

MR. HARCOURT: I can't think of any other pressing issue that needs to be addressed right now for the moment.

THE COURT: I have been advised that Mr. Hamm is to be transported back to Holman this afternoon -- Kilby, okay, he's not at Holman?

THE CLERK: Is that correct?

OFFICER: That's correct.

THE COURT: Okay.

MR. GOVAN: Your Honor, I think it has to do with the transportation -- I think that's kind of like a hub before they are returned to other locations. I'm assuming -- I'm assuming that he ultimately would be going

back to Holman, given that there was an execution pending, Your Honor's issue of a stay may change that, but that is what the initial plan was from the Department. That may change if the stay is granted or when the stay is granted or what have you, as far as returning back to Donaldson. I would assume that is where he has been housed. I can't confirm that.

THE COURT: Well, I'm just glad we were able to finish the hearing tonight instead of reconvening as had been on the calendar as an option.

I think at this point I defer to the Department of Corrections and its policies. If there is a need to have him transferred back up here, then I can entertain a motion to that affect and we can address it at that time.

I know you just made an oral motion, but I'm talking about a written one that would have time for the Department to weigh in on how their policies may or may not be impacted. Courts are to be reluctant to interfere in the policies of prison officials and I am.

Anything else?

MR. GOVAN: Your Honor, I just want to make sure it's clear for the record, I understand your Court's oral ruling, but since there was no actual motion to stay filed, we did not file a specific objection, so I just want to make clear for the record that we would be objecting to the

granting of a stay for a number of reasons. Your Honor mentioned that in this case you feel discovery and things of that nature are needed in this case, depositions, whatnot, examinations, we would contend, Your Honor, that that is a reason that weighs against the granting of a stay. If those things cannot be accomplished without granting a stay, that actually weighs in equity against the granting of a stay, it also contends there was unreasonable delay in this case. And we would also --

THE COURT: You already made those arguments in terms of your laches arguments. I applied those also to my evaluation of the need for a stay.

And I will flesh that out for you, if you want me to now, we have talked about it off the record several times today. I thought y'all wanted to leave.

But I have considered that. And I have balanced the equities. And I understand the interest of the State in promptly carrying out its execution and its sentence. And I have committed that I am going to do my best to make sure that the stay is no longer than absolutely necessary.

But I am not going to make a decision that could subject Mr. Hamm to unnecessary tortuous, I think was the word Dr. Heath used, pain and suffering that could rise to a constitutional level, I think he's submitted sufficient evidence to create genuine issues in my mind that that is

indeed a significant likelihood.

And I don't see where a short stay, especially for a medical exam, creates greater harm to the State of Alabama than would going through with a lethal injection execution that could be extremely problematic given the inferences that I can draw from the medical records that this man may indeed have lymphatic cancer in portions of his body, other than in his head where he was treated with radiation, that could significantly adverse the ability to obtain a central venous line for injection.

And I think our Constitution and the protection of the constitutional rights of every person outweighs the concern for a minor delay in execution of this man who's been on death row for thirty years.

I can do a better job in writing, and when I'm not as tired as I am now, but I have considered and weighed the equities in this case and find that they weigh in favor of a stay.

And if there is anything else that you would want to say that you have not already said in the laches argument, if you want to file a motion to reconsider, addressing things you have not already said, I won't be ticked.

But if your motion only reiterates the things that we have already discussed today, it will be denied very

quickly.

Does that make sense?

MR. GOVAN: Yes, Your Honor.

THE COURT: I want to make sure I am open to anything that you have not already presented to me on that argument.

MR. GOVAN: Yes, Your Honor. And I was just -- I was solely not -- I understand Your Honor has already thought through this and in your order would spell out more so Your Honor's reasoning. I just wanted to make it clear for the record that we were objecting to it, make sure we were preserving any aspects and yes, there would be some things that we maybe specifically didn't address like, specifically here, like we don't believe that there's a substantial likelihood of success based on some of the testimony we heard today. But we can flesh that out, if need be, later.

THE COURT: Again, I didn't set out everything. But based upon the record that is in front of me at this time, and reviewing it in the light most favorable to the plaintiff in terms of the summary judgment and in terms of the standard that we are at where there has not been any discovery, I find that if the plaintiff is able to prove the things that he said, and we'll be able to figure that out pretty soon with a medical exam, that he does have a

substantial likelihood of success on the merits in my opinion.

But we have got to get past that medical exam before that can be determined in my opinion one way or the other emphatically.

Anything else?

MR. HARCOURT: No, Your Honor.

THE COURT: I'll get with Mrs. Sherbert and we'll look at my calendar and figure out when we can set a phone conference to discuss the timing and the strategy going forward as soon as we can do it. But it won't be next week. Believe me, I would rather be with y'all. Okay. Thank you very much.

I appreciate the way you have presented everything today and in writing and in submission and I hope that we can continue to work together in the same fashion going forward. Thank you.

(COURT ADJOURNED)

C E R T I F I C A T E

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-referenced matter.

_____

Teresa Roberson, RPR, RMR

Appendix E

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

DOYLE LEE HAMM,	]	
	]	
Plaintiff,	]	
	]	
v.	]	
	]	
JEFFERSON S DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS; CYNTHIA STEWART, WARDEN, HOLMAN CORRECTIONAL FACILITY; LEON BOLLING, III, WARDEN, DONALDSON CORRECTIONAL FACILITY; OTHER UNKNOWN EMPLOYEES AND AGENTS, ALABAMA DEPARTMENT OF CORRECTIONS	]	**2:17-cv-02083-KOB**
	]	
Defendants.	]	

MEMORANDUM OPINION

Doyle Hamm challenges the constitutionality of Alabama's method of execution, not generally, but as applied to him. (Doc. 15 at 1–2). As the Supreme Court of the United States has repeatedly said, "because it is settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out." *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (quotation marks omitted). But the Eighth Amendment forbids cruel and unusual punishment, creating tension between imposing a constitutional death sentence and carrying out the death sentence in a constitutional manner.

In this country, the chosen method of execution has evolved as social mores have changed. *See Baze v. Rees*, 553 U.S. 35, 40–41 (2008) (plurality opinion) ("As is true with respect to each of [the thirty-five States that impose capital punishment] and the Federal Government, Kentucky has altered its method of execution over time to more humane means of

carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty."). Today, death penalty advocates view lethal injection, the most prevalent method of capital punishment, as a more humane means of execution than its predecessors. *See id.*

Mr. Hamm contends that, as applied to him, Alabama's method of execution—intravenous lethal injection—crosses the line from a constitutional method of fulfilling his death sentence to one that would cause undue and exceptional pain and suffering. He asserts that his current medical condition, caused by years of intravenous drug use, hepatitis C, and untreated lymphoma, renders his veins severely compromised; he contends that he does not have peripheral veins suitable to handle the size of intravenous catheter required to properly administer the lethal drugs. If his current medical condition includes compromised peripheral veins, lymphoma untreated for three years, and lymphadenopathy, as he and his medical experts believe to be true, attempts to insert the intravenous catheter would subject him to unlimited and repeated needle sticks; the injection of fluid could "blow out" his veins with infiltration of drugs into the surrounding tissue; and efforts to place a central line could be hindered by enlarged lymph nodes creating a higher *risk* of puncturing a central artery—all resulting in severe and unnecessary pain.

To avoid such a gruesome scenario, Mr. Hamm suggests an alternative method of lethal injection: an "oral injection" of death-causing drug or drugs. He seeks not a total injunction prohibiting his execution, but an injunction of execution by intravenous injection.

Defendants, who control Mr. Hamm's access to medical treatment and evaluation, argue that Mr. Hamm has not presented any medical *proof* that his condition has deteriorated as he

asserts. Further, they argue that he has not proven that his proposed alternative method of execution is appropriate or available. As a result, they seek summary judgment.

Too many unanswered questions in the current record preclude a determination of the issues before the court. The heart of this case centers on Mr. Hamm's current medical status, particularly the condition of his peripheral veins, lymphoma, and potential lymphadenopathy. Because Defendants control his access to medical care, Mr. Hamm cannot be faulted for being unable to present a definitive evaluation to the court. Without knowledge of his current medical condition, the court cannot answer the many questions raised by Mr. Hamm's request for an injunction or by Defendants' motion for summary judgment.

The looming February 22, 2018, execution date leaves insufficient time to resolve these unknowns. But Mr. Hamm has provided enough evidence to create genuine issues of material fact about his as-applied claim. As a result, based on the record as it currently exists, Mr. Hamm has shown a substantial likelihood of success on the merits, and the court finds that the execution date must be stayed pending an independent medical examination of Mr. Hamm.

After allowing testimony and argument at a January 31, 2018 hearing, the court announced its decisions: (1) to deny summary judgment as to Defendants' timeliness challenge of Mr. Hamm's as-applied claim because genuine issues of material fact exist about when his cause of action accrued; (2) to deny Defendants' motion for summary judgment as to the merits of Mr. Hamm's as-applied claim; (3) to deny as premature Defendants' motion for summary judgment as to the merits of Mr. Hamm's other Eighth Amendment claim; and (4) to grant a temporary and limited stay of execution. The court now memorializes those rulings in a written opinion and order.

First, the court WILL DENY Defendants' motion for summary judgment as to the timeliness of Mr. Hamm's as-applied claim. The court finds that genuine issues of material fact exist about whether and when Mr. Hamm's medical condition worsened to a degree that gave rise to his as-applied challenge to Alabama's method of execution, triggering Alabama's two-year statute of limitations. The court also finds that the equitable doctrine of laches does not bar Mr. Hamm's complaint because he reasonably sought relief in the Alabama Supreme Court before filing his federal lawsuit.

Second, the court WILL DENY Defendants' motion for summary judgment as to the merits of Mr. Hamm's as-applied claim because he has created genuine issues of material fact about whether Alabama's method of execution is sure or very likely to cause him needless suffering and whether a feasible, readily implemented alternative method of execution exists that would significantly reduce a substantial risk of severe pain.

Third, the court WILL DENY AS PREMATURE Defendants' motion for summary judgment as to the merits of Mr. Hamm's other Eighth Amendment claim because the parties have not yet had an opportunity to engage in discovery about that claim.

Fourth, the court RESERVES RULING on Mr. Hamm's request for a preliminary injunction enjoining Defendants from executing him by intravenous injection, because the record is too sparse for the court to decide whether, as applied to Mr. Hamm, execution by intravenous injection would violate his right to be free from cruel and unusual punishment. But the court WILL STAY the execution for the purpose of obtaining an independent medical examination and opinion concerning the current state of Mr. Hamm's lymphoma, the number and quality of peripheral venous access, and whether any lymphadenopathy would affect efforts to obtain

central line access. The results of that examination will determine whether the stay should be extended for discovery on other issues raised by Mr. Hamm's amended complaint.

I. PROCEDURAL HISTORY

This matter is before the court on Plaintiff's request for a preliminary injunction (doc. 15 at 44) and Defendants' renewed motion for summary judgment (doc. 16).

In 1987, Mr. Hamm was convicted in Alabama of robbery-murder and sentenced to death. *See Hamm v. Comm'r, Ala. Dep't of Corr.*, 620 F. App'x 752 (11th Cir. 2015). In 1990, the Alabama Supreme Court affirmed his conviction and sentence, *Ex parte Hamm*, 564 So. 2d 469 (Ala. 1990), and the United States Supreme Court denied certiorari. *Hamm v. Alabama*, 498 U.S. 1008 (1990). After exhausting his state collateral attacks in 2005, Mr. Hamm sought federal habeas relief. *Hamm*, 620 F. App'x at 756–58. In 2013, this court denied him habeas relief, and in 2015, the Eleventh Circuit affirmed. *Id.* at 758–59. On October 3, 2016, the United States Supreme Court denied certiorari. *Hamm v. Allen*, 137 S. Ct. 39 (2016).

On June 23, 2017, the State moved the Alabama Supreme Court to set Mr. Hamm's execution date. (Doc. 12-1). On August 8, 2017, on the Alabama Supreme Court's order, Mr. Hamm filed an answer requesting that the court allow Dr. Mark Heath to examine Mr. Hamm before deciding the State's motion to set an execution date. (Doc. 12-2). Dr. Heath completed that examination on September 23, 2017, and on December 13, 2017, the Alabama Supreme Court entered an order setting Mr. Hamm's execution for February 22, 2018. (Doc. 15-1 at 2; Doc. 14-17). On the same day that the Alabama Supreme Court entered that order—December 13, 2017—Mr. Hamm filed his initial § 1983 complaint. (Doc. 1).

Because Mr. Hamm's complaint contained a request for preliminary injunctive relief, the court immediately set a hearing. (Doc. 3). Before that hearing, Defendants filed a motion to

dismiss or, in the alternative, for summary judgment on Mr. Hamm's complaint. (Doc. 12). The court construed the entire motion as one for summary judgment and notified Mr. Hamm of the need to submit evidence in opposition to that motion. (Doc. 13). Mr. Hamm filed a response *and* an amended complaint, which reiterated his as-applied challenge and raised an Eighth Amendment challenge to his treatment during his time on death row. (Doc. 15). Defendants renewed their motion for summary judgment, and the parties completed briefing and the submission of evidence on an expedited schedule. (Docs. 16, 17).

II. BACKGROUND FACTS

1. Medical Terminology

Before discussing the disputed and undisputed facts, the court must set out some medical terms. Under Alabama's lethal injection protocol, lethal injection is performed by "peripheral venous access" or, if peripheral venous access is not possible, by "central line placement." Peripheral venous access requires insertion of a catheter into one of the peripheral veins in the arms, hands, legs, or feet. Central line placement is insertion of a catheter into the jugular vein in the neck, the subclavian vein near the clavicle, or the femoral vein in the groin. According to Dr. Heath, the anesthesiologist who testified on Mr. Hamm's behalf, to obtain a central line, the practitioner must apply local anesthesia; insert a small needle into the vein; thread a wire through the needle into the vein; withdraw the needle while leaving the wire in place; cut a small opening, large enough to allow the catheter to enter the body, in the patient's flesh near the entry place for the wire; thread the catheter along the wire and into the vein; withdraw the wire; and suture the skin closed over the catheter. In the absence of an emergency, the practitioner should use an ultrasound to monitor the placement of the needle, the wire, and the catheter.

Another set of important medical terms is lymphoma and lymphadenopathy. Lymphoma is a blood cancer, and lymphadenopathy is enlargement of lymph nodes. A number of things can cause lymphadenopathy, including lymphoma and "less common illnesses." *Lymphadenopathy*, Taber's Medical Dictionary Online, *https://www.tabers.com/tabersonline/view/Tabers-Dictionary/768963/all/lymphadenopathy?q=lymphadenopathy*; (Doc. 15-1 at 4). Dr. Heath attests that lymphoma is a progressive disease, meaning that a past diagnosis of lymphoma can indicate "significant involvement and enlargement of lymph nodes in other areas of [Mr. Hamm's] body, including his neck, chest, and groin." (Doc. 15-1 at 4). According to Dr. Heath's testimony, lymphadenopathy can greatly complicate central line access because the largest clusters of lymph nodes are located around the jugular, femoral, and subclavian veins. Swelling of those lymph nodes can distort the tissues surrounding the veins, making accessing those veins more difficult.

2. Alabama's Lethal Injection Protocol

Alabama's confidential, sealed lethal injection protocol provides that, as soon as possible after arrival at Holman Correctional Facility, where all Alabama executions occur, a physician will make an assessment of the inmate's vein structure. An IV team will also view the inmate's veins before the execution. Aside from non-medical staff, two trained medical professionals, usually Emergency Medical Technicians ("EMTs"), and, as needed, one physician, are part of the IV team.

On the day of the execution, two IV lines will be placed in the inmate's veins. If the IV team cannot access peripheral veins, medical personnel will use a central line to obtain intravenous access. After two team members check the IV lines, one leaves the execution chamber and gives the Warden a signal to proceed; one team member remains in the chamber at

the inmate's left side. The Warden administers the lethal injection solution from another room. The solution consists of midazolam hydrochloride, two other drugs, and saline, administered sequentially.

The lethal injection protocol describes the process by which the remaining IV team member—who is not one of the trained medical professionals—can check whether the inmate is conscious after the Warden has started administering the midazolam hydrochloride. But the protocol does not describe how long the IV team may attempt to obtain peripheral access, how many times the team may attempt peripheral venous access, how the team determines if peripheral access is unobtainable, or what sort of medical equipment or medical specialist is available in the event the team must attempt to obtain a central line.

3. Mr. Hamm's Medical History

No one disputes that Mr. Hamm has a long and complicated medical history, which includes intravenous drug use, hepatitis C, and a 2014 diagnosis of B-cell lymphoma with a tumor behind Mr. Hamm's left eye. And no one disputes that Mr. Hamm's history of intravenous drug use complicates the accessibility of his peripheral veins. Instead, the essential factual disputes in this case revolve around (1) whether, despite the undisputed inaccessibility of *many* peripheral veins, Mr. Hamm still has enough good quality peripheral veins for the State to execute him using the procedures described in its confidential lethal injection protocol; (2) when, if ever, Mr. Hamm's lymphoma went into remission; (3) whether Mr. Hamm is currently experiencing lymphadenopathy; and (4) when, if at all, the condition of Mr. Hamm's veins worsened to an extent to give rise to his as-applied challenge.

In April 2014, a doctor conducted a CT scan of Mr. Hamm's abdomen and found "[n]o pathologically enlarged lymph nodes." (Doc. 14-4 at 18). But a May 2014 report from another

doctor reported "numerous abnormal lymph nodes" in Mr. Hamm's chest. (Doc. 14-3 at 6). The physician noted, however, that "[t]here [were] no palpable nodes in the cervical, supraclavicular [above the clavicle], axillary [armpit], or inguinal [groin] areas." (*Id.* at 7). The court notes that a lack of palpable lymph nodes does not prove a lack of lymphadenopathy; Dr. Heath testified that lymphadenopathy can occur internally in areas that a physician would not be able to feel by palpation.

Although physicians noted potential lymph node issues in those 2014 reports, Mr. Hamm never received any further medical examinations or treatment relating to those issues. (Doc. 19-1 at 1). And according to Dr. Charles Blanke, an oncologist who testified on Mr. Hamm's behalf, "[b]ased on the medical consultations done to date, it is impossible to state with any degree of certainty whether or not [Mr. Hamm] has active lymphoma overall." (*Id.* at 2).

Mr. Hamm, in an affidavit, stated that since March or April 2017, nurses at Donaldson Correctional Facility had been able to draw blood only by using a small butterfly needle on a vein in his right hand. (Doc. 14-6 at 1). He attests that they "have had problems drawing blood from there," but it is the only vein from which they have had any success drawing blood. (*Id.* at 1–2). He states that in October and November 2017, nurses had unsuccessfully tried to draw blood from his hands, arms, and legs, "each time pricking [him] about 4 or 6 times." (*Id.* at 2). By contrast, nurses from Donaldson attested that they were able to draw blood on October 3, 2017, on the second attempt; on November 7, 2017, on the third attempt; on November 14, 2017, on the first attempt; and on December 18, 2017, on the first attempt. (Doc. 12-6 at 2; Doc. 12-7 at 2). Nurses were unable to draw blood on October 31, 2017. (Doc. 12-6 at 2). Dr. Heath explains that drawing blood with a small butterfly needle is easier than obtaining intravenous access with a catheter, as a catheter is larger than a butterfly needle. (Doc. 14-5 at 2–3).

Difficulties obtaining access with a butterfly needle can indicate even more difficulty obtaining access with a catheter. (*Id.*).

On March 4, 2017, around the same time that Mr. Hamm noticed nurses having difficulty drawing blood, he also submitted a sick call request stating "need to see the doctor. I have lumps in my chest . . . ." (Doc. 14-4 at 12). On March 5, 2017, a nurse noted four "knots" on Mr. Hamm's chest near his clavicle, armpits, and above his navel. (*Id.* at 11). Dr. Roy Roddam, a prison physician, filled out a "progress note" on March 7, 2017, stating that Mr. Hamm was complaining of "mildly tender" knots on his chest. (*Id.* at 10). The handwriting is difficult to read, but appears to say that Mr. Hamm had "subcutaneous nodules" below the right clavicle and chest, among other areas. (*Id.*). Dr. Roddam wrote: "These feel like lymph nodes but could be [illegible] as their location is against lymphadenopathy." (*Id.*). Dr. Roddam noted the need for an X-ray and wrote "may need biopsy if continues to enlarge." (*Id.*). The record before the court on the motion for summary judgment contains no information about any X-ray or follow-up.

Dr. Heath examined Mr. Hamm on September 23, 2017. (Doc. 15-1). The Donaldson Correctional Facility staff would not permit him to bring in his medical equipment, but he reports that "Mr. Hamm has extremely poor peripheral venous access." (*Id.* at 3). He states that Mr. Hamm has no usable peripheral veins on his left arm and hand or either of his legs or feet. (*Id.*). On his right hand, he has one "small, tortuous vein . . . that is potentially accessible with a butterfly needle." (*Id.*). Dr. Heath could not evaluate the accessibility of Mr. Hamm's jugular, supraclavial, or femoral vein because he lacked medical equipment. (*Id.* at 4).

Prison physician Dr. Roddam attests that he conducted a medical examination of Mr. Hamm on January 2, 2018, and found "no evidence of lymphadenopathy in the cervical,

supraclavical, or axillary areas of Mr. Hamm's body." (Doc. 12-4 at 2). But Dr. Roddam's affidavit does not state whether he conducted any imaging tests, or merely palpated those areas of Mr. Hamm's body. Dr. Roddam also states that, in his opinion, "Mr. Hamm has two superficial veins in his right wrist that would be available for venous access." (*Id.*). Finally, and in contrast to almost every other medical professional who has examined Mr. Hamm, prison nurse Dennis Butler attests that Mr. Hamm has numerous peripheral veins suitable for peripheral intravenous access with a catheter. (Doc. 12-5 at 2).

4. Proposed Alternative Method of Execution

Mr. Hamm proposes, as an alternative method of execution, "oral injection" of either: (1) 10 grams of secobarbital; or (2) "DDMP II," which is composed of 1 gram of diazepam, 50 milligrams of digoxin, 15 grams of morphine sulfate, and 2 grams of propranolol. (Doc. 15 at 23). The proposed alternative procedure follows the procedure used under Oregon's Death with Dignity Act. Dr. Blanke, who specializes in end-of-life care and medical-aid-in-dying, testified at the evidentiary hearing that each of these drugs is common and readily available for prescription in the United States.

Dr. Blanke described a method of administering the proposed alternative drugs: a nasogastric tube, which is a thin tube placed up the nasal cavity and down into the stomach. He testified that the drug or drug combination would be placed into a syringe, which would then be inserted into the end of the nasogastric tube. The person administering the drugs would compress the plunger of the syringe, pushing the fluid through the tube and directly into the stomach; *i.e.*, the drugs would be injected into the person through the nasogastric tube. He testified that patients lose consciousness within five minutes and die within twenty-five minutes.

III. DISCUSSION

The court has before it Mr. Hamm's request for preliminary injunctive relief enjoining Defendants from executing him using intravenous injection. (Doc. 15 at 44). The court also has before it Defendants' motion for summary judgment on Mr. Hamm's amended complaint. (Doc. 16). The court will address Defendants' motion for summary judgment first, followed by Mr. Hamm's request for injunctive relief. Finally, the court will discuss the need for a brief stay of execution, even though Mr. Hamm has not requested one.

1. Motion for Summary Judgment

Summary judgment allows a trial court to decide cases when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). When a district court reviews a motion for summary judgment it must determine two things: (1) whether any genuine issues of material fact exist; and if not, (2) whether the moving party is entitled to judgment as a matter of law. *Id.* In deciding a motion for summary judgment, the court "draw[s] all inferences and review[s] all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (quotation marks omitted).

Mr. Hamm raises two claims in his amended complaint. (Doc. 15 at 21, 30). Defendants move for summary judgment, contending that the statute of limitations and the equitable doctrine of laches bar his amended complaint, and that Mr. Hamm has failed to create a genuine issue of material fact about a substantial risk of serious harm to him or about a known and available alternative method of execution. (Doc. 16; Doc. 12 at 26–35; Doc. 18 at 19–30).

The court notes that, because Mr. Hamm's execution is scheduled for February 22, 2018, it expedited briefing and submission of evidence. Neither party has had an opportunity to

conduct discovery. The court finds that, based on the record that currently exists, genuine issues of material fact exist about whether Mr. Hamm's amended complaint is timely filed and whether Alabama's method of execution is unconstitutional *as applied to him*. But the court notes that once Mr. Hamm has had an independent medical examination and/or once the parties have had an opportunity to conduct discovery, evidence may negate the genuine disputes of material fact that currently exist.

a. Statute of Limitations

Defendants contend that, under binding Eleventh Circuit precedent, Alabama's two-year statute of limitations bars Mr. Hamm's complaint. (Doc. 12 at 20). They contend that his claim accrued no later than July 2004, two years after Alabama adopted its current execution protocol. (*Id.* at 20–22). And they contend that Mr. Hamm's unique medical condition does not change that analysis because the factual allegations underlying his as-applied challenge have not changed in the last two years. (*Id.* at 22–24).

Because Mr. Hamm's as-applied claim challenges Alabama's method of execution, Alabama's two-year statute of limitations for personal injury actions applies to that claim. *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872 (11th Cir. 2017). Typically, an inmate's "method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008). Under either of those triggering dates, Mr. Hamm's lawsuit would be untimely because the state courts completed review in 1990, (doc. 1 at 5–6), and Alabama enacted its current execution protocol on July 1, 2002. *See West v. Warden, Comm'r, Ala. Doc*, 869 F.3d 1289, 1291 (11th Cir. 2017).

But Mr. Hamm does not raise a facial challenge to Alabama's method of execution. Instead, Mr. Hamm contends that, because of his unique medical condition, which arose years after the limitations period for a facial challenge expired, Alabama's method of execution is unconstitutional *as applied to him*. The Eleventh Circuit has indicated that the triggering date for an as-applied challenge is different from the triggering date for a facial challenge.

For example, in *Siebert v. Allen*, the plaintiff raised a facial challenge to Alabama's method of execution, and while his lawsuit was pending, he received a diagnosis of hepatitis C and pancreatic cancer. 506 F.3d 1047, 1048 (11th Cir. 2007). The plaintiff "immediately" filed an amended complaint adding an as-applied claim. *Id.* The district court dismissed the facial challenge based on the plaintiff's unreasonable delay in bringing the claim, but concluded that the as-applied claim was not barred by the statute of limitations or the doctrine of laches because the plaintiff filed it "as soon as he could have brought it." *Id.* at 1049. The Eleventh Circuit agreed. *See id.* at 1050 ("Given the timeliness of the filing of Siebert's 'as-applied' claim . . . .").

And in *Gissendaner v. Commissioner, Georgia Department of Corrections*, the Eleventh Circuit affirmed the dismissal as untimely of a plaintiff's as-applied claims because "they rely on factual conditions that have not changed in the past twenty-four months." 779 F.3d 1275, 1281 (11th Cir. 2015). The only reason to count back twenty-four months from filing would be if specific factual conditions could trigger a new statute of limitations for an as-applied challenge. The court rejects Defendants' argument that Mr. Hamm's cause of action for his *as-applied* challenge expired in 2004, two years after Alabama last significantly changed its lethal injection protocol.

Mr. Hamm filed his complaint on December 13, 2017. So the question is whether Mr. Hamm's as-applied claim accrued within the preceding two years; *i.e.*, after December 13,

2015. Mr. Hamm contends that his peripheral vein access worsened in the spring of 2017, meaning that Defendants would have to resort to a central line to execute him; but his lymphadenopathy makes central line placement extremely risky. If that contention is true, then his as-applied challenge is timely.

The court finds that genuine disputes of material fact exist about whether and, if so, when Mr. Hamm's medical condition changed in a way that gave rise to his as-applied challenge. Mr. Hamm states in a sworn affidavit that nurses at Donaldson began having trouble even drawing blood—a process that is easier than inserting a catheter—starting in March or April 2017. (Doc. 14-6). That affidavit is sufficient to create a genuine issue of material fact about when medical professionals began having trouble gaining peripheral venous access.

Defendants contend that "Hamm provides no evidence, *outside of his self-serving affidavit*, to support" the assertion that his peripheral venous access began manifesting in 2017. (Doc. 18 at 6 n.1) (emphasis added). But as the *en banc* Eleventh Circuit reminded us a few days ago, "an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment *even if it is self-serving and uncorroborated*." *United States v. Stein*, slip op. 16-0914, at 2 (11th Cir. January 31, 2018) (en banc) (emphasis added); *see also Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1253 (11th Cir. 2013) ("To be sure, Feliciano's sworn statements are self-serving, but that alone does not permit us to disregard them at the summary judgment stage."); *Price v. Time, Inc.*, 416 F.3d 1327, 1345 (11th Cir.) ("Courts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving."), *modified on other grounds on denial of reh'g*, 425 F.3d 1292 (11th Cir. 2005).

Defendants argued at the hearing that the court should disregard Mr. Hamm's affidavit because it is a sham affidavit. "The Eleventh Circuit, in limited circumstances, allows a court to disregard an affidavit as a matter of law when, without explanation, it flatly contradicts his or her own prior deposition testimony for the transparent purpose of creating a genuine issue of fact where none existed previously." *Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1306 (11th Cir. 2016). Defendants have not pointed to any prior deposition testimony from Mr. Hamm stating that his peripheral veins were inaccessible before 2017. And in any event, the court notes that Mr. Hamm underwent at least one MRI with contrast in 2014, indicating that medical professionals were able to insert a catheter at that time. (*See* Doc. 14-4 at 16). The court declines to find that Mr. Hamm's affidavit is a sham.

The court also notes that genuine disputes of material fact exist about how many of Mr. Hamm's peripheral veins are accessible for drawing blood. Dr. Heath says Mr. Hamm *might* have one vein; Dr. Roddam says Mr. Hamm has two; and Mr. Butler says Mr. Hamm has multiple accessible veins. But as Dr. Heath testified, veins that are accessible for drawing blood may not be accessible for inserting an intravenous catheter. Even if Mr. Hamm has peripheral veins that can support insertion of a butterfly needle for the purpose of drawing blood, the court finds a genuine dispute of material fact about whether peripheral venous access exists for the purpose of inserting an intravenous catheter.

Next, the court finds the existence of a genuine dispute of material fact about whether Mr. Hamm's lymphoma is active and whether he is currently experiencing lymphadenopathy. According to Dr. Heath, lymphoma is a progressive disease. According to the medical records available to the court on this motion for summary judgment, aside from the tumor in his head, Mr. Hamm has received no medical treatment for his lymphoma since 2015 at the latest. It is not

a stretch to infer that an untreated (and unmonitored) progressive disease could worsen over the course of time and finally manifest in later years.

The court finds that Mr. Hamm presented sufficient evidence to create a genuine dispute of material fact about whether the cumulative effect of his lymphoma, history of intravenous drug use, and untreated abnormal lymph nodes in his chest and abdomen resulted in worsened peripheral veins that manifested in spring 2017. The court WILL DENY Defendants' motion to dismiss Mr. Hamm's complaint as time-barred under the statute of limitations.

b. Laches

Defendants contend that, even if Mr. Hamm's complaint is timely under the statute of limitations, the court should dismiss it based on the doctrine of laches because Mr. Hamm unreasonably delayed filing his complaint, causing the State undue prejudice. (Doc. 12 at 9–10).

The court finds that, if Mr. Hamm's condition truly worsened in March 2017, a nine-month delay is not unreasonable in this case, especially in light of his efforts to exhaust his claim. Mr. Hamm contends that, based on principles of federalism and comity, he *could not* have filed his § 1983 complaint until after the Alabama Supreme Court rejected his as-applied claim. And the Alabama Supreme Court *requested* Mr. Hamm's response to the State's motion to set an execution date.

Indeed, the Supreme Court in *Nelson v. Campbell* stated that the Prison Litigation Reform Act, which applies to death sentenced inmates challenging the method of their execution, "requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement." 541 U.S. 637, 650 (2004). But the court doubts that opposing the State's motion to set an execution date qualifies as exhausting *administrative* remedies under the Prison Litigation Reform Act, or that Mr. Hamm's federal

case was not ripe until the Alabama Supreme Court set the execution date. Nevertheless, the court finds that Mr. Hamm reasonably believed that he needed to make his argument to the Alabama Supreme Court before making it to this court.

In addition, the court notes that, despite the diligent efforts of Mr. Hamm's counsel to obtain Mr. Hamm's medical records from Defendants, they did not provide those medical records to him until June 2017. Nor did Defendants permit Dr. Heath to examine Mr. Hamm until September 2017. It was not unreasonable for Mr. Hamm to wait to file his complaint until he had some evidence to support his allegations. Because laches is an equitable doctrine, and the equities in this case play both ways, the court WILL DENY Defendants' motion to dismiss Mr. Hamm's complaint based on laches.

c. Merits

"The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of 'cruel and unusual punishments.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). The Supreme Court has noted that "because it is settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out." *Id.* at 2732 (quotation marks omitted).

Alabama Code § 15-18-82.1 provides 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). Mr. Hamm did not elect execution by electrocution within the time period required by the statute, so he has waived that method of execution. *See id.* § 15-18-82.1(b) (requiring the prisoner to elect execution by electrocution within 30 days after July 1, 2002); (Doc. 1 at 3–4). As a result, under Alabama law, the only currently lawful

method to execute Mr. Hamm is by "lethal injection." The Alabama Code does not define "lethal injection."

To prevail on an Eighth Amendment challenge to a State's method of execution, a prisoner must demonstrate that "the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion) (some quotation marks omitted) (emphases in original). In addition, "prisoners must identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* (quoting *Baze*, 553 U.S. at 52) (second alteration in original); *see also Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 803 F.3d 565, 569 (11th Cir. 2015) (applying the readily-available alternative requirement to an as-applied challenge of a State's method of execution). The proposed alternative method "must significantly reduce a substantial risk of severe pain." *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1299 (11th Cir. 2016).

> *Glossip*'s 'known and available' alternative test requires that a petitioner must prove that (1) the State actually has access to the alternative; (2) the State is able to carry out the alternative method of execution relatively easily and reasonably quickly; and (3) the requested alternative would in fact significantly reduce a substantial risk of severe pain relative to the State's intended method of execution.

Id. at 1299 (quotation marks and alteration omitted). The Eleventh Circuit has interpreted the "known and available" prong of *Glossip*'s test to require that the plaintiff first show that the State's statutorily authorized method of execution is unconstitutional before proposing any other method that is not statutorily authorized. *Id.* at 1316–17; *see also Boyd*, 856 F.3d 853, 867 (11th Cir. 2017).

A genuine dispute of material fact exists about whether Mr. Hamm has adequate peripheral venous access to allow Defendants to execute him without resorting to a central line.

And a genuine dispute of material fact exists about whether Mr. Hamm has lymphadenopathy in areas of his body that would make a central line placement extremely dangerous. As a result, the court finds that a genuine dispute of material fact exists about whether executing Mr. Hamm using the intravenous injection method described in Alabama's lethal injection protocol "presents a risk that is '*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" *Glossip*, 135 S. Ct. at 2737. If his medical condition is as he alleges, then his execution would be unnecessarily painful and dangerous.

Mr. Hamm has offered two alternative methods of execution: (1) 10 grams of secobarbital; or (2) "DDMP II," which is composed of 1 gram of diazepam, 50 milligrams of digoxin, 15 grams of morphine sulfate, and 2 grams of propranolol. (Doc. 15 at 23). Dr. Blanke, a physician who specializes in medical-aid-in-dying, attests that he has used those methods for patients in Oregon. (Doc. 15-3). He attests that they cause death in "more than 99% of cases" and that complications are "extremely rare." (*Id.* at 1–2).

The court finds that, if Mr. Hamm can prove the inaccessibility of his peripheral and central veins, his proposed alternative "significantly reduce[s] a substantial risk of severe pain." *Arthur*, 840 F.3d at 1299. He has offered at least some evidence that, *as applied to him*, Alabama's method of execution may be ineffective and painful, while his proposed alternative is very likely to be effective and painless.

Defendants contend that Mr. Hamm's alternative is not feasible or readily implemented because Mr. Hamm would have to drink either of the proposed drug combinations, so they cannot be considered "lethal injections." *See* Ala. Code § 15-18-82.1(a) (requiring execution by "lethal injection").

As Dr. Blanke testified and as Taber's Medical Dictionary states, the medical definition of "injection" does not require a needle piercing the body; it requires only "[t]he forcing of a fluid into a vessel, tissue, *or cavity*." Injection, Taber's Medical Dictionary Online, *https://www.tabers.com/tabersonline/view/Tabers-Dictionary/757723/all/injection?q=injection* (emphasis added). Non-medical dictionaries appear to agree. *See* Inject, Merriam-Webster's Dictionary, *https://www.merriam-webster.com/dictionary/injecting* ("[T]o force a fluid into"); Inject, Oxford English Dictionary, *http://www.oed.com/view/Entry/96079?redirectedFrom=inject#eid* ("To drive or force (a fluid, etc.) in a passage or cavity, as by means of a syringe, or by some impulsive power; said esp. of the introduction of medicines or other preparations into the cavities or tissues of the body.").

The court finds that administration of the proposed alternative drugs through a nasogastric tube would comply with Alabama's statute requiring execution by "lethal injection" because it would involve forcing the liquid into Mr. Hamm's body. But the court also finds that, even if Alabama's statute requiring "lethal injection" required a needle piercing the inmate's skin, Mr. Hamm has presented sufficient evidence to create a genuine issue of material fact about whether that type of "lethal injection" would be unconstitutional *as applied to him*. As a result, even if administration of the drugs by nasogastric tube is not statutorily allowed under Alabama law, the court finds that, *at this stage*, Mr. Hamm has presented sufficient evidence to defeat summary judgment. The court WILL DENY summary judgment as to Mr. Hamm's as-applied claim.

The court notes that Mr. Hamm raised an Eighth Amendment deliberate indifference claim in his amended complaint, which he filed during the expedited briefing schedule on his initial complaint. The court finds that ruling on Defendants' motion as to Mr. Hamm's second

claim would be premature because the parties have not had an adequate opportunity to conduct discovery. *See WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988) ("[S]ummary judgment may only be decided upon an adequate record."). The court WILL DENY AS PREMATURE the motion for summary judgment on the merits of Mr. Hamm's second Eighth Amendment claim.

2. Request for Injunctive Relief

Mr. Hamm has not moved this court to stay his execution, but he does seek an injunction enjoining Defendants from executing him by intravenous injection. (Doc. 15 at 44). But "[t]he standard for granting a temporary restraining order or a stay of execution is the same." *Gissendaner*, 779 F.3d at 1280. The movant must show that "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011). In addition, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (quoting *Nelson*, 541 U.S. at 650).

The court reserves ruling on Mr. Hamm's request for preliminary injunctive relief because the court lacks sufficient information to determine whether execution by intravenous injection would violate Mr. Hamm's right to be free of cruel and unusual punishment. At this stage, Mr. Hamm has presented sufficient evidence to defeat Defendants' motion for summary judgment, but he has not presented evidence *establishing* that he lacks the number and quality of peripheral veins needed for Defendants to execute him under Alabama's lethal injection

protocol. Nor has he presented evidence *establishing* that he is experiencing lymphadenopathy, such that Defendants could not safely resort to the protocol's alternative method of execution using a central line. The court notes that Defendants control Mr. Hamm's ability to obtain such information *and* the medical examinations that will be necessary for Mr. Hamm to prove those facts (or for Defendants to disprove them).

As a result, although the court declines to enter a preliminary injunction at this time, the court will enter a stay of execution so that an independent medical examiner can be appointed to examine Mr. Hamm and report to the court about his current medical condition. The court acknowledges that Mr. Hamm has not requested a stay of execution, but the court *sua sponte* finds that a stay is necessary. *See Grayson v. Allen*, 499 F. Supp. 2d 1228, 1234 (M.D. Ala. 2007), *affirmed by* 491 F.3d 1318 (11th Cir. 2007) ("'Consideration of the merits' means more than a hurried hearing by a harried judge and counsel. As the Eleventh Circuit intimated in *Jones* [*v. Allen*, 485 F.3d 635, 640 n.2 (11th Cir. 2007)], consideration of the merits in this circuit means full adjudication, entailing a sufficient period to conduct discovery, depose experts, and litigate the issue on the merits, including any appeals. . . . [I]f full adjudication is not possible on a fast-track schedule here, then the issue of a stay of execution arises . . . .").

The court has considered the equities and has concluded that, under the information currently available to Mr. Hamm and to the court, he has shown a substantial likelihood of success on the merits, a risk that he will suffer irreparable injury absent a stay, no substantial risk of harm to Defendants, and that the stay would not be adverse to the public interest.

As discussed above, Mr. Hamm has created genuine issues of material fact about whether Alabama's method of execution is unconstitutional *as applied to him* in light of his unique medical conditions. If, with the benefit of discovery, he can substantiate the inferences the court

was required to draw in his favor at the summary judgment stage, he would prevail on his as-applied claim. At this stage, Mr. Hamm has shown a substantial likelihood of success on the merits. The risk that Mr. Hamm will suffer irreparable injury absent a stay is self-evident, and the court will not dwell on it.

The court will, however, briefly dwell on the risk of harm to Defendants. The State of Alabama has a legitimate interest in carrying out the execution of Mr. Hamm's sentence. The family of Mr. Hamm's victim also has a significant interest in the execution of Mr. Hamm's sentence. The court is mindful of those important considerations. But the court notes that both of those interests will be satisfied; Mr. Hamm will be executed, either by intravenous injection or by "oral injection."

The court has also considered whether a stay would be adverse to the public interest. The court finds that, in this case, a stay could not be adverse to the public interest. The public interest requires *constitutional* punishments. An execution that is carried out in a cruel and unusual manner is decidedly adverse to the public interest.

Finally, the court has considered the "'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584. As discussed above, at this stage, and on the record currently before the court, the court finds that Mr. Hamm brought his complaint in a timely manner. If he brought it later than the court would have preferred, it was not due to lack of diligence or in a bad faith attempt to delay his execution.

As soon as possible after the entry of this opinion and order, the court will appoint an independent medical examiner who will examine Mr. Hamm and report the medical findings back to the court. The medical examiner will evaluate the accessibility of Mr. Hamm's

peripheral veins as well as the current status of his lymphoma and whether he is currently experiencing lymphadenopathy, or any medical condition that would interfere with Mr. Hamm's execution by lethal intravenous injection. Once the court has received the medical examiner's report, the court will reevaluate the necessity for a stay or a preliminary injunction.

IV. CONCLUSION

The court WILL DENY Defendants' motion for summary judgment on timeliness grounds. The court WILL DENY Defendants' motion for summary judgment on the merits of Mr. Hamm's as-applied claim. The court WILL DENY AS PREMATURE Defendants' motion for summary judgment on the merits of Mr. Hamm's other Eighth Amendment claim. The court RESERVES RULING on Mr. Hamm's request for a preliminary injunction. The court WILL STAY Mr. Hamm's execution.

DONE and **ORDERED** this 6th day of February, 2018.

Karon O. Bowdre

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE