

February 15, 2024
House Bill 2782
Statement of Robert M. Grass
Opponent

Thank you for the opportunity to submit this statement to assist the Judiciary Committee’s consideration of House Bill No. 2782, which would, among other things, amend K.S.A. § 22-4001(a) to authorize “carrying out a sentence of death in this state . . . by hypoxia administered in such a way to cause death in a swift and humane manner.”

I am an attorney employed by Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”). Arnold & Porter represented Kenneth Eugene Smith in postconviction proceedings after his conviction for capital murder in Alabama became final. I was among the attorneys who provided that legal representation. In that capacity, I witnessed Mr. Smith’s execution by forced inhalation of pure nitrogen gas (hereinafter referred to as “nitrogen hypoxia”) on January 25, 2024 through a window in a witness room adjacent to the execution chamber at William C. Holman Correctional Facility (“Holman”) in Atmore, Alabama.

As far as I know, Mr. Smith is the only person anywhere to be executed by nitrogen hypoxia. As such, Mr. Smith’s experience may be useful in determining whether that “mode of carrying out a sentence of death” will “cause death in a swift and humane manner.”¹ Based on my observations, I do not think it did in Mr. Smith’s case. At a minimum, Mr. Smith did not appear to be unconscious in seconds and dead in minutes as Alabama predicted.

When I was escorted into the witness room with Mr. Smith’s other designated witnesses (his wife, one of his sons, and a local reporter), a closed curtain prevented observation of the execution chamber. Thereafter, five local reporters entered the same witness room.² Once the

¹ K.S.A. § 22-4001(a).

² Each of the media witnesses has independently published his or her own observations of Mr. Smith’s execution. See Marty Roney, “Nitrogen gas execution: Kenneth Smith convulses for four minutes in Alabama death chamber,”

curtain was opened, I saw Mr. Smith strapped to a gurney by restraints across his chest, abdomen, and arms. He was wrapped in a white sheet up to his neck and there was a full-face mask covering his face. Mr. Smith's spiritual advisor, two corrections officers, and an administrator from the Alabama Department of Corrections ("ADOC") were in the room with Mr. Smith. The warden at Holman entered the execution chamber, read the death warrant, and asked Mr. Smith if he wanted to make a statement. After Mr. Smith made his statement, the warden left the execution chamber.

When the warden left the execution chamber, ADOC presumably began to supply nitrogen into the mask covering Mr. Smith's face and he appeared to be having convulsions or seizures. His eyes rolled up. His legs moved violently up and down several times. His head thrust forward and back to the gurney several times. He clenched his fists and his arms and body strained against the gurney restraints. I was not permitted to bring a watch into the witness room so I cannot be precise as to the passage of time. But I can say that Mr. Smith writhed for minutes—not seconds.

After Mr. Smith stopped writhing, he continued to breathe, although his breathing seemed labored. For at least five or more minutes, he appeared to gasp for air. While this was happening, the corrections officer stationed to the left side of Mr. Smith stepped toward him and leaned over his face. After a few seconds, the corrections officer returned to his position.

Montgomery Advertiser (updated Jan. 25, 2024); <https://www.montgomeryadvertise.com/story/news/local/alabama/2024/02/25/four-minutes-of-convulsions-kenneth-smith-executed-with-nitrogen-gas/72358038007/>; Ivana Hrynkiw, "Alabama Executes Kenneth Eugene Smith by New Nitrogen Gas Method for 1988 Murder of Pastor's Wife," *AL.com* (Jan. 26, 2024), <https://www.al.com/news/Birmingham/2024/01/alabama-to-execute-kenneth-smith-with-untested-nitrogen-gas-tonight.html>; Kim Chandler, "Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used," *Associated Press* (Jan. 26, 2024), <https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900>; Ralph Chapoco, "Kenneth Eugene Smith executed by nitrogen gas for 1988 murder-for-hire scheme," *Alabama Reflector* (Jan. 25, 2024), <https://alabamareflector.com/2024/01/25/kenneth-eugene-smith-executed-by-nitrogen-gas-for-1988-murder-for-hire-scheme/>; Lauren Layton, "News 19's Lauren Layton's account of the nation's first nitrogen hypoxia execution," *WHNT* (Jan. 26, 2024), <https://whnt.com/news/alabama-news/kenneth-eugene-smith/news-19s-lauren-laytons-account-of-the-nations-first-nitrogen-hypoxia-execution/>; Lee Hedgepeth, "'Never Alone': The suffocation of Kenneth Eugene Smith," *Tread by Lee Hedgepeth* (Jan. 26, 2024), <https://www.treadbylee.com/p/never-alone-the-suffocation-of-kenneth>.

The State has an obligation to carry out death sentences consistent with the prohibitions in the United States and Kansas Constitutions against cruel and unusual punishments.³ Even aside from its constitutional obligations, when the State takes human life, as Kansas law requires, it should do so “in a swift and humane manner”⁴ to preserve the dignity of the condemned and to spare the witnesses, including the condemned person’s family and loved ones, from a gruesome spectacle. If, as the Alabama Attorney General said, Mr. Smith’s execution was a “textbook” example of an execution by nitrogen hypoxia,⁵ that method does not accomplish those goals.

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³ See U.S. Const. amend. VIII; Kansas Const. Bill of Rights § 9.

⁴ K.S.A. § 22-4001(a).

⁵ See Alisha Rahaman Sarkar, Rachel Sharp, Michelle Del Rey & Mike Bedigan, “Kenneth Smith’s nitrogen execution was ‘textbook’ and will be used again Alabama AG says: updates, *Independent* (Jan. 28, 2024), <https://www.aol.com/kenneth-smith-nitrogen-execution-textbook-222431833.html>.