

House Judiciary Committee
February 15, 2024
House Bill 2782
Testimony of Rebecca E. Woodman, Attorney
In Opposition

Chairman Humphries and Members of the Committee:

I am an attorney with decades of experience representing death-sentenced individuals on appeal and in post-conviction in Kansas and other states. I spent many years with the Appellate Defender Office and Capital Appellate Defender Office within the Kansas public defender system, and I also served as Director of the Death Penalty Litigation Clinic in Kansas City, Missouri. In these roles and as an attorney in private practice, I have represented dozens of death-sentenced clients in both state and federal courts, including arguing before the Kansas Supreme Court and the United States Supreme Court. I am also an adjunct professor of law at UMKC School of Law, where I teach a course on the death penalty, and I have taught a similar course at Washburn Law School in past years.

In the aftermath of Kenneth Smith’s execution in Alabama, the first execution ever using nitrogen gas, Alabama Attorney General Steve Marshall claimed the execution was “textbook” and a “success.”¹ Before Mr. Smith’s execution, Attorney General Marshall represented to the victim’s family members, and to the world, that the gas would cause unconsciousness “within seconds” and death “within minutes.”² All of this was false.

Accounts from numerous eyewitnesses documented that Mr. Smith’s execution was anything but “textbook,” and did not proceed as Alabama promised. Rather than being rendered unconscious within seconds, shortly after the gas began flowing, Mr. Smith started shaking violently in seizure-like movements. This went on for several minutes, and was followed by loud, visible gasps.³

Nor was Mr. Smith killed “within minutes.” Rather, at least 10 minutes passed after the gas began flowing before Mr. Smith’s breathing was no longer visible, and it took another 20 minutes until death was pronounced.⁴

¹ “*Ala. attorney general expects other states to follow state’s ‘textbook’ nitrogen execution*,” CORRECTIONS1 (Jan. 29, 2024), available at <https://www.corrections1.com/capital-punishment/ala-attorney-general-expects-other-states-to-follow-states-textbook-nitrogen-execution>; Christopher Cann, “*After Kenneth Smith’s execution by nitrogen gas, UN and EU condemn method*,” USA TODAY (Jan. 26, 2024), available at <https://www.usatoday.com/story/news/nation/2024/01/26/kenneth-eugene-smith-nitrogen-gas-execution-condemned/72364465007/>.

² Nicholas Bogel-Burroughs, “*A Select Few Witnessed Alabama’s Nitrogen Execution. This is What They Saw*,” THE NEW YORK TIMES (Feb. 1, 2024), available at <https://www.nytimes.com/2024/02/01/us/alabama-nitrogen-execution-kenneth-smith-witnesses.html>; Austin Sarat, “*Another New Execution Method, Another Botched Execution*,” available at <https://verdict.justia.com/2024/01/29/another-new-execution-method-another-botched-execution>; “*Questions Surround Execution of Kenneth Smith*,” EQUAL JUSTICE INITIATIVE (Jan. 25, 2024), available at <https://eji.org/news/alabama-executes-kenny-smith-using-nitrogen-suffocation/>.

³ *Id.*

⁴ *Id.*

Alabama's subsequent insistence that Mr. Smith's execution went exactly as planned can only mean that the State intended to inflict a prolonged and painful ordeal on him. Indeed, legal commentators have described the execution as nothing short of torture,⁵ and those who witnessed it report being traumatized by the experience.⁶

Despite the grotesque spectacle of Mr. Smith's execution, the Attorney General is now trying to peddle this new method in Kansas. This Committee should not accept his gruesome offer. Rather, if Kansas does carry an execution in the modern death penalty era, we should proceed with the care and humanity that consistently define our state.

There are many reasons to reject the proposed legislation. Beyond the plain horror of the lethal gas method it contemplates, H.B. 2782 contains numerous constitutional deficiencies that will deprive prisoners of fundamental due process and substantially increase the risk of inflicting cruel, unusual, and torturous pain amounting to "the pointless and needless extinction of life" forbidden by the Eighth Amendment and the Kansas Constitution.⁷ Not only should the Kansas Legislature reject any bill that endorses such constitutional violations, it also should consider that passing it would inevitably lead to costly and time-consuming legal challenges.

Specifically, it is unclear from the bill's language whether the state supreme court's notification to the district court that "all appeals and post-conviction proceedings are resolved" applies to both state *and federal* appeals and post-conviction proceedings. The language itself appears to include only state appeals and post-conviction proceedings, since it suggests that the Kansas Supreme Court is to send a copy of "the court's final order" to the district court. But the bill does not specify at what point this "final order" issues.

All prisoners, particularly those under sentence of death, are entitled to seek relief on their legal claims not only in the state courts, but also through federal habeas corpus proceedings. The ambiguous language of the bill creates unnecessary confusion and risks cutting off legally available avenues of relief in both state and federal court, as well as requiring additional litigation as prisoners may be forced to request stays of execution in order to ensure they can pursue all available remedies.

Moreover, the warrant process itself may limit a prisoner's ability to pursue available legal claims once the warrant has issued. Indeed, the bill requires the district court to issue an execution warrant within thirty days after receiving the so-called "final order" of the Kansas Supreme Court. The bill then authorizes the district court to schedule an execution period within as little as eight days following the issuance of the warrant, because the Secretary of Corrections need only provide the prisoner and other parties with seven days' notice of the selected date. This bizarre and compressed timing creates the very real possibility that a prisoner and his

⁵ Sam Levine and Ed Pilkington, "Alabama condemned for nitrogen gas execution: 'They intended to torture him,'" THE GUARDIAN (Jan. 26, 2024), available at <https://www.theguardian.com/us-news/2024/jan/26/alabama-nitrogen-gas-execution-torture#:~:text=%E2%80%9CIt%20appeared%20Smith%20held%20his,that%20the%20execution%20was%20successful>.

⁶ *Id.*; *supra* n. 3.

⁷ *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring); *see also* Kansas Const. Bill of Rights § 9.

attorneys would have barely a week to seek a stay of execution to pursue otherwise routinely available federal habeas proceedings while also attempting to assemble an application for executive clemency and assert any challenges that cannot be brought prior to a scheduled execution, such as competency to be executed. Even more frightening, post-conviction DNA testing in Kansas is often initiated through proceedings that are separate from the direct appeal and K.S.A. 60-1507 procedures, and that would also appear to fall outside this bill's contemplation. All of this is a recipe for a wrongful execution, a mistake that cannot be fixed.

In sum, the severe time constraints this bill incorporates would preclude a prisoner's ability to adequately develop and litigate important claims before the execution is carried out, resulting in serious constitutional violations.

The bill is also problematic in that it grants the Secretary of Corrections – or the warden as the Secretary's designee -- complete discretion to change the substances administered in either lethal injection or hypoxia, as well as to modify the method of killing by hypoxia, at any time he or she deems necessary. This means that the Secretary or the warden would have the discretion to substitute a drug for lethal injection or a gas to induce hypoxia based on availability, expedience, or simply a whim, with no notice to the prisoner or his attorneys, and no assurance of safety, efficacy, or adequate training of the execution team. The terms of this bill appear to allow such a substitution to be made even during the execution itself. And there is no discernable limitation beyond the Secretary's own imagination as to the method by which hypoxia may be induced. These provisions not only create a grave and substantial risk of unconstitutional pain and suffering during an execution, but they are also completely unhinged from the "dignity of man" principle at the core of the Eighth Amendment.⁸

Kansas is not Alabama when it comes to the death penalty. While we retain capital punishment, we do not impose it often. Since its return to the state 30 years ago we have yet to carry out an execution and we are unlikely to do so any time soon. The proposed legislation is entirely at odds with Kansas's commitment to the dignity and sanctity of human life. It would allow executions to proceed in a rushed, chaotic, and torturous manner while increasing the risk that someone will be executed despite being innocent, incompetent, or otherwise unqualified for the ultimate punishment. I urge you to reject this unnecessary and problematic proposal.

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⁸ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).