

House Committee on Judiciary
February 15, 2024
House Bill 2782
Presented by Brandon Barrett & Caroline Zuschek, private citizens
Opponent

Chairperson Humphries and Members of the Committee:

I want to begin with a brief introduction. We are Caroline Zuschek and Brandon Barrett. Caroline represents Kansans facing execution on appeal. Brandon works as general counsel for Kansas' indigent defense system, and formerly assisted in the post-conviction representation of individuals sentenced to death in Missouri.

As Kansans, parents, and human beings, we are horrified by HB2782. As criminal legal system stakeholders, with personal experience in capital appellate and post-conviction representation, we are outraged by the ramifications of this bill.

The Human Experiment on Kenneth Smith

On January 26, 2024, Alabama executed Kenneth Smith using nitrogen hypoxia, which subjected him to inhalation of nitrogen gas through a mask leading to his suffocation. Mr. Smith's execution marked the first execution by suffocation from nitrogen gas.¹ Alabama administered the lethal gas, fatally depriving Smith of oxygen, without first administering a sedative.² Kris Kobach claims to have spoken directly with the Attorney General of Alabama and believes Smith's execution by hypoxia "worked extremely well."³

But witnesses vividly described the true inhumanity of the execution. Reverend Jeff Hood, who witnessed Mr. Smith's death firsthand, described it as "the most horrible thing [he had] ever seen."⁴ Mr. Smith remained *conscious* for several minutes after the execution begun and he writhed in pain for several more after he appeared to lose consciousness. Even then, witnesses described seeing movement and agonal breathing. Smith's execution lasted 22 minutes.⁵

This is the execution that Kobach believed "worked well." This is how proponents would like to kill Kansans. This is the "unbelievable evil" proponents would like the world to now associate with Kansas. This bill asks you to condone the imposition of the death penalty in a manner that

¹ Dakin Andone, Isabel Rosales, & Christina Maxouris, "Alabama inmate Kenneth Smith executed with nitrogen gas, marking the emergence of a wholly new method of capital punishment," CNN, January 26, 2024. *Available at* <https://www.cnn.com/2024/01/25/us/kenneth-smith-nitrogen-gas-execution-alabama>.

² Jacqui Wise, "Use of nitrogen in US execution may constitute torture, warns human rights agency," *British Med. J.* 2024; 384 :q145, *available at* <https://www.bmj.com/content/384/bmj.q145>.

³ Tim Carpenter, "Kansas attorney general sponsors bill adding hypoxia option for executing capital murderers," *Kansas Reflector*, February 9, 2024. *Available at:* <https://kansasreflector.com/2024/02/09/attorney-general-in-kansas-sponsors-bill-adding-hypoxia-option-for-executing-capital-murderers/>.

⁴ Andone, Rosales, & Maxouris, *supra* n. 1.

⁵ Ed Pilkington, "Alabama inmate executed with nitrogen gas was 'shaking violently', witnesses say," *The Guardian*, January 26, 2024. *Available at:* <https://www.theguardian.com/us-news/2024/jan/25/alabama-executes-kenneth-smith-nitrogen-gas>.

violates international treaty obligations prohibiting torture,⁶ and to legitimize a method so cruel and distressing it is banned for use on animals.⁷

Uncertainty of Acquiring the Drugs

Proponents justify their advocacy for this bill by explaining the difficulties in acquiring drugs for lethal injections, reasoning gases causing suffocation will be easier to obtain.⁸ But, to date, only Alabama, Oklahoma, and Mississippi have adopted nitrogen hypoxia as an execution method. And only Alabama has employed it.

Though proponents introduced this bill in a poor attempt to combat the difficulty in acquiring execution drugs, the execution of Kenneth Smith raises serious questions about the viability of this as an alternative. In order to execute Mr. Smith, Alabama was forced to turn to a Canadian nitrogen manufacturer to obtain the lethal substance after being denied nitrogen by Airgas.⁹ Airgas is the largest U.S. gas distribution network with 24 branches in Alabama alone. Given the backlash the Canadian company is already receiving for its role in Mr. Smith's execution, the State will soon have the same difficulty acquiring nitrogen that it currently has acquiring lethal injection drugs. This bill does not solve the problem of obtaining substances to use in executions: it merely shifts it to a different industry. Put simply, the bill does not fix the problem it purports to address.

Ex Post Facto Violations

It is also critical to note that the bill likely cannot be constitutionally applied to those already sentenced to death in Kansas. The United States Constitution prohibits the operation of Ex Post Facto laws, *i.e.*, laws that make a punishment more severe and are intended to operate retroactively. Because juries convicted the individuals currently on Kansas' death row of conduct that occurred when the law only contemplated execution by lethal injection, it is unlikely individuals already under a death sentence could be constitutionally executed by the more barbaric infliction of suffocation.¹⁰ Thus, this bill would not expedite the execution of individuals presently on death row; rather, it would prospectively permit the infliction of crueler state-sanctioned deaths.

⁶ Equal Justice Initiative, "Nitrogen Suffocation." *Available at:* <https://eji.org/issues/nitrogen-suffocation/> (last checked February 14, 2024).

⁷ Associated Press, "It's not fit for putting down animals, but Alabama plans to use nitrogen hypoxia on death row inmate," CBC, January 23, 2024. *Available at:* <https://www.cbc.ca/news/world/alabama-nitrogen-hypoxia-execution-1.7091845#:~:text=The%20American%20Veterinary%20Medical%20Association,by%20the%20proposed%20execution%20method.>

⁸ Carpenter, *supra* n.3.

⁹ Ivana Hrynkiw, "Airgas refuses to supply nitrogen for Alabama executions," AL.com, January 15, 2023, <https://www.al.com/news/2023/01/airgas-refuses-to-supply-nitrogen-for-alabama-executions.html#:~:text=Airgas%20contacted%20Alabama%20in%20December,the%20purpose%20of%20human%20execution.>

¹⁰ *Cf. Weaver v. Graham*, 450 U.S. 24, 32, 101 S. Ct. 960 (1981) ("In *Malloy v. South Carolina*, 237 U.S. 180, 184-85, 35 S. Ct. 507 (1915), we concluded that a change in the method of execution was not *ex post facto* because evidence showed the new method to be *more humane* . . .") (Emphasis added). See also, *Miller v. Parker*, 909 F.3d 827 (6th Cir. 2018) (holding a change in a State's execution method will *not* be an *ex post facto* violation if evidence shows the new method to be *more humane*).

Unconstitutionally Vague/Discriminatory Application

Further, while much of the national conversation around hypoxia as a means for execution has focused on the use of nitrogen gas, the Attorney General's bill does not specifically propose that. Instead, this bill authorizes "hypoxia" as a means of execution. Hypoxia occurs when the lack of oxygen in an individual's tissues results in death. Under this bill, there is no stated method for causing hypoxia. If passed, the bill would allow the State to kill people utilizing any method that deprives an individual of oxygen until they die. Thus, the bill authorizes executions by everything from gassing, to strangulation, to placing a plastic bag over an individual's head. The possibilities of execution methods are virtually endless. Accordingly, the litigation challenging this statute will also be endless, time consuming, and costly.

Additionally, this bill does not require a uniform method of execution. It allows for the Kansas Department of Corrections or an individual warden to indiscriminately determine which method of execution they see fit for each individual. It provides no oversight in the application process. This means the decision makers may choose more painful execution methods for inmates they don't like. It is not difficult to see how the exercise of this unfettered discretion could result in discrimination based on race, nationality, religion, or gender, with disfavored groups receiving crueler punishments than their counterparts.

Unconstitutional Gutting of Procedural Safeguards

This bill also divests the execution process of procedural safeguards presently in place to ensure the constitutional adequacy of the death penalty's implementation. For example, the bill strips the Kansas Supreme Court of its authority to initiate the execution process by ordering an execution and delegates that authority to the district court judge who sentenced an accused in a particular matter. Because it is no longer a unitary entity initiating the execution process, Kansas can expect the process to occur differently depending on geography. A district judge may swiftly order an execution in one case, while another district judge may delay an execution in another case. Again, this could result in the unconstitutional discriminatory application of the death penalty.

The bill will also result in the execution of innocent individuals because it short circuits an individual's opportunity to file innocence actions, request DNA retesting, file a successive petition catching an error or omission in the original 1507, or move for clemency once judicial avenues for relief have been exhausted. We live in a country that has executed entirely innocent people who were later exonerated. In fact, a seminal study of more than 4,500 capital cases found that "an astonishing 82% of retried death row inmates turned out not to deserve the death penalty,"¹¹ and the primary reason for the reversal of state capital convictions was the police or prosecutor's failure to disclose "important evidence that the defendant was innocent or did not deserve to die."¹² Since 1973, more than 196 people sentenced to death have been exonerated.¹³ To date, we have been fortunate that Kansas has not murdered a demonstrably innocent person. This bill would undermine our ability to maintain that record by attempting to speed up a process that already gets

¹¹ James S. Leibman, et al., "Technical Errors Can Kill," Nat'l L.J., Sept. 4, 2000, at A1642.

¹² James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-95*, at ii (2000).

¹³ Death Penalty Information Center, *Policy Issues: Innocence*, available at: <https://deathpenaltyinfo.org/policy-issues/innocence> (last visited February 14, 2024).

it wrong. This is not a risk anyone should be willing to take. As Kansans, we do not need that blood on our collective hands.

The bill, which provides a mere seven days of notice to the accused and his legal team following selection of the method of execution, will also make it impossible to effectively challenge a selected execution method, no matter how cruel or unusual. Thus, not only does the bill delegate the authority to decide the method of execution to someone lacking both the medical and legal background to determine whether the selected method comports with the guarantees of the Eighth Amendment or the Kansas Constitution (*i.e.*, the Kansas Department of Corrections or an individual warden), it then cuts off the ability of an accused to challenge that decision. This is both morally reprehensible and constitutionally intolerable.

Swift and Humane: Empty Words

This bill states executions should occur in a "swift and humane manner," *i.e.*, a "manner consistent with the requirements of the [E]ighth [A]mendment to the [C]onstitution of the United States." The bill is silent on the Kansas Constitution. We discussed above how this bill undermines the possibility for thorough federal review. But defining the punishment by referencing only Federal law and then denying someone meaningful access to the Federal system is not only illogical, but fundamentally unjust.

Moreover, the bill delegates the decision of how an individual's execution may be performed to the Secretary of Corrections, or any warden he or she designates, bypassing completely the informed viewpoints of scientists and doctors about whether the proposed method or chemical would in fact be swift or humane. Though the bill claims that hypoxia executions will be performed in a manner consistent with the Eighth Amendment, it provides no safeguards to ensure that is true. At no point in the process proposed by the bill does anyone with expertise—either medically or legally—opine on a suggested execution method's physical cruelty, legal viability, or on whether the execution will be "swift." Neither does the bill afford an individual facing execution sufficient time to challenge the method selected. The bill provides mere lip service to the Eighth Amendment: saying something will be swift and humane does not make it so.

For all of these reasons, and because no constitutional punishment may "involve the unnecessary and wanton infliction of pain,"¹⁴ we ask you to vote against HB 2782, which implements hypoxia executions in Kansas while simultaneously gutting the procedural protections that presently exist to better ensure that Kansas' exercise of the death penalty comports with the rule of law.

Thank you for your time and full consideration on this matter of utmost importance.

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¹⁴ *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909 (1976).