

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

DAVID P. WILSON,)	
)	
Plaintiff)	Case No. _____
)	
v.)	
)	
JOHN Q. HAMM, Commissioner of the)	*DEATH PENALTY CASE*
Alabama Department of Corrections,)	
)	
Defendant.)	

COMPLAINT

Introduction

1. The State of Alabama has a bad track record of botched executions. In the modern death penalty era, since the resumption of executions after *Gregg v. Georgia*, 428 U.S. 153 (1976), there have been five failed executions in which the person survived and walked out of the execution chamber.¹ Three out of the five, or 60 percent of the failed executions were carried out by the State of Alabama. Since 2018, there have been ten botched executions in the United States.² Five of

¹ The five men who survived execution since *Gregg* are Romell Broom (OH, 2009), Alva Campbell (OH, 2017), Doyle Lee Hamm (AL, 2018), Alan Miller (AL, 2022), and Kenneth Smith (AL, 2022).

² See “Botched Executions,” Death Penalty Information Center (Dec. 6, 2022), available at <https://deathpenaltyinfo.org/executions/botched-executions> (these include, by definition, failed executions; Plaintiff maintains in his complaint that Kenneth Smith’s execution on January 25, 2024 was botched and therefore includes Mr. Smith’s second execution (as well as the first failed execution) in the tally of botched executions.)

those, or fifty percent were carried out by the State of Alabama. To put this in context, since 2018 there have been 121 attempted executions in the United States, fifteen of which were carried out by the State of Alabama.³ Whereas Alabama is responsible for about twelve percent of all executions, it accounts for more than half of failed and botched executions in the United States. By any metric, the State of Alabama is the least competent state at carrying out executions in this country.

2. Despite that and the many warnings, extensive federal litigation, and international opposition, the State of Alabama engaged in human experimentation on Thursday, January 25, 2024, and executed a man, Mr. Kenneth Smith, by means of a nitrogen gas-mask asphyxiation method that had never been used before in human history.

3. Prior to the execution, representatives of the State of Alabama claimed that the new method would render Mr. Smith unconscious within seconds. In pleadings filed with the United States Supreme Court, the Eleventh Circuit, and this Court, the Alabama Attorney General made repeated representations that the nitrogen gas protocol would work *within seconds*: “The State’s method will rapidly lower the oxygen level in the mask, ensuring unconsciousness in seconds.” Opposition to Application for a Stay of Execution Pending Petition for Writ of Certiorari and Brief in Opposition at 22, *Smith v. Hamm*, No. 23A688 (U.S. 2024). The Attorney General assured the federal courts that death would immediately ensue “within minutes”: “ADOC’s nitrogen hypoxia protocol will rapidly reduce oxygen inside the mask, cause unconsciousness within seconds, and cause death within minutes.” Defendants’ Post-Hearing Brief in Opposition to Plaintiff Smith’s Motion for a Preliminary Injunction at 12, *Smith v. Hamm*, No. 2:23-cv-00656 (M.D. Ala., Dec. 29, 2023), ECF No. 66. In fact, the Alabama Attorney General depended on Mr. Smith losing

³ See “Execution Database,” Death Penalty Information Center (Feb. 13, 2024), available at <https://deathpenaltyinfo.org/database/executions>.

consciousness immediately to argue that the procedure was constitutional: “In all likelihood, hypoxia will cause unconsciousness in a matter of seconds, rendering Smith unable to feel pain.”

Id. at p. 15.

4. In stark contrast to the Attorney General’s representations, the five media witnesses chosen by the Alabama Department of Corrections and present at Mr. Smith’s execution recounted a prolonged period of consciousness marked by shaking, struggling, and writhing by Mr. Smith for several minutes after the nitrogen gas started flowing.

5. Marty Roney of the *Montgomery Advertiser* reported that “Kenneth Eugene Smith appeared to convulse and shake vigorously for about four minutes after the nitrogen gas apparently began flowing through his full-face mask in Alabama’s death chamber. It was another two to three minutes before he appeared to lose consciousness, all while gasping for air to the extent that the gurney shook several times.” Marty Roney, “Nitrogen gas execution: Kenneth Smith convulses for four minutes in Alabama death chamber,” *Montgomery Advertiser* (Jan. 25, 2024), <https://www.montgomeryadvertiser.com/story/news/local/alabama/2024/01/25/four-minutes-of-convulsions-kenneth-smith-executed-with-nitrogen-gas/72358038007/>. From 7:57 to 8:01pm, “Smith writhed and convulsed on the gurney. He appeared to be fully conscious when the gas began to flow. He took deep breaths, his body shaking violently with his eyes rolling in the back of his head. [...] Smith clenched his fists, his legs shook under the tightly tucked-in white sheet that covered him from his neck down. He seemed to be gasping for air. The gurney shook several times during this time.” *Id.* At 8:02 p.m., “Smith appeared to lose consciousness. His chest remained still for about 20 seconds then he took several large gasps for air. There appeared to be saliva or tears on the inside of the facemask.” *Id.* It was not until 8:06 that “Smith’s gasping appeared to slow down.” *Id.* And at 8:07 p.m. “Smith appeared to take his last breath.” *Id.* The curtains closed at 8:15 p.m. *Id.*

6. Ivana Hrynkiw of *AL.com* reported that “The gas appeared to start flowing at approximately 7:58 p.m. Smith visibly shook and writhed against the gurney for around two minutes. His arms thrashed against the restraints. He breathed heavily, slightly gasping, for approximately seven more minutes. [...] At 8:01 p.m., a correctional officer in the execution chamber leaned over Smith and examined his face, before stepping away and walking back to his post. Smith appeared to stop breathing at 8:08 p.m. [...] The curtain closed to the execution at 8:15 p.m.” Ivana Hrynkiw, “Alabama Executes Kenneth Eugene Smith by New Nitrogen Gas Method for 1988 Murder of Pastor’s Wife,” *AL.com* (Jan. 25, 2024, 11:00 a.m. (published); Jan. 26, 2024, 12:42 p.m. (updated)), <https://www.al.com/news/birmingham/2024/01/alabama-to-execute-kenneth-smith-with-untested-nitrogen-gas-tonight.html>.

7. Following the execution, Hrynkiw made a public statement, corroborating her written account, saying that “Following the flow of nitrogen gas, Smith laid on the gurney and shook for about two minutes shaking and writhing on that gurney, the gurney did move several times there. Following that shaking on the gurney, there were several minutes, about— between five and seven minutes according to media witnesses of heavy breathing on the gurney. [...] At about 8:08, movement appeared to stop and there was no perceptible breathing from Kenneth Smith. The curtains to the execution viewing room closed at 8:15pm Central Time, and Governor Ivey pronounced death at 8:25 Central Time. [...] Also, the Alabama Attorney General's office had said in prior court filings that they expected him to lose consciousness pretty quickly after that gas began to flow. But media witnesses saw that Kenneth Smith appeared to be conscious for several minutes after that gas began to flow, again, before he proceeded to shake and writhe on that gurney for about two minutes. Again, that got — that two minutes of shaking and writhing on the gurney was followed by about five to seven minutes of heavy breathing.” Transcript of video, Ivana Hrynkiw, “Witness describes final moments of Alabama prisoner Kenneth Smith killed with

nitrogen gas,” *YouTube* (Jan. 25, 2024), available at <https://youtu.be/X6MVEWMcdrM?si=nZkGt3FWOEVdd6HR>.

8. Kim Chandler of the *Associated Press* reported that “The execution took about 22 minutes from the time between the opening and closing of the curtains to the viewing room. Smith appeared to remain conscious for several minutes. For at least two minutes, he appeared to shake and writhe on the gurney, sometimes pulling against the restraints. That was followed by several minutes of heavy breathing, until breathing was no longer perceptible.” 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>.

9. Ralph Chapoco of the *Alabama Reflector* reported that “Smith convulsed for two minutes, with seven minutes of heavy breathing as he took large breaths.” Ralph Chapoco, “Kenneth Eugene Smith executed by nitrogen gas for 1988 murder-for-hire scheme,” *Alabama Reflector* (January 25, 2024), <https://alabamareflector.com/2024/01/25/kenneth-eugene-smith-executed-by-nitrogen-gas-for-1988-murder-for-hire-scheme/>.

10. Lauren Layton of WHNT recounted, like her colleagues, that the gas began flowing around 7:58, at which point “Smith began writhing and shaking. His eyes rolled back. This was followed by several minutes of deep breaths until breaths weren’t visible by witnesses anymore.” Lauren Layton, “News 19’s Lauren Layton’s account of the nation’s first nitrogen hypoxia execution,” WHNT (January 26, 2024), <https://whnt.com/news/alabama-news/kenneth-eugene-smith/news-19s-lauren-laytons-account-of-the-nations-first-nitrogen-hypoxia-execution/>. “It’s kind of hard to say if it went to plan, because we’ve seen state officials say [Smith] could lose consciousness within seconds, and death [could occur] within minutes [...] Now, from curtain open to curtain close, it was about 22 minutes. But did he lose consciousness within seconds? No,

he didn't," Layton said. Lauren Layton, "Witness describes Alabama's first execution by nitrogen gas," WJTV (Jan. 26, 2024), <https://www.wjtv.com/news/witness-describes-alabamas-first-execution-by-nitrogen-gas/>.

11. In addition to the official media witnesses selected by the Alabama Department of Corrections, Mr. Smith invited Lee Hedgepeth, a political reporter based in Alabama, to witness his execution along with his family and lawyer. Mr. Hedgepeth corroborated his colleagues' accounts, reporting that "Around 7:57, Smith began to react to the nitrogen flowing into the mask covering his face. He began thrashing against the straps, his whole body and head violently jerking back and forth for several minutes. [...] Soon, for around a minute, Smith appeared heaving and retching inside the mask. By around 8:00, Smith's struggle against the restraints had lessened, though he continued to gasp for air. Each time he did so, his body lifted against the restraints. Smith's efforts to breathe continued for several minutes [...] Around 8:07 p.m., Smith made his last visible effort to breathe." 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>.

12. Mr. Hedgepeth also spoke with reporters in the aftermath of Mr. Smith's execution. "Once the execution began within a couple of minutes, Kenny began to violently push against the straps, his head began to move back and forth violently. This was the fifth execution that I've witnessed in Alabama, and I have never seen such a violent reaction to an execution," Mr. Hedgepeth told the BBC. Transcript of video, "BBC News, Alabama carries out first US nitrogen gas execution on Kenneth Eugene Smith," *BBC News*, YouTube (Jan. 26, 2024), <https://www.youtube.com/watch?v=qe8gIvhmjOQ>. "Within seconds of Mr. Smith giving his final remarks, we saw him begin violently shaking, thrashing against the straps that held him down. This was the fifth execution that I've witnessed in Alabama and I've never seen such a violent

execution or a violent reaction to the means of execution. So we saw him thrash against the straps holding him onto the gurney for probably four or five minutes. After that, he gasped for breath for probably an additional ten minutes or so. That included some dry heaving into the mask [...] So what we saw last night was, you know, a more violent execution than I've ever witnessed in the four previous executions that I have been at out here in Alabama,” Mr. Hedgepeth told MSNBC. MSNBC, “‘Violently shaking, thrashing:’ Witness details first ever nitrogen gas execution,” YouTube (Jan. 26, 2024), <https://www.youtube.com/watch?v=MgcymCOriGs>.

13. The media outlet *The New York Times* compiled and reviewed all the media witness accounts, as well as accounts by the families, friends, and supporters of Mr. Smith and Elizabeth Sennett, and concluded that once the nitrogen gas began to flow, Mr. Smith struggled and remained conscious for several minutes. See Nicholas Bogel-Burroughs, “A Select Few Witnessed Alabama’s Nitrogen Execution. This Is What They Saw,” *New York Times*, Feb. 1, 2024, available at <https://www.nytimes.com/2024/02/01/us/alabama-nitrogen-execution-kenneth-smith-witnesses.html>. The *New York Times* reported that:

Marty Roney, a longtime reporter for The Montgomery Advertiser, had witnessed two previous executions. This time, he said, the dimly lit viewing room had a strong scent of disinfectant as five journalists and Mr. Smith’s family members were led in. His job, in part, would be to keep track of the elapsed time, if he could.

“The room is probably 8 by 12 [feet], with 13 folding chairs — it’s tight. There is a large glass window in front of the media room that lets you look into the death chamber. The five of us [reporters] decided to divvy up duties. ... My job was, if I found the clock, I would keep the clock.”

In another witness room sat two sons of the murder victim, Mike and Chuck Sennett, as well as their wives, a friend and another relative of Ms. Sennett’s.

Mike Sennett said there were also two people he did not know; he thought they were prison officials from another state. In 2010, the family attended

the lethal injection [execution of John Parker](#), who was also convicted in his mother's murder.

“We went down for the Parker execution and it was like him going to sleep. We didn't know what to expect with this. My anxiety was just building all day long, wondering what's going to happen.”

Kim Chandler, a reporter with The Associated Press, [wrote an account of what she saw](#) when the curtains were pulled back at 7:53 p.m.

“Smith, wearing a tan prison uniform, was already strapped to the gurney and draped in a white sheet. A blue-rimmed respirator mask covered his face from forehead to chin. It had a clear face shield and plastic tubing that appeared to connect through an opening to the adjoining control room.”

Another media witness, Ralph Chapoco of [The Alabama Reflector](#), wrote that Mr. Smith seemed to be trying to reassure his relatives.

“From the moment the curtain opened and throughout the time that corrections staff read the death warrant, Kenneth Eugene Smith never took his eyes off his supporters or the members of his family. ... He scanned their faces one by one, smiled at each of them and several times made a sign with his fingers which meant “I love you.” He would look into the eyes of one person, smile, then move onto the next person, smile and then move on to the next person.”

The gas begins flowing

Mr. Smith remained conscious for several minutes, according to the five media witnesses, including Mr. Roney.

“For four minutes, he was gasping for air. He appeared to be conscious. He was convulsing, he was writhing, the gurney was shaking noticeably.”

Mr. Roney said that he tried to count the seconds between Mr. Smith's gasps.

“We're not allowed watches. There is no second hand on the clock. It's a digital clock that's on military time. I'm sitting there, 'one Mississippi, two Mississippi,' between his breaths.”

He said the execution was vastly different than the two he had witnessed before.

“The two lethal injections I saw, I saw very little physical movement after we believe the process began. Their head goes down, their eyes roll in the back of their head, and then you look for the chest to stop working. You can always fool yourself in that

situation into thinking you're watching someone fall asleep. But there was no mistaking this for what it was.”

[...] The media witnesses said Mr. Smith's breathing was no longer visible at 8:08 p.m.

[...] As Mr. Smith continued to shake, Mr. Sennett said he began to think, “How long is this going to take?”

“We were told by some people that worked [in the prison system] that he'd take two or three breaths and he'd be out and gone. That ain't what happened. After about two or three breaths, that's when the struggling started. Other people kept saying he was trying to raise himself up. Yeah, he was. I'd probably try and do the same, try and get off the table.”

Mr. Sennett says he has been unable to get the violence of Mr. Smith's last moments out of his mind.

“With all that struggling and jerking and trying to get off that table, more or less, it's just something I don't ever want to see again.”

The curtains close

The curtains to the media witness room were closed at 8:15 p.m. [...]

Mr. Chapoco found it difficult to turn to the task of writing an article.

“Trauma has a way of playing tricks on a person's mind. I knew what I experienced. I could even visualize it. For some reason, however, I could not string a series of coherent thoughts together. ... Frankly, I underestimated the impact [the] execution would have, believing I could place it in the back of my mind.”

Bogel-Burroughs, “A Select Few Witnessed Alabama's Nitrogen Execution. This Is What They Saw,” *New York Times*, Feb. 1, 2024.

14. Even the victim's son, Mr. Sennett, described the “struggling and jerking and trying to get off that table” as “something I don't ever want to see again.” *Id.*

15. Despite Attorney General Steve Marshall's proclamation of a “textbook” execution of Mr. Smith (he was not present), the media witnesses and others, including Mr. Smith's family and Elizabeth Sennett's sons, watched as Mr. Smith remained conscious for many minutes after

the nitrogen gas started flowing, struggled and writhed on the gurney, convulsed, dry heaved and retched into his mask, gasped for breath, and was finally pronounced dead 22 minutes later. What the witnesses saw was a far cry from the peaceful and dignified passing that the Attorney General represented to the Court and the public prior to the execution, whereby Mr. Smith would be rendered unconscious and unable to feel pain before he died. Instead, he not only remained conscious for a lengthy period of time, but struggled and writhed on the gurney, and gasped for oxygen in obvious distress.

16. For over a decade, scientific literature had demonstrated that gas asphyxiation through a gas-mask method is not a humane way to kill a person. In Switzerland, the right-to-die organization Dignitas has experimented with assisted suicide by oxygen-deprivation with helium delivered via a face mask. Their results were published in 2010 and were available as Alabama was developing and implementing their own nitrogen mask protocol. The study found that “[o]xygen deprivation with a face mask is not acceptable because leaks are difficult to control and it may not eliminate rebreathing. These factors will extend time to unconsciousness and time to death.” Russel D. Ogden et al., *Assisted suicide by oxygen deprivation with helium at a Swiss right-to-die organization*, 36 J. Med. Ethics 174, 174 (2010). The study also found that there was “wide variation” in the amount of time each individual took to die, attributed to the fit of the mask on each person. *Id.*

17. It should not come as a surprise that no state in this country permitting medical aid-in-dying authorizes doctors to use asphyxiation to help their patients die. Instead, all states that have legalized medical-aid-in-dying only permit doctors to prescribe lethal drugs to patients who qualify for the procedure. “States with Medical Aid in Dying,” *ProCon.org* (August 9, 2023), <https://euthanasia.procon.org/states-with-legal-physician-assisted-suicide/> .

18. In fact, even veterinarians do not allow nitrogen asphyxiation for mammals. The American Veterinary Medical Association (AVMA) has published guidelines on the euthanasia of animals. The AVMA specifically recommends *against* the use of nitrogen gas: “Use of Ar [Argon gas] or N₂ [nitrogen gas] is unacceptable for [...] mammals,” apart from pigs, according to the AVMA, because “These gases create an anoxic environment that is distressing for some species and aversive to laboratory rodents and mink; other methods of euthanasia are preferable for these species.” American Veterinary Medical Association, *AVMA Guidelines for the Euthanasia of Animals* 28 (2020 ed.). Even pigs are not permitted to be euthanized using pure nitrogen gas (N₂); the AVMA specifically finds that only Ar or a N₂-CO₂ gas mixture are acceptable for the euthanasia of pigs. *Id.* In short, pure nitrogen gas, which was used to kill Mr. Smith, is specifically not acceptable for the euthanasia for *any* mammal according to the AVMA. *Id.*

19. Neither doctors, nor veterinarians, nor the international community condone the use of nitrogen gas. International law proscribing the use of gas against human beings dates back to at least the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, also known as the Geneva Protocol, which went into force in 1925 in the aftermath of the First World War. Prior to Mr. Smith’s execution, the United Nations High Commissioner for Human Rights, Ravina Shamdasani, expressed concern that the execution of Mr. Smith would “breach the prohibition on torture or other cruel, inhuman, or degrading treatment or punishment,” and four United States Special Rapporteurs expressed concern that the execution would violate the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173 (Dec. 9, 1988). *See* Jacqui Wise, “Use of nitrogen in US execution may constitute torture, warns human rights agency,” *The BMJ* (January 18, 2024); United Nations Human Rights Office of the High

Commissioner, “United States: UN experts alarmed at prospect of first-ever untested execution by nitrogen hypoxia in Alabama,” United Nations (January 3, 2024), <https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-alarmed-prospect-first-ever-untested-execution>.

20. The fact is, despite its scientific-sounding name, “nitrogen hypoxia” as a method of execution was not conceived by scientists or doctors, but rather by criminal law professors. In 2014, Professors Michael Copeland, Christine Pappas, and Thomas Parr at Oklahoma’s East Central University co-authored a 14-page white paper (hereinafter “the Copeland Paper”) in which they advocated for the use of nitrogen gas asphyxiation (which they called “nitrogen hypoxia”)⁴ over lethal injection. See Michael Copeland, Thom Parr, and Christine Pappas, *Nitrogen Induced Hypoxia as a Form of Capital Punishment* (2014). At the time, Oklahoma was under fire for multiple botched executions using lethal injection. In September 2014, Mike Christian of Oklahoma’s House of Representatives invited Copeland to present his research to the Oklahoma House Judiciary Committee.⁵ Soon thereafter, in February 2015, Rep. Christian introduced House Bill 1879 to authorize “nitrogen hypoxia” as a legal alternative to lethal injection. The bill sailed through the Oklahoma state legislature (without expert review), and Governor Mary Fallin signed HB 1879 into law just over two months from its introduction. Oklahoma thereby became the first state to sanction execution by nitrogen gas asphyxiation. Approximately two years later, Mississippi and Alabama followed suit—adopting statutes with language nearly identical to Oklahoma’s HB 1879.

⁴ The term “nitrogen hypoxia” itself reflects the method’s non-medical origin. The word “hypoxia” means “low oxygen.” It does not describe a process, but rather a state of being. A medical professional would instead describe this execution method as “asphyxiation”—i.e., the *process* of being deprived of oxygen. Thus, Mr. Wilson’s Complaint uses the more medically accurate phrase “nitrogen gas asphyxiation” rather than Copeland’s imprecise “nitrogen hypoxia.”

⁵ Jack Shuler, “Can Executions Be More Humane?,” *Atlantic* (March 20, 2015), <https://www.theatlantic.com/politics/archive/2015/03/can-executions-be-more-humane/388249/>.

21. Alabama became the first state to use nitrogen gas asphyxiation as a method of execution, in a human experiment that officials botched miserably on January 25, 2024. It cannot be allowed to be repeated.

22. Plaintiff David P. Wilson, by and through counsel, hereby files this complaint requesting that the Court enforce his constitutional rights under the Eighth and Fourteenth Amendments to the U.S. Constitution by issuing injunctive and declaratory relief. Mr. Wilson petitions this Court to order Defendant to abstain from carrying out his execution using the state's new gas-mask nitrogen asphyxiation protocol, and to declare that protocol facially unconstitutional or, alternatively, unconstitutional as applied to Mr. Wilson in light of his unique medical conditions.

23. Mr. Wilson brings two causes of action pursuant to 42 U.S.C. § 1983. First, Alabama's new nitrogen asphyxiation protocol violates the Eighth Amendment in all of its applications by exposing persons to an unconstitutional risk of gratuitous pain. Second, Mr. Wilson's unique medical conditions will almost certainly cause him to suffer a painful and prolonged death in violation of the Eighth Amendment if the state is allowed to execute him using its current nitrogen asphyxiation protocol.

JURISDICTION

24. Federal question jurisdiction over this matter arises under 42 U.S.C. § 1983, 28 U.S.C. § 1292, 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 1651, 28 U.S.C. § 2201, and 28 U.S.C. § 2202.

VENUE

25. Venue is appropriate in the Middle District of Alabama under 28 U.S.C. § 1391(b) because Plaintiff David Wilson's death sentence was imposed in Dothan, Alabama, in Houston

County, which is within the district, and his federal habeas corpus petition is currently pending in the Middle District of Alabama.

THE PARTIES

26. Plaintiff David Wilson is a United States citizen and resident of the State of Alabama. He is under a death sentence and is currently being held in the custody of Defendant at W.C. Holman Correctional Facility in Atmore, Alabama.

27. Defendant John Q. Hamm is the Commissioner of the Alabama Department of Corrections, which is headquartered in Montgomery, Alabama. Mr. Hamm is responsible for overseeing operations at the Alabama Department of Corrections. He is charged with overseeing all executions. He has an obligation to ensure that all executions are carried out in compliance with the United States Constitution. He is being sued in his official capacity. He is a United States citizen and resident of Alabama.

PROCEDURAL HISTORY

28. David Wilson was convicted and sentenced to death by the Circuit Court of Houston County on December 5, 2007. (Tr. C. 354-55.) On direct appeal, the Alabama Court of Criminal Appeals (ACCA) remanded to the trial court to determine if the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *Wilson I*, 142 So. 3d at 747-48. After a hearing, the circuit court denied the claim. (Tr. C-Remand 40.) On March 23, 2012, the ACCA affirmed Mr. Wilson's conviction and sentence. *Wilson*, 142 So. 3d at 748 (op. on return to remand), and on June 22, 2012, denied rehearing. *Id.* The Alabama Supreme Court ("ASC") denied certiorari on September 20, 2013. *Ex parte Wilson*, No. 1111254 (Ala. Sept. 20, 2013). The United States Supreme Court denied Mr. Wilson's petition for writ of certiorari on May 19, 2014. *Wilson v. Alabama*, 134 S. Ct. 2290 (2014).

29. Mr. Wilson filed a Rule 32 state post-conviction petition on September 19, 2014. (C. 16-88.) He filed an Amended Petition on December 11, 2015 (C. 224-1027), and a supplement on September 7, 2016 (C. 1429-61). The State filed an Amended Answer and Motion to Dismiss on February 24, 2016 (C. 1051-1124), and a response to the supplement on October 6, 2016 (C. 1485-91). The court held a hearing on the State's Motion on November 8, 2016 (R. 113), and dismissed the petition in its entirety without granting discovery or holding an evidentiary hearing on February 24, 2017 (C. 1524-1646, 1647-176914). Mr. Wilson filed a Motion to Reconsider on March 24, 2017 (C. 1772-1861), which was denied by operation of law on March 26, 2017. *But see* C. 1873, 1874 (orders dated April 7, 2017, incorrectly stating that Mr. Wilson's notices of appeal divested the court of jurisdiction to rule on his motion to reconsider). The ACCA affirmed the dismissal of Mr. Wilson's Rule 32 petition on March 9, 2018. *Wilson v. State*, No. CR-16-0675 (Ala. Crim. App. Mar. 9, 2018) (unpublished table decision) ("Wilson II"), and denied rehearing on May 4, 2018.

30. Mr. Wilson petitioned for certiorari from the Alabama Supreme Court. That court denied certiorari on August 24, 2018. *Ex parte David Phillip Wilson*, No. 1170747 (Ala. Aug. 24, 2018). Mr. Wilson filed a petition for writ of certiorari with the U.S. Supreme Court on January 18, 2019. The Supreme Court denied certiorari on April 29, 2019.

31. Mr. Wilson then filed for a federal writ of habeas corpus on April 22, 2019. His petition is before Judge R. Austin Huffaker, Jr.

ADDITIONAL FACTS

32. Plaintiff David Wilson suffers from pulmonary problems, Asperger's Syndrome (which renders him hyperreactive to tactile input), and light sensitivity and vision problems that mandate eyewear.

i. Pulmonary Issues

33. Mr. Wilson's medical records demonstrate that he suffers from pulmonary health problems of long date, including tuberculosis and other respiratory difficulties. These are chronic and permanent conditions that constrict the airways in his lungs, making it difficult for him to breathe. Mr. Wilson was prescribed an albuterol inhaler to treat his respiratory illness when he was detained in the Houston County Jail back in February 2008. *See* Appendix A. Mr. Wilson has contracted tuberculosis (TB) and tested positive for tuberculosis at Holman Prison. *See* Appendix B. He was placed on tuberculosis medication for nine months in 2010, and is subject to medical examination every three months for a tuberculosis update to ensure that active tuberculosis does not flare up. Mr. Wilson's airways are chronically clogged by phlegm and other discharge that makes it difficult for him to breathe normally. Mr. Wilson reports coughing up fluid on a regular basis. Mr. Wilson has also had COVID-19 on several occasions, which has impaired his lungs further. Mr. Wilson reports that his lungs often feel inflamed and he has a sensation of burning when he breathes.

ii. Asperger's Syndrome

34. As Mr. Wilson has pled in his post-conviction and habeas corpus petitions, Mr. Wilson is on the autism spectrum and has Asperger's Syndrome. *See David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 1, Petition for Writ of Habeas Corpus, filed April 24, 2019, at 189. Trial counsel was ineffective in failing to retain a medical expert to diagnose Mr. Wilson prior to his conviction; post-conviction counsel retained Dr. Robert D. Shaffer, a forensic and neuropsychologist who interviewed Mr. Wilson and his family and who was prepared to testify that Mr. Wilson "suffers from Asperger's Syndrome, a constituent of autism spectrum disorder

[ASD].” *David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 1, Petition for Writ of Habeas Corpus, at 190.

35. The current diagnostic criteria established by the Diagnostic and Statistical Manual of Mental Disorders V (DSM-V) provides that, in addition to “persistent deficits in social communication and social interaction across multiple contexts,” individuals with ASD exhibit “Restricted, repetitive patterns of behavior, interests, or activities,” manifested through at least two of four behaviors, one of which is sensory perceptual issues. Individuals with autism spectrum disorder often have “Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment.” *See Diagnostic and Statistical Manual of Mental Disorders V* (Am. Psychiatric Ass’n. 2013), Autism Spectrum Disorder, at 50. Although not all individuals with ASD experience sensory perceptual issues, the vast majority of individuals with ASD (approximately 90%)⁶ experience sensory perceptual issues, and about “70 percent of people with ASD experience tactical sensory differences.”⁷ Mr. Wilson is one such individual.

iii. *Light Hyper-sensitivity and Vision Impairment*

36. Consistent with Mr. Wilson’s ASD and compounding his hyper-sensitivity to physical touch or constrictions, Mr. Wilson’s medical records demonstrate that he suffers from atypically high sensitivity to light and has repeatedly requested permission to wear sunglasses. *See* Appendix C, David Wilson Medical Records. Without sunglasses, bright lights (even mere sunlight) cause Mr. Wilson significant distress. During an execution, Mr. Wilson would be required to stare straight into high-intensity ceiling lights, as the protocol requires him to be strapped to a gurney facing the ceiling. Compounding Mr. Wilson’s light sensitivity caused by his

⁶ “Research suggests up to 90 percent of individuals with autism display sensory differences compared with people who do not have autism.” “What are Sensory Processing Differences and How Do They Relate to Autism?,” *Mount Sinai* (Jun. 30, 2022), <https://health.mountsinai.org/blog/what-are-sensory-processing-differences-and-how-do-they-relate-to-autism/>.

⁷ Diarmuid Heffernan, *Sensory Issues for Adults with Autism Spectrum Disorder* 52 (Jessica Kingsley Publishers 2016).

ASD, Mr. Wilson has written that direct light also causes him severe migraines if he does not wear sunglasses. His repeated requests for sunglasses show that these migraines are chronic and continue to this day.

37. According to media witnesses who were present at Mr. Smith's execution, the mask used by the State to carry out executions covers the condemned person's face from "forehead to chin." See Bogel-Borroughs, "A Select Few Witnessed Alabama's Nitrogen Execution. This Is What They Saw."

38. Mr. Wilson would not be able to wear sunglasses under the full face-mask during any execution and would have to stare straight into the ceiling lights. Therefore, there is a significant likelihood that Mr. Wilson would either have to suffer severe migraines during his execution, or, in the alternative, keep his eyes closed and forfeit his last chance to see his family and loved ones before he is killed. Even if the state refuses to allow Mr. Wilson to wear sunglasses in the execution chamber, Mr. Wilson wears prescription glasses when there is no strong light. He would not be able to wear those glasses with the mask on either, and therefore would be killed without the opportunity to see his family.

CAUSES OF ACTION

39. David Wilson incorporates by reference, here and below, all facts and allegations detailed throughout this complaint.

40. The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." It is well established that, to be considered constitutional, a punishment must not be "incompatible with the evolving standards of decency that mark the progress of a maturing society" and may not "involve unnecessary or wanton infliction of pain." *Estelle v. Gamble*, 492 U.S. 97, 102 (1976); see also *In re Kemler*, 136 U.S. 436, 447 (1890) ("[P]unishments are cruel when they involve torture or a lingering death.").

41. To establish that a future harm will violate the Eighth Amendment, “the conditions presenting the risk must be ‘*sure or very likely* to cause serious illness and needless suffering,’ and give rise to ‘sufficiently *imminent* dangers.’” *Baze v. Rees*, 553 U.S. 35, 50 (2008) (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). In the context of executions, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm,’ that prevents prison officials from pleading that they were ‘subjectively blameless for the purposes of the Eighth Amendment.’” *Id.* at 1531 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

42. A person challenging a method of execution is legally required to identify an alternative method that is “feasible, readily implemented, and [will] in fact significantly reduce a substantial risk of severe pain.” *Id.* at 1532. If a plaintiff offers an alternative that meets the *Baze* criteria and “a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as ‘cruel and unusual’ under the Eighth Amendment.” *Id.* If no constitutional method of execution is permissible under Alabama law, then the state cannot execute Mr. Wilson until a constitutional method becomes available. *Nance v. Comm’r, Ga. Dep’t of Corr.*, 59 F.4th 1149, 1155 (11th Cir. 2023).

43. David Wilson can make both of these showings, and challenges Alabama’s gas-mask nitrogen asphyxiation method on its face and as applied to his case.

I. COUNT 1: ALABAMA’S NITROGEN GAS ASPHYXIATION PROTOCOL IS FACIALLY UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT.

A. The State’s Current Nitrogen Gas Asphyxiation Protocol Causes Serious Pain and Suffering.

44. Human beings breathe in life-sustaining oxygen and breathe out carbon dioxide. People who have experienced suffocation describe it as agonizing. Proponents of nitrogen gas asphyxiation as a method of execution believed that the pain of suffocation was caused not by the lack of oxygen, but rather by the buildup of carbon dioxide in the lungs. Since a condemned person would still be able to breathe out carbon dioxide, while breathing in pure nitrogen, proponents argued that the condemned person would not experience the pain of “air hunger.” As such, proponents maintained that nitrogen gas asphyxiation ought to have been quick and painless.

45. The scientific evidence suggested otherwise. Studies had indicated that fatally low oxygen levels alone could cause agony, anxiety, and intense fear, and that asphyxiation itself is deeply painful and can produce severe nausea, disorientation, dizziness, and seizures—irrespective of the body’s carbon dioxide levels.

46. The results of the first human experiment are now in and they demonstrate that nitrogen gas asphyxiation is neither quick nor painless, but agonizing and painful. The execution of Mr. Smith on January 25, 2024, demonstrates that the method resulted in about four to six minutes of struggling, writhing, and shaking against restraints, followed by five to seven minutes of deep breathing.

47. As evidenced by Mr. Kenneth Smith’s torturous, 22-minute execution, Alabama’s nitrogen asphyxiation protocol carries a substantial risk of causing severe pain and suffering, in violation of the Eighth Amendment.

B. Alternative Methods

48. It is morally repugnant that federal judges have interpreted the Eighth Amendment to impose on persons who are going to be executed the responsibility of pleading and proving that there are more humane methods of execution than the one they are facing. There is nothing in the Eighth Amendment that requires this burden, as a textual, originalist, or contextual matter, and the judicial interpretation is legally obscene. Moreover, there is no other type of § 1983 action that requires a plaintiff to suggest a way for the government to accomplish its goals without violating the plaintiff's constitutional rights.

49. The requirement that a plaintiff must develop his own execution protocol—despite the fact that there is no rational relation between the constitutionality of one method of execution and the existence of an alternative method—forces a person to participate in their own execution. It is the moral equivalent of forcing someone to dig their own grave, which has been found to be a form of torture under international law.⁸ To be sure, the State of Alabama and the federal courts are not alone in mandating this macabre practice. The Nazis forced Jewish persons to dig their own graves.⁹ More recently, Russian armed forces were accused of forcing a Ukrainian woman to dig her own grave.¹⁰ According to Amnesty International, such practices are common in North Korean

⁸ *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), Inter-Am. Ct. H.R., §VII, ¶51 (Sept. 10, 1993) (“The beatings received, the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims.”)

⁹ Jennifer Holton, “Auschwitz survivor turns 100 despite being forced to dig his own grave by Nazis,” *Fox 13* (March 7, 2022), available at <https://www.fox13news.com/news/auschwitz-survivor-turns-100-despite-being-forced-to-dig-his-own-grave-by-nazis>; “Nazis Force Jews in Minsk District to Dig Their Own Graves,” *Jewish Telegraphic Agency* (August 12, 1941), <https://www.jta.org/archive/nazis-force-jews-in-minsk-district-to-dig-their-own-graves>.

¹⁰ Jake Epstein, “Ukrainian woman said her Russian captors mocked her execution and forced her to dig her own grave,” *Business Insider* (April 19, 2023), available at <https://www.businessinsider.com/ukrainian-woman-survived-russian-captivity-forced-dig-own-grave-2023-4>.

prisons today.¹¹ But the practice is roundly understood by the international community as a form of torture for the executed person and a violation of international law.

50. Torture is a crime under customary international law, belonging in the category of *jus cogens*, and its prohibition is codified in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by the United States in 1994, and Congress enacted 18 U.S.C. §§ 2340-2340A to carry out the United States' obligations under the Convention in 1994), the International Covenant on Civil and Political Rights (ratified by the United States in 1992), and the Inter-American Convention To Prevent And Punish Torture. *See also Definition of Torture Under 18 U.S.C. §§ 2340–2340A*, 28 Op. O.L.C. 297 (December 20, 2004). Forms of torture include “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for purposes including that of punishment. *See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1994, 1465 U.N.T.S. 85. Mock executions, including forcing someone to dig their own grave, is considered such a form of torture. *See 18 U.S.C. § 2340A (2)(C) (2000)*. It should also be understood as an immoral and torturous imposition on counsel for the condemned person, as well as for the federal judges deciding these cases. It unnecessarily inflicts trauma on defense counsel and the judge, neither of whom are willing participants in the state's machinery of death.

51. Should this Court nevertheless continue to require a plaintiff to prove the existence of a less cruel method of execution, there are of course many ways that governments have executed their citizens lawfully over the centuries. Socrates was executed by an oral ingestion of hemlock

¹¹ Alexander Smith, “North Korea expands prison camp where inmates dig own graves: Amnesty International,” *NBC News* (December 5, 2013), available at <https://www.nbcnews.com/news/world/north-korea-expands-prison-camp-where-inmates-dig-own-graves-flna2d11698391>.

in Athens in 399 BCE. Jesus of Nazareth was executed by crucifixion outside of Jerusalem in 30 CE. The Habsburg Emperor Maximilian I was executed by firing squad in the Mexican Republic in 1867. Marie Antoinette was beheaded at the guillotine in 1793. Nathan Hale was executed by hanging in 1776. There is a long menu of methods of execution used in human history that have been held to be legal.

The “Socratic Method”

52. Sticking with Socrates, it would be very easy to turn to new methods of medical aid-in-dying currently used in the United States: a ten-gram dose of secobarbital injected orally in four ounces of liquid; alternatively, a drug cocktail known to doctors as “DDMP II,” which is composed of 1 gram of diazepam, 50 milligrams of digoxin, 15 grams of morphine sulfate, and 2 grams of propranolol, injected orally. Dr. Charles David Blanke, an experienced physician who specializes in end-of-life care, specifically in medical-aid-in-dying (MAID) in Oregon, has testified about this alternative in federal court in Alabama. *See Hamm v. Dunn*, No. 2:17-cv-02083-KOB (N.D. Ala., 2018), Doc. 15, Appendix C, Affidavit of Dr. Charles David Blanke, ¶ 5, 6, 11. This “Socratic method” is feasible, readily implementable, and would surely reduce the certainty of severe pain associated with nitrogen gas asphyxiation. *See Baze*, 553 U.S. at 50. The United States District Court for the Northern District of Alabama already deemed this alternative to be a lawful alternative method of execution to lethal injection. *See Hamm v. Dunn*, No. 2:17-cv-02083-KOB (N.D. Ala. Feb. 6, 2018), Doc. 30, *reversed on other grounds*.¹² The evidence regarding this alternative method has already been presented to the federal court in *Hamm v. Dunn*, No. 2:17-cv-

¹² Note that Alabama law does not limit lethal injection to solely intravenous injection. The statute states only that “[a] death sentence shall be executed by lethal injection.” Ala. Code § 15-18-82.1(a). The definition of “injection” is not confined to only intravenous injections. The Oxford English Dictionary defines “injection” as “[t]he action of forcing a fluid, etc. into a passage or cavity, as by means of a syringe, or by some impulsive force.” Therefore, an oral form of lethal injection is actually authorized by Alabama statute. In contrast to other states that explicitly narrow the term injection to venous injection, the Alabama statute clearly allows for other forms of injection, such as oral injection.

02083-KOB (N.D. Ala. Feb. 6, 2018) and is incorporated herein by reference. *See* Appendix D (Hearing on oral injection on January 31, 2018, cross examination starting at page 106, direct examination starting at page 113); and Appendix E (Court order on oral injection alternative). If the Court should require an alternative method, this is one that has already been approved by a federal judge in Alabama.

II. COUNT 2: ALABAMA’S NITROGEN GAS ASPHYXIATION PROTOCOL IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT *AS APPLIED* TO DAVID WILSON, IN LIGHT OF HIS UNIQUE MEDICAL CONDITIONS.

A. The State’s Use of Nitrogen Gas Asphyxiation to Execute David Wilson is Highly Likely to Cause Him Severe Pain and Suffering.

53. There is a “substantial” and “objectively intolerable” risk that Mr. Wilson will experience severe pain and suffering if Alabama proceeds to execute him by nitrogen asphyxiation, in violation of his Eighth Amendment rights.

i. Pulmonary Health Problems

54. Alabama’s current nitrogen gas asphyxiation protocol would cause Mr. Wilson severe pain and suffering in light of his pulmonary health issues. Mr. Wilson’s medical records demonstrate that he suffers from chronic (lifelong) conditions that constrict the airways in the lungs. He has contracted tuberculosis, which has been worsened by several bouts of COVID-19. As a result of his compounding pulmonary issues, Mr. Wilson’s airways are chronically clogged by phlegm and other discharge. A nitrogen asphyxiation protocol would cause Mr. Wilson severe distress.

55. These pulmonary health problems include symptoms such as inflammation, airway hyperresponsiveness, and bronchoconstriction, which might collectively interfere with the

nitrogen gas protocol and cause Mr. Wilson severe pain and suffering. A person suffering from these conditions typically has inflamed bronchioles (breathing tubes), accompanied by excess mucus, which dramatically reduces the size of the airway—making it very difficult for air to pass through. While inflammation may be present even when a person is not experiencing pulmonary problems, their bronchioles can become further constricted due to airway hypersensitivity.

56. It is unknown whether the inhalation of nitrogen gas alone is likely to trigger a pulmonary attack. However, there is evidence that low levels of oxygen, as would be the case in nitrogen asphyxiation, can lead persons with pulmonary health problems to struggle to breathe. *See* Robert Geisler, “Asthma and High Elevation Activity,” Children’s Hospital Los Angeles (Feb. 27, 2014), available at <https://www.chla.org/blog/advice-experts/asthma-and-high-elevation-activity#:~:text=Why%20High%20Elevation%20Triggers%20Asthma,or%20quick%20breathin g%20can%20occur>. This would be severely distressing to Mr. Wilson. Furthermore, given that Mr. Wilson has also been repeatedly infected with COVID-19, which weakens the immune system, he is at even greater risk of active tuberculosis. Active tuberculosis causes lung tissue to harden and die, making it vastly more difficult for the individual to breathe.

57. Mr. Wilson has chronic discharge within his airways and has permanently constricted airways. Even without an active tuberculosis diagnosis, Mr. Wilson does not breathe like a healthy person. Mr. Wilson’s pulmonary issues would interfere with the efficacy of the nitrogen gas asphyxiation protocol. If Mr. Wilson experiences a pulmonary attack at the time of his execution, his involuntary coughing might cause the nitrogen gas-mask to become dislodged—thereby introducing atmospheric oxygen into the system and the possibility of brain damage. Similarly, the constriction of Mr. Wilson’s airways would likely prolong his suffering, by restricting the intake of nitrogen gas into his lungs. All the while, Mr. Wilson would be experiencing the severe pain and suffering associated with a pulmonary attack and asphyxiation.

ii. *Asperger's Syndrome*

58. Alabama's current nitrogen gas asphyxiation protocol would cause Mr. Wilson severe pain and suffering in light of his Asperger's Syndrome. Mr. Wilson's medical records demonstrate that he suffers from hyper-reactivity to sensory input. He has atypically high sensitivity to light and has repeatedly requested sunglasses. Without sunglasses, the light causes Mr. Wilson to experience severe migraines. This symptom is consistent with the sensory perceptual issues experienced by persons with ASD.

59. Defendant's current nitrogen asphyxiation protocol requires that a full face-mask be fitted over the condemned person's entire face. In an effort to prevent atmospheric oxygen from seeping into the nitrogen delivery system, the mask is required to be fitted tightly. It would not allow for wearing glasses.

60. During the COVID-19 pandemic, mask use became prevalent. For some individuals with ASD and their families, including Mr. Wilson, mask requirements posed an enormous challenge—as what was a minor discomfort for neurotypical individuals was an unbearable experience for people with ASD. In 2020, the Harvard Medical School published an online guide to managing the pandemic for individuals with ASD. In it, they write:

Many people with ASD are highly sensitive to touch, and the face can be especially so. Wearing a face mask involves many unpleasant sensations. On the surface, there's the scratchy texture of fabric, tight contact where the top of the mask meets the skin, and the tug of elastic on the ears. Sensations under the mask are no more pleasant and include the warm, damp smell of recycled air. In addition, the sensation of breathing in and exhaling air through the nose can feel restrictive, leading to concern and worry for many individuals with ASD. While wearing a mask is uncomfortable at best, these unpleasant sensory experiences can be intensely magnified in people with ASD.¹³

¹³ "Helping people with autism spectrum disorder manage masks and Covid-19 tests," *Harvard Medical School* (Jun. 10, 2020), <https://www.health.harvard.edu/blog/helping-people-with-autism-spectrum-disorder-manage->

Mr. Wilson could not wear either a mask or face shield during the COVID-19 pandemic. He felt like he was suffocating when he had a mask on. The mask required by Alabama's current nitrogen asphyxiation protocol is not merely a slip of cloth covering the nose and mouth. It is a stiff and suffocating gas mask. Such a mask would be intolerable for people like Mr. Wilson who suffer from sensory perceptual issues due to ASD. While no person sentenced to death has the right to a painless death, Alabama's current nitrogen gas asphyxiation protocol would cause Mr. Wilson to experience suffering far in excess of that which a neurotypical condemned person would endure.

61. While any method of execution would create sensory stimuli, not all would involve the level of stimulation that Mr. Wilson would experience from Alabama's current nitrogen gas asphyxiation protocol—which requires extensive tactile stimulation of the face (a particularly sensitive part of the body). Alternatives would involve far less stimulation.

iii. *Light Sensitivity and Visual Impairment*

62. Mr. Wilson experiences hypersensitivity to light, suffering from severe migraines when exposed to direct light. He wears sunglasses each time he goes outdoors. It is inevitable that, forced to stare straight into ceiling lights, Mr. Wilson would suffer from crippling migraines during the execution.

63. Furthermore, Mr. Wilson wears prescription glasses and is not able to see clearly without them. During the nitrogen gas execution, he would not be able to see his family and friends or the movements of the people in the execution chamber.

64. As a result, Mr. Wilson would need to wear prescription sunglasses during the execution.

[masks-and-covid-19-tests-2020061020089#:~:text=Many%20people%20with%20ASD%20are.of%20elastic%20on%20the%20ears.](#)

65. The State of Alabama's nitrogen asphyxiation protocol uses a gas mask that covers the entire face of the condemned person. Mr. Wilson would not be able to wear any glasses during the execution. He would thus be put in the position of either suffering from debilitating migraines during his last moments of life in order to catch a blurry glimpse of his family and friends, or in the alternative, forfeit his last opportunity to see his loved ones at all.

B. There Are Feasible, Readily Implemented Alternatives that Would Eliminate the Substantial Risk of Severe Pain Arising from David Wilson's Unique Medical Conditions

66. As discussed earlier, the burden should not be on Mr. Wilson to propose an alternative method of execution; there are, however, alternatives available, including oral injection, that would cause him significantly less pain and suffering than Alabama's current nitrogen gas asphyxiation protocol. The United States District Court for the Northern District of Alabama has already found that execution by oral injection is a feasible and readily available alternative to Alabama's protocol that significantly reduces the risk of severe harm.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiff David P. Wilson respectfully requests that this Court:

Enter a declaratory judgment, first, that Defendant's current nitrogen gas asphyxiation protocol violates David Wilson's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

Grant injunctive relief to enjoin the Defendant from proceeding with the execution of David Wilson using its nitrogen gas asphyxiation protocol, which will cause David Wilson cruel and unusual suffering, in violation of the Eighth and Fourteenth Amendments.

Grant any further relief as it deems just and proper.

This, the 14th day of February 2024.

Respectfully submitted,

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a vertical line to its right.

Bernard E. Harcourt
Alabama Bar Number: ASB-4316-A31B

The Initiative for a Just Society (IJS)
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, New York 10027
Telephone: (212) 854-1997
Fax: (212) 854-7946
Email: beh2139@columbia.edu

Attorney for Plaintiff David Wilson