IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DAVID P. WILSON, Plaintiff v. JOHN Q. HAMM, Commissioner, Alabama Department of Corrections, Defendant.	))))))))))	Case No. 2:24-cv-00111-ECM ***DEATH PENALTY CASE***

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

THIS §1983 CIVIL RIGHTS LAWSUIT arises because of Defendant's botched execution of Kenneth Eugene Smith on January 25, 2024. That day, Defendant engaged in the first execution in human history that used a nitrogen gas mask asphyxiation protocol, and it proved to be torture. As the Complaint alleges, Mr. Smith struggled and writhed in pain while conscious for about four minutes; it took a few more minutes before he lost consciousness, and during that time he gasped for

air and shook the execution gurney so much that the whole gurney moved several times. *See* Doc. 1, ¶ 5 and 7. As the Complaint alleges, this nitrogen method of execution is "agonizing and painful" and "carries a substantial risk of causing severe pain and suffering." (Doc. 1, ¶ 46-47).

Defendant is fully on notice of the nature of this timely §1983 lawsuit—filed only 14 business days after the botched execution of Mr. Smith. Nevertheless, Defendant has filed a motion to dismiss arguing, *inter alia*, that Plaintiff has not given proper notice of the claims and violated the statute of limitations. Defendant raises four grounds for dismissal, none of which have merit.

Pursuant to the Court's Order dated April 19, 2024 (Doc. 18), Plaintiff respectfully submits this response to Defendant's motion to dismiss (Doc. 16).

TABLE OF CONTENTS

I. PLAINTIFF'S CHALLENGE IS TIMELY

1. Mr. Wilson's §1983 civil rights lawsuit is subject to a two-year statute of limitations. *See West v. Warden*, 869 F.3d 1289, 1298 (11th Cir. 2017). A §1983 claim accrues when "the facts which would support a cause of action [became] apparent or should [have been] apparent to a person with a reasonably prudent regard for his rights." *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). In this case, the facts supporting Mr. Wilson's §1983 claims became apparent on January 25, 2024, when Defendant botched Mr. Smith's execution, or on or about August 25, 2023, when Defendant publicized the substantially changed August 2023 execution protocol including, for the first time, nitrogen gas mask asphyxiation. Under either of those dates, Mr. Wilsons' challenge is timely.

2. Defendant argues that Plaintiff's facial and as applied challenges to nitrogen gas mask asphyxiation are barred by the statute of limitations. *See* Doc. 16, p. 3 and p. 5. Defendant's argument is without merit.

A. The Facial Challenge

3. Defendant contends that the two-year statute of limitations on Mr. Wilson's facial challenge began to run in 2018 when (1) the State of Alabama enacted legislation allowing for execution by means of "nitrogen hypoxia" and (2) Mr.

Wilson opted out of lethal injection and elected the only legal, statutory alternative of "nitrogen hypoxia." (Doc. 16, p. 4)

4. However, at that time in 2018, Mr. Wilson did not know how Defendant would carry out a "nitrogen hypoxia" execution, and he believed that at least some forms of nitrogen asphyxiation could lead to unconsciousness within seconds. In 2018, Mr. Wilson did not know the facts that underlie this §1983 civil rights action. Nor had he any reason to know them. As late as January 22, 2024, the Alabama Attorney General was assuring the United States Supreme Court that "[t]he State's method will rapidly lower the oxygen level in the mask, ensuring unconsciousness in seconds." *See* Doc. 1, ¶ 3, quoting 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).

4. It was only on January 25, 2024, when Defendant botched the execution of Mr. Smith, that "the facts which . . . support [Mr. Wilson's] cause of action [became] apparent" to him. *Mullinax*, 817 F.2d at 716. It is on that date—January 25, 2024—that the statute of limitations on Mr. Wilson's §1983 lawsuit accrued. *See Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022) (per curiam) (holding that method of execution claim accrued "at the onset of [a previous condemned person's] attempted execution" because "[i]t is the

emergence of ADOC's pattern of superadding pain through protracted efforts to establish IV access in the two previous execution attempts that caused Smith's claim to accrue").[1] Mr. Wilson filed this action only two weeks later—well within the two-year statute of limitations.

5. Mr. Wilson's Complaint is crystal clear: this challenge arose *because of* the botched execution of Mr. Smith on January 25, 2024. *See* Doc. 1, pp. 1-10. As the Complaint makes clear from the very first paragraph about "botched executions" through the following ten pages, which minutely recount what the witnesses saw at Mr. Smith's execution, it was the botched execution of Mr. Smith that gives rise to this §1983 lawsuit. It is the fact that, as witness Lee Hedgepeth said and as the Complaint alleges: "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. […] 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." Doc. 1, ¶ 12. It is based on those facts that Mr. Wilson

[1] Unpublished opinions can serve as persuasive authority. *See* 11th Cir. R. 36-2.

became aware that, as the Complaint alleges, Defendant's nitrogen gas mask asphyxiation protocol is "agonizing and painful" and "carries a substantial risk of causing severe pain and suffering." (Doc. 1, ¶ 46-47). On January 25, 2024, Mr. Wilson became cognizant of the facts that support this lawsuit.

6. In any event, Mr. Wilson's claim is timely because he filed it within two years of Defendant publishing a substantially revised protocol for executing condemned people by "nitrogen hypoxia." When the Alabama Legislature authorized such executions in 2018, Defendant had no protocol for carrying them out. Mr. Wilson did not know and could not have known the procedures that Defendant would use to accomplish an execution by "nitrogen hypoxia." Under those circumstances, the Eleventh Circuit has held that "[a]n Eighth Amendment method-of-execution claim 'accrues on . . . the date on which the capital litigant becomes subject to a new or substantially changed execution protocol.'" *West*, 869 F.3d at 1298. That did not occur until either (1) August 25, 2023, or (2) August 29, 2023.

7. First, on Friday August 25, 2023, the Alabama Attorney General filed in federal and state court—in the United States District Court for the Middle District of Alabama and in the Alabama Supreme Court—a motion with the Alabama Supreme Court requesting an execution date for Kenneth Eugene Smith and attached, as an exhibit to the motion, a heavily redacted copy of Defendant's

substantially changed August 2023 execution protocol, which, for the first time, set forth procedures for "nitrogen hypoxia" executions. *See Smith v. Hamm*, No. 2:22-cv-00497-RAH (M.D. Ala. August 25, 2023), Doc. 104-1 (Exhibit A, State of Alabama's Motion to Set an Execution Date), and Doc. 104-2 (Exhibit B, ADOC Execution Procedures for Lethal Injection, Nitrogen Hypoxia, Electrocution: August 2023). In other words, Defendant's substantially changed August 2023 execution protocol became public on August 25, 2023.

8. Second, on Tuesday, August 29, 2023, a correctional officer from Holman Correctional Facility (who Plaintiff identified as a Captain or Sargent with a last name sounding like "McKinsey") and an attorney with Defendant's General Counsel's Office gave Mr. Wilson a heavily redacted copy of the substantially changed August 2023 execution protocol, which now included for the first time procedures for "nitrogen hypoxia" executions. *See* Doc. 11, ¶ 27; Doc. 15-1 (substantially changed August 2023 execution protocol). The prison official and representative of Defendant's office had Mr. Wilson sign a legal document to acknowledge his receipt of the new protocol. They did not give Mr. Wilson a copy of that acknowledgment. The signature receipt is in the possession of Defendant. *See* Doc. 11, ¶ 27. Mr. Wilson signed it on or about August 29, 2023.

9. Accordingly, pursuant to binding Eleventh Circuit precedent in *West v. Warden,* 869 F.3d 1289, 1298 (11th Cir. 2017), the statute of limitations on Mr. Wilson's lawsuit accrued no earlier than August 25 or August 29, 2023.

10. In either case, January 2024 or August 2023, the statute of limitations has not run in this §1983 lawsuit. Plaintiff will explain the chronology step by step.

(1) The Chronology

(i) *June 2018*

11. At the time of Alabama's enactment of legislation allowing "nitrogen hypoxia," on June 1, 2018, Mr. Wilson did not know how Defendant would administer the new method. At the time, Mr. Wilson also believed that some form of nitrogen asphyxiation could lead to unconsciousness within seconds.

12. In the enacting legislation, the State of Alabama did not specify how "nitrogen hypoxia" would be administered. The statute did not specify whether a gas chamber, a plastic head-to-torso hood, a full-face gas mask (fitted or generic), an anesthetic gas mask, or any other method of delivery would be used in an execution. As a scientific matter, death by nitrogen asphyxiation can be induced using either a closed gas chamber, a head-to-torso hood (also referred to as a plastic Exit bag), or a variety of face masks. *See* Hearing on Motion for Preliminary Injunction, *Smith v. Hamm*, No. 2:23-cv-00656-RAH (M.D. Ala. Dec. 20, 2024), Doc. 67, p. 50-51

(based on the deposition of State's expert Dr. Joseph Antognini). But the Alabama statute merely referred to "nitrogen hypoxia" and did not state what delivery method would be used for the nitrogen. *See* Ala. Code 1975 § 15-18-82.1(a) (effective June 1, 2018). No one knew how Defendant would implement what was called "nitrogen hypoxia."

13. "Nitrogen hypoxia" is not a scientific or legal term, and it does not specify how a low level of oxygen will be achieved or how nitrogen will be delivered. The term was invented, for purposes of capital punishment, by three criminal justice professors at Oklahoma's East Central University, who do not have medical training. *See* Michael Copeland, Thom Parr, and Christine Papas, *Nitrogen Induced Hypoxia as a Form of Capital Punishment* (2014).

14. The word "hypoxia" is a noun that is formed, etymologically, from the conjunction of "hypo" (the prefix meaning "under," "beneath," or "below" from Greek), "ox" (meaning "oxygen," the chemical element), and "ia" (the suffix meaning "a state of being" from the Latin and Greek formulation that converts an adjective into an abstract noun, as used for instance in "mania," "hysteria," or "amnesia"). *See Oxford English Dictionary,* s.v. "hypoxia *(n.),* Etymology," July 2023, https://doi.org/10.1093/OED/7692987036. So "nitrogen hypoxia" means, as best anyone could guess, the state of a human being having a low level of oxygen,

below normal levels, as a result of inhaling nitrogen. But it does not specify in any way how Defendant would deliver the nitrogen.

15. Using simply the term "nitrogen hypoxia," the Alabama Code in question—Ala. Code 1975 § 15-18-82.1(a), effective June 1, 2018—did not put Mr. Wilson on notice of facts that would have supported a §1983 cause of action under the Eleventh Circuit's *Mullinax* standard. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). In fact, the Copeland, Parr, and Papas report, *Nitrogen Induced Hypoxia as a Form of Capital Punishment*, recommended using a hood to administer nitrogen to "create a hypoxic atmosphere" and cautioned against the use of a mask, which they found could permit unintended leakage of oxygen. *See id.,* at p. 7 and 10. No one knew how "nitrogen hypoxia" would be implemented in Alabama.

16. Moreover, because Defendant had not changed its execution protocol to include "nitrogen hypoxia" in 2018, there was no "new or substantially changed execution protocol" to trigger the statute of limitations under the *West* standard. *West,* 869 F.3d at 1298.

17. In June 2018, it would have been impossible for a condemned person to file a § 1983 challenge: no one knew how the method would be implemented. At the time, "nitrogen hypoxia" was not a method of execution—it was still merely a state of being (low oxygen caused by nitrogen intake) that caused death.

18. In addition, at the time in June 2018, Mr. Wilson believed that some form of nitrogen asphyxiation could cause unconsciousness in seconds. Mr. Wilson was a named plaintiff in the consolidated litigation challenging intravenous lethal injection in Alabama, and he had settled his litigation by signing a form opting out of intravenous lethal injection and electing "nitrogen hypoxia." *See* Doc. 16-1.

19. Mr. Wilson originally filed his §1983 complaint challenging Alabama's three-drug intravenous lethal injection protocol on May 19, 2016; in his complaint, Mr. Wilson pled three alternative methods of execution that did not include nitrogen asphyxiation. *See Wilson v. Dunn*, No. 2:16-CV-364-WKW, Doc. 1, Complaint (M.D. Ala. May 19, 2016), pp. 30-35. In his Amended Complaint filed one year later, on March 2, 2017, Mr. Wilson added "nitrogen asphyxiation" as an alternative method of execution. Mr. Wilson pled the following: "Following the administration of an anxiolytic, such as midazolam, Defendants could deliver pure nitrogen gas to a condemned inmate using a mask, rendering the inmate unconscious within seconds and painlessly dead within minutes." *Wilson v. Dunn*, No. 2:16-CV-364-WKW, Doc. 24, Amended Complaint (M.D. Ala. March 2, 2017), p. 36-37, ¶ 123. Mr. Wilson dropped a footnote and added a reference to a study about helium asphyxiation using a hood, as well as a short comment: "Russel D. Ogden & Rae H. Wooten, *Asphyxial Suicide with Helium and a Plastic Bag*, 23(3) AM. J. FORENSIC

MED. AND PATHOLOGY 234 (2002). Both helium and nitrogen are inert gases." *Id.,* p. 37, fn. 107. Mr. Wilson's pleading of the alternative method of nitrogen asphyxiation was dismissed on Defendant's motion to dismiss. Judge W. Keith Watkins of this Court ruled that nitrogen asphyxiation was "not an execution method authorized in the Code of Alabama" and therefore "would be unlawful." *Wilson v. Dunn*, No. 2:16-CV-364-WKW, Doc. 33, Memorandum Opinion and Order (M.D. Ala. Nov. 21, 2017), p. 18.[2]

20. Because Judge Watkins struck the alternative proposed method of nitrogen asphyxiation from Mr. Wilson's amended complaint, Mr. Wilson did not plead nitrogen asphyxiation as an alternative method of execution when his lawsuit was consolidated with those of other men on Alabama's Death Row in the consolidated litigation challenging intravenous lethal injection under the Eighth Amendment. *See In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 348, Consolidated Amended Complaint (M.D. Ala. November 29, 2017). In that Consolidated Amended Complaint, Mr. Wilson could not, and did not, plead nitrogen asphyxiation as an alternative method of execution. *Id*., at p. 32, n.50.

[2] Note that the United States Supreme Court reversed the Eleventh Circuit's position on this question and, in *Nance v. Ward* in 2022, held that a person facing execution could plead an alternative method of execution that is not currently approved in the state's statutes. *See Nance v. Ward,* 597 U.S. 159, 169–70 (2022) ("That remains true, we hold today, even if the alternative route necessitates a change in state law. Nance's requested relief still places his execution in Georgia's control. Assuming it wants to carry out the death sentence, the State can enact legislation approving what a court has found to be a fairly easy-to-employ method of execution.")

However, Mr. Wilson continued to believe, along with the other consolidated plaintiffs, that, in the words of the Consolidated Amended Complaint: "Following the administration of an anxiolytic, such as midazolam, Defendants could deliver pure nitrogen gas to a condemned inmate using a mask, rendering the condemned inmate unconscious within seconds and painlessly dead within minutes." *Id*., at p. 33, ¶ 163.

21. That consolidated litigation was settled through a joint agreement on July 10, 2018, by means of which all the plaintiffs (including Mr. Wilson) could opt-out of intravenous lethal injection and elect the only legal, statutory alternative method of execution, which as of June 1, 2018, was "nitrogen hypoxia," still unspecified. At the time, the United States Supreme Court had not yet issued *Nance v. Ward,* 597 U.S. 159, 169–70 (2022), so parties still believed that they could only use alternative methods of execution that were statutorily prescribed; and "nitrogen hypoxia" had just been passed by the Legislature a month earlier.

22. The parties filed a Joint Motion to Dismiss on that date, July 10, 2018, requesting that the court dismiss the action "without prejudice." *In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 427, Joint Motion to Dismiss (M.D. Ala. July 10, 2018). The fact that the parties agreed to dismiss the consolidated §1983 action "without prejudice" reflects that this settlement

agreement allowed all plaintiffs to opt out of intravenous lethal injection and prohibited the state from ever again subjecting plaintiffs to intravenous lethal injection.

23. A few days prior to that, Mr. Wilson had signed a legal form, which Defendant would adopt, opting out of intravenous lethal injection and electing instead "nitrogen hypoxia," still unspecified. *See* Doc. 16-1. "Still unspecified" because the information on the form did not specify how "nitrogen hypoxia" would be administered. *See* Doc. 16-1; *see also* Doc. 427-1 of *In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 10, 2018) (Appendix A, the form that accompanied the Joint Motion to Dismiss in the consolidated litigation challenging intravenous lethal injection). At that time, Defendant could have created a closed gas chamber, or used an Exit hood, or bought countless number of different masks, whether full face (covering the eyes, nose, and mouth) or anesthetic (covering only the nose and mouth, and not covering the eyes). But what is clear from this record is that Mr. Wilson still believed, in signing the form, that some method of conducting nitrogen asphyxiation could cause unconsciousness in seconds.

24. At that point in time, in the summer of 2018, Mr. Wilson did not know the facts that would support a §1983 lawsuit facially challenging "nitrogen hypoxia."

He could not identify the method he was challenging, and there was no substantial change yet to Alabama's execution protocol.

(ii) *August 2023*

25. The first time that Mr. Wilson knew how Defendant was going to conduct "nitrogen hypoxia" executions was in August 2023, when Defendant substantially changed its execution protocol to include procedures for "nitrogen hypoxia" executions, which in reality is a nitrogen gas mask asphyxiation method.

26. As mentioned earlier, the Alabama Attorney General made public the substantially changed August 2023 execution protocol on August 25, 2023; and Defendant distributed a copy of the substantially changed August 2023 execution protocol to Mr. Wilson in his cell on Alabama's Death Row on or about August 29, 2023. *See supra*, ¶ 8. It is only on that date that Plaintiff learned that Defendant planned to implement nitrogen asphyxiation using a "mask," rather than by means of a gas chamber (as used for gas executions in Arizona or California) or by means of a head-to-torso hood (as used in certain suicides). *See* Doc. 15-1, p. 16 (Alabama's substantially changed August 2023 execution protocol). But still at that time, Mr. Wilson did not yet know what kind of mask Defendant intended to use (full face or anesthetic) or whether Defendant's protocol would, as promised, cause unconsciousness in seconds.

27. And still at that time, Mr. Wilson had reason to believe the Alabama Attorney General who was assuring this Court 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; *see* Doc. 1, at ¶ 3.

(iii) *January 25, 2024*

28. It is only on January 25, 2024, that Mr. Wilson became aware of the facts underlying this §1983 civil rights lawsuit—namely that Defendant's new method of execution is "agonizing and painful" and "carries a substantial risk of causing severe pain and suffering." (Doc. 1, ¶ 46-47).

29. As the Complaint states, "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." Doc. 1, ¶ 2. Mr. Wilson documented in his Complaint the botched execution of Mr. Smith. As the Complaint clearly alleges: "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." Doc. 1, ¶ 46.

30. The Complaint could not be clearer: the facts giving rise to this lawsuit occurred on January 25, 2024.

(2) The Legal Standard

31. As a legal matter, it is beyond cavil that the statute of limitations applicable to a §1983 cause of action only begins to accrue when a plaintiff learns of the facts that would support filing a lawsuit. As the Eleventh Circuit has repeatedly declared:

> In Section 1983 cases, "'the statute [of limitations] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Calhoun v. Alabama Alcoholic Beverage Control Board*, 705 F.2d 422, 425 (11th Cir.1983) (quoting *Reeb v. Economic Opportunity Atlanta, Inc*., 516 F.2d 924, 930 (5th Cir.1975)). Thus Section 1983 actions do not accrue until the plaintiff knows or has reason to know that he has been injured. *Calhoun*, 705 F.2d at 424; *Rubin*, 621 F.2d at 116; *Lavellee*, 611 F.2d at 1131.

Mullinax v. McElhenney, 817 F.2d 711, 716 (11th Cir. 1987).

32. Under the *Mullinax* standard, the statute of limitations began to run on January 25, 2024, the date at which Mr. Wilson became aware of the dangers associated with Defendant's substantially changed August 2023 execution protocol. Nitrogen asphyxiation had never been used on a human being for purposes of

execution at any prior time in history. It was a human experiment in the execution setting, and no one knew what would happen.

33. In fact, the Alabama Attorney General also has taken the position that January 25, 2024, was a watershed day. On January 25, 2024, the Alabama Attorney General published a press release on his website stating that: "Tonight also marked the first time in the nation—and the world—that nitrogen hypoxia was used as the method of execution." Alabama Attorney General Steve Marshall Statement on the Execution of Murderer Kenneth Smith by Nitrogen Hypoxia (Jan. 25, 2024), https://www.alabamaag.gov/alabama-attorney-general-steve-marshall-statement-on-the-execution-of-murderer-kenneth-smith-by-nitrogen-hypoxia/. In a press conference following the execution of Mr. Smith, the Alabama Attorney General announced that nitrogen "is no longer an untested method—it is a proven one." Abigail Brooks and Erik Ortiz, "Alabama AG calls first nitrogen gas execution 'textbook,' but witnesses say inmate thrashed in final moments," *NBC* (Jan. 26, 2024), https://www.nbcnews.com/news/us-news/alabama-ag-calls-first-nitrogen-gas-execution-textbook-witnesses-say-i-rcna135810. Thus, the Attorney General himself recognized that the facts concerning nitrogen gas mask asphyxiation did not exist until January 25, 2024.

34. Prior to that date, Mr. Wilson could rely on the Attorney General's assertions that nitrogen hypoxia was a rapid and painless affair—namely, that a person on the execution gurney would fall unconscious "within seconds" and die "within minutes." *See* Doc. 1, ¶ 3. Those representations were not proven false until Mr. Smith became the first human test subject. It was only after Mr. Smith's botched execution that Mr. Wilson knew or had reason to know of the superadded pain he was likely to incur from Alabama's nitrogen gas mask asphyxiation protocol.

35. As an alternative, the clock could begin when Defendant publicized its substantially changed 2023 execution protocol in August 2023, but that would not change the result here. In §1983 challenges to methods of execution, the Eleventh Circuit has repeatedly stated, most recently in *West* in September 2017, that "An Eighth Amendment 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." *West,* 869 F.3d at 1298 (internal citation omitted).

36. Mr. Wilson completed his state review before he became subject to the substantially changed August 2023 execution protocol. *See Ex parte David Phillip Wilson*, No. 1170747 (Ala. Aug. 24, 2018). Accordingly, on the *West* standard, the statute of limitations would have begun to accrue when Mr. Wilson became subject

to the substantially changed August 2023 execution protocol, in August 2023. At that time, Mr. Wilson was given notice of certain facts (e.g., that Alabama was going to utilize a gas mask) that potentially could have alerted him to the injury he would possibly incur with regard to the facial challenge, even though he did not know exactly what kind of mask would be used.

37. Mr. Wilson's situation should be distinguished from that of condemned persons who became subject to intravenous lethal injection in 2002 when the Legislature authorized that method of execution. When the State of Alabama authorized intravenous lethal injection for the first time in 2002, effective July 1, 2002, Defendant simultaneously adopted a substantially changed July 2002 execution protocol, which included procedures for executions by that method. In other words, Defendant put in place a revised protocol including lethal injection at the same time that the enabling legislation went into effect. *See West,* 869 F.3d at 1298 ("the State adopted lethal injection, *by way of a three-drug protocol*, on July 1, 2002) (emphasis added). For this reason, the Eleventh Circuit held in *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008), and other cases, that the statute of limitations for method-of-execution challenges to lethal injection began to run in July 2002 on "the date on which the capital litigant becomes subject to a new or substantially

changed execution protocol." *McNair*, 515 F.3d at 1174.[3] It was not the enabling legislation in 2002 that started the statute of limitations regarding the challenge to the three-drug lethal injection method of execution. It was the existence of a substantially changed execution protocol, which the plaintiff had opted into.

38. In Mr. Wilson's case, there was no revised protocol for "nitrogen hypoxia" executions when the enabling legislation authorizing that method became effective. And because Mr. Wilson only became subject to a "substantially changed execution protocol" in August 2023, that is when the statute of limitations began to run.

(i) ***The execution protocol substantially changed in August 2023, not in June 2018:***

39. Defendant directs this Court to an Eleventh Circuit decision, *Gissendaner v. Commissioner, Georgia Department of Corrections*, 779 F.3d 1275 (11th Cir. 2015), for the proposition that the statute of limitations began to run in 2018 rather than 2023. *See* Doc. 16, p. 4. That case involves the litigation challenging Defendant's earlier midazolam protocol, known as the "Midazolam Litigation." It is factually intricate, but one thing is clear: it was a very different situation because, in that case,

[3] In fact, the first lethal injection was carried out only a few months later, on December 12, 2002. *See* Gary Mitchell, "Alabama Executes First Inmate by Injection," *Washington Post* (Dec. 12, 2002), available at https://www.washingtonpost.com/archive/politics/2002/12/13/alabama-executes-first-inmate-by-injection/f0cd70de-ffcf-455e-b8e4-02a9f0ac9dec/. On that day in December, Alabama executed Anthony Keith Johnson with a three-drug protocol using sodium thiopental as the first drug.

there was a lethal injection protocol already in place. Here, there never was a protocol for "nitrogen hypoxia" until August 2023, and Mr. Wilson sued well within two years of that date.

40. The Midazolam Litigation is a distraction in this case. The Midazolam Litigation involved a one-drug change to a three-drug intravenous lethal injection protocol that already existed. By contrast, in Mr. Wilson's case, the nitrogen gas mask asphyxiation protocol was not available on paper until August 2023. Prior to August 2023, there was merely legislation authorizing "nitrogen hypoxia," unspecified. The same is true when Plaintiff signed the form to opt out of intravenous lethal injection and selected "nitrogen hypoxia," unspecified. *See* Doc. 16-1; Doc 427-1 of *In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 427-1, Appendix A (M.D. Ala. July 10, 2018). The only description of the alternative execution method available to individuals on Death Row in 2018 was Defendant's form that simply stated that the execution would be conducted by "nitrogen hypoxia," with no elaboration.

41. Had Plaintiff filed a §1983 case challenging "nitrogen hypoxia" in July 2018, the case would have been summarily dismissed as premature. The cause of action ripened only when Defendant produced a "substantially changed execution protocol." *West v. Warden,* 869 F.3d at 1298. That was in August 2023.

42. Insofar as Defendant is now arguing that Plaintiff is making a wholesale challenge to "nitrogen hypoxia," that argument too is without merit. Defendant made a similar argument before, but it was ultimately rejected by the Eleventh Circuit in *West v. Warden,* 869 F.3d 1289 (11th Cir. 2017). In *Grayson v. Dunn*, 221 F. Supp. 3d 1329 (M.D. Ala. 2016), Defendant argued that a challenge to the midazolam component of a three-drug lethal injection protocol was equivalent to a time-barred challenge to the three-drug protocol in its entirety. Defendant convinced Judge Watkins of the Middle District and the Eleventh Circuit to rule that the midazolam substitution was not a substantial change to the execution protocol. However, that decision was overturned by the Eleventh Circuit in *West v. Warden, op. cit*. In *West*, the Eleventh Circuit refused to uphold the District Court's ruling that a plaintiff's challenge to one substituted drug in a three-drug protocol was a time-barred challenge to the entire three-drug protocol. *Id.* at 1297-98. Under *West,* there is no doubt that the execution protocol that Defendant issued in August 2023 is a substantially changed execution protocol for purposes of the statute of limitations.

43. In sum, Defendant substantially changed its execution protocol in August 2023, and that would be the applicable date under the *West* standard.[4]

[4] As an ancillary matter, when state legislatures adopt new methods of execution, new protocols do not always follow close behind, and therefore it cannot be argued that Mr. Wilson should have predicted a new protocol the minute Alabama authorized nitrogen asphyxiation in 2018. Oklahoma, for example, has authorized the firing squad since at

(3) Plaintiff's alternative method does not affect the nature of Mr. Wilson's challenge.

44. Defendant contends that because Mr. Wilson has not pled in his Complaint an alternative method that includes a form of nitrogen asphyxiation, he is challenging all forms of nitrogen gas asphyxiation and therefore could have filed his §1983 lawsuit in 2018 when Alabama adopted "nitrogen hypoxia." Doc. 16, at p. 4.

45. That argument, however, is barred by the Eleventh Circuit's decision in *West*, where the Court explicitly rejected a similar argument Defendant made and clearly stated, in no uncertain terms:

> *The alternative execution methods Appellants proffered in the Complaint do not change the specific nature of the challenge*. The ADOC argues that because all three of Appellants' proposed alternatives involve single-drug protocols, their specific challenge to midazolam is in truth a general attack on Alabama's continued use of its three-drug lethal injection protocol. The logical conclusion of this argument is that a prisoner challenging the use of a particular drug in a three-drug protocol must propose only a procedure keeping the three-drug protocol intact in order to avoid having his complaint styled as a "general challenge." The District Court agreed, stating, "to comply with *Glossip*, [Smith] would be required to propose an alternative drug(s), such as sodium thiopental or pentobarbital, to be used as the first drug in the ADOC's three-drug protocol,

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least 2011, but it has yet to finalize an execution protocol for the method. CRIMINAL PROCEDURE—DEATH SENTENCES—EXECUTIONS, 2011 Okla. Sess. Law Serv. Ch. 70 (H.B. 1991) (WEST); "2 men in Oklahoma's death row ask for execution by firing squad over lethal injection," NPR (Jan. 13, 2022), https://www.npr.org/2022/01/13/1072708133/oklahoma-death-row-firing-squad. Similarly, Oklahoma authorized "nitrogen hypoxia," still unspecified, in 2018, but has not changed its execution protocol to allow for the new method. This is true as well for Mississippi.

> *essentially a return to the ADOC's pre-midazolam protocol*." *Smith*, 221 F.Supp.3d at 1334 (emphasis added).
>
> *Not so.* A prisoner must meet two prongs. First, he must show that (1) the challenged protocol presents a "substantial risk of serious harm." *Baze*, 553 U.S. at 50, 128 S.Ct. at 1531 (quotations omitted) (quoting *Farmer*, 511 U.S. at 842, 846, and n. 9, 114 S.Ct. at 1970). Second, he must show that the alternatives he has proffered will "significantly reduce" that risk and are "feasible" and "readily implement[able]." *Id*. at 52, 128 S.Ct. at 1532. Whether those alternatives consist of one drug, two drugs, three drugs, or no drugs is irrelevant. And where, as here, the statute of limitations would bar a general challenge to a three-drug lethal injection protocol, the prisoner must additionally show that the substitution of one drug for another represents a "substantial change" in protocol. *Gissendaner*, 779 F.3d at 1282. *Nothing more or less is required. That the challenger's proposed alternatives all employ a single-drug protocol does not transform a specific challenge to one drug's use in a three-drug protocol into a general challenge to three-drug protocols in all their various and sundry combinations.*

West v. Warden, 869 F.3d, at 1300–01 (emphasis added).

46. The same applies here: Defendant argues that Mr. Wilson's alternative methods change the character of his challenge. "Not so." *Id.* They are irrelevant to the first prong and to the fact that Mr. Wilson is challenging the nitrogen gas mask asphyxiation method. Just because Mr. Wilson's challenge to this specific gas mask method might preclude the state of Alabama from using a broader category of nitrogen asphyxiation—depending upon practicalities not now foreseeable and upon the breadth of any pertinent judicial decision in the present case or others—does not transform his specific challenge into a general challenge to nitrogen hypoxia "in all

their various and sundry combinations." *Id.* In fact, given that the breadth of nitrogen methods is yet to be established, unlike the use of three-drug protocols, the rule in *West* is even more applicable in the instant case.

47. Defendant's argument is barred by law, but it is also illogical. It is only now, after the botched execution of Mr. Smith on January 25, 2024, that Plaintiff can begin to determine what went wrong. It is probable that there was oxygen leakage through the sides of the gas mask. This then casts new light on some of the earlier studies and evidence regarding nitrogen asphyxiation—namely (1) the fact that the Copeland Report cautioned that the use of a gas mask could permit unintended leakage of oxygen, *see* Copeland, Parr, and Papas, *Nitrogen Induced Hypoxia as a Form of Capital Punishment*, at p. 7 and 10; (2) the fact that the right-to-die organization Dignitas, in Switzerland, had found in a study in 2010 that "[o]xygen deprivation with a face mask is not acceptable because leaks are difficult to control and it may not eliminate rebreathing," Doc 1, ¶ 16; (3) the fact that the American Veterinary Medical Association (AVMA) has published guidelines recommending against the use of nitrogen gas for euthanizing mammals, *see* Doc. 1, ¶ 18; and (4) the fact that no state in this country that permits medical aid in dying authorizes their doctors to use nitrogen gas asphyxiation, *see* Doc. 1, ¶ 17. What happened on January 25, 2024, sheds new light on all these studies and findings. But they "do not

change the specific nature of the challenge" in Mr. Wilson's §1983 civil right action: it is the botched execution of Mr. Smith that gives rise to this methods challenge.

B. The "As Applied" Challenge

48. Similarly, the facts that support Plaintiff's "as applied" challenge did not become apparent until the botched execution of Mr. Smith on January 25, 2024, or, alternatively on August 25, 2023, when Alabama published its substantially changed 2023 execution protocol. It was only then that Mr. Wilson was given notice that the execution protocol would involve him lying on his back, facing a ceiling light, while nitrogen is distributed into his respiratory system via a gas mask (as of August 2023) that covered his entire face (as of January 25, 2024). Plaintiff only learned that Defendant would use a full-face gas mask as a result of the execution of Mr. Smith; the redacted execution protocol does not state what kind of mask, full-face industrial or nose-and-mouth anesthetic, the Defendant would use.

49. It was only in August 2023 that Plaintiff learned that he would not be sitting up in a nitrogen-filled gas chamber or seated wearing a head-to-torso hood. And it was only on January 25, 2024, that Mr. Wilson learned that Defendant would strap a five-point full-face mask on his face covering his eyes, nose, and mouth, and making it impossible to wear glasses. As such, Mr. Wilson did not know, nor have reason to know, that he would be caused specific injury on account of his Asperger's

syndrome, light sensitivity, and pulmonary problems, until Defendant released the protocol in August 2023 and executed Mr. Smith in January 2024. Those potential harms are all associated with the full-face mask, which aggravates Mr. Wilson's hypersensitivity to tactile stimulation and would prevent him from wearing glasses.

50. Moreover, it was only on January 25, 2024, that Mr. Wilson learned that "nitrogen hypoxia" does not lead to unconsciousness within seconds even for a man who does *not* suffer from pulmonary issues. It is only at that time that Mr. Wilson's pulmonary problems became an issue as a potential aggravating factor to an already gruesome, painful, and agonizing death, as evidenced by Mr. Smith's botched execution.

II. PLAINTIFF EXPLICITLY RETAINED HIS RIGHT TO CHALLENGE NITROGEN ASPHYXIATION

51. Defendant contends that Plaintiff must first exhaust his administrative remedies before filing this lawsuit in federal court, pursuant to the Prison Litigation Reform Act. (Doc. 16, p. 7) This argument fails for several reasons.

52. First, Mr. Wilson specifically retained his right to constitutionally challenge nitrogen asphyxiation in federal court when he settled the previous intravenous lethal injection litigation by opting out of intravenous lethal injection and selecting the only legal, statutory alternative. In the form that accompanied the Joint Motion to

Dismiss, Appendix A, incorporated therein by reference, the plaintiffs in the consolidated litigation (including Mr. David Wilson), specifically declared: "This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia." *In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 427-1, Appendix A (M.D. Ala. July 10, 2018). Defendant incorporated this language into its own form which it distributed to men on Alabama's Death Row. Mr. Wilson signed a form opting out of intravenous lethal injection. *See* Doc. 16-1. In signing that form, Mr. Wilson specifically retained his legal right to challenge the constitutionality of nitrogen asphyxiation in federal court: "This election is not intended to […] waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia." Doc. 16-1.

53. Second, under Alabama state law, Eighth Amendment challenges to methods of execution are exempt from the Alabama Administrative Procedures Act. *See* Ala. Code 15-18-82.1(g) ("The policies and procedures of the Department of Corrections for execution of persons sentenced to death shall be exempt from the Alabama Administrative Procedure Act, Chapter 22 of Title 41"). Accordingly, there are no state administrative procedures for Mr. Wilson to follow. As the Eleventh Circuit

stated in *Boyd* in 2017, the Alabama legislature "exempted the ADOC from the Alabama Administrative Procedure Act in exercising" its authority in § 15-18-82.1 of the Alabama Code concerning methods of execution. *Boyd v. Warden*, 856 F.3d at 860.

54. Third, Defendant has admitted to this Court that the Alabama Administrative Procedure Act does not apply in the context of Alabama's execution protocol. In Defendant's answer to the Consolidated Amended Complaint filed by Mr. Wilson and other men on Alabama's Death Row, Defendant stated: "Defendants further admit that the policies and procedures of the ADOC for carrying out a lawful execution are exempt from the Alabama Administrative Procedure Act, pursuant to section 15-18-82.1(g) of the Code of Alabama." *In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 354, Consolidated Amended Complaint (M.D. Ala. November 29, 2017), p. 3, ¶ 15.

55. Fourth, Mr. Wilson does not have "an adequate remedy" and could not "have simply declined to elect nitrogen hypoxia," as Defendant argues. Doc. 16, p. 7. Mr. Wilson's challenge is to Defendant's method of execution, the protocol for which was released for the first time in August 2023 and which was applied for the first time in January 2024—five years after he elected "nitrogen hypoxia." As Plaintiff explains *infra* at ¶¶ 19-24, Mr. Wilson elected "nitrogen hypoxia" as a

settlement of litigation challenging intravenous lethal injection, and Defendant agreed that Mr. Wilson could challenge the constitutionality of a "nitrogen hypoxia" protocol when one was approved. Mr. Wilson settled that case and is entitled to the benefit of his bargain, which includes his right to challenge the nitrogen "hypoxia" protocol if the evidence suggests it causes superadded pain—as Mr. Smith's botched execution demonstrates.

56. Lastly, the exhaustion requirements under the PLRA apply only to "suits about prison life." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). A lawsuit concerning a method of execution is the precise opposite of a lawsuit on the conditions of prison life—it concerns only the process through which the prisoner is killed. This distinction is determinative. The legislative purpose underlying the PLRA's exhaustion requirement does not apply to a method-of-execution lawsuit. Moreover, the exhaustion requirement of the PLRA "hinges on the 'availab[ility]' of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 578 U.S. 632, 642 (2016). Defendant has suggested that the available remedy would be for Mr. Wilson to have not signed the opt-out form at all; but as indicated above, that is not an available option. As evidenced by Mr. Wilson's constitutional challenge to lethal injection,

staying with intravenous lethal injection would not accomplish the purpose of preventing an unconstitutional execution.

III. PLAINTIFF HAS ACTED IN GOOD FAITH AND IS NOT ESTOPPED

57. Defendant argues that Plaintiff is estopped from challenging the nitrogen gas mask asphyxiation method because he has engaged in misrepresentation, could have remained with intravenous lethal injection, and should not have signed form Doc. 16-1. *See* Doc. 16, p. 7-8 ("If he prefers lethal injection to nitrogen hypoxia—as his complaint suggests—then his statement on the 2018 election form was a misrepresentation of fact on which he had reason to believe the State would rely," *id.* at p. 8). This estoppel argument has no merit.

58. First, Defendant is conflating intravenous lethal injection with oral administration of a lethal substance. Plaintiff has proposed oral administration of a lethal substance as an alternative method of execution. That does not mean "he prefers [intravenous] lethal injection to nitrogen hypoxia," nor that he made any kind of misrepresentation about intravenous lethal injection.

59. Second, Defendant fails to acknowledge that the election forms and the "nitrogen hypoxia" alternative were a negotiated settlement of consolidated lawsuits challenging the three-drug intravenous lethal injection method. Mr. Wilson was one of the named plaintiffs in the consolidated litigation challenging lethal injection

under the Eighth Amendment. *See In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 348, Consolidated Amended Complaint (M.D. Ala. November 29, 2017). That consolidated litigation was settled by means of an agreement whereby the plaintiffs would dismiss their challenge to intravenous lethal injection "without prejudice," opt out of intravenous lethal injection as a method of execution, and elect the only legal, statutory alternative method of execution at the time ("nitrogen hypoxia"), while explicitly retaining their right to challenge "nitrogen hypoxia" should there later develop facts to support such a challenge. *See In re: Alabama Execution Protocol Litigation*, 2:12-cv-00316-WKW-CSC, Doc. 427, Joint Motion to Dismiss (M.D. Ala. July 10, 2018). Mr. Wilson was part of that settlement agreement and dismissed his constitutional challenge to intravenous lethal injection, in exchange for electing "nitrogen hypoxia," signing a form in which he retained his right to constitutionally challenge the new method. Doc. 16-1. Mr. Wilson is not reopening that settlement agreement. Instead, he is challenging the nitrogen gas mask asphyxiation method as per Defendant's agreement.

60. None of the five elements identified by the Eleventh Circuit in *Busby v. JRHBW Realty, Inc.,* 513 F.3d 1314, 1326 (11th Cir. 2008) for applying equitable estoppel are present here. First, Mr. Wilson has not "misrepresented material facts." Mr. Wilson challenged intravenous lethal injection, settled the litigation, and is not

seeking now to be executed by that method. Instead, as clearly presented in Mr. Wilson's Complaint, he is challenging Defendant's "nitrogen hypoxia" protocol and proposing oral administration of a lethal substance as a feasible alternative method, as he is compelled to do under *Baze-Glossip.* Because Mr. Wilson has not "misrepresented material facts," the first element of the standard for applying equitable estoppel is not satisfied, and neither are the third and fifth elements, which depend upon the existence of a misrepresentation.

61. Moreover, the second and forth elements are not present here because Mr. Wilson had no reason to know that his medical conditions would have any bearing on the constitutionality of Defendant's execution method until January 2024. It is only in January 2024 that Mr. Wilson had the information on the basis of which to challenge the new method of nitrogen gas mask asphyxiation as applied to him.

62. Furthermore, it is well-established that "the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" *Heckler v. Community Health Services of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984). Defendant has not shown that it "detrimentally relied upon the misrepresentation." *Busby,* 513 F.3d at 1326. Defendant has executed Mr. Smith using the new nitrogen method and has moved for an execution warrant from the Alabama Supreme Court to execute another condemned person—Mr. Alan E.

Miller—by nitrogen. *See Ex parte Alan E. Miller (In re: Alan Eugene Miller v. State of Alabama)*, No. 1040564, State of Alabama's Motion to Set an Execution Date (Ala. Feb. 21, 2024). The Alabama Supreme Court has just authorized the State of Alabama to set Mr. Miller's execution date. *See Ex parte Alan E. Miller (In re: Alan Eugene Miller v. State of Alabama)*, No. 1040564, Order Granting State of Alabama's Motion to Set Execution Date and Authorizing the Commissioner of the Department of Corrections to Carry Out Death Sentence (Ala., May 2, 2024). The Alabama Attorney General has now called nitrogen gas mask asphyxiation a "proven" method. *See* Abigail Brooks and Erik Ortiz, "Alabama AG calls first nitrogen gas execution 'textbook,' but witnesses say inmate thrashed in final moments," NBC (Jan. 26, 2024), https://www.nbcnews.com/news/us-news/alabama-ag-calls-first-nitrogen-gas-execution-textbook-witnesses-say-i-rcna135810. And the Attorney General has recommended that other states adopt the method and offered to help them. *See* Jonathan Allen, "Alabama will help bring nitrogen asphyxiation executions to other states," *Reuters* (Jan. 27, 2024), https://www.reuters.com/world/us/alabama-will-help-bring-nitrogen-asphyxiation-executions-other-states-2024-01-26/. In fact, as a result, the state of Louisiana has adopted "nitrogen hypoxia" and other states, including Ohio and Nebraska, are considering doing the same. *See* James Finn, "Jeff Landry signs bills to expand

Louisiana death penalty, eliminate parole," *Nola.com* (March 5, 2024), https://www.nola.com/news/politics/legislature/jeff-landry-signs-bill-to-expand-louisiana-death-penalty/article_9b33b116-da5d-11ee-a325-3f26b93ed77e.html; Natasha Dailey and Anna Betts, "States Where the Death Penalty Has Stalled Look to Alabama," *New York Times* (Jan. 30, 2024), https://www.nytimes.com/2024/01/30/us/death-penalty-alabama-ohio.html. Accordingly, Defendant cannot claim that he has relied to his detriment on Mr. Wilson's representations.

IV. PLAINTIFF HAS STATED A CAUSE OF ACTION UNDER THE EIGHTH AMENDMENT

63. Defendant argues that Plaintiff has not pled with sufficient detail the Eighth Amendment violations. *See* Doc. 16, p. 9. Defendant's argument has no merit.

64. In order to state a claim, Rule 8 of the Federal Rules of Civil Procedure requires a complaint to provide only a "short and plain statement of the claim" in question that "show[s] that the pleader is entitled to relief." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573 (2007) (quoting Federal Rule of Civil Procedure 8(a)). To survive a motion to dismiss for failure to state a claim, the complaint at issue need only contain factual allegations that "raise a reasonable expectation that discovery will reveal evidence" in support of the claim and that plausibly suggest

relief is appropriate. *Id.* at 556; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, under these well-established principles, the reviewing court "accepts as true" all factual allegations made within the complaint, *Iqbal*, 556 U.S. at 675. "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations," *Twombly*, 550 U.S. at 555-56.

65. A motion to dismiss brought under Rule 12(b)(6) challenges a complaint at this low threshold and merely tests whether the claims in question are well-pled. *See Iqbal*, 556 U.S. at 678. As the Eleventh Circuit explained recently, reversing a lower court's grant of a motion to dismiss:

> The threshold for surviving a motion to dismiss for failure to state a claim under rule 12(b)(6) is a low one. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir. 1983). A plaintiff must plead only enough facts, all of which are accepted as true, to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007). In other words, a plaintiff must provide the grounds for his entitlement to relief but needn't include detailed factual allegations. *Id.* at 555. Overall, a complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* (alteration omitted).

Soho Ocean Resort TRS, LLC v. Rutois, No. 21-11392, 2023 WL 242350, at *2 (11th Cir., Jan. 18, 2023).

66. There is no question here that Defendant has "fair notice of what the claim is and the grounds upon which it rests." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

A. Plaintiff Has Alleged an Eighth Amendment Violation

67. To state a claim under an Eighth Amendment method of execution challenge, a plaintiff must allege sufficient facts to support the claim that "the challenged method of execution presents a substantial risk of serious harm. That is, the method must present a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *West*, 869 F.3d at 1293 (quoting *Baze v. Rees*, 553 U.S. 35 (2008); internal quotations and citations omitted).

68. Plaintiff has stated sufficient facts, under *Iqbal* and *Twombly*, to satisfy this requirement and support his claim that his execution under Alabama's nitrogen gas mask execution protocol would violate the Eighth Amendment. Plaintiff has set forth twelve paragraphs detailing the media accounts of the botched execution of Mr. Smith. *See* Doc. 1, ¶¶ 4-15. Plaintiff has explicitly pled that "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. […] [H]e not only remained conscious for a lengthy period of time, but struggled and writhed on the gurney, and gasped for oxygen in obvious distress. (Doc. 1, ¶ 15) Plaintiff has specifically pled, based upon the only available public accounts by witnesses to the execution, the fact that this method of execution is "agonizing and painful" and

"carries a substantial risk of causing severe pain and suffering." (Doc. 1, ¶ 46-47). These factual and legal allegations satisfy the notice pleading requirements.

69. Defendant claims that Plaintiff's allegations have not crossed from "possible to plausible" and that the complaint does not rise above the speculative level. However, the *Twombly* and *Iqbal* standards were set by the Supreme Court to preclude complaints that merely give "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Mr. Wilson clearly has not done that, instead choosing to put before this Court all of the factual evidence currently available from the media witnesses regarding the execution of Mr. Kenneth Smith.

70. Defendant contends that even though "Smith allegedly writhed… it does not on its own imply severe pain." Doc. 16 at 11. But, on this motion to dismiss, Mr. Wilson is entitled to all reasonable inferences from the pleaded facts. "Writhe" means "a twisting or writhing movement of the body or face (*spec.* as a result of pain, distress, etc.)" *Oxford English Dictionary*, s.v. "writhe (n.), sense 2.a," March 2024, https://doi.org/10.1093/OED/5415116579. The use of the word "writhe" by the media, without specifications to the contrary, should produce an understanding among reasonable persons that Mr. Smith was moving because of "pain" or "distress." *Id.*

71. Moreover, Defendant contends that the use of the words "apparently" and "appeared" in the media accounts indicates speculation on the part of Plaintiff. Again, this argument is disingenuous. "[A]pparently" means "So far as it appears from the evidence." *Oxford English Dictionary*, s.v. "apparently (*adv.*), sense 4," July 2023, https://doi.org/10.1093/OED/1456302724. And "appeared" means "To be in sight, be visible." *Oxford English Dictionary*, s.v. "appear (*v.*), sense 3," December 2023, https://doi.org/10.1093/OED/8396057447. As witnesses to the execution, the media can only report on what they saw, *i.e.*, on what "appeared" to them, which was that Mr. Smith was moving in a way that seemed to be the result of severe pain and agony.

72. Defendant also contends that Mr. Smith was holding his breath and refers this Court to an article by Philip Nitschke, "The Facts about Nitrogen Hypoxia 101," in *The Peaceful Pill Handbook* (Jan. 27, 2024), https://www.peacefulpillhandbook.com/the-factsabout-nitrogen-hypoxia-101/. *See* Doc. 16, p. 12. Defendant contends that Plaintiff must allege facts disproving this. *Id.* That is inappropriate on a motion to dismiss where the Court must accept all pleaded facts as true. Defendant is not entitled at this stage to seek dismissal based on facts outside the complaint that have not been tested by discovery. In any event, Dr. Nitschke did not witness Mr. Smith's execution and the comments in his article

amount to mere speculation that holding his breath may have contributed to Mr. Smith's pain and agony, not that it was the cause of his pain and agony.

B. Plaintiff Has Alleged a Feasible Alternative

73. Defendant contends that Plaintiff has not pled a feasible alternative. *See* Doc. 16, p. 16-21. That argument is also without merit.

74. Plaintiff has not only pled the alternative of oral administration of a lethal substance, but Plaintiff has also attached to his Complaint and incorporated therein by reference a full evidentiary hearing presenting the testimony of a medical expert, Dr. Charles Blanke, who explained that method of execution with readily-available poisons. *See* Doc. 1-1, pp. 48 *et seq., Hamm v. Dunn*, No. 2:17-cv 02083-KOB (N.D. Ala. Jan. 31, 2018) (Hearing on oral administration of a lethal substance on January 31, 2018, cross examination starting at page 106, direct examination starting at page 113). That lengthy testimony in federal court formed the basis for a judicial determination by District Judge Karon Bowdre of the Northern District of Alabama that oral administration of a lethal substance was a feasible alternative to intravenous lethal injection. *See* Doc. 1-1, pp. 200 *et seq., Hamm v. Dunn*, No. 2:17-cv-02083-KOB (N.D. Ala. Feb. 6, 2018), Doc. 30, *reversed on other grounds*, *Hamm v. Commr., Alabama Dept. of Corrections*, No. 18-10473, 2018 WL 2171185 (11th

Cir. Feb. 13, 2018) (also incorporated into the Complaint by reference, *see* Doc. 1, ¶ 52.[5]

75. Based on the Complaint, including those two incorporated exhibits, Mr. Wilson has pled the following alternative method of execution: an oral administration of either a ten-gram dose of secobarbital in four ounces of liquid, or 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. This proposed alternative procedure follows the procedure used under Oregon's Death with Dignity Act. Each of these drugs is common and readily available in the United States. As Dr. Blanke testified, these drugs are available at pharmacies and are not among the drugs that are restricted from sale to prisons by pharmaceutical companies. In particular, secobarbital is a common barbiturate drug that is frequently used as a sedative prior to surgery. *See Encyclopedia of Psychopharmacology*.[6] Moreover, all the components of the second alternative proposed method, the DDMP II cocktail, are available in pharmacies in Alabama. All the components of the DDMP II cocktail are also covered by the Alabama Blue

[5] In proposing an alternative method of execution as required by the United States Supreme Court, Mr. Wilson does not waive, in any way, his claim that imposing the burden on a plaintiff in a methods-of-execution challenge to establish an alternative method of execution and its feasibility is a form of torture that violates international law and *jus cogens*. *See* Doc. 1, ¶ 50.

[6] Childs, E. (2010) Secobarbital *in* Stolerman (ed.), *Encyclopedia of Psychopharmacology* at 1187.

Cross Blue Shield insurance policy.[7] *See* Doc. 1-1, pp. 165-169. The method of administering the proposed alternative drugs would either be through voluntary oral consumption or by means of a nasogastric tube, which is a thin tube placed up the nasal cavity and down into the stomach. In the latter case, 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, so that the drugs would be injected into the person through the nasogastric tube.

76. As Judge Bowdre held in *Hamm v. Dunn*, these drugs are readily available, and this alternative method is "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain," in this case associated with nitrogen gas mask asphyxiation. *Baze*, 553 U.S. at 50; *see* Doc. 1-1, at pp. 220-221.

[7] Blue Cross and Blue Shield of Alabama, *Generics Plus Drug Guide* (Oct. 2017), https://www.myprime.com/content/dam/prime/memberportal/forms/2017/FullyQualified/Other/ALL/BCBSAL/COMMERCIAL/ALGENPLDRG/ALGP_Prescription_Drug_Guide.pdf; diazepam on p. 34, digoxin on p. 26, morphine sulfate on p. 43, and propranolol on p. 22.

WHEREFORE, Plaintiff David P. Wilson respectfully moves the Court to deny Defendant's motion to dismiss.

Done and signed this 3rd day of May, 2024.

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2024, the foregoing motion has been electronically filed with the Clerk of the Court and a copy has been electronically mailed to counsel for Defendant:

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Office of the Attorney General
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