No. _____

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITIONER'S APPENDIX—VOLUME I (APP'X A-E)

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In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10095

KENNETH EUGENE SMITH,

Plaintiff-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:23-cv-00656-RAH

Before WILSON, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

Kenneth Eugene Smith is a death row inmate in the custody of the Alabama Department of Corrections (ADOC) at William C. Holman Correctional Facility (Holman). Smith is set to be executed on Thursday, January 25, 2024, for the second time. In its first execution attempt, Alabama failed to obtain intravenous (IV) access necessary to complete the lethal injection. Now, Alabama plans to use nitrogen hypoxia for the first time.

Smith sued ADOC Commissioner John Hamm and Holman Warden Terry Raybon (collectively, Defendants), asserting violations of the First, Eighth, and Fourteenth Amendments, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and the Alabama Constitution's Religious Freedom Amendment (ARFA), Ala. Const. art. I, § 3.01. Smith also asked for a preliminary injunction to stop the scheduled execution. The Defendants moved to dismiss the complaint and opposed the request for an injunction. Although the district court found that Smith alleged plausible claims under the First and Eighth Amendments, RLUIPA, and ARFA, Smith failed to show a substantial likelihood of success on those claims to warrant a preliminary injunction.

After careful review and with the benefit of oral argument, we affirm the district court.

I. Background

On June 24, 2022, Alabama moved to set Smith's execution date for the murder of Elizabeth Sennet.[1] On September 30, 2022, the Supreme Court of Alabama granted Alabama's motion and set Smith's execution for Thursday, November 17, 2022.

On August 18, 2022, Smith sued Hamm and ADOC, asserting two Section 1983 claims—violations of the Eighth and Fourteenth Amendments. Hamm and ADOC moved to dismiss Smith's complaint, and the district court granted the dismissal with prejudice. Smith moved to amend the judgment to a dismissal without prejudice, and alleged that ADOC's "[u]se of [the lethal injection p]rotocol" would subject him to an Eighth Amendment violation because, "as ADOC implements it," he would likely be subject to cruel and unusual punishment because of particular physiological predispositions. The district court denied Smith's motion, explaining that, to support an Eighth Amendment violation, Smith had to show how ADOC's deviations—or how implementation of its

[1] In April 1996, a jury convicted Smith of capital murder based on the robbery and murder of Elizabeth Sennett. *Smith v. State*, 908 So. 2d 273, 278 n.1, 279 (Ala. Crim. App. 2000). Ultimately, the jury recommended by a vote of 11 to 1 a sentence of life imprisonment without the possibility of parole. *Id.* at 278. The trial judge overrode the jury's recommendation and sentenced Smith to death. *Id.* But in 2017, Alabama amended its law to no longer permit judicial override in capital cases. *See* Ala. Code § 13A-5-47(a) ("Where a sentence of death is not returned by the jury, the court *shall* sentence the defendant to life imprisonment without parole.") (emphasis added). But Alabama has not made that statute retroactive, so Smith's death sentence still stands.

lethal injection protocol more broadly—subjected Smith to a substantial risk of serious harm, and Smith failed to do so.

Smith timely appealed and sought to stay his execution pending his appeal. We reversed the district court. A majority of the panel found that Smith pled sufficient facts to plausibly support an Eighth Amendment method-of-execution claim that was not barred by the applicable statute of limitations. Because we resolved Smith's underlying appeal, we denied as moot his motion for stay of execution pending appeal. We expedited the mandate so that Smith's case could proceed in the district court.

On November 17, 2022, Smith filed an amended complaint and moved for a preliminary injunction. Smith also sought an emergency motion to stay his execution. Ultimately, the district court denied Smith's request for a preliminary injunction and stay of execution finding that Smith inexcusably delayed in seeking these requests. Smith again appealed to this court and moved to stay his execution. The panel unanimously granted Smith's request for stay at approximately 8:00 PM CST. Before the stay was entered, Smith was taken to the execution chambers.

Smith remained strapped to a gurney in the execution chambers while Alabama's Office of the Attorney General asked the Supreme Court of the United States to allow the execution to proceed. Smith was not told that his case had been stayed. At approximately 10:00 PM CST, the Supreme Court vacated our stay without any explanation. But the execution team could not obtain IV

access before the expiration of the death warrant. At approximately 11:30 PM CST, ADOC called off the execution.

The case returned to the district court where Smith moved to amend his complaint to include related failed execution claims and add new defendants. In his second amended complaint, Smith detailed the almost four hours that he spent on the gurney in the execution chamber. Smith asserted three claims: (1) an Eighth Amendment violation that a second execution attempt by lethal injection would constitute cruel and unusual punishment; (2) an Equal Protection violation by seeking a second attempt to execute Smith despite not doing the same for another inmate whose execution failed; and (3) a violation of court order to not deviate from ADOC's lethal injection protocol related to Smith's failed execution.

ADOC then moved to dismiss the complaint, but the district court denied in part the motion to dismiss and allowed Smith's Eighth and Fourteenth Amendment claims to proceed. Specifically, the district court found that Smith plausibly alleged an Eighth Amendment claim, noting:

> given Smith's allegations that he himself experienced severe pain during a prior execution attempt, and that the prior execution attempt was the latest in an ongoing pattern of the State's difficulties in establishing venous access when attempting to carry out lethal injection executions, it is plausible, rather than merely possible, that a second lethal injection execution poses a substantial risk of severe pain to Smith.

ADOC then answered, and the court directed the parties to develop a case management report under Rule 26. On August 24, 2023, the district court entered a scheduling order and set an initial disclosures deadline for August 29, 2023. On August 25, 2023, ADOC moved to dismiss because Hamm determined that nitrogen hypoxia was available as a means of execution and agreed that lethal injection would not be used in any future attempts to execute Smith. Smith opposed—he agreed with the injunction to prevent a second execution using lethal injection, but objected to the use of nitrogen hypoxia without the opportunity to review ADOC's protocol to ensure it met constitutional requirements. Based on ADOC's representations, the district court granted its motion to dismiss and entered a permanent injunction barring it from using lethal injection to execute Smith.

On August 25, 2023, Alabama's Office of the Attorney General sought authorization from the Alabama Supreme Court to execute Smith by nitrogen hypoxia. Over Smith's objection, on November 1, 2023, the Alabama Supreme Court granted the motion and ordered the Commissioner to carry out the death sentence. On November 8, 2023, the Governor set Smith's execution for a thirty-hour time frame beginning January 25, 2024.

That same day, Smith filed this action with the district court against Hamm and Raybon, alleging that ADOC's nitrogen hypoxia protocol (Protocol) and Alabama's selection of him to be the first inmate executed by this method violate several constitutional and statutory provisions. Smith moved to preliminarily enjoin

Hamm and Raybon from executing him under the present Protocol. They moved to dismiss.

On December 20, 2023, the district court held a hearing on Smith's injunction motion, where the court reviewed 111 exhibits, expert witness declarations, case reports, medical articles, videos of individuals wearing the mask, the mask itself, and various witnesses testifying to the Protocol's potential ramifications. On January 10, 2024, the district court granted in part the Defendants' motion to dismiss, dismissing Smith's Fourteenth Amendment claim, but denied the motion as to the remaining counts, allowing those claims to proceed. Ultimately, the district court denied Smith's motion for preliminary injunction.

The order organized Smith's claims into Counts One (Fourteenth Amendment), Two (Eighth Amendment), Three (First Amendment), Four (RLUIPA), and Five (ARFA). The district court dismissed Count One, where Smith alleges that his right to equal protection under the Fourteenth Amendment was violated when "the State chose [him] to be the first condemned person to be subject to execution" by nitrogen hypoxia despite his pending state collateral appeal and an Alabama custom that waits for exhaustion of all conventional appeals. The district court found that Smith lacked standing because Hamm and Raybon, as the named defendants, lack authority to select inmates and set execution dates under Alabama law. Since neither Hamm nor Raybon held decisional authority to select Smith, the district court concluded "Count One

suffers from traceability and causation infirmities that require its dismissal."

As to the remaining counts, the district court held that Smith properly pled plausible claims as to the remaining counts. Turning to Count Two, the district court concluded that Smith sufficiently alleged an Eighth Amendment method-of-execution claim because taking the allegations as true, the Protocol could increase time to unconsciousness, presents imminent dangers to superadd pain (e.g., a persistent vegetative state, stroke, vomiting, or sensation of suffocation), and two feasible, readily implemented alternative methods exist (i.e., an amended Protocol with ten proposed changes or death by firing squad using Utah's execution protocol). Turning to Count Three, the district court concluded that Smith sufficiently alleged a First Amendment free speech claim because no "compelling government interest" justifies masking Smith for his final statement, so the Protocol's burden on speech is not reasonably related to a legitimate penological interest. On Count Four, the district court determined that Smith plausibly pled a RLUIPA violation: audible prayer (1) comes from a long history of traditional religious exercise at prisoners' executions, (2) is part of his sincere religious beliefs, and (3) substantially burdens his exercise by forcing "the untenable choice of either praying audibly or risking the consequences of dislodging the mask." The district court also held that "Smith has also necessarily pled a plausible First Amendment free exercise claim" because RLUIPA "embeds a heightened standard for government restrictions of the free exercise of religion." Finally, the district court found a plausible claim

under ARFA because, although requiring strict scrutiny similar to RLUIPA, the statute dramatically lowers the threshold from "substantial burden" to "*any* burden—even an incidental or insubstantial one." Therefore, Smith's pleading under RLUIPA more than satisfied a claim under ARFA.

However, the district court ultimately denied Smith's motion for a preliminary injunction against his execution under the Protocol. The court held that Smith failed to show a substantial likelihood of success on the merits under the Eighth Amendment, RLUIPA, and ARFA.[2] First, the district court concluded that Smith's Eighth Amendment claim failed because "there is simply not enough evidence to find with any degree of certainty or likelihood" that the possibility of the mask dislodging or Smith choking on his own vomit will occur—therefore, "only if a cascade of unlikely events occurs" would execution under the Protocol superadd pain or prolong death. Second, the district court rejected Smith's RLUIPA claim because ADOC "provided substantial evidence that the mask will not dislodge if Smith audibly prays during his execution," obviating any untenable choice between audibly praying and prolonging death. Third, the district court determined that Smith's ARFA claim failed for similar reasons—Smith failed to show "there

[2] Smith's First Amendment claims under Count 3 were not considered because Smith did not seek a preliminary injunction based on those grounds. And, because Smith's Fourteenth Amendment claim under Count 1 was dismissed, it was also not considered in the preliminary injunction analysis.

is likely to be *any* burden on his ability to audibly pray during his execution," because the evidence "strongly shows the opposite."

Smith timely appealed and sought a stay of execution. This court set the case for expedited briefing and oral argument. At oral argument on January 19, 2024, Smith's counsel informed the panel that Smith had started to vomit as his execution date approached and he had been seen by medical professionals at Holman. That evening, Smith filed a "Notice of Supplemental Evidentiary Submission." The panel construed the filing as a motion to supplement the record and denied that request without prejudice to seek relief in the district court. On January 20, 2024, Smith moved in the district court to supplement the record with Smith's counsel's affidavit regarding Smith's new physical symptoms. On January 22, 2024, the district court denied Smith's motion to supplement the record but explained that:

> Pursuant Federal Rule of Civil Procedure 62.1(b), Smith shall notify the Eleventh Circuit's clerk of court of this court's indicative ruling that it would grant his motions to supplement the record as currently presented if the Eleventh Circuit remanded for that purpose.

On January 23, 2024, Smith moved again in this court to supplement, or in the alternative, for limited remand. We granted his motion and remanded for the limited purpose of entertaining Smith's motion to supplement the record and permitting the State to submit additional evidence in response to Smith's new evidence.

We asked the district court to determine whether the newly submitted evidence would change the previous factual findings or conclusions of law in its January 10, 2024 order denying Smith's request for a preliminary injunction.

Once we remanded, the district court ordered the parties to file their motions to supplement and argument on how to interpret the new evidence. Both parties filed motions to supplement. Smith presented his recent medical records about his vomiting and supplemental declarations from Dr. Yong and Dr. Porterfield, indicating that the new medical records demonstrate that Smith is likely to vomit during his execution, along with declarations from his counsel. The Defendants provided an affidavit from Warden Raybon stating Smith would receive his last meal at 10:00 a.m. and would not consume liquids after 4:00 p.m.

The district court reviewed this new evidence and found as follows:

> Even in light of the new evidence, the court cannot conclude the Defendants' method of execution creates a "substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purpose of the Eighth Amendment," or that Smith identified "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] [the] risk of severe pain" he alleges he will suffer if he becomes nauseous or vomits during the execution.

The case returned to us, and Smith renewed his motion to stay his execution, arguing that with this new information, he is likely to show a success on the merits of his Eighth Amendment claim.

Turning to the remainder of Smith's appeal, Smith argues that the district court erred in dismissing his Fourteenth Amendment claim. Smith argues the district court abused its discretion in denying him a preliminary injunction on his Eighth Amendment claim and RLUIPA claims.[3] Last, Smith argues that the district court abused its discretion in two of its evidentiary rulings.

First, we will address Smith's argument about the dismissal of his Fourteenth Amendment claim. Then we will turn to his arguments about the denial of a preliminary injunction and the evidentiary issues associated with that order. Last, we will address Smith's motion to stay his execution.

II. Motion to Dismiss

"We review the grant of a motion to dismiss under Rule 12(b)(6) *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty.*, 48 F.4th 1222, 1229 (11th Cir. 2022). Similarly, we review a district court's standing determinations de novo. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1112 (11th Cir. 2021). We first address our jurisdiction over Smith's Fourteenth Amendment claim. We have jurisdiction

[3] In his reply brief, Smith explicitly drops his ARFA claim as it relates to his preliminary injunction argument.

to consider Smith's Eighth Amendment and RLUIPA claims under 28 U.S.C. § 1292(a)(1), as this is an appeal from an order denying a preliminary injunction based on those claims. Further, we may extend our review to Smith's Fourteenth Amendment claim since it was "[a]n integral part of the District Court's denial of the preliminary injunction." *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994). Since the Fourteenth Amendment served as an integral ground of Smith's preliminary injunction request, we exercise jurisdiction over this claim.

In order to bring a particular claim in federal court, the petitioner must have standing. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). Standing requires (1) an injury in fact that (2) is fairly traceable to the defendant's actions and is (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The second requirement demands that the injury be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* at 560 (cleaned up).

Smith challenges the district court's conclusion that he lacks standing because his Fourteenth Amendment injury "suffers from traceability and causation infirmities that require its dismissal." He argues that nothing in Alabama law expressly authorizes the Attorney General to select condemned people for execution. But testimony in the record confirms the Attorney General's primary role in selecting condemned inmates and serving as the final confirmation for an execution to proceed during the course of Alabama's

execution process. Without the Attorney General's actions, neither Hamm nor Raybon may proceed with their duties under Alabama Code § 15-18-82(b) and (c). Rather, Smith's execution selection injury is directly traceable to the Attorney General. As a result, Smith's Fourteenth Amendment injury fails on traceability grounds, and therefore he lacks standing to raise this claim.

III. Motion for Preliminary Injunction

"A movant is eligible for a preliminary injunction or a stay of execution only if he establishes that (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction or stay issues, (3) the injunction or stay would not substantially harm the other litigant, and (4) if issued, the injunction or stay would not be adverse to the public interest." *Barber v. Governor of Ala.*, 73 F.4th 1306, 1317 (11th Cir. 2023). The first factor is considered one of "the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When a court concludes that the movant fails to establish a substantial likelihood of success on the merits, "it [is] unnecessary" for the court to determine whether the movant "satisfied the second, third, or fourth factors." *Grayson v. Warden, Comm'r, Ala.*, 869 F.3d 1204, 1238 n.89 (11th Cir. 2017).

"Our standard of review on appeal is deferential, and we ask only whether the district court abused its discretion" in either denying or granting a preliminary injunction. *Reeves v. Comm'r, Ala. Dep't of Corr.*, 23 F.4th 1308, 1320 (11th Cir. 2022). "In so doing, we review the findings of fact of the district court for clear error and legal conclusions *de novo*." *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th

Cir. 2010). "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005) (per curiam).

The abuse of discretion standard "recognizes the range of possible conclusions the [district court] may reach." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). It "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Id.* (quotation marks omitted). Thus, under the abuse of discretion standard, we may not reverse "'simply because we are convinced that we would have decided the case differently.'" *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1323 (11th Cir. 2019) (quoting *Glossip v. Gross*, 576 U.S. 863, 881 (2015)).

Smith argues that he has established a substantial likelihood of success on the merits, and that the district court abused its discretion by denying him a preliminary injunction on his Eighth Amendment and RLUIPA claims. Smith also asserts that the district court abused its discretion in two of its evidentiary rulings related to its preliminary injunction decision. We address each argument in turn.

A. Eighth Amendment Claim

To state a plausible claim for relief under the Eighth Amendment, a plaintiff must plead "a substantial risk of serious harm, an

objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (internal quotation marks omitted). The Eighth Amendment inquiry focuses on whether the state's chosen method of execution "cruelly superadds pain to the death sentence" by asking whether the state has "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

Smith argues that the district court erred in denying his request for a preliminary injunction because he is likely to succeed on his Eighth Amendment claim. Smith asserts that the Protocol as developed by ADOC fails to ensure an airtight seal and would allow oxygen to infiltrate the mask. This oxygen infiltration while nitrogen is being pumped into the mask could lead to a persistent vegetative state, stroke, or suffocation. Smith also argues that his exposure to high levels of nitrogen, which may cause nausea, in combination with his documented chronic nausea induced by his PTSD from his prior execution attempt, could lead to him vomiting and asphyxiation. Finally, Smith argues that he has identified feasible and readily available alternative methods to ADOC's protocol.

To demonstrate that a risk of harm violates the Eighth Amendment, the petitioner must show the conditions leading to the risk are "*sure* or *very likely* to cause serious illness and needless suffering," and will cause "*sufficiently imminent* dangers." *Helling v.*

McKinney, 509 U.S. 25, 33–34 (1993) (emphasis added). There must be a "substantial risk of serious harm," also considered an "objectively intolerable risk of harm," that negates any contention by prison officials that they qualify as "subjectively blameless" under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 842, 846, & n.9 (1994). Further, the petitioner must show that its alternative method "would significantly reduce a substantial risk of severe pain. A minor reduction in risk is insufficient; the difference must be clear and considerable." *Bucklew*, 139 S. Ct. at 1130 (internal citation omitted).

Supreme Court precedent is clear that a new method of execution does not automatically establish a claim for cruel and unusual punishment. *See id.* at 1123–24 (discussing the shift to electrocution and how that was not considered cruel in the constitutional sense); *Glossip*, 576 U.S. at 881–86 (discussing the changes in lethal injection drugs and how those changes do not amount to cruel and unusual punishment); *Baze*, 553 U.S. at 50–51 (addressing lethal injection for the first time and finding it not to be cruel and unusual). There is no doubt that death by nitrogen hypoxia is both new and novel. Because we are bound by Supreme Court precedent, Smith cannot say that the use of nitrogen hypoxia, as a new and novel method, will amount to cruel and unusual punishment in violation of the Eighth Amendment by itself. Rather, Smith must show why this method will cause him "a demonstrated [substantial] risk of severe pain." *Glossip*, 576 U.S. at 878. Smith must also "show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that

[Alabama] has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125.

Here, the district court was tasked with conducting factual findings for the first new method of execution in over 40 years. The district court boiled Smith's arguments down to three:

> (1) use of an off-the-shelf mask, as opposed to some other device such as a hood, subjects Smith 'to a substantial risk of oxygen infiltration'; (2) the specific mask the ADOC intends to use for Smith's execution 'will permit the entertainment of room air' resulting in a substantial risk of superadded pain short of death; [and] (3) the Protocol itself, and Smith's individual circumstances—now suffering from PTSD and depression as a result of the failed lethal injection execution attempt and his looming execution—subjects him to a "substantial risk of asphyxiation on his own vomit."

After an analysis of expert testimony, various supporting exhibits, and the mask apparatus, the court held:

> What the testimony from the experts shows, if anything from an overall standpoint of consistency, is that the uninterrupted introduction of pure nitrogen will result in nitrogen hypoxia and that nitrogen hypoxia will ultimately lead to death. On this record, there is simply not enough evidence to find with any degree of certainty or likelihood that execution by nitrogen hypoxia under the Protocol is substantially

> likely to cause Smith superadded pain short of death or a prolonged death.

After a thorough review of the underlying record, and in light of our highly deferential standard of review, we are bound to agree with the district court's factual findings. We address the district court's findings surrounding the likelihood of vomiting and oxygen infiltration in turn.[4]

Our deferential standard of review does not support a finding that the district court's determination that Smith is not substantially likely to vomit during the execution is clearly erroneous. The district court found that "[t]he record still lacks evidence demonstrating when, where, or how much Smith might vomit during the execution, with or without the mask on, before or during the administration of nitrogen." The district court noted that Smith's experts testified that Smith is likely to vomit during the execution based on the medical records. But even with that information, the district court balanced this testimony against the Defendants' alteration of when Smith will receive his last meal, prohibiting solid food intake for over eight hours before his scheduled execution. This was similar to one of Smith's suggested remedies to the Protocol to reduce the substantial risk of harm. Because there is no evidence that Smith is likely to vomit at the moment in which nitrogen is introduced into the mask, we cannot say that the district

[4] As we noted above, this case has been back to the district court for further review, so the district court's factual finding on whether Smith is likely to vomit comes from the district court's January 24, 2024 order.

court erred in finding that Smith would not be at substantial risk of harm from choking on his vomit during the execution.

We are similarly bound by the district court's factual findings surrounding a substantial risk of oxygen infiltration. The district court found that:

> Given its design, the court finds it highly unlikely the mask would dislodge or that the seal would be broken and outside air introduced if it is tightly secured on the condemned inmate's head in a positive pressure environment, even under the scenarios Smith alleges could break the seal—like audibly speaking or moving his mouth or head.

After a painstaking review of the underlying record, we cannot say this conclusion is a clear error. Diagrams and testimony about the mask's design confirm that its five straps securely fit the mask across the entire face, with the entire assembly enveloping the wearer's head. Videos demonstrate the condemned will be strapped to a gurney with limited mobility[5] and, coupled with the mask's design, it is not clearly erroneous to find it "highly unlikely" the mask will dislodge. Even if the mask is an imperfect fit, the footage exhibits an unsecured mask that, when pumped with a

[5] Alabama provided video evidence of volunteers who wore the mask, while strapped to the gurney and spoke while breathing oxygen through the apparatus. We note that this evidence has limited relevance given the vastly different circumstances the condemned faces—a second execution, by a novel method, through the use of an inert gas.

high volume of nitrogen, creates a rapidly hypoxic environment over the course of 45 seconds. Taken together, it is not clearly erroneous to conclude that the mask will be adequately sealed to create sufficiently severe hypoxic conditions that, according to expert testimony, will lead to unconsciousness within seconds. Based on this record, we cannot say the mask is "sure or very likely to" dislodge or permit enough oxygen to infiltrate to create a substantial risk of severe pain. *See Helling*, 509 U.S. at 33–34.

In *Glossip*, the Supreme Court reiterated that "prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering' and give rise to '*sufficiently imminent* dangers." 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 50). When the district court assessed Smith's claim, it discussed that most of Smith's claims are predicated on "a cascade of unlikely events." And considering the underlying factual findings, which are not clearly erroneous, Smith is unable to meet the high standard that Eighth Amendment jurisprudence requires.[6]

We are bound by this record to hold the district court did not clearly err in its substantial risk of serious harm findings. Because Smith's claim fails on this prong, his Eighth Amendment

[6] We also note that in *Glossip*, when confronted with little evidence about the use and effects of midazolam, the Supreme Court explained that the inmate "bear[s] the burden of persuasion" even if there is a "dearth of evidence." 576 U.S. at 881–84. The lack of evidence here on the effects nitrogen hypoxia will have on Smith makes it impossible for us to reverse. *Glossip* ties our hands.

claim must fail.[7] We consequently must affirm the district court on its Eighth Amendment holding.

B. RLUIPA

Under RLUIPA, "[n]o government shall impose a *substantial burden* on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). In practice, the person challenging a policy under RLUIPA bears the initial burden of proving that said policy implicates and substantially burdens his or her religious exercise. *Holt v. Hobbs*, 574 U.S. 352, 360 (2015). Once that burden is met, the burden shifts to the government, which then must prove that (1) the policy is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. *Id.* at 362.

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[7] We do not address Smith's alternative methods. But we do want to note that the district court improperly latched on to Alabama's "veritable blueprint" argument when it faulted Smith's proposed amendments as "far from providing a feasible, readily implemented alternative nitrogen hypoxia protocol with his list of proposed amendments." But the district court overstates Smith's "feasible" and "readily implemented" requirement and misreads the holding in *Nance v. Ward*, 597 U.S. 159 (2022). The Supreme Court did not state "that a condemned person proposing an alternative method of execution must provide a veritable blueprint for carrying the death sentence out." Rather, this language comes from a factual analogy of that inmate's proposal—not from a new legal standard. *See* 597 U.S. at 169.

Congress enacted RLUIPA "to provide very broad protection for religious liberty" by subjecting the State to strict scrutiny whenever it "substantially burdens [a prisoner's] religious exercise." *Id.* at 356 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). Under RLUIPA, the term "religious exercise" broadly "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Audible prayer has been recognized by the Supreme Court as a form of religious exercise with a rich history in the United States. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1278–79 (2022).

Here, Smith argues that the Protocol substantially burdens his ability to audibly pray during the course of his execution because he faces an untenable choice—audibly pray or face a substantial risk of superadded pain or prolonged death due to a dislodged mask. It is not speculative that Smith would engage in religious exercise because he both audibly prayed and sang the contemporary hymn "I Am Not Alone" during his failed execution. However, we cannot say that the district court clearly erred when it found that any risk of the mask gaping or dislodging is speculative based upon the same factual findings regarding the mask's design, fit, and nitrogen volumes above. Without such findings, we cannot conclude that Smith will be substantially burdened in his ability to audibly pray during the course of the execution. Based upon this standard of review, we are bound to accept the district court's findings as to Smith's claim and affirm the district court on its RLUIPA holding.

C. Evidentiary Issues

Lastly, Smith asserts that the district court abused its discretion in denying his motion to strike Dr. Antognini's opinion, and failing to respond, thus implicitly denying, his motion to compel information predating ADOC's adoption of the current protocol.

We typically review evidentiary issues for abuse of discretion. *Harrison v. Culliver*, 746 F.3d 1288, 1297 (11th Cir. 2014). But we also have an obligation to review sua sponte whether we have jurisdiction at any point in the appellate process. *See Reaves v. Sec'y, Fla. Dep't. of Corr.*, 717 F.3d 886, 905 (11th Cir. 2013).

Generally, interlocutory discovery orders are not immediately appealable. *Doe No. I v. United States*, 749 F.3d 999, 1004 (11th Cir. 2014). And we find that the district court's order did not resolve Smith's motion to compel information predating ADOC's adoption of the current protocol. Because there is nothing for us to review, we lack jurisdiction. *Cf. Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (per curiam).

As to Smith's motion to strike Dr. Antognini's opinion, the district court overruled the objections as it related to Dr. Antognini, explaining that he would take Smith's arguments "into consideration as it concerns the weight and credibility." Although still uncertain about whether the motion has been resolved, we assume that the district court's discussion at the hearing denied the motion. Even though discovery orders are typically not appealable, we may review such an order if it is "inextricably intertwined" with an issue before the court. *Jones v. Fransen*, 857 F.3d 843, 850 (11th Cir. 2017).

Dr. Antognini's opinion goes directly to several of the issues in the preliminary injunction, including the mask fit and whether it would dislodge during use.

Thus, we have jurisdiction to review the district court's decision denying Smith's motion to strike Dr. Antognini's opinion. Turning to the merits, the district court has wide discretion on evidentiary rulings. *Harrison*, 746 F.3d at 1297. "[W]e will not overturn discovery rulings unless it is shown that the District Court's ruling resulted in substantial harm to the appellant's case." *Iraola & CIA, S.A. v. Kimberly–Clark Corp.*, 325 F.3d 1274, 1286 (11th Cir. 2003) (internal quotation marks omitted). Smith's argument focuses on Dr. Antognini's review of the system at Holman, tests involving the system, and how it was unfair that he was not privy to this information. But as Alabama notes, Smith's main argument involves the type of mask and how it could possibly dislodge. Smith's expert, Dr. Nitschke, inspected the mask and provided his opinion on whether it could become dislodged, as did Dr. Antognini. Smith deposed Dr. Antognini about the opinion[8] and had the opportunity to cross-examine him at the evidentiary hearing. Thus, the district court did not abuse its discretion in allowing Dr. Antognini's opinion.

[8] Smith does note that he received Dr. Antognini's opinion late the night before Dr. Antognini's deposition. We appreciate the expedited nature of this case and the balancing of confidential information, but we are concerned and disheartened that Alabama's Office of the Attorney General would wait until late the night before a deposition to provide an expert opinion report, especially one that was hired before the start of this litigation.

IV. Motion to Stay Execution

The standard governing a stay of execution mirrors that for a preliminary injunction: the movant must establish a substantial likelihood of success on the merits. *See Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011) (per curiam). For the reasons we have discussed above, Smith has failed to show a substantial likelihood of success on the merits of his claims. Accordingly, his motion for a stay of execution is due to be denied without regard to the other prerequisites for the issuance of the same.

AFFIRMED.

WILSON, Circuit Judge, Concurring:

The Supreme Court has recognized that death is not painless, and an execution that causes pain "by accident or as an inescapable consequence of death" does not constitute a risk which rises to an Eighth Amendment violation. *Baze v. Rees*, 553 U.S. 35, 50 (2008). But the Eighth Amendment does prohibit an execution that would amount to cruel and unusual punishment. *Id.* at 51. With that in mind, Smith may not be constitutionally guaranteed a painless death, but I have concerns that these circumstances may rise to a cruel and unusual execution.[1]

My first apprehension concerns what would occur if Smith were to vomit after nitrogen has been turned on, because ADOC has no protocol to handle this situation. Instead, Cynthia Stewart-Riley, the ADOC Regional Director, testified that the execution team will do nothing if this were to happen, which could lead Smith to asphyxiating. And expert testimony established that if Smith were to vomit once nitrogen is introduced, Smith faces a likelihood of asphyxiating on his own vomit.[2]

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[1] We have recognized that Alabama has a history of failed executions. *See Barber v. Governor of Ala.*, 73 F.4th 1306, 1317 (11th Cir. 2023) (Pryor, J. dissenting) ("Three botched executions in a row are three too many.").

[2] In Dr. Yong's supplemental declaration, he stated that if Smith is "in a reclined position, he will likely inhale vomit and asphyxiate, resulting in painful sensations of choking and suffocations or even death from asphyxiation."

My second concern focuses on Smith's prior failed execution and subsequent litigation. For context, I provide a truncated version of past events.

Before his first attempted execution,[3] scheduled for November 17, 2022, Smith repeatedly warned that Alabama would struggle—if not fail—to obtain IV access necessary to complete the lethal injection. Smith alleged that Alabama's lethal injection protocol would subject him to an Eighth Amendment method-of-execution claim, pointing to evidence of Alabama's recent mishandling of condemned inmates with similar difficulties.[4] Smith argued that Alabama recently deviated from its execution protocol twice and would likely do so again. The district court denied Smith's motion, but we reversed, finding that he pled sufficient facts to plausibly support his Eighth Amendment claim. On November 17, 2022, at approximately 8:00 PM CST, we unanimously granted Smith's

[3] If Smith were to be convicted and sentenced today, he would be ineligible for the death penalty. The jury in his capital murder case recommended a sentence of life imprisonment—by a vote of 11 to 1. A single judge had the power override the reasoned decision of a jury Smith's peers and impose the death penalty himself. Judges no longer have this power, as the Supreme Court has since held that this sort of unilateral sentencing scheme violates criminal defendants' Sixth Amendment right to trial by jury. *Hurst v. Florida*, 577 U.S. 92, 94 (2016). Pertinent here, Smith's conviction predates *Hurst*'s mandate.

[4] In July 2022, Alabama executed Joe Nathan James. James was behind closed curtains for over three hours as the execution team sought to gain IV access. In September 2022, Alabama attempted to execute Alan Eugene Miller. Miller was strapped to a gurney for two hours, his arms outstretched over his head, while the execution team attempted to gain IV access.

request for stay of execution. Before the stay was entered, Alabama took Smith to the execution chambers. The execution team strapped Smith to a gurney in the chamber while Alabama sought to vacate this court's stay of execution with the United States Supreme Court. And at approximately 10:00 PM CST, the Supreme Court vacated the stay without explanation. When Alabama's execution team attempted to gain IV access, Smith explained that "[the IV Team] began repeatedly jabbing Mr. Smith's arms and hands with needles, well past the point at which the executioners should have known that it was not reasonably possible to access a vein." As Smith predicted, Alabama was unable to obtain IV access, and at 11:30 PM CST Alabama called off the execution.

Smith filed an amended complaint to include allegations from his failed execution. He asserted that a second execution would constitute cruel and unusual punishment and violate his equal protection rights. Alabama moved to dismiss the complaint, but this time, the district court allowed Smith's Eighth and Fourteenth Amendment claims to proceed, noting that:

> [Smith's] allegations, which must be assumed true at this stage, go well beyond merely being pricked subcutaneously over a brief period in an attempt to establish an IV line. Rather, Smith's allegations support a plausible claim of cruel superadded pain as part of the execution, as multiple needle insertions over the course of one-to-two hours into muscle and into the collarbone in a manner emulating being stabbed in the chest, in combination with being strapped to the gurney for up to four hours and at one point being

> placed in a stress position for an extended period of time, goes "so far beyond what [is] needed to carry out a death sentence that [it] could only be explained as reflecting the infliction of pain for pain's sake." Moreover, given Smith's allegations that he himself experienced severe pain during a prior execution attempt, and that the prior execution attempt was the latest in an ongoing pattern of the State's difficulties in establishing venous access when attempting to carry out lethal injection executions, it is plausible, rather than merely possible, that a second lethal injection execution poses a substantial risk of severe pain to Smith.

The district court directed the parties to develop a case management report under Rule 26 to begin the discovery process. The district court entered a scheduling order and set a deadline for initial disclosures. The next day (four days before the initial disclosures' deadline), Alabama moved to dismiss because John Hamm, Commissioner of ADOC, determined that nitrogen hypoxia would be an available method of execution. He also affirmed that lethal injection would not be used in any future attempts to execute Smith. Smith's counsel agreed with the injunction to prevent a second execution by lethal injection. However, he objected to the use of nitrogen hypoxia, as Alabama only provided Smith—and the court—with a heavily redacted version of their proposed protocol and sparse detail on how the execution would work in practice. Nonetheless, the district court granted Alabama's motion to

dismiss and entered a permanent injunction barring Alabama from using lethal injection to execute Smith.

But as our opinion explains, the standard of review governs our determination on whether the district court made clearly erroneous factual findings. Clear error mandates that "[if] the district court's view of the evidence is plausible in light of the entire record, an appellate court *may not reverse* even if it is convinced that it would have weighed the evidence differently in the first instance." *Barber v. Governor of Ala.*, 73 F.4th 1306, 1317 (11th Cir. 2023) (quoting *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021)) (emphasis added). And, for Smith to prevail, he must show that those factual findings are clearly erroneous. Like our opinion notes, Smith has failed to meet this demanding burden. Thus, I must concur.

JILL PRYOR, Circuit Judge, Dissenting:

The State of Alabama seeks to test an entirely new method of execution on Kenny Smith, opting for him to die not by lethal injection, but by nitrogen gas. Alabama proposes to do so even though its new nitrogen gas protocol has never been tested and despite real doubts about the protocol's ability to safeguard a condemned person's constitutional rights. And—critically, as I view this case—Alabama has chosen this condemned person, this protocol, and this moment, even though Mr. Smith is suffering mentally and physically from the posttraumatic stress Alabama caused when it botched its first attempt to execute him in 2022.

What is all of this likely to look like when the time comes for Mr. Smith to face his death again? He will be escorted by his executioners to the same execution chamber that was previously used for the first attempted execution. Inside the chamber, he will be strapped to a gurney, the same one that held him for hours as he endured excruciating pain just over a year ago. Nitrogen gas will begin to flow into the mask. Under these conditions Mr. Smith's undisputed posttraumatic stress disorder, which no one contests is causing him to persistently vomit, will be at its absolute peak. At the same time, he will experience oxygen deprivation, a known effect of which is vomiting. If Mr. Smith vomits, his executioners will not intervene—they have told us so—even as vomit fills the mask and flows into Mr. Smith's nose and mouth. Then, at last, Mr. Smith's body will succumb to the effects of oxygen deprivation,

asphyxiation, or both. He will die. The cost, I fear, will be Mr. Smith's human dignity, and ours. *See Hall v. Florida*, 572 U.S. 701, 708 (2014).

The Supreme Court has imposed a high bar on a condemned person seeking to prove that his impending execution will violate the Eighth Amendment's guarantee against cruel and unusual punishment. He must show that "the risk of pain associated with the State's method is substantial when compared to a known and available alternative." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (internal quotation marks omitted). The district court found that Mr. Smith had satisfied neither the substantial risk part of the test nor the known and available alternative part. As for the known and available alternative part, the district court legally erred in applying a "veritable blueprint" standard. *See* Maj. Op. at 22 n.7. Without addressing Mr. Smith's proposed amendments to the nitrogen gas protocol, I would hold that he has identified firing squad as a known and available alternative.

I part with the majority opinion because I believe the district court clearly erred in its factual findings regarding the substantial risk part of the Supreme Court's Eighth Amendment test. The district court said Mr. Smith's claim that he is likely to vomit during the execution while nitrogen is flowing is "possible only upon the occurrence of a cascade of unlikely events." But the record shows that Mr. Smith is likely to vomit, both because of the undisputed effects of oxygen deprivation and because of the undisputed activation of his posttraumatic stress disorder from the first botched

execution attempt, of which his persistent vomiting is a documented symptom. Because no one will intervene if he vomits, his vomit will flood his face, both nose and mouth. And the record reflects that when a person inhales vomit and asphyxiates, he experiences "painful physical sensations of choking and suffocation." As I see it, this cascade of likely events is, in turn, likely to prolong or superadd pain and suffering to Mr. Smith's death. I view the district court's findings of fact otherwise as clearly erroneous. And given the record evidence about the effects of this execution on this individual, I would conclude that Mr. Smith has shown a substantial likelihood of success on the merits of his Eighth Amendment claim, and I would not allow his execution to proceed.[1]

Respectfully, I dissent.

[1] Because I would enjoin Mr. Smith's execution on Eighth Amendment grounds, I would not reach his remaining claims in this appeal.

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

KENNETH EUGENE SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:23-cv-656-RAH
	)	[WO]
JOHN Q. HAMM, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Kenneth Eugene Smith was convicted of capital murder and sentenced to death in 1996. He is now scheduled for execution via a new method—nitrogen hypoxia—on January 25, 2024. This is the State of Alabama's second attempt to execute Smith, the first attempt at execution by lethal injection having failed. Both before and after the failed first attempt, Smith voiced his preference that any execution be conducted by nitrogen hypoxia. After the failed first attempt, the State of Alabama honored Smith's request and notified him of its intent to execute him by nitrogen hypoxia. Now, and unsurprisingly, Smith objects to that method too, at least under Alabama's current protocol. He also offers up amendments to the current protocol and Utah's firing squad execution protocol as feasible and readily implemented alternative methods. He challenges his current execution method pursuant to 42 U.S.C. § 1983 under the First, Eighth, and Fourteenth Amendments to the United States Constitution, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and the Alabama Constitution's Religious Freedom Amendment (ARFA), Ala. Const. amend. 622.

Smith has moved for a preliminary injunction to enjoin Defendants John Q. Hamm (Commissioner of the Alabama Department of Corrections) and Terry Raybon (Warden at the William C. Holman Correctional Facility), in their official capacities, from executing him under Alabama's current nitrogen hypoxia protocol (Protocol). The Defendants have moved to dismiss Smith's Second Amended Complaint (SAC), the operative one. The motions are ripe for review. For the reasons that follow, the court will grant in part and deny in part the Defendants' motion to dismiss and will deny Smith's motion for preliminary injunction.

II. BACKGROUND

Sometime in mid-August 2023, Hamm formally approved a nitrogen hypoxia execution protocol, the first protocol of its kind in the United States. On August 25, 2023, the State of Alabama, through the Office of the Attorney General, moved for an order from the Alabama Supreme Court authorizing the Alabama Department of Corrections (ADOC) to carry out Smith's death sentence by means of nitrogen hypoxia within a time frame set by the Governor of Alabama. Over Smith's opposition, the Alabama Supreme Court granted the Attorney General's motion and ordered Hamm to carry out Smith's death sentence within the time frame set by the Governor. The Governor then set Smith's execution for a thirty-hour time frame between January 25, 2024, and January 26, 2024. Smith then filed the instant lawsuit.

A. Smith's Capital Litigation History

In 1988, Elizabeth Dorlene Sennett was found dead in her home. *Smith v. State,* 908 So. 2d 273, 279 (Ala. Crim. App. 2000), *cert. denied*, 546 U.S. 928 (2005), *denying stay of execution*, 143 S. Ct. 440 (2022). She was stabbed eight times in the chest and once on each side of her neck. In 1996, an Alabama jury convicted Smith of murdering Sennett for $1,000 and recommended a sentence of life imprisonment without the possibility of parole by an 11-to-1 vote. The trial judge however

overrode the jury's recommendation and sentenced Smith to death. After pursuing conventional post-trial and post-conviction relief in state court, including a direct appeal of his conviction and sentence and his first Rule 32 action, Smith filed for federal habeas relief pursuant to 28 U.S.C. § 2254, seeking to reverse his conviction and sentence, which the United States District Court for the Northern District of Alabama denied. *Smith v. Dunn*, No. 2:15-cv-0384-AKK, 2019 WL 4338349 (N.D. Ala. Sept. 12, 2019), *aff'd*, 850 F. App'x 726 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1108 (2022).

On August 18, 2022, and after the Attorney General sought an execution date, Smith filed his first method-of-execution action challenging Alabama's lethal injection protocol. *Smith v. Hamm*, No. 2:22-cv-497-RAH, 2022 WL 10198154 (M.D. Ala. Oct. 16, 2022). In that action, Smith asserted that execution by lethal injection violated his Eighth Amendment rights, and he further asserted that nitrogen hypoxia was his preferred method of execution because it was an available and feasible alternative method. Smith also sought a preliminary and permanent injunction against the ADOC's plan to execute him by lethal injection. On September 30, 2022, the Alabama Supreme Court authorized Smith's execution and the Governor thereafter set his execution for November 17, 2022.

After the defendant (Hamm) moved to dismiss that action, Smith's complaint was dismissed and his later attempt to alter or amend the dismissal ruling with an amended complaint was denied. *Smith v. Hamm*, No. 2:22-cv-497-RAH, 2022 WL 16842050 (M.D. Ala. Nov. 9, 2022). On appeal, the Eleventh Circuit reversed, holding that Smith's proposed amended complaint stated a plausible Eighth Amendment claim. *Smith v. Comm'r, Ala. Dep't of Corr.,* No. 22-13781, 2022 WL 17069492 (11th Cir. 2022) (per curiam), *cert. denied*, No. 22-580, 143 S. Ct. 1188 (2023).

The same day the Eleventh Circuit ruled, and the day of his execution, Smith moved for a preliminary injunction seeking an order enjoining the defendants from executing him by lethal injection. He also sought an emergency stay of execution. Both requests were denied. *Smith v. Hamm*, No. 2:22-cv-497-RAH, 2022 WL 17067498 (M.D. Ala. Nov. 17, 2022). Smith appealed again that day. The Eleventh Circuit then granted a temporary stay of execution, *Smith v. Comm'r, Ala. Dep't of Corr.,* No. 22-13846-P, 2022 WL 19831029 (11th Cir. 2022), which the United States Supreme Court vacated several hours later, *Hamm v. Smith*, No. 22A441, 143 S. Ct. 440 (2022).

With the green light to proceed, at approximately 8:00 p.m. that evening, ADOC officials attempted to execute Smith via lethal injection. The ADOC was unsuccessful with its efforts despite trying to access Smith's veins for over 90 minutes. *Smith v. Hamm*, No. 2:22-cv-497-RAH, 2023 WL 4353143, at *3 (M.D. Ala. July 5, 2023). The execution was terminated just before midnight.

After the failed execution attempt, Smith's lethal injection litigation continued, this time with another amended complaint that also included the Alabama Attorney General as a defendant. During that litigation, Smith, through counsel, continued to represent in court proceedings that nitrogen hypoxia was his preferred method of execution. On August 25, 2023, the defendants moved to dismiss the case, stating that Smith's challenge to lethal injection was now moot because the defendants had agreed never to attempt to execute Smith by lethal injection again and that the Attorney General had moved to reset Smith's execution, this time by nitrogen hypoxia. On September 20, 2023, Smith's lethal injection case was dismissed for lack of a live case or controversy and the defendants were enjoined from conducting any future execution of Smith by lethal injection. *Smith v. Hamm,* No. 2:22-cv-497-RAH, *Final Judgment & Order* (M.D. Ala. Sept. 20, 2023).

On May 12, 2023, Smith filed a second Rule 32 petition in state court (the Circuit Court of Jefferson County, Alabama) related to the failed execution attempt by lethal injection, seeking to prevent the State of Alabama from attempting to execute him a second time by any means; that is, relieve him of his death sentence (Doc. 58-1 at 30.) The state trial court dismissed Smith's petition, and the Alabama Court of Criminal Appeals affirmed that dismissal on December 8, 2023. (*Id.* at 39.) On December 18, 2023, Smith petitioned for a Writ of Certiorari in the Alabama Supreme Court. (*Id.* at 2.) As the court writes, that petition remains pending.

B. Alabama's Novel Nitrogen Hypoxia Execution Protocol

In June 2018, Alabama's statutory amendment allowing execution by nitrogen hypoxia as an approved method of execution went into effect. Ala. Code § 15-18-82.1(b). Although condemned inmates have offered nitrogen hypoxia as the preferred feasible and readily implemented alternative method of execution in their capital § 1983 litigation challenging lethal injection, *Smith*, No. 2:22-cv-497-RAH, 2023 WL 4353143, at *5; *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129–30 (2019); *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019); *Miller v. Hamm*, No. 2:22-cv-506-RAH, 2022 WL 4348724, at *3 (M.D. Ala. Sept. 19, 2022), the Attorney General's office and the ADOC maintained, until just a few months ago, that nitrogen hypoxia was not a feasible and available method because the ADOC had not yet formalized and approved an execution protocol for it. Then, in August 2023, with no warning that it was coming, the Attorney General's office announced the finalization of the Protocol.

Maintaining the ADOC's familiar veil of secrecy over its capital punishment procedures, the public version of the Protocol is heavily redacted. But its 40 pages contain provisions and instructions for ADOC officials to follow from the time the ADOC receives word that an execution directive has been issued by the Alabama Supreme Court and Governor to the time of the inmate's interment after execution,

including detailed procedures for carrying out the State of Alabama's three approved methods of execution: electrocution, lethal injection, and nitrogen hypoxia.

The present action concerns the Protocol's nitrogen-hypoxia-specific provisions. These provisions contain detailed directives and warnings about gas usage in an enclosed space; training; and inspections, testing, calibration, and use of atmospheric monitors, gas measurement devices, pulse oximeters, tubing, masks, and other devices. (Doc. 31-1.) The Protocol also contemplates the attendance of the condemned inmate's spiritual advisor in the execution chamber and securing and checking the mask.

C. The Present Action

The SAC is the governing pleading. In it, Smith pleads five causes of action against two defendants, John Q. Hamm, in his official capacity as the ADOC Commissioner, and Terry Raybon, in his official capacity as Warden of the William C. Holman Correctional Facility. Smith seeks declaratory and injunctive relief.

1. Fourteenth Amendment Claim

In Count One, Smith asserts a claim under the Fourteenth Amendment.[1] He asserts that the State of Alabama's custom is to wait to move for an inmate's execution until after the inmate has exhausted his conventional appeals, and that here, Smith "has not exhausted his appeals." (Doc. 31 at 29.) He alleges that his appeal from his *Second Petition for Relief from Death Sentence Under Alabama Rule of Criminal Procedure 32*, filed on May 12, 2023, seeking an order altogether relieving him of his death sentence, remains pending. He further alleges that "[o]ther condemned people in Alabama who elected to be executed by nitrogen hypoxia five years ago have exhausted their appeals" and therefore the "Defendants' actions

[1] For ease of reference, Smith's claims for relief will be referred to as Counts One, Two, Three, Four and Five, instead of his First Claim for Relief, Second Claim for Relief, etc. as used in the SAC.

toward Mr. Smith are arbitrary and capricious and violate its own stated custom regarding selecting condemned people for execution." (Doc. 31 at 29.) This, according to Smith, is not rationally related to a legitimate government purpose and therefore violates his Fourteenth Amendment rights.

2. Eighth Amendment Claim

In Count Two, Smith asserts that the Defendants' intention to execute him by nitrogen hypoxia under this Protocol would expose him to a "severe risk of a persistent vegetative state, a stroke, or the painful sensation of suffocation, i.e., superadded pain" and that there are feasible and readily implemented alternatives that would reduce the risk to him either by amending the Protocol or executing him by firing squad using Utah's protocol. (*Id.* at 31.) He alleges, "[i]t is clear that the consequences of attempting an execution by nitrogen hypoxia using ADOC's deficient Protocol will be dire. If not performed correctly, execution by nitrogen hypoxia can result in another failed execution that risks leaving Mr. Smith with permanent injuries." (*Id.* at 4.) Smith asserts that death by nitrogen hypoxia exposes him to a severe risk of superadded pain, including hypoxemia and hypoxia short of death.

In particular, he alleges that the Protocol does not contain guidance on the type of mask to be used; how, when, and by whom it will be placed, adjusted, and inspected; how variations in the physical characteristics of the inmate, such as facial hair and obesity, can increase the mask's ventilation through breach of the mask's seal; what training the ADOC execution team will receive; how the ADOC will conduct a final inspection to determine if the mask has been properly placed; and what will happen if the mask becomes displaced or dislodged during the execution process. All, Smith alleges, could result in the infiltration of oxygen inside the mask, thereby increasing time to unconsciousness and increasing the risk of dire consequences such as a vegetative state, a stroke, or the painful sensation of

suffocation. He also alleges that allowing an inmate to speak with the mask on will increase the possibility that the mask could dislodge and break the seal. He further alleges that the Protocol does not provide for the removal of exhaled carbon dioxide, does not specify the purity of nitrogen gas to be used, and does not require monitoring of the pulse oximeters after nitrogen is introduced. Smith also claims the Protocol fails to account for the possibility that he could vomit inside the mask thereby causing him to choke, a possibility due to his diagnosed post-traumatic stress disorder (PTSD), depression, and anxiety attributable to the circumstances surrounding his current situation and the previously failed execution attempt. He claims that procedures should be implemented to account for these issues, including: the use of a custom fit mask; allowing him to speak, including his prayers and final statement, before placement of the mask; adding a mechanism to remove carbon dioxide from the mask; use of 100% pure nitrogen; disclosure of the source of the nitrogen and testing of it; inclusion of procedures to test the nitrogen; monitoring of the pulse oximeter; halting the execution if vomiting occurs; accounting for Smith's PTSD and depression; and having a licensed medical provider present. Alternatively, Smith alleges the Defendants should execute him by firing squad consistent with the protocol used by the State of Utah.

3. First Amendment, RLUIPA, and ARFA Claims

In Counts Three, Four, and Five, Smith alleges that his First Amendment and religious freedom rights under RLUIPA and ARFA will be violated because "[m]asking will interfere with Mr. Smith's right to make an audible statement and to pray audibly" and "any statement or prayer may not be audible and may risk consequences associated with dislodging the mask and/or building the level of carbon dioxide under the mask." (Doc. 31 at 31.) He also alleges that the Protocol burdens his exercise of religion because it forces Smith to "choose between abstaining from his religious practice of audible prayer at the end of his life or face

the dangerous consequences of dislodging the mask while praying." (Doc. 31 at 32–33.)[2]

D. Evidence Presented at the December 20, 2023, Hearing

On December 20, 2023, the court held a hearing on Smith's preliminary injunction request. The court admitted 58 exhibits from Smith and 53 exhibits from the Defendants. Among other things, the evidence included: declarations from expert witnesses, Smith, and other party and non-party witnesses; case reports and articles discussing hypoxia in the context of industrial accidents and assisted suicides; medical articles concerning the respiratory system and anesthesiology; and several videos of individuals donning the mask the Defendants intend to use for Smith's execution. The Defendants also presented the court with the mask apparatus, which the court examined in detail.[3] Smith called five witnesses: Dr.

[2] Smith also claims that he has been placed on "single walk" status, "which means that he cannot share the same space with other" inmates, "some of whom he has developed familial relationships with over decades." (Doc. 31 at 26.) Smith alleges the Protocol is further deficient because it is silent on "single walk" status even though "Defendants intend to maintain Mr. Smith isolated from his brothers on that status for 78 days through his planned execution." (*Id.*) By his account, "single walk" status "deprives Mr. Smith of the fellowship of his brother inmates when he needs their friendship most. . . [and] deprives him of the companionship of his family during this critical period." (*Id.*) While he is on "single walk" status, "Smith's family cannot schedule a visit with him when any other Holman inmate has a scheduled visit[,]" and the status "interferes with his relationship with his counsel when he needs their advice most because their visits are constrained for the same reason." (*Id.*) "And while Defendants recently permitted Mr. Smith to select one religious service that he will be permitted to attend each week accompanied by two corrections officers, his 'single walk' status also burdens the exercise of his religion." (*Id.*) Although he generally makes these allegations, he does not raise them in Counts Three, Four and Five.

[3] The court's examination of the mask apparatus revealed it to be a NIOSH-approved, industrial grade, continuous flow supplied-air respirator mask with an adjustable five point harness system and a pliable, double flange rubber seal that would tightly fit and hold the mask over the entirety of the wearer's face—including eyes, nose, mouth, and chin—that also contained a one-way valve near the mouth and nose allowing for the exit of exhaled gases, including carbon dioxide. Such masks are often used in industrial settings involving confined spaces and chemical processes where external air conditions are or can be dangerous. The mask is very different from those encountered in a medical or hospital setting or used to deliver continuous air pressure to individuals diagnosed with sleep apnea, i.e., CPAP machines.

Robert Jason Yong, Defendant John Q. Hamm, Dr. Philip Nitschke, Smith, and Dr. Katherine Porterfield. The Defendants called, and made available for cross-examination, nine witnesses: Dr. Joseph Antognini, Cynthia Stewart-Riley, James Houts, and six assistant attorneys general who were videoed wearing the mask in the execution chamber while also breathing and speaking.

The court need not repeat or summarize all the testimony and declarations here but will summarize relevant portions of the testimony several witnesses provided during the hearing.

During the hearing, Dr. Yong, an anesthesiologist and pain doctor with expertise in the respiratory system and ventilation, testified about nitrogen hypoxia and the use of masks to deliver gas. In his declaration, he testified that "[b]reathing in 100% nitrogen gas would result in hypoxemia, eventual end-organ damage, and ultimately death." (Doc. 19-1 at 6.) But he also voiced concerns about the use of anything less than 100% pure nitrogen and a mask delivery system in general.[4] His concerns about the mask included that the mask may not properly fit due to variations in the physical characteristics of wearers, such as nose structure and facial hair; dislodgment of the mask if a wearer resists or is noncompliant, turns his head, speaks, or suffers a seizure; the failure of the mask to allow for the removal of exhaled carbon dioxide; and vomiting inside of the mask—all of which could result in the condemned inmate experiencing a persistent vegetative state, stroke, suffocation, choking, or other complications short of death. At the hearing, Dr. Yong testified that there is "not an abundant body of literature" or case reports to allow for concrete scientific conclusions about what will happen to a person subject to the current Protocol. And concerning whether nitrogen hypoxia could leave a person in a persistent vegetative state, he said there are a very small number of OSHA reports

[4] No testimony was provided that Dr. Yong has seen, viewed, or examined the mask that the Defendants intend to use. As such, his opinions were largely theoretical.

in total and no report states such a vegetative state has or would actually occur. He further testified that there is no data to conclude with certainty the time to unconsciousness under conditions with no or minimal oxygenation because the science is experimental and that any conclusions he has made in his declaration concerning the time to unconsciousness under the Protocol amount to extrapolations from industrial disasters or assisted suicides. Dr. Yong also testified that the Protocol lacks a "nothing by mouth" order by which a condemned inmate would be prohibited from consuming food for an amount of time prior to the execution to avoid, or minimize the risk of, vomiting during the execution process.

Defendant Hamm testified that he alone, pursuant to his duty as Commissioner of the ADOC, approved and adopted the Protocol. He did not recall whether he had considered an alternative to the mask, such as a hood, to deliver nitrogen to the condemned inmate. He testified it is and will be his responsibility to determine whether an execution fails and at what moment to call off an execution attempt.

Dr. Nitschke, a medical doctor with expertise in assisted suicides and a PhD in Physics, opined that the risks he gleaned from the Protocol could subject Smith "to incomplete cerebral hypoxia. A resultant vegetative state with permanent brain damage cannot be excluded." (Doc. 19-2 at 8.) He inspected the nitrogen delivery system, and mask (including the mask user manual) the Defendants intend to use during Smith's execution as well as the declaration of Dr. Antognini, the Defendants' expert witness. At the hearing, Dr. Nitschke testified to the use of a bag delivery system, as opposed to a mask, during assisted suicides to reduce the risk of outside air infiltration during nitrogen delivery. He also testified it is possible for a person exposed to nitrogen via a bag delivery system to experience nausea.

Smith testified that he was put on "single-walk" status after a prison official informed him that the Governor had set his execution date. He testified that "single-

walk" status deprived him of the close relationships he developed with his fellow inmates and that his status limits his availability for visitation because he cannot have a visitor at the same time any other inmate has a visitor. He also testified that he and his spiritual advisor have agreed to a plan on the day of his execution, which includes praying audibly, communion, reading of scripture, and the spiritual advisor anointing Smith with oil.

Dr. Porterfield, a clinical psychologist from New York with expertise in treating survivors of torture and war trauma, examined Smith after the previous failed execution attempt. Dr. Porterfield opined that, due in large part to the failed execution, Smith suffers from PTSD and depression, and that the experience from the upcoming execution "will likely create a panic reaction that is totally destabilizing to his mind and nervous system" and "will most certainly cause him severe suffering, destabilization and psychological deterioration." (Doc. 19-3 at 35.) At the hearing, Dr. Porterfield acknowledged that Smith did not report to her that he has vomited as a result of PTSD or depression, and that he did not report nausea during his previous failed execution attempt. She also testified that it is possible but not certain that Smith may experience nausea during the next execution attempt.

Dr. Antognini, an anesthesiologist, submitted a declaration and supplemental declaration. He stated that, in his professional opinion, the Protocol will result in a likely 35 to 40 second time to unconsciousness, death in 10 to 15 minutes after nitrogen begins flowing, and will not cause carbon dioxide rebreathing, significant leakage that will allow outside air to enter the mask, significant suffering or pain, or result in brain damage, persistent vegetative state, or stroke short of death. (Docs. 62-60; 62-61.) At the hearing, Dr. Antognini testified that he has never induced nitrogen hypoxia in a person or published articles related to administering nitrogen to a person. But he has inspected the subject mask and has arrived at his conclusions based upon his own research, relying in part on internet searches, his credentials,

and his scientific background. He testified that although no human data exists for the time to unconsciousness by nitrogen hypoxia, death will occur when the oxygen level in a person's breathing environment reaches less than six percent.

Stewart-Riley, the ADOC Regional Director, submitted a declaration and two affidavits, stating among other things that the ADOC has not found and is not aware of any study or scientific literature evidencing that the selected mask would increase the risk of harm to Smith were he to vomit during the execution. At the hearing, she testified to her knowledge of the Protocol.

The court also reviewed the declarations of Thomas R. Govan, Jr., Audrey Jordan, Alana K. Cammack, Lauren Simpson, Jasper B. Roberts, Jr., and Cameron Ball, all of whom were videoed wearing the mask in the execution chamber and audibly speaking while wearing the mask. At the hearing, Simpson, Ball, and Roberts testified to their experience wearing the mask.

Houts, an attorney and retired military officer, submitted a declaration opining favorably on the Protocol. At the hearing, he testified that he is not an expert on the development of nitrogen hypoxia execution protocols and is unsure whether such an expert exists.

III. JURISDICTION AND VENUE

The court has original subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Personal jurisdiction and venue are uncontested, and the court concludes that venue properly lies in the Middle District of Alabama. *See* 28 U.S.C. § 1391.

IV. DISCUSSION

The court will first consider the Defendants' motion to dismiss and then dispose of Smith's motion for preliminary injunction on the remaining claims.

A. The Defendants' Motion to Dismiss

The Defendants have moved to dismiss each of Smith's claims under Federal Rule of Civil Procedure 12(b)(6). In ruling upon a Rule 12(b)(6) motion, a court

considers only the allegations contained in the complaint and any attached exhibits. *Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016). A Rule 12(b)(6) motion tests the sufficiency of the complaint against the legal standard set forth in Federal Rule of Civil Procedure 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The court must take "the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. But if the facts in the complaint "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief,'" and the complaint must be dismissed. *Id.* (alteration adopted) (citing Fed. R. Civ. P. 8(a)(2)).

1. The Eighth Amendment Claim

For clarity, the constitutionality of capital punishment is *not* before the court. The death penalty is constitutional, *see Baze v. Rees*, 553 U.S. 35, 47 (2008) (citing *Gregg v. Georgia*, 428 U.S. 153, 177 (1976)), and it is in force in Alabama. The State of Alabama elected not to join 23 of its sister states in abolishing the death penalty, so the unenviable task falls to this court to decide whether Alabama's newest method of execution, one Smith himself previously declared was his

preferred method of execution, inflicts cruel and unusual punishment in violation of the Eighth Amendment. *See* U.S. Const. amend. VIII.

Smith contends the Protocol, in its current form, exposes him to a substantial risk of severe and superadded pain although feasible, readily implemented alternative methods of execution exist—like an amended Protocol or death by firing squad—that would significantly reduce that risk.

The Defendants raise several arguments in support of dismissing the claim as set forth in Count Two, with particular emphasis on the doctrine of estoppel and, to a much lesser extent, issue preclusion. They claim Smith is estopped from bringing an Eighth Amendment challenge to nitrogen hypoxia because, in his previous lawsuit, he successfully argued that nitrogen hypoxia was a feasible, readily implemented alternative method of execution. They also note that Smith repeatedly stated that nitrogen hypoxia was his preferred method of execution even though he knew it was untested and that no protocol existed. *See generally*, *Smith*, No. 2:22-cv-497-RAH, 2023 WL 4353143. By repeatedly pointing to nitrogen hypoxia as his preferred method, Smith even achieved an injunction enjoining the Defendants from ever again attempting to execute him by lethal injection. (Doc. 39-11.) Thus, according to the Defendants, Smith is taking a "new and contradictory position" in this action by now opposing his execution by nitrogen hypoxia "simply because his interests have changed," (Doc. 39 at 34–35 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001))), and he now seeks to delay his execution by "attempting to manipulate the judicial process to his benefit,"[5] (*id.* at 37).

[5] The Defendants cite one judge's statement, 22 F.4th 621 (Mem.), concerning the Sixth Circuit's recent denial of rehearing en banc in *Middlebrooks v. Parker*, 15 F.4th 784 (6th Cir. 2021), a § 1983 method-of-execution case in which the Sixth Circuit reversed the district court's dismissal of a facial challenge to Tennessee's three-drug lethal injection protocol because it concluded the challenge was barred by the doctrine of res judicata. That judge suggested, "[i]n future cases, states might consider arguing that judicial estoppel bars inmates from making inconsistent claims in order to delay proceedings." 22 F.4th at 628. So, the Defendants did. That judge may well be

The equitable doctrine of estoppel is intended to "prevent the perversion of the judicial process" and "protect [its] integrity . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc) (alterations in original) (quoting *New Hampshire*, 532 U.S. at 749–50). When a party does so, the doctrine of estoppel allows a court to exercise its discretion to dismiss the party's claims. *Id*. To determine its application, courts look to "whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were 'calculated to make a mockery of the judicial system.'" *Id.* (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002)). The court must consider Smith's actions and motive and determine whether his current claim is the result of "cold manipulation" and not "inadvertence or mistake." *Id.* at 1881 (brackets omitted) (quoting *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973)).

It is not lost on the court that Smith vehemently argued for execution by nitrogen hypoxia in his previous litigation only several months ago when he was scheduled for execution by lethal injection. He likely did so under the belief that the ADOC was nowhere near finalizing and issuing a final nitrogen hypoxia protocol, thereby placing Smith, like any condemned inmate subject to a nitrogen hypoxia execution, in an indefinite holding pattern while other lethal injection executions went forward. Now that Alabama is prepared to carry out his sentence using the method of execution he has consistently declared he prefers, the circumstances have changed. And what was once highly unlikely is now a certainty. With that change,

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right, but such gatekeeping is outweighed where, such as here, a condemned inmate properly brings a plausible challenge when he "becomes subject to a new or substantially changed execution protocol." *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 873 (11th Cir. 2017) (citations omitted).

Smith now seeks to enjoin the Defendants from carrying out his death sentence using the Protocol, arguing it unconstitutionally superadds pain such that the court should order the Defendants to amend it or execute him by firing squad, a "relatively uncommon and archaic" method. *Nance v. Comm'r, Ga. Dep't Corr.*, 59 F.4th 1149, 1155 (11th Cir. 2023) (*Nance III*) (quoting the State's brief). On that basis, the Defendants assert estoppel. But the details here compel rejecting the application of estoppel, or issue preclusion to the extent the Defendants invoke it.

Eighth Amendment jurisprudence holds that a condemned inmate has a new "method of execution claim [that] accrues on the later of the date on which state review [of his conviction and sentence] is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." *Boyd*, 856 F.3d at 873 (citations omitted).

In this case, Smith does not challenge nitrogen hypoxia as a method of execution per se. Rather, he challenges the current procedure by which it will be carried out. The novelty of the Protocol and that Smith is to be the first condemned inmate executed under it are undisputed facts. The Protocol did not exist or, at least, was not approved for use and made publicly known until after the Attorney General's office moved for dismissal of Smith's prior lethal injection litigation last August and September. Smith's claim here did not accrue until the Attorney General moved for, and the Alabama Supreme Court authorized, his execution under the novel Protocol.

It goes without saying that many capital cases come to the federal court system with the primary or sole aim of delaying execution indefinitely. And inherent in many if not every capital case is the condemned inmate's goal to altogether avoid his death sentence. It is human. But in Smith's previous lawsuit, the Protocol was not yet approved or fully made known, and he was not yet subject to it. So, he was unable to fully and fairly litigate the Eighth Amendment claim that he now brings in this case. Applying estoppel or issue preclusion here would work a mockery of the

Eleventh Circuit's recognition that condemned inmates must be allowed a vehicle to challenge new and substantially changed execution protocols. The court refuses to apply either doctrine here.

The Defendants next argue that Smith's Eighth Amendment claim is far too speculative to state a claim because he has failed to plead plausible facts showing an actual risk that he will suffer superadded pain under the Protocol and that "ADOC officials are aware of, but are disregarding, known substantial risks" of severe pain. (Doc. 39 at 38, 47–48.) Notably, the Defendants do not argue at this stage that Smith's identification of Utah's execution protocol for the firing squad fails to identify a "feasible, readily implemented" alternative, but the Defendants do argue that Smith's proposed amendments to the Protocol fail as a satisfactory alternative under *Bucklew* and *Nance III*.

To state a plausible method-of-execution claim, Smith must (1) show that the challenged method "presents a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and gives rise to 'sufficiently *imminent* dangers'"; and (2) identify "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain and that the state has refused to adopt without a legitimate penological reason." *Price*, 920 F.3d at 1325–26 (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015), *Baze*, 553 U.S. at 50–51, and *Bucklew*, 139 S. Ct. at 1129). Deciding "whether the State has cruelly 'superadded' pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by 'compar[ing]' that method with a viable alternative." *Bucklew*, 139 S. Ct. at 1126 (alterations in original). The comparison "'provides the needed metric' to measure whether the State is lawfully carrying out an execution or inflicting 'gratuitous' pain." *Id.* (citation omitted).

Smith's burden under this legal test can be "overstated," so the Supreme Court has clarified that a condemned person "seeking to identify an alternative method of

execution is not limited to choosing among those presently authorized by a particular State's law." *Id.* at 1128. Nonetheless, Smith "faces an exceedingly high bar" because the Supreme Court "has yet to hold that a State's method of execution qualifies as cruel and unusual, and perhaps understandably so. Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite[,]" *id.* at 1124, that is, "more humane way[s] to carry out death sentences," *Glossip*, 576 U.S. at 868.

In support of their contention that Smith's allegations are too speculative to state a claim, the Defendants primarily rely upon six decisions—*Baze*; *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260 (11th Cir. 2014); *Ferguson v. Warden, Fla. State Prison*, 493 F. App'x 22 (11th Cir. 2012); *Pardo v. Palmer*, 500 F. App'x 901 (11th Cir. 2012); *Jackson v. Danberg*, 594 F.3d 210 (3d Cir. 2010); *Wackerly v. Jones*, 398 F. App'x 360 (10th Cir. 2010). But none of those decisions were before courts on a motion to dismiss where, as here, the allegations are assumed true. Each of those cases, except *Baze,* reviewed the condemned inmate's Eighth Amendment claim under preliminary injunction or summary judgment standards. Although informative to the court's later preliminary injunction analysis, the Defendants' cited authority offers little in support of their argument that Smith has failed to state a plausible Eighth Amendment claim under a Rule 12(b)(6) attack.

Here, Smith has alleged several imminent dangers—improper fit of the mask; the potential for the mask to dislodge from its sealed position for a variety of reasons such as speaking, praying, or vomiting; vomiting; the introduction of oxygen into the mask; and the lack of monitoring of the pulse oximeters during the execution—that he also alleges present risks that are sure or very likely to increase the time for Smith to reach a state of unconsciousness and "would expose [him] to a severe risk of a persistent vegetative state, a stroke, or the painful sensation of suffocation, i.e., superadded pain." (Doc. 31 at 22, 31.) Smith has further alleged two alternative

methods that he says would in fact reduce the risk of severe or superadded pain and needless suffering he avers the current Protocol is sure or very likely to cause: (1) amending the Protocol to incorporate several changes he identifies in Paragraph 102 of the SAC or (2) carrying out his execution by firing squad using Utah's protocol. (*Id.* at 27–28.)

Taking Smith's allegations as true at this stage of the litigation, as the court must, Smith has alleged facts beyond "a formulaic recitation of the elements of a cause of action," and his allegations have a sufficient basis in fact "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Smith has pled that the Protocol could and will increase the time to unconsciousness and will present imminent dangers and superadd pain in the form of a persistent vegetative state, stroke, or the sensation of suffocation. He has alleged two feasible, readily implemented alternative methods that he says will reduce the risk of that harm. Together, those dangers—as compared to Smith's allegations about his proposed alternative methods—amount to "a 'substantial risk of serious harm'—severe pain over and above death itself[.]" *Nance v. Ward*, 597 U.S. 159, 164 (2022) (*Nance II*). He has therefore pled a plausible Eighth Amendment claim, *cf. Smith,* No. 22-13781, 2022 WL 17069492, and the Defendants' motion to dismiss Smith's Eighth Amendment claim in Count Two is thus due to be denied.[6]

2. The Fourteenth Amendment Claim

In Count One, Smith alleges that the Defendants have acted in an "arbitrary and capricious" manner in violation of his equal protection rights by seeking to execute him by nitrogen hypoxia even though "[o]ther condemned people in

[6] Concluding Smith has stated a plausible Eighth Amendment claim does not mean his request for a preliminary injunction is due to be granted because his request for a preliminary injunction is subject to an altogether different standard.

Alabama who elected to be executed by nitrogen hypoxia five years ago have exhausted their appeals."[7] (Doc. 31 at 29.) Smith also alleges "that attempting to execute [him] by nitrogen hypoxia before he has exhausted his pending appeals would violate his right to equal protection under the laws under the Fourteenth Amendment." (*Id.* at 34.)

Smith argues that he has stated a plausible equal protection claim because (1) he is similarly situated to all other condemned inmates who are subject to execution by nitrogen hypoxia; (2) he has an appeal pending with the Alabama Supreme Court; (3) the State of Alabama has a custom to wait to seek an execution date until after the inmate has exhausted his conventional appeals: direct appeal, state post-conviction, and federal habeas; (4) there are other condemned inmates in Alabama whose appeals have been exhausted and who elected to be executed by nitrogen hypoxia in 2018 and are still awaiting execution; (5) the ADOC has given at least one condemned inmate who it intends to execute by nitrogen hypoxia a grace period for the inmate and his legal counsel to review the Protocol before the Attorney General seeks an execution date; (6) Smith was not given a similar grace period; and (7) the Defendants chose Smith to avoid discovery into their "failed lethal injection procedures" in his previous lawsuit before this court.

The Defendants argue that dismissal is appropriate because state law does not assign either of the named defendants the responsibility of seeking an order to carry out Smith's execution, let alone any death sentence. The Defendants also argue that they did not violate any custom of their own; because any custom involving who is selected next for execution is that of the Attorney General, who is not a party in this litigation. Additionally, Defendants contend Smith's pending Rule 32 litigation is meritless and he has failed to adequately plead comparators. Finally, Defendants

[7] Smith voluntarily withdrew his due process claim. (*See, e.g.*, Doc. 44 at 14.)

argue that dismissal is required on estoppel and res judicata grounds, primarily pointing to the fact that Smith voiced no concern or objection to the order of his selection as next in line for execution in his previous litigation.

It is not necessary to address whether Smith's second Rule 32 petition is meritless, barred by estoppel, or by any of the Defendants' other grounds because Smith's claim fails for lack of standing. Article III of the Constitution limits the subject matter jurisdiction of federal courts to "cases and controversies." U.S. Const. art. III, § 2. "To have a case or controversy, a [plaintiff] must establish that he has standing, which requires proof of three elements." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (quoting *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) (internal quotation marks omitted). To show standing, a plaintiff must prove (1) an injury in fact that (2) is fairly traceable to the defendant's actions and is (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "[F]ederal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the jurisdictional doctrines.'" *United States v. Hays*, 515 U.S. 737 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–31 (1990) (alterations adopted). "[E]ach element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'" *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 878 (11th Cir. 2000) (quoting *Lujan*, 504 U.S. at 561). "Therefore, when standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct may be sufficient to show standing." *Id.*

To have standing, a plaintiff's injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations adopted).

Smith contends that he is injured because he has been selected for execution before his second state postconviction appeal has been exhausted and before the executions of other inmates who have selected nitrogen hypoxia long before he selected it. So, for Smith to have standing, his selection for execution over other condemned inmates and during the pendency of other litigation must be traceable to the actions of Defendants Hamm and Raybon in their capacities as the Commissioner of the ADOC and the Warden of Holman Prison, respectively. Smith's problem is that Alabama law tasks the Attorney General with seeking and moving for an execution date with the Alabama Supreme Court. *See* Ala. R. App. P. 8(d)(1); Ala. Code § 36-15-1(2) (noting the Attorney General of Alabama "shall attend, on the part of the state, to all criminal cases pending in the Supreme Court"); State of Alabama's Motion to Set an Execution Date, *Ex parte Kenneth Eugene Smith*, No. 1000976 (Ala. Aug. 25, 2023).[8] Then, the Alabama Supreme Court decides whether this is an "appropriate time" to execute a condemned inmate and, if so, authorizes the execution. Finally, the Governor sets an execution date. The Commissioner of the ADOC and the Warden at Holman play no role in selecting which condemned inmate comes next in carrying out a death sentence. In fact, Alabama law merely requires the Defendants to carry out an execution that has been authorized by the Alabama Supreme Court and set by the Governor. Ala. Code § 15-18-82(b), (c) ("It shall be

[8] The court takes judicial notice of the Attorney General's motion to set Smith's execution date in the Alabama Supreme Court pursuant to Fed. R. Evid. 201(b). This judicial act is not in dispute. The Eleventh Circuit has explained that "[j]udicial notice of court records is ordinarily confined to determining what happened in the course of a proceeding—when a plaintiff filed a complaint, what claims were argued and adjudicated on, and so on." *Kerruish v. Essex Holdings, Inc.*, 777 F. App'x 285, 293 (11th Cir. 2019). Moreover, "the Eleventh Circuit has distinguished between taking judicial notice of the fact that court records or court rulings *exist* versus taking judicial notice of the *truth* of the matter stated within those court records or court rulings." *Auto Owners Ins. Co. v. Morris*, 191 F. Supp. 3d 1302, 1304 (N.D. Ala. 2016) (emphasis in original). Here, the court references this document to show that the Attorney General, as the State of Alabama's representative to the Alabama Supreme Court, is the official who sought Smith's execution before others.

the duty of the Department of Corrections of this state to provide the necessary facilities, instruments, and accommodations to carry out the execution. The Warden of the William C. Holman unit of the prison system . . . shall be the executioner."). And nowhere in Smith's SAC does he state how either Defendant played a role in his selection over other inmates for execution.

Despite his allegation that the ADOC maintains a "custom" of waiting to move for an execution until a condemned inmate has exhausted his conventional appeals, Smith mischaracterizes *whose* custom it actually is. Smith cites to the custom mentioned in *Woods v. Comm'r, Ala. Dep't of Corrs.*, 951 F.3d 1288, 1292 (11th Cir. 2020), to support his equal protection claim. However, it is not the ADOC as an institution, nor the Defendants in their official capacities, that maintain this custom; instead, it is the Attorney General's office. Since the Attorney General is the state official who "attends to the criminal cases pending in the Supreme Court," a violation of this custom is fairly traceable back to the Attorney General, not the Commissioner of the ADOC or the Warden of Holman. Ala. Code § 36-15-1(b); *see Lujan*, 504 U.S. at 560. Therefore, Smith has failed to show an injury that is fairly traceable to any defendant in this case. *Lujan*, 504 U.S. at 560.

Smith's SAC is also devoid of any allegation that one or both of these two Defendants acted outside of their statutory authority or improperly influenced the Attorney General to move for Smith's execution. This court, absent allegations of such conduct, will assume that a state official's authority lies where the "applicable law purports to put it." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988). Since Smith is unable to show that his injury is fairly traceable to the Defendants, he lacks the required standing to bring his equal protection claim against them. *See Jacobson*, 974 F.3d at 1245 ("To have a case or controversy, a [plaintiff] must establish that he has standing, which requires proof of [all] three elements.").

The court is aware of prior capital punishment litigation in Alabama federal courts involving equal protection claims where the Attorney General was a defendant, yet the choice to include the Attorney General was not made here even though Smith sued the Attorney General in his previous litigation. *See generally*, *Woods v. Dunn*, No. 2:20-cv-58-ECM, 2020 WL 1015763 (M.D. Ala. Mar. 2, 2020); *Smith*, No. 2:22-cv-497-RAH, 2023 WL 4353143.

Standing aside, Smith's equal protection claim also fails on the merits for a different but related reason: the lack of a causal connection.[9] Without a causal connection between a defendant's actions and a plaintiff's alleged constitutional violation, a § 1983 claim fails. *See Spencer v. Benison*, 5 F.4th 1222, 1232 (11th Cir. 2021) (quoting *Troupe v. Sarasota Cnty.*, 419 F.3d 1160, 1165 (11th Cir. 2005)). Smith's equal protection claim is premised upon an alleged custom by the ADOC in how it determines whose execution date will be set next. As Smith defines the claim in the SAC, his claim focuses on whether or not the Defendants violated their "custom [to] wait[] to move for an inmate's execution until he has exhausted his conventional appeals: direct appeal, state postconviction, and federal habeas." (Doc. 31 at 2–3, 29 (quoting *Woods*, 951 F.3d at 1292)). But again, the Defendants are not involved in the selection of condemned inmates for execution, moving for an execution date, or authorizing an execution. Their duties are statutory and are merely to carry out an execution once authorized by the Alabama Supreme Court and set by

[9] Defendants also argue that Smith's claim is due to be dismissed under the *Rooker-Feldman* doctrine, arguing that success on this claim would effectively nullify the Alabama Supreme Court's authorization of Smith's execution. The court declines to apply the narrow *Rooker-Feldman* doctrine because Smith does not identify or complain of an injury caused by the Alabama Supreme Court but rather complains about the conduct of the Defendants in "selecting" him for execution despite having an appeal outstanding. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (holding that the *Rooker-Feldman* doctrine is limited and confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments").

the Governor. *Compare* Ala. Code § 15-18-82 *with* Ala. Code § 36-15-1(2). There is no discretion in the Defendants' responsibilities or duties here. And nowhere in the SAC or in his responsive briefing does Smith allege that these two Defendants—Hamm or Raybon—were involved in the process of selecting Smith, or any other condemned inmate, for execution, or were involved in moving the Alabama Supreme Court to authorize Smith's execution. Alabama law provides no ability for either of these Defendants to involve themselves in this process. As such, there is simply no causal connection between the Defendants' actions, Smith's alleged equal protection violations, and Smith's injury, other than the Defendants' mandatory and statutory obligations to carry out the death sentence.

In short, Count One must be dismissed for several reasons. Despite Smith's allegations, Defendants Hamm and Raybon do not have the statutory power to select, move for, or authorize his execution—those actions lie with the Attorney General and the Alabama Supreme Court. As a result, Count One suffers from traceability and causation infirmities that require its dismissal.

3. The First Amendment Free Speech Claim

In Count Three, Smith alleges that the Protocol violates his First Amendment rights because it "will interfere with [his] right to make an audible statement and to pray audibly" and "[a]ny statement or prayer . . . may risk consequences associated with dislodging the mask and/or building the level of carbon dioxide under the mask." (Doc. 31 at 31.) Thus, two parts comprise Smith's claim: (1) a free exercise claim and (2) a free speech claim. Because RLUIPA claims "embed[] a heightened standard for government restrictions on the free exercise of religion" than do First Amendment free exercise claims, the court reserves its analysis of Smith's free exercise claims for its discussion of Smith's RLUIPA claim. *Dorman v. Aronofsky*, 36 F.4th 1306, 1313 (11th Cir. 2022). And because, as discussed below, Smith pled

facts sufficient to state a claim that the Protocol violates his First Amendment right to free speech, the Defendants' motion to dismiss that claim is due to be denied.[10]

In the context of the execution chamber, it is not obvious or recognized that Smith has a First Amendment "right to make an audible statement" that the SAC alleges he has. (Doc. 31 at 31.) *See In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2017 WL 2964901, at *26 (S.D. Ohio 2017) ("While last statements have traditionally been a part of executions in the Anglo-American tradition, nothing in the Constitution compels honoring that tradition. In the contemporary Ohio context, the means of communication between the inmate in the death chamber and witnesses in the witness room is by way of a microphone provided by the State. Even if the Constitution protects—on free speech or free exercise grounds—the right of an inmate to speak, it does not compel the State to furnish him with a means to ensure that speech is heard by certain people."). Although "federal courts must take cognizance of the valid constitutional claims of prison inmates," *Turner v. Safley*, 482 U.S. 78, 84 (1987), "a lesser standard of scrutiny is appropriate in determining the constitutionality of [] prison rules" than in determining the validity of laws impacting constitutional rights outside the prison context, *id.* at 81. Specifically, a prison regulation or protocol impacting prisoners' constitutional rights is valid if "the regulation is . . . reasonably related to legitimate penological interests." *Id.* at 89 (alterations in original) (citations omitted). And there are four factors used to

[10] In the SAC, Smith also states that his single-walk status "burdens the exercise of his religion," although he does not state exactly how his exercise of religion is burdened. (Doc. 31 at 26.) Moreover, Smith did not include a single-walk status allegation in his First Amendment claim (Count Three), RLUIPA claim (Count Four), or ARFA claim (Count Five), and he did not respond to the Defendants' arguments about Smith's single-walk status in their motion to dismiss. (Doc. 39 at 59, 62, 64–65, 68.) Accordingly, the court considers Smith's allegations that his single-walk status interferes with his religious exercise abandoned.

determine whether a regulation is reasonably related to legitimate penological interests:

> (1) whether there is a "valid, rational connection" between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an "exaggerated response" to prison concerns.

Hakim v. Hicks, 223 F.3d 1244, 1247–48 (11th Cir. 2000). Thus, to state a First Amendment claim, Smith must state facts alleging that the prison regulation is unreasonable, and facts supporting the *Hakim* factors would help him do so.

Taking everything Smith alleges in the SAC as true, the court concludes the SAC sufficiently alleges that the Protocol's burden on his speech is not reasonably related to a legitimate penological interest. Smith offers an alternative that would resolve his free speech concerns (allowing him to speak without a mask on) (Doc. 31 at 27), and he states that there is no "compelling governmental interest that justifies" masking Smith for his final statement, (Doc. 31 at 6). And crucially, "evaluating whether there is a legitimate penological interest that permits a restriction on the constitutional rights of incarcerated individuals is not normally an exercise that can be undertaken in the context of a motion to dismiss brought under Rule 12(b)(6)." *Mayberry v. Humphreys Cnty.*, No. 3:11-0855, 2012 WL 4506027, at *9 (M.D. Tenn. Sept. 4, 2012) (citations omitted), *report and recommendation adopted*, No. CIV. 3:11-0855, 2012 WL 4490809 (M.D. Tenn. Sept. 28, 2012). Smith's response to Defendants' assertion that he has not stated a First Amendment free speech claim is that he needs further factual development so that he can address the *Hakim* factors. (Doc. 44 at 46.) Moreover, the Defendants fail to identify binding law on this court that states that any of their asserted interests (*see* Doc. 39

at 50–51) are, as a matter of law, reasonably related to the need to mask Smith at the time of his final words. And so, "[w]hile Defendants may develop evidence consistent with *Turner* that [they] could rely on at the summary judgment stage, there is no such evidence before the Court at this juncture." *Garber v. Conway*, No. 1:16-CV-137-AT, 2016 WL 11545540, at *2 n.2 (N.D. Ga. Dec. 6, 2016). And even if there was, the court cannot consider it for purposes of the Defendants' motion to dismiss.

Although it is entirely possible that the Protocol's regulation of Smith's speech rights is reasonable, that fact-centered determination is not before the court at this stage of the litigation. Instead, the court must determine whether Smith has alleged enough to state a plausible claim that the Protocol imposes an unreasonable restriction on his First Amendment free speech rights. Because the court concludes he did, although barely, the Defendants' motion to dismiss Smith's free speech claim in Count Three will be denied.

4. The RLUIPA Claim

Count Four alleges that the Protocol violates RLUIPA because it (1) "substantially burdens Mr. Smith's religious exercise to pray audibly" during his last statement and because it (2) "substantially burdens Mr. Smith's religious exercise to pray audibly by forcing Mr. Smith to choose between abstaining from his religious practice of audible prayer at the end of his life or face the dangerous consequences of dislodging the mask while praying." (Doc. 31 at 32.) Because Smith has sufficiently pled that the Protocol substantially burdens an exercise of his sincere religious beliefs, the Defendants' dismissal motion as to Smith's RLUIPA claim will be denied.

RLUIPA states that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if

> the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a). The Supreme Court has summarized the RLUIPA test as follows:

> A plaintiff bears the initial burden of proving that a prison policy implicates his religious exercise. Although RLUIPA protects any exercise of religion, whether or not compelled by, or central to, a system of religious belief, a prisoner's requested accommodation must be sincerely based on a religious belief and not some other motivation. The burden on the prisoner's religious exercise must also be substantial. Once a plaintiff makes such a showing, the burden flips and the government must demonstrate that the imposition of the burden on that person is the least restrictive means of furthering a compelling governmental interest.

Ramirez v. Collier, 595 U.S. 411, 425 (2022) (cleaned up). Thus, to survive a motion to dismiss a claim that a prison policy violates RLUIPA, Smith must plead that audible prayer is an exercise of his sincere religious beliefs and that the Protocol substantially burdens his ability to audibly pray. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015) (stating that "of course, a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation"); *Williams v. Wilkinson*, 645 F. App'x 692, 699 (10th Cir. 2016) ("To survive a motion to dismiss . . . [the prisoner] was required to allege only that his request to eat a kosher diet was motivated by a sincerely held religious belief and that his exercise of that belief has been substantially burdened by the government.").

As to religious exercise, the SAC alleges that Smith is a "man of faith." (Doc. 31 at 11.) Audible prayer is an exercise of that religious faith. The Supreme Court has found that "traditional forms of religious exercise" satisfy the religious exercise

prong of RLUIPA, and that "there is a rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation[.]" *Ramirez*, 595 U.S. at 425, 427. Moreover, the court struggles to conceive of a practice more central to religious exercise than audible prayer. Accordingly, the court finds that Smith has pled sufficient facts to state a plausible claim under the first prong of the RLUIPA analysis.

And as to RLUIPA's substantial burden analysis, the

> inquiry . . . asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other form of religious exercise. We have held that a substantial burden is more than an inconvenience and is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. We said in *Midrash Sephardi* that a substantial burden can tend to force adherents to forego religious precepts or mandate religious conduct.

Dorman, 36 F.4th at 1314 (cleaned up). Smith alleges that being masked "may prevent [his] prayers from being audible," and that during his execution he will face the untenable choice of either praying audibly or risking the consequences of dislodging the mask. (Doc. 31 at 32.) Taking these allegations as true, Smith has stated a plausible claim that the Protocol substantially burdens his religious exercise under RLUIPA. Accordingly, because Smith has plausibly pled that the Protocol imposes a substantial burden on his religious exercise, the Defendants' motion to dismiss Smith's RLUIPA claim (Count Four) will be denied.

5. The First Amendment Free Exercise Claim

As previously stated, "[i]f a prison's regulation passes muster under RLUIPA . . . it will perforce satisfy the requirements of the First Amendment, since RLUIPA offers greater protection to religious exercise than the First Amendment offers." *Smith v. Allen*, 502 F.3d 1255, 1264 n.5 (11th Cir. 2007). And "[i]f a claim fails under the RLUIPA—which embeds a heightened standard for government

restrictions of the free exercise of religion—it necessarily fails under the First Amendment." *Dorman*, 36 F.4th at 1313 (citing *Allen*, 502 F.3d at 1264 n.5). Because Smith has plausibly pled a RLUIPA claim, Smith has also necessarily pled a plausible First Amendment free exercise claim, and therefore the Defendants' motion to dismiss Smith's free exercise claim in Count Three will be denied.

6. The ARFA Claim

Section V of the ARFA states:

> (a) Government shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person:
>
> (1) Is in furtherance of a compelling governmental interest; and
>
> (2) Is the least restrictive means of furthering that compelling governmental interest.

Ala. Const. amend. 622 § V. "Thus, ARFA, like RLUIPA, requires the government's action to satisfy strict scrutiny to survive review." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 83 F.4th 922, 929 (11th Cir. 2023) (*TMAA II*). But there is an important difference between RLUIPA and ARFA: rather than requiring a "substantial" burden on religious exercise as RLUIPA does, *any* burden on "freedom of religion" triggers ARFA. *See Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 840 (11th Cir. 2021) (*TMAA I*) ("Under Alabama law, our job (giving it our best *Erie* guess) is to interpret [ARFA's] language to mean exactly what it says. And what ARFA says is that *any* burden—even an incidental or insubstantial one—suffices to trigger strict scrutiny." (internal quotations and citations omitted)).

Were the court to have found that Smith's RLUIPA claim failed to state a claim because Smith did not plead a "substantial burden," the critical difference between RLUIPA and ARFA would be relevant here: while Smith might not have pled a *substantial* burden, he could have still survived the Defendants' motion to dismiss his ARFA claim having merely pled a burden. *See TMAA I*, 980 F.3d at 839 ("ARFA repeatedly states that, except in extraordinary circumstances, the government may not 'burden' religious exercise. In its 'findings' section, ARFA provides that '[g]overnments should not *burden* religious exercise without compelling justification.'" (emphasis in original) (quoting Ala. Const. amend. 622)). But because Smith has successfully pled that the Protocol substantially burdens his sincere religious beliefs, the critical difference between RLUIPA and ARFA does not matter here. As such, Smith has sufficiently pled that the Protocol merely *burdens* Smith's religious exercise, and therefore the Defendants' motion to dismiss Smith's ARFA claim will be denied.

B. Smith's Preliminary Injunction Motion

Smith's motion for preliminary injunction proceeds only as to those claims that survive the Defendants' motion to dismiss and only on those claims for which he has sought a preliminary injunction against his execution under the Protocol—his Eighth Amendment, RLUIPA, and ARFA claims.[11]

"When ruling on a preliminary injunction, 'all of the well-pleaded allegations [in a movant's] complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true.'" *Alabama v. U.S. Dep't of Com.*, 546 F. Supp. 3d 1057, 1063 (M.D. Ala. 2021) (quoting *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976)). "At the preliminary injunction stage, a district court may

[11] Although his First Amendment claims (Count Three) survived the Defendants' motion to dismiss, Smith did not seek a preliminary injunction based on them. Accordingly, the court will not consider Smith's First Amendment claims in his request for a preliminary injunction.

rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding.'" *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (quoting *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986)).

And crucially, "where facts are *bitterly* contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1312 (11th Cir. 1998) (emphasis added). At an evidentiary hearing, the district court sits as both factfinder and credibility assessor. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003). Highly disputed factual issues may cast doubt on the plaintiff's substantial likelihood of success. Ultimately, "[t]he grant or denial of a preliminary injunction is a decision within the sound discretion of the district court." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Smith is entitled to a preliminary injunction if he demonstrates (1) a substantial likelihood of success on the merits; (2) a likelihood of suffering irreparable injury without the injunction; (3) that the threatened injury to him outweighs the harm the injunction would cause the State; and (4) that the injunction would not be adverse to the public interest. *Barber*, 73 F.4th at 1317. A preliminary injunction is "'not to be granted unless the movant clearly established the "burden of persuasion"' for each prong of the analysis." *Am.'s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014) (citation omitted). Smith, as the movant, must satisfy his burden on all four elements "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

Substantial likelihood of success on the merits is "the most critical" factor in the preliminary injunction analysis, and because the court concludes that Smith has failed to meet his burden on this factor, "'it is unnecessary' for the court to determine whether [Smith] 'satisfied the second, third, or fourth factors.'" *Barber*, 73 F.4th at 1317 (quoting *Grayson v. Warden, Comm'r, Ala.*, 869 F.3d 1204, 1238 n.89 (11th Cir. 2017)). Although Smith has plausibly alleged claims such that they survive dismissal at the motion to dismiss stage, he has failed to show a substantial likelihood of success on their merits. Accordingly, Smith's motion for preliminary injunction will be denied.

1. The Eighth Amendment Claim

Execution by nitrogen hypoxia is unusual because it is novel. But Smith has the burden to "establish a likelihood" that the Protocol is unconstitutionally cruel because it will inflict an "unacceptable risk of severe pain" that is "substantial when compared to known and available alternatives." *Glossip*, 576 U.S. at 878. The Eleventh Circuit has applied the Supreme Court's Eighth Amendment method-of-execution framework and held that a condemned inmate must show that the challenged method of execution creates "a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment," and additionally must point to "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Price*, 920 F.3d at 1326 (quoting *Glossip*, 576 U.S. at 877). In other words, Smith must again satisfy the *Baze*-*Glossip* test, as interpreted in *Price*, but now he must bolster his allegations, which are highly contested by the Defendants, with evidence to meet his heavy burden.

The parties do not dispute that nitrogen hypoxia can and ultimately will result in death. Smith contends the Protocol lacks the "proper controls" to alleviate the

risk of "torture or lingering death," (Doc. 19 at 24, 28 (quoting *Baze*, 553 U.S. at 49–50)), or the "'superadd[ing]' of 'terror, pain, or disgrace,'" (*id.* at 24 (quoting *Bucklew*, 139 S. Ct. at 1124).) In other words, he argues that there are deficiencies with the Protocol that could unnecessarily prolong his death or result in complications short of death, such as a persistent vegetative state or experiencing a stroke, the sensation of suffocation, or choking. In his SAC, Smith originally enumerated six purported deficiencies in the Protocol that will subject him to a substantial risk of serious harm. However, since that time, Smith has been given a complete, unredacted copy of the Protocol and has engaged in limited expedited discovery, both of which appear to have allayed some of those concerns. As such, at the evidentiary hearing and in his briefing, Smith has reduced those six initial deficiencies down to three: (1) use of an off-the-shelf mask, as opposed to some other device such as a hood, subjects Smith "to a substantial risk of oxygen infiltration"; (2) the specific mask the ADOC intends to use for Smith's execution "will permit the entertainment of room air" resulting in a substantial risk of superadded pain short of death; (3) the Protocol itself, and Smith's individual circumstances—now suffering from PTSD and depression as a result of the failed lethal injection execution attempt and his looming execution—subjects him to a "substantial risk of asphyxiation on his own vomit[.]" (Doc. 65 at 25–44.) Smith's briefing and arguments at the hearing focus his superadded pain argument on his assertion that the Protocol *may* result in him vomiting while the mask is on which, according to Smith, could cause him to choke and/or could dislodge the seal of the mask, thereby allowing oxygen and outside air into the mask after the nitrogen begins to flow, which risk pain and physical complications short of death.

To reduce or alleviate the purported substantial risk of harm, Smith proposes two allegedly feasible and readily implemented alternative methods: (1) an amended

nitrogen hypoxia protocol that includes ten proposed changes,[12] or (2) death by firing squad using Utah's execution protocol. (Doc. 31 at 27–28; Doc. 19 at 28–29.) In support of the firing squad, Smith submitted Utah's execution protocol (*see* Doc. 19-8) and the declaration of Dr. Jonathan I. Groner, M.D., stating:

> The Utah firing squad protocol involves 4 skilled individuals firing 30 caliber bullets directly at the inmate's heart. These bullets will tear open the heart causing immediate loss of pumping function to the heart. The loss of pumping function of the heart will cause the blood flow to the brain to cease immediately. Loss of consciousness occurs a few seconds after blood flow to the brain ceases. The loss of consciousness that occurs when blood flow to the brain ceases is

[12] Smith did not draft a proposed amended nitrogen hypoxia protocol. Instead, he submitted a bullet-point list of ten proposed amendments:

- Measure each condemned person subject to execution by nitrogen hypoxia for a custom fit mask to reduce the risk that oxygen leaks under the mask seal or, alternatively, use a closed space or a hood.
- Provide a condemned person an opportunity to speak and to audibly pray without being masked.
- Disclose the training that the execution team members will receive in placing and adjusting the mask over the condemned inmate's face, their level of experience with the masks being used, and the metrics that will be used to ensure the mask is "properly placed" and passes the "final inspection."
- Add a mechanism to remove carbon dioxide that the condemned inmate exhales from under the mask.
- Disclose the source of the nitrogen to be used, and information about its transportation and storage to avoid contamination.
- Require testing of the nitrogen gas before use to ensure purity of the nitrogen gas.
- Add procedures to monitor the pulse oximeter throughout the process.
- Add procedures to halt the execution if the condemned person vomits into the mask.
- Add procedures for attempting to execute condemned inmates who have survived a previous attempt and are experiencing PTSD as a result.
- Employ a third-party licensed medical provider who (1) will be permitted to observe the execution process from the time the condemned inmate is taken into the execution chamber until completed, and (2) has the authority to call off or postpone the execution if, in his or her judgment, the condemned inmate is at risk of serious injury short of death.

(Doc. 31 at 27–28 ¶102; Doc. 19 at 28–29.)

> complete, meaning the individual cannot experience pain. The inmate will remain comatose and be clinically dead (absence of heart beath, breathing, or any reflexes) within a few minutes.

(Doc. 19-8.)

Smith submitted the declarations of Dr. Yong and Dr. Nitschke, both of whom opined that improper sealing of the face mask, movement of Smith's head or mouth during the execution process, improper gas pressure and flow, vomiting, and respiratory complications specific to an individual person *could* each complicate the execution process and *may* result in prolonged time to death or medical complications short of death—like the sensation of suffocation, panic, stroke, or a persistent vegetative state. Both Dr. Yong and Dr. Nitschke testified at the hearing on December 20, 2023. No evidence was presented showing either Dr. Yong or Dr. Nitschke had read the unredacted Protocol in its entirety, but both testified they had reviewed the redacted Protocol. Dr. Yong testified from his viewpoint as a medical doctor, whose goal is to minimize risks in medical settings to reduce complications and to preserve life and not to reduce complications in a penal setting for the purpose of quickly ending life, as is the case here. From Dr. Nitschke's perspective with a background in assisted suicide, although he stated those seeking assisted suicide now tend to use a hood system instead of a mask, he did not, nor could he, identify to a scientific certainty or likelihood that the ADOC's choice of this particular mask when combined with Smith's physical characteristics or with speaking or praying will in fact cause complications from air leakage or a dislodged seal, and he testified at the hearing that nausea is possible even in a hood system. What both doctors acknowledged, although from different viewpoints, was that nitrogen hypoxia would ultimately cause death.

As to the possibility of vomiting inside the mask during the execution, Stewart-Riley, the Regional Director of the ADOC, testified that the execution team

would remove and clean the mask and check and clean Smith's airway if Smith vomited *before* nitrogen was introduced into the mask. She also testified that the team would not halt the execution if Smith vomited *after* nitrogen was introduced into the mask. Both Dr. Yong and Dr. Nitschke stated, in their professional opinions, the Defendants' proposed procedure to handle vomit *could* lead to death by asphyxiation instead of hypoxia. Notably, neither expert stated, or could state to a scientific or medical certainty, the time to unconsciousness after nitrogen is introduced into the mask, the time to death, or what percentage of oxygen or other breathing air could cause pain if the mask dislodged.

Although Dr. Yong and Dr. Nitschke were largely silent on the possibility that Smith himself could vomit during the execution, Smith introduced the testimony of Dr. Porterfield. Dr. Porterfield testified Smith suffers from nausea resulting from PTSD and depression. She also opined that the Protocol does not account for Smith's individual mental circumstances and therefore may cause him to panic or experience "fight or flight dissociation" during the execution. (Doc. 19-3 at 8.)

Dr. Porterfield acknowledged under questioning by defense counsel that Smith told her that he did not experience nausea during the previous execution attempt and that he did not report to her vomiting from PTSD-induced nausea since that time. No one, including Dr. Porterfield, could state with any certainty whether Smith will feel nauseous during the execution. And no one could state with any certainty the likelihood Smith will vomit during the execution, with or without the mask on, before or during the administration of nitrogen; when, where, or how much he might vomit during the execution, or any other condition or risk. Nor did any witness provide a foundation upon which any such likelihood of vomiting would be based, such as the time of Smith's last meal, whether Smith would eat a last meal, and if so, the volume of stomach contents that would exist at the time of execution. Instead, witnesses merely opined to the theoretical possibility the Protocol may lead

a condemned inmate to vomit, and—by extrapolation—the complications from an episode of vomiting if the mask happened to become dislodged during the execution or was removed altogether.

In response, the Defendants argue that each of the purported deficiencies Smith has identified in the Protocol, although posing *some* theoretical risks, do not rise to the level of *substantial* risk of causing severe pain when compared to Smith's proposed alternatives. And as to the alternatives, the Defendants argue that Smith's list of proposed amendments to the Protocol fails *Nance*'s "veritable blueprint" standard, *see Nance II*, 597 U.S. at 169 (stating that a condemned person proposing an alternative method of execution must provide "a veritable blueprint for carrying the death sentence out" and "persuade[] a court that the State could readily use his proposal to execute him"), but offer little argument against Utah's method of execution by firing squad except to attack the brevity of Dr. Groner's declaration.

In opposition to Smith's preliminary injunction request, the Defendants submitted the declaration of Stewart-Riley. (Doc. 39-13.) Stewart-Riley stated that she is familiar with the mask that is to be used and that the mask "is designed to fit and does fit a broad range of wearers." (*Id.* at 2.) She said the mask will be secured to Smith using a five-point harness or strapping system "that allows for a secure fit, even in instances where the wearer needs to be able to communicate with others" when masked. (*Id.* at 2–3.) Based on Stewart-Riley's observations, "the strapping system creates a tight seal" and Smith will be able to speak audibly without dislodging the mask. (*Id.* at 3.) Stewart-Riley also stated that she has worn the mask herself and she "was able to breathe comfortably and to make [her]self heard by those around [her], including persons in the witness rooms[.]" (*Id.*) Finally, she said she and others who wore the mask did not report problems breathing or complications arising from the entrapment of carbon dioxide because the "mask is

designed to be used with supplied air and features exhalation valves for venting carbon dioxide." (*Id.*)

As to the mask's design and fit, the court inspected it, including the harness system, the contours and size of the face shield, and the rubber seal. Given its design, the court finds it highly unlikely that the mask would dislodge or that the seal would be broken and outside air introduced if it is tightly secured on the condemned inmate's head in a positive pressure environment, even under the scenarios Smith alleges could break the seal—like audibly speaking or moving his mouth or head.

The Defendants also submitted the declaration of Dr. Antognini. In his declaration, Dr. Antognini opined the time to unconsciousness when nitrogen is introduced into a virtually air-tight mask is 35 to 40 seconds, and the time to death is 10 to 15 minutes. He arrived at his conclusion using case reports studying the lethality of inert gases during industrial accidents and assisted suicides. Dr. Antognini disagreed with Dr. Yong and Dr. Nitschke: it is his "expert medical and scientific opinion that the use of the mask, as proposed, and the delivery of nitrogen to the mask, would result in rapid unconsciousness, followed by cardiac arrest and death[,]" and that the condemned inmate would experience no pain as a result of the nitrogen hypoxia execution process. (Doc. 62-60 at 16–17.) But the court recalls defense counsel's cross-examination of Dr. Yong and, specifically, when Dr. Yong testified that, because so little data exists on the use of inert gases to cause death in humans, he could not give an opinion with any certainty concerning the time to unconsciousness or time to death based merely on extrapolations sourced from industrial accidents or assisted suicides.

What the testimony from the experts shows, if anything from an overall standpoint of consistency, is that the uninterrupted introduction of pure nitrogen will result in nitrogen hypoxia and that nitrogen hypoxia will ultimately lead to death. On this record, there is simply not enough evidence to find with any degree of

certainty or likelihood that execution by nitrogen hypoxia under the Protocol is substantially likely to cause Smith superadded pain short of death or a prolonged death. It could, in a highly theoretical sense, but only if a cascade of unlikely events occurs.[13] Or it may well be painless and quick. Execution by nitrogen hypoxia is novel, and it will remain novel even if the Defendants employ Smith's proposed amendments to the Protocol.

But novel methods of execution are not new to the federal courts, and the Supreme Court has examined them before. After all, although lethal injection is currently the most common form of execution in the present day in this country, it was once novel. So too were the introduction of various types of sedatives and drugs during the evolution of many states' lethal injection protocols over the years. For example, in *Glossip*, the Supreme Court considered the constitutionality of Oklahoma's amended three-drug lethal injection protocol which replaced pentobarbital with midazolam after Oklahoma was unable to source sodium thiopental and pentobarbital. 576 U.S. at 871. Faced with a dearth of evidence relating to the use and effects of midazolam during a lethal injection procedure in humans, the Supreme Court affirmed the district court's denial of a preliminary injunction because the district court had not clearly erred when it found the condemned petitioners failed to establish that a massive dose of midazolam during the lethal injection procedure would entail a substantial risk of severe pain. *Id.* at 883–84. The fact that little or no evidence and scientific proof on the topic existed did not relieve the condemned petitioners of their burden "of showing that the method creates an unacceptable risk of pain." *Id.* at 884.

[13] For example, Smith eating a sufficiently large meal at a time sufficiently close to the execution which, together with his anxiety and/or PTSD, results in him vomiting a sufficient volume of stomach contents into the mask after nitrogen has been introduced that in turn clogs his airways or impacts the performance of the mask and requires the execution team to intervene and interrupt the flow of nitrogen.

Again, preliminary injunctions are extraordinary remedies meant to preserve the status quo until the merits of a case are fully and fairly adjudicated. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001). They are the exception, not the rule. *Barber*, 73 F.4th at 1317 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). So, it is Smith's burden to show a substantial likelihood that he will succeed on his Eighth Amendment claim before the court will enjoin his execution to allow him to litigate his challenge, and for good reason. The status quo here is that Smith will be executed by nitrogen hypoxia on January 25, 2024, using the ADOC's current Protocol. Courts presume, based upon the history and development of capital punishment in this country and the legislative process, that the Defendants do not "seek[] to superadd terror, pain, or disgrace to their executions" unless and until a condemned person can make the requisite showing under *Baze* and *Glossip*. *Bucklew*, 139 S. Ct. at 1124–25 (citing *Baze* and *Glossip*).

Considering all the evidence presented and the parties' arguments, Smith has not met that burden. His evidence and allegations amount to speculation, at best "scientific controvers[y,]" well short "of showing that the method creates an unacceptable risk of pain." *Glossip*, 576 U.S. at 882, 884. As in *Glossip*, Smith's own experts effectively conceded that they lacked evidence to prove Smith's case beyond dispute. *See id.* at 884. Proof of *some* theoretical risk does not clear Smith's high hurdle: "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50. Smith has argued and provided some evidence that the Protocol could theoretically result in some risk of pain if many other events occur, like vomiting or the dislodging of the mask during the execution procedure but—far from providing a feasible, readily implemented alternative nitrogen hypoxia protocol with his list of proposed amendments to the Protocol or his cursory allegations and evidence about

the firing squad—he has not shown the current Protocol is sure or very likely to cause substantial risk of serious harm or superadded pain when compared to either of his alleged alternatives, nor that either of his alternative methods would in fact significantly reduce that risk if used instead.

Smith is not guaranteed a painless death. *Bucklew*, 139 S. Ct. at 1124. On this record, Smith has not shown, and the court cannot conclude, the Protocol inflicts both cruel and unusual punishment rendering it constitutionally infirm under the prevailing legal framework. Having failed to show a substantial likelihood of success on the merits, Smith is not entitled to injunctive relief on his Eighth Amendment claim.

2. The RLUIPA Claim

In his motion for preliminary injunction, Smith argues that the Protocol "substantially burdens [his] religious exercise by inhibiting audible prayer at the time of his execution." (Doc. 19 at 30.) For the court to issue a preliminary injunction on Smith's RLUIPA claim, Smith must, as a threshold matter, clearly establish a prima facie case—that is, that the Protocol substantially burdens his sincere religious beliefs. *See Hudgens*, 742 F.3d at 1329; *Ramirez*, 595 U.S. at 425. If Smith establishes a prima facie case, the burden then shifts to the Defendants to demonstrate that the Protocol is the least restrictive means of furthering a compelling government interest. *See, e.g.*, *Smith v. Comm'r, Ala. Dep't of Corr.*, 844 F. App'x 286, 291–93 (11th Cir. 2021).

The RLUIPA analysis for Smith's preliminary injunction request begins with RLUIPA's first prong: whether Smith can clearly establish that audible prayer is an exercise of his sincere religious beliefs. Smith's SAC states that he is a man of faith and that he prayed audibly during his previous attempted execution. And during the December 20, 2023 evidentiary hearing, Smith testified to the plans that he and his spiritual advisor have made for the day of his execution, and that those plans include

audibly praying. Moreover, the Defendants do not appear to question this aspect of Smith's RLUIPA burden. Accordingly, the court finds that Smith has carried his burden to show that audible prayer is an exercise of his sincere religious beliefs. The preliminary injunction analysis thus moves to whether Smith has clearly established that the Protocol substantially burdens his ability to audibly pray.

The substantial burden prong of the RLUIPA analysis requires that, for the court to issue a preliminary injunction, Smith clearly establish that the Protocol will force him to "engage in conduct that seriously violates [his] religious beliefs." *Holt*, 574 U.S. at 360 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014)). The Eleventh Circuit has written that "'substantial burden' requires something more than an incidental effect on religious exercise." *Midrash Sephardi*, 366 F.3d at 1227.

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Id.

The evidence Smith presented that the mask will substantially burden his ability to audibly pray during his execution was, as described above in the court's analysis of Smith's Eighth Amendment claim, speculative. Dr. Yong and Dr. Nitschke stated via their declarations that improper sealing of the face mask and movement of Smith's head or mouth *could* complicate the execution process and *may* result in prolonged time to death or medical complications short of death. And Smith stated that this possibility could lead him to elect not to audibly pray while he

is being executed.[14] So while this assertion could be true, it is speculative because it is not based on any evidence that Smith has presented and because it is untethered from the mask that will be used during Smith's execution.

In contrast to the limited evidence that Smith provided, the Defendants provided substantial evidence showing that the mask used during the execution will not dislodge if Smith elects to audibly pray. The Defendants provided numerous videos showing multiple individuals on the execution gurney in the execution chamber speaking while wearing the mask without any problem associated with dislodging the mask. (Docs. 62-72 to 62-77.) And further, Stewart-Riley stated in her affidavit:

> 3. The mask that ADOC intends to use is designed to fit and does fit a broad range of wearers. I understand that this type of mask is commonly used for industrial purposes. The mask features a five-point strapping system that allows for a secure fit, even in instances where the wearer needs to communicate with others while wearing the mask.
>
> 4. I have observed the mask in use in conditions closely replicating those that will take place during the execution. … Based on my observations, the strapping system creates a tight seal. Individuals wearing the mask have been able to speak audibly without dislodging the mask. It would be highly unlikely and very difficult for the wearer to dislodge the mask without use of his or her hands.

(Doc. 39-13 at 2–3.)

In sum, the Defendants have provided substantial evidence that the mask will not dislodge if Smith audibly prays during his execution. Smith, in contrast, provided little-to-no actual evidence, let alone compelling evidence, to the contrary. So, while Smith's evidence does suggest that it is *possible* that his audible prayer

[14] The court notes that Smith did not plead and did not present evidence that he actually *would* elect not to audibly pray out of fear of dislodging the mask. Smith's pleadings and evidence only indicate that he believes he would have to choose between the two. (*See* Doc. 31 at 32–33.)

could dislodge the mask during his execution to some extent, Smith has failed to meet the requisite burden required for this court to issue a preliminary injunction. Having considered the evidence presented at the December 20, 2023 evidentiary hearing as well as the written and physical evidence submitted by the parties, the court concludes that Smith has not clearly established that his ability to audibly pray at the time of his execution will be substantially burdened by wearing the execution mask.[15] Accordingly, Smith has not shown a substantial likelihood of success on the merits of his RLUIPA claim.

3. The ARFA Claim

Again, ARFA, unlike RLUIPA, only requires that Smith show that the Protocol will *burden* his religious exercise. *TMAA I*, 980 F.3d at 840. But the difference between ARFA and RLUIPA is irrelevant here: Smith has not clearly shown that there is likely to be *any* burden on his ability to audibly pray during his execution. The evidence presented strongly shows the opposite. Smith will have to wear a mask during his execution, but Smith has not shown that wearing a mask in and of itself burdens the exercise of his religion. Smith has therefore not shown a substantial likelihood of success on the merits of his ARFA claim.

V. CONCLUSION

For these reasons, it is **ORDERED** as follows:

1. The Defendants' Motion to Dismiss (Doc. 39) is **GRANTED in part and DENIED in part**. Count One of Plaintiff's Second Amended Complaint (Doc. 31) is **DISMISSED without prejudice**. Counts Two, Three, Four, and Five remain.

[15] In their supplemental briefing, and at the court's suggestion, the Defendants state that they are *willing* to modify the Protocol to allow Smith to audibly pray with his spiritual advisor in the execution chamber with the mask off. (*See* Doc. 66 at 45–46.) But the Defendants did not say they *will* in fact modify the Protocol as such, so the court analyzes Smith's preliminary injunction request assuming they will not do so.

2. Plaintiff's *Motion for Preliminary Injunction to Enjoin Defendants from Executing Mr. Smith by Nitrogen Hypoxia Using Their Protocol* (Doc. 19) is **DENIED**.

DONE on this the 10th day of January 2024.

R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10095

KENNETH EUGENE SMITH,

Plaintiff-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:23-cv-00656-RAH

Before WILSON, JILL PRYOR, and GRANT, Circuit Judges.

BY THE COURT:

On January 19, 2024, Plaintiff-Appellant Kenneth Eugene Smith filed a "Notice of Supplemental Evidentiary Submission." After review, we construe this is a motion to supplement the record, and as such that motion is DENIED WITHOUT PREJUDICE. *See Dickerson v. State of Ala.*, 667 F.2d 1364, 1367 (11th Cir. 1982) ("While federal appellate courts do not often supplement the record on appeal with evidence not reviewed by the court below, it is clear that the authority to do so exists."). We would permit Smith to refile his motion after he first seeks relief in the district court.

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

KENNETH EUGENE SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:23-cv-656-RAH
	)	[WO]
JOHN Q. HAMM, *et al.*,	)	
	)	
Defendants.	)	

ORDER

The Eleventh Circuit Court of Appeals remanded the case to this court for the limited purpose of "entertain[ing] Smith's motion to supplement the record[,]" and "to permit the State to submit additional evidence in response to Smith's new evidence." (Doc. 84.) The Eleventh Circuit asked the court "to determine whether the new evidence would change the previous factual findings or conclusions of law in its January 10, 2024 order denying Smith's request for a preliminary injunction." (*Id.*)

The court incorporates its previous factual findings and conclusions of law (*see* doc. 69) and will grant both parties' respective motions to supplement the record with new evidence (docs. 86, 87). The Defendants' new evidence includes a declaration from Defendant Terry Raybon, Warden of the Holman Correctional Facility. Smith's new evidence includes: two declarations from his counsel; Smith's recent medical records detailing his complaints of vomiting and nausea to medical staff; a supplemental declaration from Dr. Robert Jason Yong, M.D.; and the second supplemental declaration of Dr. Katherine Porterfield. Smith did not include either the new Dr. Yong or Dr. Porterfield declaration in his previous motions to

supplement the record in this court upon which the court based its indicative ruling. Although the court will allow Smith to supplement the record with that evidence, it does so reluctantly, given the last-minute nature of the requests and the fact that the evidence could have been presented more than a week ago.

After a detailed review of Attorney Grass's declarations and Smith's medical records, Smith's purported vomiting is based entirely on his own personal reports. They have not been corroborated by anyone else. But, taking the medical records in which Smith complains of nausea and vomiting as written, he has experienced "intermittent" (doc. 87-4) nausea and vomiting this month but there is no evidence concerning when exactly, the number of times, and how close in time to Smith eating solid food or drinking liquids the vomiting occurred. Dr. Yong stated broadly that, based upon the medical records, "there is a significant risk" Smith "will experience nausea and vomiting during his execution[,]" and he said there is a connection between anxiety and "nausea/vomiting." (Doc. 87-4.) Dr. Porterfield opined, based too upon the medical records, Smith's purported vomiting is a symptom of is Post-traumatic Stress Disorder (PTSD), worsening as the execution approaches, resulting in "a substantial and serious risk" Smith "will experience nausea and vomiting during his execution[.]" (Doc. 87-5.)

Raybon, however, declared that Smith will be given his final meal before 10:00 a.m. on January 25, 2024—if he eats one at all—and he will not be allowed any solid food after 10:00 a.m.; he will be allowed clear liquids until 4:00 p.m.; and his execution will begin no sooner than 6:00 p.m., "at which point Smith will have had no solid food for eight hours and no liquids for two hours." (Doc. 86-1.)

Smith contends his recent complaints increase the risk that he will experience both nausea and vomiting during his execution and, therefore, there is a substantial risk that he will vomit into the mask and asphyxiate. In his view, the new evidence

suggests there is a substantial likelihood he will succeed on the merits of his Eighth Amendment claim. The court disagrees.

As before, the substantial risk of severe harm and pain Smith alleges is theoretical, possible only upon the occurrence of a cascade of unlikely events: Smith in fact vomits during the execution, precisely between the time nitrogen begins to flow and before he reaches unconsciousness, vomit remains in his mouth and throat in a sufficient volume to block his airway such that he chokes or otherwise experiences severe pain prior to his loss of consciousness or death by nitrogen hypoxia. True, there is now evidence in the record, assuming Smith's uncorroborated self-reports are true, showing Smith has experienced nausea and vomiting in the last month, but there is still no convincing evidence showing the risk of which he complains is sure or very likely to occur. The record still lacks evidence demonstrating when, where, or how much Smith might vomit during the execution, with or without the mask on, before or during the administration of nitrogen. In other words, Smith's evidence remains broad and non-specific. Dr. Yong and Dr. Porterfield's opinions concerning the likelihood Smith will vomit during the execution are undermined by Raybon's declaration concerning the time between Smith's last meal and his execution; that is, the eight-plus hours between Smith's last meal and the time of the execution. Presumably, their testimony is based on Smith consuming his last meal at 4:00 p.m., as he did before his previous execution attempt. The Defendants will implement just what Smith previously argued the Protocol lacked: a nothing-by-mouth order. The risk of substantial harm *if* Smith experiences nausea and vomiting during the execution remains speculative. And there is no new evidence showing such risk would or could be significantly reduced by Smith's alleged alternative methods of execution. Nor is there new evidence relating to Smith's argument that the mask will lack a proper seal.

Even in light of the new evidence, the court cannot conclude the Defendants' method of execution creates a "substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment," or that Smith identified "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] [the] substantial risk of severe pain" he alleges he will suffer if he becomes nauseous or vomits during the execution. *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1326 (11th Cir. 2019) (internal quotation marks and citations omitted). Smith still failed to show a substantial likelihood of success on the merits of his Eighth Amendment claim and his new evidence does not change this court's previous factual findings or conclusions of law. (*See* doc. 69.)

It is therefore **ORDERED** as follows:

1. The court construes the Defendants' *Response to Order* (Doc. 86) as a Motion to Supplement the Record, and that Motion is **GRANTED**;

2. Smith's *Renewed Emergency Motion to Supplement the Record* (Doc. 87) is **GRANTED**;

3. Pursuant to the Eleventh Circuit's request, the court concludes the new evidence does not change its previous factual findings or conclusions of law. (*See* doc. 69.)

DONE on this the 24th day of January 2024.

R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

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

KENNETH EUGENE SMITH, Plaintiff, v. JOHN Q. HAMM, in his official Capacity as Commissioner, Alabama Department of Corrections, and TERRY RAYBON, in his official Capacity as Warden, Holman Correctional Facility, Defendants.	)	Case No. 2:23-cv-00656-RAH CAPITAL CASE **EXECUTION SCHEDULED FOR JANUARY 25, 2024**

PLAINTIFF KENNETH EUGENE SMITH'S RENEWED EMERGENCY MOTION TO SUPPLEMENT THE RECORD

Pursuant to the limited remand of this case by the U.S. Court of Appeals for the Eleventh Circuit (DE 84) and this Court's Order (DE 85), Plaintiff Kenneth Eugene Smith respectfully renews his previously-filed motion (DE 77) to supplement the record in this case, and based on that new evidence, asks that the Court find that the Defendants' proposed execution of Mr. Smith would violate his Eighth Amendment rights and constitute cruel and unusual punishment.

Specifically, Mr. Smith requests leave to supplement the record with:

- Declaration of Robert M. Grass, dated January 19, 2024 ("Grass Dec.") (DE 76-1) (Ex. 1);

- Supplemental Declaration of Robert M. Grass, dated January 20, 2024 ("Supp. Grass Dec.") (DE 77-1) (Ex. 2);
- Medical Records of Kenneth Eugene Smith (DE 80-1) (Ex. 3);
- Supplemental Declaration of Robert Jason Yong, MD MBA, dated January 22, 2024 ("Supp. Yong Dec.") (11th Cir. Doc. 47 at 29–43) (Ex. 4);
- Supplemental Declaration of Katherine Porterfield, Ph.D., dated January 23, 2024 ("Supp. Porterfield Dec.") (Ex. 5).

In his preliminary injunction motion, Mr. Smith contended, among other things, that his scheduled execution on January 25, 2024, using the procedures in the protocol adopted by the Alabama Department of Corrections ("ADOC") would violate his right to be free from cruel and unusual punishment under the Eighth Amendment because there is a substantial risk that he will vomit into the mask that ADOC intends to use and, thus, asphyxiate. DE 19 at 17–22. Mr. Smith contended that, in addition to the baseline risk of nausea and vomiting caused by oxygen deprivation, he was at heightened risk due to his diagnosed post-traumatic stress disorder from ADOC's failed attempt to execute him in November 2022. DE 19 at 20. Defendants have argued that the risk of Mr. Smith vomiting during the scheduled execution is speculative. DE 39 at 62; DE 66 at 17–20.

In concluding that Mr. Smith was not likely to succeed on the merits of his Eighth Amendment claim, the Court found:

> Dr. Porterfield acknowledged under questioning by defense counsel that Smith told her that he did not experience nausea during the previous execution attempt and that he did not report to her vomiting from PTSD-induced nausea since that time. No one, including Dr. Porterfield, could state with any certainty whether Smith will feel nauseous during the execution. And no one could state with any certainty the likelihood Smith will vomit during the execution, with or without the mask on, before or during the administration of nitrogen; when, where, or how much he might vomit during the execution, or any other condition at risk. Nor did any witness provide a foundation upon which any such likelihood of vomiting would be based . . . .

DE. 69 at 39.

On January 10, Mr. Smith filed a notice of appeal to the Eleventh Circuit from this Court's denial of his preliminary injunction motion. *See* DE 70. Since then, critical events post-dating this Court's Order and bearing on Mr. Smith's medical condition have occurred. The information bears directly on the risk that Mr. Smith will vomit during his scheduled execution and confirms Dr. Porterfield's opinion that Mr. Smith's condition will deteriorate as his execution approaches. *See* DE 62-54 at 3 ("It is my clinical opinion that the current plan of execution and the possibility of having to again face these procedures is completely terrifying for Mr. Smith and leading to ongoing deterioration."); *id.* at 30 ("The new execution date set for Mr. Smith will begin a process of reexperiencing of reminders and details that are sure to be highly triggering for Mr. Smith.").

On the evening of January 18, Mr. Smith reported to his counsel that "he has been vomiting consistently for at least a week," "has lost approximately eight pounds," and that the medical staff at the W.C. Holman Correctional Facility "has prescribed him Zofran, an anti-emetic, to help control the nausea and vomiting." Grass Dec. ¶ 3 (Ex. 1).

Further, on January 20, Mr. Smith's wife, Deanna Smith, contacted counsel to provide additional information concerning Mr. Smith's medical condition. Ms. Smith reported that Zofran was not helping Mr. Smith's symptoms. He reported that to a nurse on the medical staff at Holman and is putting in a sick-call slip, but he was told that there is nothing that can be done about it until Monday, January 22. *See* Supp. Grass Dec. ¶ 2 (Ex. 2). On January 21, 2024, Defendants provided medical records relevant to Mr. Smith's vomiting. *See* DE 80-1. On January 22, 2024, Dr. Robert Jason Yong reviewed the additional medical records and provided a supplemental declaration, which was not available when Mr. Smith moved in this Court to supplement the record. *See* Supp. Yong Dec. (Ex. 4). And on January 23, 2024, Dr. Katherine Porterfield reviewed the additional medical records and provided a supplemental declaration, which also was not available when Mr. Smith moved in this Court to supplement the record. *See* Supp. Porterfield Dec. (Ex. 5).

On January 23, this Court entered an order directing the parties to provide "an explanation of how to interpret the supplementary evidence." DE 85. The new

evidence that is the subject of this renewed motion to supplement the record, in conjunction with the existing record, undermines Defendants' contentions and the Court's findings in denying the preliminary injunction motion.

First, this Court found that Mr. Smith "did not report to [Dr. Porterfield] vomiting from PTSD-induced nausea." DE 69 at 39. And in their Appellate briefing before the Eleventh Circuit, the first point Defendants made in support of this Court's conclusion regarding Mr. Smith's Eighth Amendment claim based on a substantial risk of asphyxiation due to vomiting was that "there is no evidence in the record that he has vomited even one time as a result" of his post-traumatic stress disorder and "[g]iven that Smith has chronic nausea . . . and apparently never vomits, the baseline risk is not substantial." 11th Cir. Doc. 28 at 32. The premise of Defendants' argument and this Court's conclusion, DE 69 at 39, is directly undermined by this new evidence. There is now evidence that Mr. Smith has been vomiting—repeatedly—and "[g]iven this new information, there is a significant risk that Mr. Smith will experience nausea and vomiting during his execution." Supp. Yong Dec. ¶ 4 (Ex. 4); Supp. Porterfield Dec. ¶ 7 ("[I]t is my opinion to a reasonable degree of clinical certainty that there is a ***substantial and serious risk*** that Mr. Smith will experience nausea and vomiting during his execution, due to his condition of PTSD and his ongoing, worsening symptoms of nausea and vomiting seen over the last four weeks. ***This creates a significant risk that Mr. Smith will suffer***

substantial harm, including but not limited to asphyxiating—that is, choking to death—on his own vomit.") (emphasis added); *see also* DE 80-1 (Ex. 3).

Second, Defendants contend that it would not matter if Mr. Smith vomits unless that occurs "after the nitrogen begins to flow but before he reaches unconsciousness." 11th Cir. Doc. 48 at 10; *see also* 11th Cir. Doc. 28 at 31. Defendants' contention is contradicted by the existing record both because it assumes that the mask that Defendants will place over Mr. Smith's face will be adequately sealed[1] and airtight and because it is undisputed that Defendants' plan to use a finger sweep to clear vomit from Mr. Smith's mouth and airway while breathing air is delivered to him is inadequate as suction is required for that purpose. *See* 11th Cir. Doc. 36 at 17–18. Defendants will not do anything to address vomiting once nitrogen is supplied to Mr. Smith; he will be left to choke on his own vomit. 11th Cir. Doc. 16 at 40.

Moreover, as Dr. Antognini testified, even after a person loses consciousness, "[y]ou can get passive regurgitation of stomach contents, which can go up into the airway – into the mouth and then into the airway." DE 67, at 162:21–23. And Defendants will not do anything to prevent the risk of asphyxiation when nitrogen is

[1] Defendants' assurance that "Smith will be unconscious in under one minute," 11th Cir. Doc. 48 at 11, assumes that the mask it intends to place on Mr. Smith's face will be sealed and airtight even though Defendants do not intend to follow the guidance of the mask manufacturer, which the district court ignored, and do any test to ensure that is the case. *See* 11th Cir. Doc. 19 (unredacted) at 35–36.

being supplied to Mr. Smith; they will let him choke on his own vomit. *See* 11th Cir. Doc. 16 at 40. Thus, Mr. Smith will be at risk of asphyxiation due to vomiting from the time he is taken to the execution chamber when the mask is placed on his face, DE 62-3 at § X.A.v, until the procedure concludes, which can be an indefinite period of time because nitrogen "will be administered for (1) fifteen minutes or (2) five minutes following a flatline indication on the EKG, *whichever is longer*." DE 62-3 at § X.A.xv (emphasis added); *see also* DE 67, at 101:1–102:17.

Third, Defendants contend that Mr. Smith is not at risk even if he vomits because "the volume of the mask is sizable," Mr. Smith will be "lying at an incline," and be able to "lift [his] head[] and move [his] head[] from side to side." 11th Cir. Doc. 48 at 12. Defendants cite no record evidence that any of those facts detract from the risks associated with vomiting into a closed mask. And none of that will help Mr. Smith if he is unconscious when vomiting occurs and the State will not do anything to prevent asphyxiation.

Fourth, Defendants ask the impossible when they contend that Mr. Smith "has not shown any evidence about the characteristics of the vomit he anticipates, nor about his inability to expel vomit." 11th Cir. Doc. 48 at 13. Mr. Smith cannot possibly know anything about the characteristics of future vomit or his ability to expel vomit while wearing a mask he has never worn nor even seen. And Defendants' argument about when he will eat relative to his execution ignores that

the Protocol provides that Mr. Smith is entitled to a "last meal." DE 62-3 at ¶ IX.B. And when Defendants attempted to execute Mr. Smith in November 2022, his last meal was delivered to him at about 4:00 p.m.—only two hours before his scheduled 6:00 p.m. execution. *See* Doc. 62-25 at ¶ 138.

Fifth, Defendants contend that asphyxiation on his own vomit is not "the type of pain that an inmate sentenced to death is entitled to avoid" because execution methods like hanging used in the Eighteenth Century could cause asphyxiation. 11th Cir. Doc. 48 at 14. Defendants' contention relies on an incorrect reading of the Eighth Amendment, which does not permit any execution method merely because it compares favorably with disemboweling, burning at the stake, or other abandoned methods deemed to be cruel and unusual. *See* 11th Cir. Doc. 36 at 16–17.

Sixth, Defendants contend that Mr. Smith's Eighth Amendment claim based on the substantial risk of asphyxiation "fails for want of an alternative that would significantly reduce risk." 11th Cir. Doc. 48 at 14. That is belied by the testimony of the State's own expert, Dr. Antognini:

> Q. And a hood. You would agree that if a hood is large enough and someone vomited, they would have a less chance of aspirating than they would in a mask?
>
> A. I think that's correct too. I agree with that, yes.
>
> Doc. 62-35 at 65:21–66:4.

Finally, the fact that the State has prescribed Zofran (an antiemetic) to Mr. Smith—which has not been effective in relieving his symptoms—evidences that Mr. Smith faces a very real and significant risk of vomiting as a result of his PTSD. *See* Supp. Yong Dec. ¶ 4 ("Given this new information, there is a significant risk that Mr. Smith will experience nausea and vomiting during his execution."); *see also* Supp. Porterfield Dec. ¶ 7 ("[I]t is my opinion to a reasonable degree of clinical certainty that there is a substantial and serious risk that Mr. Smith will experience nausea and vomiting during his execution, due to his condition of PTSD and his ongoing, worsening symptoms of nausea and vomiting seen over the last four weeks. This creates a significant risk that Mr. Smith will suffer substantial harm, including but not limited to asphyxiating—that is, choking to death—on his own vomit.").

As an initial matter, doctors do not treat individuals who have PTSD with an antiemetic, which "can help decrease nausea," but it "doesn't take it away." DE 67 at 79:5–19. Instead, doctors usually take a "multidisciplinary approach to managing patients suffering with PTSD," which could include medications such as "antidepressants, anti-anxiety medications . . . [or] neuropathic agents." *Id.* at 80:10–21. Mr. Smith has been prescribed BuSpar (an anti-anxiety medication), Remeron (an antidepressant) and Prozac (another antidepressant). DE 80-1 at 5. Despite those medications, he is still suffering symptoms of nausea and vomiting, and he as reported that the antiemetic prescribed to him (Zofran) "has not relieved

his symptoms—he continues to have issues with persistent vomiting." Supp. Grass Decl. ¶ 2. Those symptoms are consistent with Dr. Porterfield's unchallenged opinion that due to his severe PTSD Mr. Smith's condition will further deteriorate as his execution approaches. *See supra* at 3; DE 62-54 at 3, 30.

Accordingly, Mr. Smith requests that the Court accept the proposed evidence as a supplement to the record and, based on that evidence, reconsider its earlier decision to deny the preliminary injunction. This new evidence—combined with the existing record—shows all the more that the scheduled execution of Mr. Smith would violate his rights under the Eighth Amendment, and the Court should enjoin Defendants from carrying out the scheduled execution.

Respectfully submitted,

/s/ Andrew B. Johnson

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CERTIFICATE OF SERVICE

I certify that on January 23, 2024, I electronically filed the foregoing with the Clerk of the Court using the Pacer system, which will send notification to the following:

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Exhibit 1

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

KENNETH EUGENE SMITH, Plaintiff, v. JOHN Q. HAMM, in his official Capacity as Commissioner, Alabama Department of Corrections, and TERRY RAYBON, in his official Capacity as Warden, Holman Correctional Facility, Defendants.	)	Case No. 2:23-cv-00656-RAH CAPITAL CASE **EXECUTION SCHEDULED FOR JANUARY 25, 2024**

DECLARATION OF ROBERT M. GRASS

ROBERT M. GRASS declares under penalty of perjury:

1. My name is Robert M. Grass, and I am counsel for Plaintiff-Appellant Kenneth Eugene Smith. I am submitting this declaration to advise the Court of pertinent and significant information Mr. Smith conveyed to me yesterday.

2. Due to exigent circumstances resulting from his incarceration and the imminent execution date, Mr. Smith has not been able to submit his own signed declaration.

3. Yesterday evening, January 18, 2024, Mr. Smith called me by telephone from Holman Correctional Facility to state that he has been vomiting consistently for at least a week. He told me that, as a result of his vomiting, he has lost approximately eight pounds. He stated that the Alabama Department of Corrections has prescribed him Zofran, an anti-emetic, to help control the nausea and vomiting.

I declare under penalty of perjury that the foregoing is true and correct under 28 U.S.C. § 1746.

Dated: January 19, 2024

/s/ Robert M. Grass

ROBERT M. GRASS
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Exhibit 2

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

KENNETH EUGENE SMITH, Plaintiff, v. JOHN Q. HAMM, in his official Capacity as Commissioner, Alabama Department of Corrections, and TERRY RAYBON, in his official Capacity as Warden, Holman Correctional Facility, Defendants.	)	Case No. 2:23-cv-00656-RAH CAPITAL CASE **EXECUTION SCHEDULED FOR JANUARY 25, 2024**

SUPPLEMENTAL DECLARATION OF ROBERT M. GRASS

ROBERT M. GRASS declares under penalty of perjury:

1. I am counsel for Plaintiff Kenneth Eugene Smith. On January 19, I submitted a declaration to report on pertinent and significant information concerning Mr. Smith's medical condition. *See* Doc. 76-2. I submit this supplemental declaration to advise the Court of additional pertinent and significant information on the same topic.

2. On January 20, I received a text message from Mr. Smith's wife Deanna Smith. Ms. Smith reported that the Zofran that was prescribed to Mr. Smith has not relieved his symptoms—he continues to have issues with persistent vomiting. Ms. Smith further reported that Mr. Smith talked to Nurse Thomas about this and will submit a sick call slip, but was told that there is nothing that can be done about it until Monday.

I declare under penalty of perjury that the foregoing is true and correct under 28 U.S.C. § 1746.

Dated: January 20, 2023

/s/ Robert M. Grass

ROBERT M. GRASS
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019-9710
(212) 836-8000

Exhibit 3

Exhibit 4

YesCare
Say Yes To Exceptional Care

Nursing Encounter Tools (NETs)
Gastrointestinal (GI)
(GI Bleed Suspected/Lower GI Symptoms/Abdominal Pain-Male and Female/Nausea Vomiting)

THIS TOOL IS NOT INTENDED TO REPLACE THE IMMEDIATE URGENT/EMERGENT CARE NEEDS OF ABC'S/BLS

DEMOGRAPHICS/VITAL SIGNS

Facility name: Holman		Location seen: MCU - Shift		Date seen: 1/18/24			Time seen: 1610
Patient name:	Last: Smith		First: Kenneth	MI:	ID#: 2512		DOB: 7/11/[illegible] Age:
Vital signs:	T: 97.3	P: 96	R: 18	BP: 161/85	Pulse Ox 98% ☐RA ☐O2: /lpm		Wt 218 ☒Actual ☐Reported
*Notify provider	*T<97.8->100.3	*P<60->110	*R<12->20	*BP <90/60->145/95	*Pulse Ox<92%		
☐No known allergies ☒Allergies: Clindamycin							
Chronic care clinic: ☒Y ☐N What clinic(s): HTN, HLD, DM, HTG, Obesity, GERD, Chronic Migraine							

SUBJECTIVE

CHIEF COMPLAINT: N/V/D x 2wks
Onset date: _____ Time: _____
Have you had this problem before ☐N ☒Y, if yes describe below:
Describe: intermittent
Close contact with someone who had/has the same symptoms: ☒N ☐Y, person(s): _____
Trauma ☒N ☐Y, describe: _____

ASSOCIATED FACTORS:
Pain scale now 0 10 at worst 10
Location of pain ☐RUQ ☐RLQ ☐LUQ ☐LLQ Generalized
☐Constant ☐Intermittent ☒Cramping ☐Burning
☐Dull ☐Sharp ☒Radiating
What makes it better: _____
What makes it worse: _____
Pain induced/increased with walking/movement ☐Y ☒N N/A
Last solid intake Date: 1/18/24 Time: 1600
Last liquid intake Date: 1/18/24 Time: 0100
Recent unintended weight changes ☐Loss, ___ lbs. ☐Gain, ___ lbs.
☐Excessive thirst ☐Excessive hunger ☒Nausea
☒Vomiting ☐Coffee grounds *(Upper GI bleed)* ☐Bloody ☐Green
Vomiting frequency/duration: _____
Last BM, date: 1/18 ☒Brown ☐Tan
☐Bloody ☐Black/tarry *(Lower GI bleed)*
☐Constipation, how long: _____ ☐Diarrhea, how often: _____
Urine color ☐Yellow ☐Brown *(Urgent)* ☐Bloody N/A
☐Excessive urine output ☐Painful urination ☐Difficulty urinating
☐Alcohol use, years/drinks per day: _____
☐Drug use, type/frequency: _____

PERTINENT MEDICAL CONDITIONS:
☐Heartburn/GERD ☐Peptic ulcer ☐Crohn's GERD
☐Gallstones ☐Colitis ☐Celiac disease
☐Diverticulitis ☐Pancreatitis ☐End stage liver disease
☐Hernia or history of, when: _____
☐GI bleed treatment: _____ Date: _____
☐Abdominal surgery: List: _____ Date: _____
☐Appendectomy ☐Kidney stones ☐Cardiovascular disease
☐Diabetes ☐Stroke ☐CHF ☐Hepatitis history
☐Pregnant ☐History of ovarian cysts ☐History of PID
☐Tobacco use _____/yrs. _____/ppd (packs per day)

MEDICATIONS:
☐ASA/NSAIDS, how long: ___ ☐Anticoagulants ☐Steroids
☐GI meds ☐Iron
☐New medication(s) within the past 30 days?
What medication(s): _____

OBJECTIVE

GENERAL APPEARANCE:
☐Distressed ☐Calm ☐Agitated ☒Anxious
Observation of patient while walking ☐Grimacing
☐Able to stand erect ☐Abnormal gait
Other: _____

RESPIRATORY/BREATHING:
Breathing ☒Normal ☐Labored ☐Tachypneic ☐Bradypneic
☐Stridor *(Emergency)* ☐Wheezing ☐Accessory muscle use
☐Cough ☐Sputum production, color/consistency: _____
Right lung ☒Clear ☐Wet ☐Diminished ☐Absent *(Emergency)*
Left lung ☒Clear ☐Wet ☐Diminished ☐Absent *(Emergency)*
Other abnormal findings: N/A

ABDOMEN:
Fully examine anatomical areas of subjective complaint to include: Epigastric, periumbilical, and suprapubic
Bowel sounds present ☐RU ☐LU ☐LL ☐RL ☒Normal
☐Absent bowel sounds, quadrant: _____ *(listen for full 5 minutes)*
☐Hypoactive ☐Hyperactive ☐High pitched ☐Rebound tenderness
If absent identify area(s): _____
☒Soft ☐Rigid ☐Distended ☐Mass ☐Tender
☐Visible bulges, describe: None
Other abnormal findings: None

CARDIAC:
Heart rate/rhythm ☒Regular ☐Irregular ☐Tachy ☐Brady
Pulse ☒Strong ☐Weak ☐Thready ☐Bounding
Abnormal sounds ☐Murmurs ☐Rubs ☐Clicks

SKIN: (Use Anatomical Figure NA0804 for details if needed)
☒Warm ☒Dry ☐Cool ☐Clammy/diaphoretic ☐Pale ☐Red
☐Bruising ☐Jaundice ☐Mottling ☐Blister ☐Rash ☐Bleeding
☐Scaly/cracking ☐Needle tracks ☐Lice ☐Mite tunnels
Describe rash and location: N/A
Other abnormal findings: _____

TESTS:
Finger stick blood sugar results: N/A (ALL)
UA dipstick results: _____ (ALL)
☐EKG (Diabetics, if available) Time: N/A
☐Scan sent to provider Time: N/A
FEMALES ☐uHCG results: _____ (ALL) ☐N/A, LMP: _____

Patient with suspected GI bleed perform orthostatic vital signs and perform Hemoccult test.

Orthostatic vital signs:
Lying: _____ Sitting: _____ Standing: _____
Hemoccult test ☐Pos. ☐Neg. ☐Unable to provide sample

NOTES/DOCUMENTATION:
C/O intermittent N/V/D x 2wks and Tarry stools

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
M Hendrick RN	M Hendrick, RN	1/18/24 1618

YesCare
Say Yes To Exceptional Care

Nursing Encounter Tools (NETs)
Gastrointestinal (GI)
(GI Bleed Suspected/Lower GI Symptoms/Abdominal Pain-Male and Female/Nausea Vomiting)

Patient	Last	First	ID Number
	Smith	Kenneth	7 5 D

☐ EMERGENT INTERVENTION–*PROVIDER CONTACT REQUIRED*

If CPR or AED is initiated use Emergency Response Form (NA6291)

IF PATIENT IS EXPERIENCING AN EMERGENT CONDITION CONTINUE WITH EMERGENT INTERVENTIONS, ACTIVATE LOCAL EMS SYSTEM, AND PREPARE PATIENT FOR TRANSPORT

SCOPE OF PRACTICE GUIDELINES FOR YOUR STATE MUST BE FOLLOWED WHEN PERFORMING EMERGENT INTERVENTION

☐ Monitor the patient's vital signs
☐ Prepare patient for transport
☐ Recheck vital signs: Time: _____ Condition improved ☐ Y ☐ N
Pulse _____ R _____ BP ____/____ Pulse Ox _____ ☐ RA ☐ O2 ____lpm/via _____

Name of provider notified: _____ Time:_____ ☐ EMS notified time: _____ Arrival time: _____

COMMENTS/ORDERS:

☐ URGENT INTERVENTION-*PROVIDER CONTACT REQUIRED*

☐ Abnormal vital signs
☐ Temp <97.8->100.3
☐ Pulse <60->110
☐ Respiration <12->20
☐ B/P <90/60->145/95
☐ SpO2<92%
☐ Absent bowel sounds (Assessed for full 5 minutes)
☐ Distended or rigid abdomen
☐ Rebound tenderness ☐ Unable to stand erect
☐ Nausea/vomiting and/or diarrhea > 24 hours ☐ Bloody (black)/tarry stools ☐ Bloody/coffee ground emesis ☐ Brown or bloody urine
☐ Signs of respiratory distress ☐ Abnormal fingerstick (Diabetic <60 or >240, Non-diabetic <70 or >200)
☐ Abnormal dipstick UrA ☐ Positive uHCG ☐ Hemoccult result positive ☐ Unintended weight loss or gain (*possible cancer or CHF indicators*)
☐ Other describe: _____

Reviewed with provider: ☐ MAR ☐ Health record
☑ Seen by provider Name: Dr. Delgado Time: 1610
☐ Contacted provider Name: _____ Time: _____
☐ Contacted Behavioral Health Name: _____ Time: _____
Provider orders received ☐ Y ☐ N ☐ Read back provider orders

Provider orders:
Zofran Sig: BID X 7days 100/10p

Disposition ☐ Monitor/Observation (24 hour) ☐ Infirmary-level ☐ Other

ADDITIONAL COMMENTS/DOCUMENTATION:
1615 — Zofran 4mg ODT Given — V.O. Zofran Sig BID X 7days per Dr. Delgado. M Hendricks, RN

☐ NURSING INTERVENTION

CONTINUITY OF CARE
Seen By Dr. Delgado today
☑ No follow up required
☐ Referral to provider for current presenting complaint
☐ Referred to provider multiple visits for same complaint
☐ Referred to provider for evaluation of enrollment in CCC
☐ Nurse follow up scheduled
☐ Custody notified of special needs
☐ Referral to Behavioral Health
☐ Other: _____

NURSING INTERVENTION
REFER TO INTERVENTION GUIDE FOR AVAILABLE OTC MEDICATIONS
☐ OTC medication(s) given and documented in MAR

PATIENT EDUCATION
☑ Patient educated to contact medical if new symptoms develop or current condition symptoms worsen
☐ Written education provided ☑ Verbal education provided ☐ Patient educated on OTC medication(s)
☑ The patient demonstrates an understanding of self-care, symptoms to report, and when to return for follow-up care

ADDITIONAL COMMENTS/DOCUMENTATION:
C/O N/V/D x 2 weeks - intermittent - "I think it's anxiety" "will see greasy when I take buspar" Denies cramps, chronic bloody diarrhea.

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
M Kenneth Smith RN	M Hendricks, RN	1/10/24 1614

Alabama Department of Corrections
Sick Call Request

Sick Call Request:

I'm vomiting and diarrhea has not stop.

(int): Kenny Smith AIS # I-512 Date of Birth 7-4-65

n: Holman B Housing Area: L-59 Date: 1-17-24

Form Collected by Health Staff: DB (initials) Title: CW Date: 1/18/24 Time: 0330

Triaged (check as appropriate):

Sick Call Nurse Encounter Not Required
(1) ____Referring to Chronic Care Manager
(2) ____Written Response/Instruction Being Provided

Nurse Sick Call Encounter Required
(1) ____Bring to HCU at this time for further evaluation
(2) ✓ **Evaluate** in next scheduled Nurse Sick Call Clinic

Title: Sharron Story-Cardwell, RN Date: 1/18/24 0330

Encounter (Nurse Evaluation Tool Completed):

_ Resolved by Nurse Encounter And Dr. Delgado saw pt @ sick call

2 ____ Referral for follow up required; to be scheduled

(a) ____ Medical Provider
(b) ____ Dental Clinic
(c) ____ Mental Health Services

ıy Fee Incurred:

$4.00 - Nurse

Housing no OTC charge

Smith Medical 2000002

Chronic Disease Clinic Follow-Up

Inmate Name: Smith, Kenneth
Number: Z512 | Institution: HCF

List chronic diseases:

1) HTN	3) Chronic Migraine	
2) HLD	4)	6)

Attach pharmacy profile or list current medications: Lisinopril 30mg qd, Prilosec 20mg, Buspar 15mg bid, Remeron 15mg hs, Prozac 20mg @ noon - Zyrtec 10mg hs, Tylenol 325mg #ii bid prn, Imitrex 50mg prn, Lopressor 50mg bid

Subjective: C/O Nausea, diarrhea X 1 wk - vomited X1

Asthma: # attacks in last month?____	Seizure disorder: # seizures since last visit? ____
# short acting beta agonist canisters in last month?____	Diabetes mellitus: # of hypoglycemic reactions since last visit? ____
# times awakening with asthma symptoms per week?____	Weight loss/gain ↓ (↑) 9 #lbs 9
CV/hypertension (Y/N): Chest pain? Ø SOB? Ø Palpitations? Ø Ankle edema? ____	
HIV/HCV (Y/N): Nausea/vomiting? ____ Abdominal pain/swelling? ____ Diarrhea? ____ Rashes/lesions? ____	

For all diseases, since last visit, describe new symptoms: [illegible]
Nonsmoker [illegible]
[illegible] "nervous"

Patient adherence (Y/N): with meds? yes with diet? No with exercise? No Noncompliance counseling? No

Vital signs: Temp 97.4 BP 144/90 Pulse 84 Resp 18 Wt 231.8 O2 Sat 99% INR NA
PEFR #1 NA #2 NA #3 NA

Labs: Hgb A1C NA HIV VL NA CD4 NA Total Chol 244 LDL 157 HDL 45 Trig 209

Range of fingerstick glucose/BP monitoring: NA

PE: [illegible]

HEENT/neck: [illegible]	Extremities: [illegible]
Heart: [illegible]	Neurological:
Lungs: [illegible]	GU/rectal:
Abdomen: [illegible]	Other:

Assessment: [illegible]

	Assessment	Degree of Control: G	F	P	NA	Clinical Status: I	S	W	NA
1	HTN [illegible] diet	☒	☐	☐	☐	☐	☒	☐	☐
2	~~HLD [illegible]~~	☐	☒	☐	☐	☐	☒	☐	☐
3	Chronic Migraine: [illegible]	☒	☐	☐	☐	☐	☒	☐	☐
4	[illegible]	☐	☐	☐	☐	☐	☒	☐	☐
5	diet, [illegible] fluids, [illegible]	☐	☐	☐	☐	☐	☐	☐	☐
6		☐	☐	☐	☐	☐	☐	☐	☐

Plan:
Medication changes: [illegible]
Diagnostics/Labs: [illegible]
Reviewed Lab/Procedures/Reports with pt. ☒ Yes ☐ No ☐ N/A Indicated Treatment Plan changes discussed: ☐ Yes ☐ No ☐ N/A
Monitoring: BP:_____ X day/week/month Glucose:_____ X day/week/month/prn Peak flow:_______ Other: ______
Education provided: ☒ Nutrition ☐ Exercise ☒ Smoking ☒ Test results ☒ Medication management ☒ Other: HTN, HLD
Next Visit (days)?: ☐ 180 ☒ 90 ☐ 60 ☐ 30 ☐ Other: ______ Discharged from CCC (clinic name): [illegible]
HCV Treatment: Y (N) Missed doses: # NA (total) OHS ID Coordinator notified of noncompliance? Y (N) Date: [illegible]

[Mid-]Level Provider Signature: [signature] | Date: 1-9-24 Time: 1000

Smith Medical 2000016

Exhibit 4

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

KENNETH EUGENE SMITH, Plaintiff, v. JOHN Q. HAMM, in his official capacity as Commissioner, Alabama Department of Corrections, and TERRY RAYBON, in his official Capacity as Warden, Holman Correctional Facility, Defendants.	)	Case No. 2:23-cv-00656-RAH CAPITAL CASE **EXECUTION SCHEDULED FOR JANUARY 25, 2024**

SUPPLEMENTAL DECLARATION OF ROBERT JASON YONG, M.D.

I, Robert Jason Yong, declare under penalty of perjury as follows:

1. I submit this declaration to supplement my declarations dated December 18, 2023 and November 17, 2023 based on additional information I received on January 22, 2024.

2. I reviewed medical records pertaining to Mr. Smith from the state correctional facility where he is incarcerated. I noted several instances of Mr. Smith reporting nausea and vomiting. On 12/24/2023, Mr. Smith reported nausea and vomiting. On 1/9/2024, Mr. Smith reported vomiting, and on a 1/18/2024 follow up, Mr. Smith reported intermittent nausea/vomiting/diarrhea x 2 weeks. This is consistent with records I previously reviewed. For example, on 12/4/2023, Mr. Smith reported nausea. On January 18, 2024, he was ultimately prescribed ondansetron 8 mg twice a day for 7 days. Ondansetron is a potent antiemetic prescribed when patients have nausea and vomiting. I have attached these records as Exhibit A.

3. Mr. Smith reports in the record that the anxiety is increasing his nausea and vomiting. There are established mechanisms showing the connection between anxiety and

nausea/vomiting[i]. There is clear evidence of a rising incidence of nausea and peer reviewed literature demonstrating the link of anxiety and nausea/vomiting.

4. Given this new information, there is a significant risk that Mr. Smith will experience nausea and vomiting during his execution.

5. I understand that the lack of mitigating protocols if a prisoner were to vomit in the mask has not been rectified and poses potential for significant harm and aspiration should this occur.

Executed on this 22nd day of January 2024,

R. Jason Yong, MD MBA

[i] Haug TT, Mykletun A, Dahl AA. The prevalence of nausea in the community: psychological, social and somatic factors. Gen Hosp Psychiatry. 2002 Mar-Apr;24(2):81-6. doi: 10.1016/s0163-8343(01)00184-0. PMID: 11869741.

EXHIBIT A

CHSS037B Drug Prescri Order Thursday January 18, 2024 17:47:37 CST

Ordered Date: 01/18/2024 Time: 17:43:12 (CT)
Encounter Type: Nurse - Verbal/Telephone Orders
Location: William C. Holman Correctional Facility [WCHOLMAN] Staff: Ayers, Christy, LPN
Order Number: 0516919 Rx Number:
Ordering Practitioner*: Delgado, Nicholas Sequence Number: 01

Allergies

Allergies (1 - 2 of 2)

Problem #	Type	Reaction	Severity	Status	As of Date
001	Zonisamide (Zonegran)	Other	Moderate	Assessed	
002	Clindamycin	Other	Mild	Assessed	

Prescription

Diagnosis Code*: Nurse Override
(•) Formulary ( ) Non-Formulary
Drug Type: Ondansetron Hcl 8 Mg Tabs 8Mg Tabs
National HIE Code(s)
RxNorm: 312086 - ondansetron 8 MG (as ondansetron hydrochloride dihydrate 10 MG) Oral Tablet;
Critical Medication: ☐
Effective Date: 01/18/2024
Generic Acceptable ☑
Profile Only: ☐
Dosage*: 1 Dosage Form: Tabs
Strength*: 8Mg
Frequency*: BID-TWICE DAILY
for*: 7 days (Total duration)
Estimated Dispense Quantity*: 14.00 Confirm Estimated Dispense Quantity Indicator: Yes ( ) No ( )
Route of Administration*: PO-By Mouth Method*: Ordered Dose
Pill Call* AM: ☐ Noon: ☑ PM: ☐ HS: ☑
Keep on Person? *: No Expiration: 01/24/2024 % Compliant: MAR Summary
Delivery Tm Frame*: Routine Drug on hold start: Drug on hold through:

Order Information

Pharmacy Indicated # Refills: 0 # Refills Issued: 0
Received Fm Pharmacy:
Status*: Approved/Approval As of Date*: 01/18/2024 Status History

Pharmacy Comments

Comments

CHSS037B - Drug Prescription Order

Medication ordered per Verbal Orde Dr Delgado for diagnosis of nausea and vomiting

Medication Administration Record

Prepare to Add

Date	Time	Quantity Administered	Source	Outcome	Comments/Addendums
No Rows Found					

Medication Receipt History

Receipt Date/Time	Administered Qty	Received By	Status	Status Date	Substitution
No Rows Found					

Update Prior Page

Show/Hide Drug Interactions

Show Last Updated Information

YesCare
Say Yes To Exceptional Care

Nursing Encounter Tools (NETs)

Gastrointestinal (GI)

(GI Bleed Suspected/Lower GI Symptoms/Abdominal Pain-Male and Female/Nausea Vomiting)

THIS TOOL IS NOT INTENDED TO REPLACE THE IMMEDIATE URGENT/EMERGENT CARE NEEDS OF ABC'S/BLS

DEMOGRAPHICS/VITAL SIGNS

Facility name: Holman	Location seen: MCU - Shift office	Date seen: 1/18/24	Time seen: 1610				
Patient name:	Last: Smith	First: Kenneth	MI:	ID#: 2512	DOB: 7/4/65	Age:	
Vital signs:	T: 97.3	P: 96	R: 18	BP: 161/85	Pulse Ox: 98% ☐RA ☐O2: /lpm	Wt: 218 ☒Actual ☐Reported	
*Notify provider	*T<97.8->100.3	*P<60->110	*R<12->20	*BP <90/60->145/95	*Pulse Ox<92%		
☐No known allergies ☒Allergies: Clindamycin							
Chronic care clinic: ☒Y ☐N What clinic(s): HTN, HLD, DLD, HTG, Obesity, GERD, Chronic migraine							

SUBJECTIVE

CHIEF COMPLAINT: N/V/D x 2wks

Onset date: _____ Time: _____

Have you had this problem before ☐N ☒Y, if yes describe below:

Describe: intermittent

Close contact with someone who had/has the same symptoms: ☒N ☐Y, person(s): _____

Trauma ☒N ☐Y, describe: _____

ASSOCIATED FACTORS:

Pain scale now 0 10 at worst 10

Location of pain ☐RUQ ☐RLQ ☐LUQ ☐LLQ Generalized

☐Constant ☐Intermittent ☒Cramping ☐Burning

☐Dull ☐Sharp ☐Radiating

What makes it better: _____

What makes it worse: _____

Pain induced/increased with walking/movement ☐Y ☐N N/A

Last solid intake Date: 1/18/24 Time: 1600

Last liquid intake Date: 1/18/24 Time: 1600

Recent unintended weight changes ☐Loss, ___ lbs. ☐Gain, ___ lbs.

☐Excessive thirst ☐Excessive hunger ☒Nausea

☒Vomiting ☐Coffee grounds *(Upper GI bleed)* ☐Bloody ☐Green

Vomiting frequency/duration: _____

Last BM, date: 1/16 ☒Brown ☐Tan

☐Bloody ☐Black/tarry *(Lower GI bleed)*

☐Constipation, how long: _____ ☐Diarrhea, how often: _____

Urine color ☐Yellow ☐Brown *(Urgent)* ☐Bloody N/A

☐Excessive urine output ☐Painful urination ☐Difficulty urinating

☐Alcohol use, years/drinks per day: _____

☐Drug use, type/frequency: _____

PERTINENT MEDICAL CONDITIONS:

☐Heartburn/GERD ☐Peptic ulcer ☐Crohn's GERD

☐Gallstones ☐Colitis ☐Celiac disease

☐Diverticulitis ☐Pancreatitis ☐End stage liver disease

☐Hernia or history of, when: _____

☐GI bleed treatment: _____ Date: _____

☐Abdominal surgery: List: _____ Date: _____

☐Appendectomy ☐Kidney stones ☐Cardiovascular disease

☐Diabetes ☐Stroke ☐CHF ☐Hepatitis history

~~☐Pregnant~~ ☐History of ovarian cysts ☐History of PID

☐Tobacco use _____/yrs. _____/ppd (packs per day)

MEDICATIONS:

☐ASA/NSAIDS, how long: ___ ☐Anticoagulants ☐Steroids

☐GI meds ☐Iron

☐New medication(s) within the past 30 days?

What medication(s): _____

OBJECTIVE

GENERAL APPEARANCE:

☐Distressed ☐Calm ☐Agitated ☒Anxious

Observation of patient while walking ☐Grimacing

☒Able to stand erect ☐Abnormal gait

Other: _____

RESPIRATORY/BREATHING:

Breathing ☒Normal ☐Labored ☐Tachypneic ☐Bradypneic

☐Stridor *(Emergency)* ☐Wheezing ☐Accessory muscle use

☐Cough ☐Sputum production, color/consistency: _____

Right lung ☒Clear ☐Wet ☐Diminished ☐Absent *(Emergency)*

Left lung ☒Clear ☐Wet ☐Diminished ☐Absent *(Emergency)*

Other abnormal findings: N/A

ABDOMEN:

Fully examine anatomical areas of subjective complaint to include: Epigastric, periumbilical, and suprapubic

Bowel sounds present ☐RU ☐LU ☐LL ☐RL ☒Normal

☐Absent bowel sounds, quadrant: _____ *(listen for full 5 minutes)*

☐Hypoactive ☐Hyperactive ☐High pitched ☐Rebound tenderness

If absent identify area(s): _____

☒Soft ☐Rigid ☐Distended ☐Mass ☐Tender

☐Visible bulges, describe: N/A

Other abnormal findings: None

CARDIAC:

Heart rate/rhythm ☒Regular ☐Irregular ☐Tachy ☐Brady

Pulse ☒Strong ☐Weak ☐Thready ☐Bounding

Abnormal sounds ☐Murmurs ☐Rubs ☐Clicks

SKIN: (Use Anatomical Figure NA0804 for details if needed)

☐Warm ☒Dry ☐Cool ☐Clammy/diaphoretic ☐Pale ☐Red

☐Bruising ☐Jaundice ☐Mottling ☐Blister ☐Rash ☐Bleeding

☐Scaly/cracking ☐Needle tracks ☐Lice ☐Mite tunnels

Describe rash and location: _____

Other abnormal findings: N/A

TESTS:

Finger stick blood sugar results: N/A (ALL)

UA dipstick results: _____ (ALL)

☐EKG (Diabetics, if available) Time: _____

☐Scan sent to provider Time: N/A

~~FEMALES~~ ☐uHCG results: _____ (ALL) ☐N/A, LMP: _____

Patient with suspected GI bleed perform orthostatic vital signs and perform Hemoccult test.

Orthostatic vital signs:

Lying: _____ Sitting: _____ Standing: _____

Hemoccult test ☐Pos. ☐Neg. ☐Unable to provide sample

NOTES/DOCUMENTATION:

C/o intermittent N/V/D x 2wks and Tarry stool

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
MHendrick RN	MHendrick, RN	1/18/24 1618

YesCare
Say Yes To Exceptional Care

Nursing Encounter Tools (NETs)
Gastrointestinal (GI)
(GI Bleed Suspected/Lower GI Symptoms/Abdominal Pain-Male and Female/Nausea Vomiting)

Patient	Last	First	ID Number
	Smith	Kenneth	7 5 D

☐ EMERGENT INTERVENTION–*PROVIDER CONTACT REQUIRED*

If CPR or AED is initiated use Emergency Response Form (NA6291)

IF PATIENT IS EXPERIENCING AN EMERGENT CONDITION CONTINUE WITH EMERGENT INTERVENTIONS, ACTIVATE LOCAL EMS SYSTEM, AND PREPARE PATIENT FOR TRANSPORT

SCOPE OF PRACTICE GUIDELINES FOR YOUR STATE MUST BE FOLLOWED WHEN PERFORMING EMERGENT INTERVENTION

☐ Monitor the patient's vital signs
☐ Prepare patient for transport
☐ Recheck vital signs: Time: _____ Condition improved ☐ Y ☐ N
Pulse _____ R _____ BP _____/_____ Pulse Ox _____ ☐ RA ☐ O2 ____lpm/via _____

Name of provider notified: _____ Time:_____ ☐ EMS notified time: _____ Arrival time: _____

COMMENTS/ORDERS:

☐ URGENT INTERVENTION-*PROVIDER CONTACT REQUIRED*

☐ Abnormal vital signs
- ☐ Temp <97.8->100.3
- ☐ Pulse <60->110
- ☐ Respiration <12->20
- ☐ B/P <90/60->145/95
- ☐ SpO2<92%

☐ Absent bowel sounds (Assessed for full 5 minutes)
☐ Distended or rigid abdomen
☐ Rebound tenderness ☐ Unable to stand erect
☐ Nausea/vomiting and/or diarrhea > 24 hours ☐ Bloody (black)/tarry stools ☐ Bloody/coffee ground emesis ☐ Brown or bloody urine
☐ Signs of respiratory distress ☐ Abnormal fingerstick (Diabetic <60 or >240, Non-diabetic <70 or >200)
☐ Abnormal dipstick UrA ☐ Positive uHCG ☐ Hemoccult result positive ☐ Unintended weight loss or gain (*possible cancer or CHF indicators*)
☐ Other describe: _____

Reviewed with provider: ☐ MAR ☐ Health record
☐ Seen by provider Name: Dr. Delgado Time: 1610
☐ Contacted provider Name: _____ Time: _____
☐ Contacted Behavioral Health Name: _____ Time: _____
Provider orders received ☐ Y ☐ N ☐ Read back provider orders

Provider orders:
Zofran 8mg BID x 7days 100/100

Disposition ☐ Monitor/Observation (24 hour) ☐ Infirmary-level ☐ Other _____

ADDITIONAL COMMENTS/DOCUMENTATION:
1615 — Zofran 4mg ODT given — V.O. Zofran 8mg BID x 7days per Dr. Delgado. M Hendricks, RN

☐ NURSING INTERVENTION

CONTINUITY OF CARE
Seen by Dr. Delgado today
☐ No follow up required
☐ Referral to provider for current presenting complaint
☐ Referred to provider multiple visits for same complaint
☐ Referred to provider for evaluation of enrollment in CCC
☐ Nurse follow up scheduled
☐ Custody notified of special needs
☐ Referral to Behavioral Health
☐ Other: _____

NURSING INTERVENTION
REFER TO INTERVENTION GUIDE FOR AVAILABLE OTC MEDICATIONS
☐ OTC medication(s) given and documented in MAR

PATIENT EDUCATION
☐ Patient educated to contact medical if new symptoms develop or current condition symptoms worsen
☐ Written education provided ☐ Verbal education provided ☐ Patient educated on OTC medication(s)
☐ The patient demonstrates an understanding of self-care, symptoms to report, and when to return for follow-up care

ADDITIONAL COMMENTS/DOCUMENTATION:
Ck N/V/D x 2 weeks — intermittent — "I think it's anxiety" "I'll see Dr. when I take buspar" Denies cramps, denies blood, diarrhea.

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
M [illegible] RN	M Hendricks, RN	1/10/24 1614

Alabama Department of Corrections
Sick Call Request

r Sick Call Request:

Vomiting and diarrhea have not stop.

in): Kenny Smith AIS # Z-512 Date of Birth 7-4-65

n: HB/Infirm B Housing Area: L-59 Date: 1-17-24

:orm Collected by Health Staff: DB (initials) Title: CW Date: 1/18/24 Time: 0330

Triaged (check as appropriate):

Sick Call Nurse Encounter Not Required

(1) ___ Referring to Chronic Care Manager

(2) ___ Written Response/Instruction Being Provided

Nurse Sick Call Encounter Required

(1) ___ Bring to HCU at this time for further evaluation

(2) ✓ **Evaluate** in next scheduled Nurse Sick Call Clinic

Title: Sharron Story-Cardwell, RN Date: 1/18/24 0330

Encounter (Nurse Evaluation Tool Completed):

Resolved by Nurse Encounter And Dr. Delgado saw pt @ sick call

2 ___ Referral for follow up required; to be scheduled

(a) ___ Medical Provider

(b) ___ Dental Clinic

(c) ___ Mental Health Services

y Fee Incurred:

$4.00 - Nurse

Housing no OTC charge

YesCare
Say Yes To Exceptional Care

Patient Information Education Log
Chronic Care

Facility Name	Holman			
Patient's Name Last	Smith	First Kenneth	MI	ID Number 2512
Birth date 7/21/65	Medication Allergies ☑ N ○ Y If Yes List:			
Diagnosis	HTN - HLD - DLD - HTG - GERD			

PIFS Title	Encounter Type	Date	Patient Initials	Provider initials
Asthma (NA6040)				
CAD (NA5075)				
CHF (NA5080)				
Cholesterol (Hyperlipidemia) (NA5079)	CCC	1-9-24	KS	MC
Chronic Care Clinic (NA5076)	CCC	1-9-24	KS	MC
Diabetes- General (NA6005)				
Diabetes- A1C (NA6054)				
Diabetes- Long Term Problems (NA6056)				
Diabetes-Checking Your Blood Sugar (NA6256)				
Diabetes-Taking Insulin (NA6257)				
HCV-(Hepatitis-C)-General (NA5079)				
HCV-(Hepatitis C)-Treatment (NA6057)				
HCV-(Hepatitis C) Liver Biopsy (NA6062)				
HIV (NA7251)				
HIV Medicines (NA7253)				
HIV My Treatment (NA7252)				
HIV Healthy Living (NA7254)				
HTN (Hypertension) (NA6058)	CCC	1-9-24	KS	MC
Seizures (NA6046)				
Sickle Cell (NA6066)				
TB General (NA6053)				
TB-INH (NA6067)				
Venous Stasis Ulcer (NA6068)				
Warfarin (medication) (NA6049)				

Education will be ongoing throughout your treatment. Your signature confirms that this education information has been reviewed with you.

Patient Signature	Patient Initials	
Kenneth Smith	KS	

Health Staff Signature	Print/Stamp Name	Initials
M Chandler LPN	MChandler LPN	MC

NA5039b
Issued 1/2013

Revised: 7/2016

Smith Medical 2000015

Chronic Disease Clinic Follow-Up

Inmate Name: Smith, Kenneth	
Number: Z512	Institution: HCF

List chronic diseases:

1) HTN	3) Chronic Migraine
2) HLD	4)
	6)

Attach pharmacy profile or list current medications: Lisinopril 30mg qd, Prilosec 20mg, Buspar 15mg bid, Remeron 15mg hs, Prozac 20mg @ noon - Zyrtec 10mg hs, Tylenol 325mg #2 bid prn, Imitrex 50mg prn, Lopressor 50mg bid

Subjective: c/o Nausea, diarrhea x 1 wk - vomited x1

Asthma: # attacks in last month?______	Seizure disorder: # seizures since last visit?______
# short acting beta agonist canisters in last month?______	Diabetes mellitus: # of hypoglycemic reactions since last visit?______
# times awakening with asthma symptoms per week?______	Weight loss/gain ↓(↑) 9 #lbs
CV/hypertension (Y/N): Chest pain? ø SOB? ø Palpitations? ø Ankle edema? ø	
HIV/HCV (Y/N): Nausea/vomiting?____ Abdominal pain/swelling?____ Diarrhea?____ Rashes/lesions?____	

For all diseases, since last visit, describe new symptoms: [illegible] Nonsmoker [illegible] last vomit [illegible] "nervous"

Patient adherence (Y/N): with meds? Yes with diet? No with exercise? No Noncompliance counseling? No

Vital signs: Temp 97.4 BP 144/90 Pulse 84 Resp 18 Wt 231.8 O2 Sat 99% INR NA

PEFR #1 NA #2 NA #3 NA

Labs: Hgb A1C NA HIV VL NA CD4 NA Total Chol 244 LDL 157 HDL 45 Trig 209

Range of fingerstick glucose/BP monitoring: NA

PE: A&O x3 [illegible] NAD [illegible]

HEENT/neck: [illegible]	Extremities: [illegible]
Heart: RRR [illegible]	Neurological:
Lungs: CTA [illegible]	GU/rectal:
Abdomen: +BS (soft NT ND	Other:

[illegible]

Assessment:

		Degree of Control G	F	P	NA	Clinical Status I	S	W	NA
1	HTN [illegible] Diet	☒	☐	☐	☐	☐	☒	☐	☐
2	~~HLD [illegible] refuses tx~~	☐	☒	☐	☐	☐	☒	☐	☐
3	Chronic Migraine: [illegible]	☒	☐	☐	☐	☐	☒	☐	☐
4	[illegible] - [illegible]	☐	☐	☐	☐	☐	☒	☐	☐
5	diet, [illegible] fluids, [illegible]	☐	☐	☐	☐	☐	☐	☐	☐
6		☐	☐	☐	☐	☐	☐	☐	☐

Plan:

Medication changes:

Diagnostics/Labs: [illegible]

Reviewed Lab/Procedures/Reports with pt. ☒ Yes ☐ No ☐ N/A Indicated Treatment Plan changes discussed: ☐ Yes ☐ No ☐ N/A

Monitoring: BP:____X day/week/month Glucose:____X day/week/month/prn Peak flow:____ Other:____

Education provided: ☒ Nutrition ☒ Exercise ☒ Smoking ☒ Test results ☒ Medication management ☒ Other: HTN, HLD

Next Visit (days)?: ☐ 180 ☒ 90 ☐ 60 ☐ 30 ☐ Other:____ Discharged from CCC (clinic name): [illegible] Migraine

HCV Treatment: Y (N) Missed doses: # NA (total) OHS ID Coordinator notified of noncompliance? Y (N) Date:

[...]ance Level Provider Signature: [signature]

Date/Time: 1-9-24 1020

YesCare

Emergency Respo Tool (ERT) *Known or Suspected Overdose Naloxone (Narcan) Administration*

THIS TOOL IS NOT INTENDED TO REPLACE THE IMMEDIATE URGENT/EMERGENT CARE NEEDS OF ABC'S/BLS

DEMOGRAPHICS/VITAL SIGNS

Patient name:	Last: Smith			First: Kenneth	MI:	ID#: 2512	Age: 58
Vital signs:	T: 97.4	P: 73	R: 17	BP: 133/72	Pulse Ox: 97 % ☒ RA ☐ O2: /lpm		
*Notify provider	*T<97.8->100.3	*P<60->110	*R<12->20	*BP<90/60->145/95	Pulse Ox<92%		

☐ No known allergies ☐ Allergies

ACUTE DISTRESS: *PERFORM ABCs, CONTACT EMS, APPLY AED, ADMINISTER NALOXONE/NARCAN, NOTIFY PROVIDER, PREPARE FOR TRANSPORT*

☐ AIRWAY COMPROMISED ☐ BREATHING LABORED/RESPIRATORY DISTRESS ☐ CIRCULATION PALE/DIAPHORETIC

☐ NEURO LETHARGIC/SLOW RESPONSES/ANXIOUS

Indications for Administration of Naloxone (Narcan):

☐ Acute distress above ☐ Known or suspected overdose ☐ Decreased respirations ☐ Altered mental status
☐ Pinpoint pupils (with other indication(s))

SUBJECTIVE

HISTORIAN: ☒ Patient ☐ Other inmate ☒ Officer ☐ Other: Records
Name_____ Time/date: 12-24-23 ~~0900~~ ☐ Witnessed ☒ Unwitnessed
Substance: ☐ Known, describe: "joint" ☒ Unknown

ASSOCIATED FACTORS:
☐ Loss of consciousness ☐ Seizure ☐ Tremor ☐ Incontinence ☒ Nausea/vomiting ☐ Vomitus present Reported by pt's Atc.

MEDICAL HISTORY:
☐ CVA ☐ Metabolic condition ☐ Cardia hx/arrhythmias ☐ Pregnant ☐ Seizure history ☐ COPD ☐ Asthma
☐ Diabetic

SOCIAL HISTORY:
☐ Drug use history ☐ IV drug use ☐ Alcohol use Unknown.

OBJECTIVE

GLASGOW COMA SCALE (GCS)		
Eye Opening (E)	Verbal Response (V)	Motor Response (M)
4 = Spontaneous 3 = To voice 2 = To pain 1 = None	5 = Normal conversation 4 = Disoriented conversation 3 = Words, but not coherent 2 = No words, only sounds 1 = None	6 = Normal 5 = Localizes to pain 4 = Withdraws to pain 3 = Decorticate (Arms bent across chest) 2 = Decerebrate (Arms straight down side) 1 = None
E= 4	V= 5	M= 6
SCORE (E+V+M)= 15 (≤13 call provider)		

EYES:

Pupil size reference chart 2mm 4mm 6mm 8mm Pupils need to be noted in 1mm-10+mm
☐ PERRLA Pupil size Right 4 mm Left 4 mm ☐ Abnormal gaze/stare ☐ Nystagmus (involuntary eye movement)

RESPIRATORY/BREATHING:
Breathing ☒ Normal ☐ Labored ☐ Tachypneic ☐ Depressed ☐ Wheezing ☐ Accessory muscle use ☐ Cyanotic

CARDIAC:
Heart rate/rhythm ☒ Regular ☐ Irregular Abnormal sounds ☐ Murmurs ☐ Rubs ☐ Clicks ☐ Other:_____
Chest movement ☒ Symmetrical ☐ Asymmetrical

NOTES/DOCUMENTATION: Pt states, "I was smoking a joint & I hit it to hard." NO S/S of "joint" laced other drug.

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
S Rowell RN	S Rowell RN	12-24-23

YesCare

Emergency Respon- Tool (ERT) *Known or Suspected Overdose Naloxone (Narcan) Administration*

Patient	Last	First	ID Number
	Smith	Kenneth	2512

EMERGENT INTERVENTION–*PROVIDER CONTACT REQUIRED*

If CPR or AED is initiated use Emergency Response Form (NA6291)

SCOPE OF PRACTICE GUIDELINES FOR YOUR STATE MUST BE FOLLOWED WHEN PERFORMING EMERGENT INTERVENTION

APPROVED LIFE SAVING INTERVENTIONS FOR OVERDOSE (Check all that apply)

☐ Administer Naloxone/Narcan (select route below):

- Intranasal spray initial dose is 4mg intranasal, if no response may give doses of 4mg every 2-3 minutes until EMS arrives (*Preferred route of administration unless contraindicated*)
- Intramuscular or subcutaneous initial dose is 2mg IM or SubQ, if no response may give doses of 2mg every 2-3 minutes for a max of 10mg

☐ Administer O2 @ 2/lpm via NC to achieve Pulse Ox >95% (88% to 92% on COPD patients)

☐ Start IV (2 large bore 18-20 gauge if possible)

- #1 Size/location:________ #2 Size/location: ________

☐ FSBS (Test all patients):________ ☐ EKG ☐ Normal ☐ Abnormal ☐ MI/Ischemia

☐ EMS notified time:______ Arrival time:______ Attach AED if EMS is notified

☐ Provider notified:________ Time:______

Disposition: ☐ Send out to ER ☐ Admit for infirmary-level care ☐ Place in observation ☐ Behavioral health referral initiated

N/A

Time	NALOXONE ADMINISTRATION DOCUMENTATION (Route/Dose/Patient response)		Pulse	R	BP /	Pulse Ox %
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
If no response, do EKG (if available) and consider other causes of symptoms while continuing Naloxone (Narcan)						
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
MAY ONLY GIVE INTRANASAL BEYOND THIS POINT 10 MG MAX ON ALL EXCEPT INTRANASAL						
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				

N/A

ADDITIONAL DOCUMENTATION/ORDERS: Pt appears high s̄ distress, on "pot". Pt laughing & talking to staff. Slurred speech from "joint." NO s/s of CVA.

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
E Rowell RN	E Rowell RN	12-24-23 0800

NA9811 Issued 08/2020

YesCare
Say Yes to Exceptional Care

Informed Consent for Psychotropic Medication

DEMOGRAPHICS

Patient Name: Smith, Kenneth
AIS #: 7512
Facility: Holman
Date of Birth: 7-4-65
Location: KLM
Sex: ☑ Male ☐ Female

MEDICATION

Medication Class	Medication	Dosage Range
Anxiolytic (Buspirone)	Buspar	15mg BID

REASON FOR USE OF PSYCHOTROPIC MEDICATION AND BENEFITS EXPECTED

Mental health disorder/diagnosis:

Patient education provided regarding:

☑ Nature of diagnosis, symptoms/signs for which medication(s) are prescribed
☑ Anticipated response to medication
☐ Alternative treatment options
☑ Type of medication, amount, frequency and route of administration and duration of treatment

BENEFITS

Benefits of taking the proposed medication are: (Check all that apply)

☑ Reduction in Symptoms: ☑ Improvement in Function

☐ Other benefits:

RISKS

Potential side effects associated with taking this medication include: (Check all that apply)

☐ Psychiatric:
☐ Neuro:
☐ Movement Related:
☑ GI: diarrhea, nausea
☑ Other: drowsiness, headache, fatigue, insomnia, blurred vision, nervousness
☐ Skin/Derm:
☐ Blood/Bone Marrow:
☐ Urogenital/Sexual:
☐ Musculoskeletal:

SIGNATURES

I have received verbal advisement and information for the medications prescribed. I understand the risks and benefits. I agree at this time to take the medication(s) and have had the alternatives explained to me. I understand that I may withdraw my consent at any time by informing any member of the medical/mental health staff.

Patient Signature X [signature] Date 12-4-23

Provider Signature [signature] Date 12-4-23

REFUSAL

My signature indicates that I understand the purpose of this medication, the benefits I may gain from taking it, the potential side effects and risks, and any alternative treatments. I also understand that I should discuss any questions or concerns with the doctor or nurse practitioner who prescribed this medicine At this time, I refuse to take the medication prescribed for me.

Patient Signature Date

Provider Signature Date

YesCare
Say Yes To Exceptional Care

Informed Consent for Psychotropic Medication

DEMOGRAPHICS

Patient Name: Smith, Kenneth
AIS #: 262512
Facility: Holman
Date of Birth: 7-4-65
Location: K, LM Community
Sex: ☑ Male ☐ Female

MEDICATION

Medication Class	Medication	Dosage Range
Tetracyclic Antidepressant (Mirtazapine)	Remeron	15 mg q hs

REASON FOR USE OF PSYCHOTROPIC MEDICATION AND BENEFITS EXPECTED

Mental health disorder/diagnosis:

Patient education provided regarding:

☑ Nature of diagnosis, symptoms/signs for which medication(s) are prescribed
☑ Anticipated response to medication
☐ Alternative treatment options
☑ Type of medication, amount, frequency and route of administration and duration of treatment

BENEFITS

Benefits of taking the proposed medication are: (Check all that apply)

☑ Reduction in Symptoms:
☑ Improvement in Function
☐ Other benefits:

RISKS

Potential side effects associated with taking this medication include: (Check all that apply)

☐ Psychiatric:
☐ Neuro:
☐ Movement Related:
☑ GI: Constipation
☑ Other: Restless, racing thoughts, dizziness, blurred vision, dry mouth, ↑ weight, dre
☐ Skin/Derm:
☐ Blood/Bone Marrow:
☐ Urogenital/Sexual:
☑ Musculoskeletal: weakness

SIGNATURES

I have received verbal advisement and information for the medications prescribed. I understand the risks and benefits. I agree at this time to take the medication(s) and have had the alternatives explained to me. I understand that I may withdraw my consent at any time by informing any member of the medical/mental health staff.

Patient Signature [signature] Date 12-4-23
Provider Signature [signature] Date 12-4-23

REFUSAL

My signature indicates that I understand the purpose of this medication, the benefits I may gain from taking it, the potential side effects and risks, and an alternative treatments. I also understand that I should discuss any questions or concerns with the doctor or nurse practitioner who prescribed this medicin At this time, I refuse to take the medication prescribed for me.

atient Signature Date

Provider Signature Date

YesCare
Say Yes to Exceptional Care

Informed Consent for Psychotropic Medication

DEMOGRAPHICS

Patient Name: Smith Kenneth
AIS #: 2512
Facility: Holman
Date of Birth: 7-4-65
Location: KLM
Sex: ● Male ○ Female

MEDICATION

Medication Class	Medication	Dosage Range
SSRI Anti-depressant (Sertraline)	Zoloft	
SSRI Anti-depressant (Citalopram)	Celexa	
SSRI Anti-depressant (Paroxetine)	Paxil	
SSRI Anti-depressant (Fluoxetine)	Prozac	20 mg q noon

REASON FOR USE OF PSYCHOTROPIC MEDICATION AND BENEFITS EXPECTED

Mental health disorder/diagnosis:

Patient education provided regarding:

- ☑ Nature of diagnosis, symptoms/signs for which medication(s) are prescribed
- ☑ Anticipated response to medication
- ☐ Alternative treatment options
- ☑ Type of medication, amount, frequency and route of administration and duration of treatment

BENEFITS

Benefits of taking the proposed medication are: (Check all that apply)

- ☑ Reduction in Symptoms:
- ☑ Improvement in Function
- ☐ Other benefits:

RISKS

Potential side effects associated with taking this medication include: (Check all that apply)

- ☐ Psychiatric:
- ☐ Neuro:
- ☐ Movement Related:
- ☑ GI: Constipation
- ☑ Other: dizziness, drowsiness, nausea, dry mouth, loss of appetite, ↑ BP, fatigue, sweating
- ☐ Skin/Derm:
- ☐ Blood/Bone Marrow:
- ☑ Urogenital/Sexual: difficult urination
- ☐ Musculoskeletal:
- Blurred vision

SIGNATURES

I have received verbal advisement and information for the medications prescribed. I understand the risks and benefits. I agree at this time to take the medication(s) and have had the alternatives explained to me. I understand that I may withdraw my consent at any time by informing any member of the medical/mental health staff.

Patient Signature [signature] Date 12-4-23

Provider Signature [signature] Date 12-4-23

REFUSAL

My signature indicates that I understand the purpose of this medication, the benefits I may gain from taking it, the potential side effects and risks, and any alternative treatments. I also understand that I should discuss any questions or concerns with the doctor or nurse practitioner who prescribed this medicine. At this time, I refuse to take the medication prescribed for me.

atient Signature Date

Provider Signature Date

Exhibit 5

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

KENNETH EUGENE SMITH, Plaintiff, v. JOHN Q. HAMM, in his official capacity as Commissioner, Alabama Department of Corrections, and TERRY RAYBON, in his official Capacity as Warden, Holman Correctional Facility, Defendants.	)	Case No. 2:23-cv-00656-RAH CAPITAL CASE **EXECUTION SCHEDULED FOR JANUARY 25, 2024**

SECOND SUPPLEMENTAL DECLARATION OF KATHERINE PORTERFIELD,

I, Katherine Porterfield, declare under penalty of perjury as follows:

1. I submit this declaration to supplement my report dated November 17, 2023 and supplemental declaration dated December 15, 2023.

2. This second supplemental declaration is based on additional information I received and reviewed on January 23, 2024.

3. The new information consists of Mr. Smith's new medical records from the state correctional facility where he is currently incarcerated and awaiting execution. The medical records note multiple instances of Mr. Smith reporting nausea and vomiting: 12/24/2023, 1/9/2024, and 1/18/2024. During the 1/18/2024 visit Mr. Smith reported intermittent nausea, vomiting and diarrhea for the past two weeks and was prescribed an antiemetic by DOC medical providers (ondansetron 8 mg twice a day for seven days).

4. The new medical records pertaining to the care and treatment of Mr. Smith are attached as Exhibit A.

5. In my prior report and declaration, I shared my conclusion that Mr. Smith suffers from Posttraumatic Stress Disorder (PTSD) and depression, something confirmed by medical and mental health practitioners (a psychiatrist and psychologist) at Holman Correctional Facility, where Mr. Smith is incarcerated. The PTSD that Mr. Smith suffers, as well as depression, are directly linked to the experience of his attempted execution on November 17, 2022. PTSD is a condition in which an individual experiences an array of psychobiological symptoms in the extended aftermath of suffering traumatic events. One of the hallmark features of PTSD is that new stressors and reminders of the trauma can exacerbate PTSD symptoms. Mr. Smith's symptoms include nausea, a symptom that has worsened into actual vomiting as his second execution has approached.

6. The medical records that I reference here indicate that Mr. Smith is experiencing a worsening of his symptoms of PTSD. This is consistent with my opinions set forth in my prior report and declaration – that his PTSD related to the trauma of his first attempted execution on November 17, 2022 will be exacerbated by the approaching events and protocols of a second execution. These events will trigger the involuntary symptoms of PTSD. Mr. Smith is clearly under increasing stress and it is critical to recognize that this symptom of increased frequency of nausea and vomiting poses a serious risk that Mr. Smith will suffer vomiting during the execution process. And, as I testified during the hearing in this matter, these records corroborate my opinion that Mr. Smith's condition is deteriorating and will continue to deteriorate as his anxiety increases in anticipation of his second attempted execution. Mr. Smith's deteriorating condition is apparent in these records.

7. Incorporating these new records into the universe of materials I have reviewed and considered in forming my opinions, it is my opinion to a reasonable degree of clinical certainty

that there is a substantial and serious risk that Mr. Smith will experience nausea and vomiting during his execution, due to his condition of PTSD and his ongoing, worsening symptoms of nausea and vomiting seen over the last four weeks. This creates a significant risk that Mr. Smith will suffer substantial harm, including but not limited to asphyxiating—that is, choking to death—on his own vomit.

Executed on this 23rd day of January 2024,

Katherine Porterfield, Ph.D.

EXHIBIT A

CHSS037B Drug Prescri Order Thursday January 18, 2024 17:47:37 CST

Ordered Date: 01/18/2024 Time: 17:43:12 (CT)
Encounter Type: Nurse - Verbal/Telephone Orders
Location: William C. Holman Correctional Facility [WCHOLMAN] Staff: Ayers, Christy, LPN
Order Number: 0516919 Rx Number:
Ordering Practitioner*: Delgado, Nicholas Sequence Number: 01

Allergies

Allergies (1 - 2 of 2)

Problem #	Type	Reaction	Severity	Status	As of Date
001	Zonisamide (Zonegran)	Other	Moderate	Assessed	
002	Clindamycin	Other	Mild	Assessed	

Prescription

Diagnosis Code*: Nurse Override
(•) Formulary ( ) Non-Formulary
Drug Type: Ondansetron Hcl 8 Mg Tabs 8Mg Tabs
National HIE Code(s)
RxNorm: 312086 - ondansetron 8 MG (as ondansetron hydrochloride dihydrate 10 MG) Oral Tablet;
Critical Medication: ☐
Effective Date: 01/18/2024
Generic Acceptable ☑
Profile Only: ☐
Dosage*: 1 Dosage Form: Tabs
Strength*: 8Mg
Frequency*: BID-TWICE DAILY
for*: 7 days (Total duration)
Estimated Dispense Quantity*: 14.00 Confirm Estimated Dispense Quantity Indicator: Yes ( ) No ( )
Route of Administration*: PO-By Mouth Method*: Ordered Dose
Pill Call* AM: ☐ Noon: ☑ PM: ☐ HS: ☑
Keep on Person? *: No Expiration: 01/24/2024 % Compliant: MAR Summary
Delivery Tm Frame*: Routine Drug on hold start: Drug on hold through:

Order Information

Pharmacy Indicated # Refills: 0 # Refills Issued: 0
Received Fm Pharmacy:
Status*: Approved/Approval As of Date*: 01/18/2024 Status History

Pharmacy Comments

Comments

CHSS037B - Drug Prescription Order

Medication ordered per Verbal Orde Dr Delgado for diagnosis of nausea and vomiting

Medication Administration Record

Prepare to Add

Date	Time	Quantity Administered	Source	Outcome	Comments/Addendums
No Rows Found					

Medication Receipt History

Receipt Date/Time	Administered Qty	Received By	Status	Status Date	Substitution
No Rows Found					

Update Prior Page

Show/Hide Drug Interactions

Show Last Updated Information

YesCare
Say Yes To Exceptional Care

Nursing Encounter Tools (NETs)

Gastrointestinal (GI)

(GI Bleed Suspected/Lower GI Symptoms/Abdominal Pain-Male and Female/Nausea Vomiting)

THIS TOOL IS NOT INTENDED TO REPLACE THE IMMEDIATE URGENT/EMERGENT CARE NEEDS OF ABC'S/BLS

DEMOGRAPHICS/VITAL SIGNS

Facility name: Holman	Location seen: MCU - Shift office	Date seen: 1/18/24	Time seen: 1610				
Patient name:	Last: Smith	First: Kenneth	MI:	ID#: 2512	DOB: 7/4/65	Age:	
Vital signs:	T: 97.3	P: 96	R: 18	BP: 161/85	Pulse Ox: 98% ☐RA ☐O2: /lpm	Wt: 218	☒Actual ☐Reported
*Notify provider	*T<97.8->100.3	*P<60->110	*R<12->20	*BP <90/60->145/95	*Pulse Ox<92%		
☐No known allergies ☒Allergies: Clindamycin							
Chronic care clinic: ☒Y ☐N What clinic(s): HTN, HLD, DLD, HTG, Obesity, GERD, Chronic migraine							

SUBJECTIVE

CHIEF COMPLAINT: N/V/D x 2wks

Onset date: _____ Time: _____

Have you had this problem before ☐N ☒Y, if yes describe below:

Describe: intermittent

Close contact with someone who had/has the same symptoms: ☒N ☐Y, person(s): _____

Trauma ☒N ☐Y, describe: _____

ASSOCIATED FACTORS:

Pain scale now 0 10 at worst 10

Location of pain ☐RUQ ☐RLQ ☐LUQ ☐LLQ Generalized

☐Constant ☐Intermittent ☐Cramping ☐Burning

☐Dull ☐Sharp ☐Radiating

What makes it better: _____

What makes it worse: _____

Pain induced/increased with walking/movement ☐Y ☐N N/A

Last solid intake Date: 1/18/24 Time: 1600

Last liquid intake Date: 1/18/24 Time: 1600

Recent unintended weight changes ☐Loss, ___ lbs. ☐Gain, ___ lbs.

☐Excessive thirst ☐Excessive hunger ☒Nausea

☒Vomiting ☐Coffee grounds *(Upper GI bleed)* ☐Bloody ☐Green

Vomiting frequency/duration: _____

Last BM, date: 1/16 ☒Brown ☐Tan

☐Bloody ☐Black/tarry *(Lower GI bleed)*

☐Constipation, how long: _____ ☐Diarrhea, how often: _____

Urine color ☐Yellow ☐Brown *(Urgent)* ☐Bloody N/A

☐Excessive urine output ☐Painful urination ☐Difficulty urinating

☐Alcohol use, years/drinks per day: _____

☐Drug use, type/frequency: _____

PERTINENT MEDICAL CONDITIONS:

☐Heartburn/GERD ☐Peptic ulcer ☐Crohn's GERD

☐Gallstones ☐Colitis ☐Celiac disease

☐Diverticulitis ☐Pancreatitis ☐End stage liver disease

☐Hernia or history of, when: _____

☐GI bleed treatment: _____ Date: _____

☐Abdominal surgery: List: _____ Date: _____

☐Appendectomy ☐Kidney stones ☐Cardiovascular disease

☐Diabetes ☐Stroke ☐CHF ☐Hepatitis history

☐Pregnant ☐History of ovarian cysts ☐History of PID

☐Tobacco use _____/yrs. _____/ppd (packs per day)

MEDICATIONS:

☐ASA/NSAIDS, how long: ___ ☐Anticoagulants ☐Steroids

☐GI meds ☐Iron

☐New medication(s) within the past 30 days?

What medication(s): _____

OBJECTIVE

GENERAL APPEARANCE:

☐Distressed ☐Calm ☐Agitated ☒Anxious

Observation of patient while walking ☐Grimacing

☒Able to stand erect ☐Abnormal gait

Other: _____

RESPIRATORY/BREATHING:

Breathing ☒Normal ☐Labored ☐Tachypneic ☐Bradypneic

☐Stridor *(Emergency)* ☐Wheezing ☐Accessory muscle use

☐Cough ☐Sputum production, color/consistency: _____

Right lung ☒Clear ☐Wet ☐Diminished ☐Absent *(Emergency)*

Left lung ☒Clear ☐Wet ☐Diminished ☐Absent *(Emergency)*

Other abnormal findings: N/A

ABDOMEN:

Fully examine anatomical areas of subjective complaint to include: Epigastric, periumbilical, and suprapubic

Bowel sounds present ☐RU ☐LU ☐LL ☐RL ☒Normal

☐Absent bowel sounds, quadrant: _____ *(listen for full 5 minutes)*

☐Hypoactive ☐Hyperactive ☐High pitched ☐Rebound tenderness

If absent identify area(s): _____

☒Soft ☐Rigid ☐Distended ☐Mass ☐Tender

☐Visible bulges, describe: N/A

Other abnormal findings: None

CARDIAC:

Heart rate/rhythm ☒Regular ☐Irregular ☐Tachy ☐Brady

Pulse ☒Strong ☐Weak ☐Thready ☐Bounding

Abnormal sounds ☐Murmurs ☐Rubs ☐Clicks

SKIN: (Use Anatomical Figure NA0804 for details if needed)

☐Warm ☒Dry ☐Cool ☐Clammy/diaphoretic ☐Pale ☐Red

☐Bruising ☐Jaundice ☐Mottling ☐Blister ☐Rash ☐Bleeding

☐Scaly/cracking ☐Needle tracks ☐Lice ☐Mite tunnels

Describe rash and location: _____

Other abnormal findings: N/A

TESTS:

Finger stick blood sugar results: N/A (ALL)

UA dipstick results: _____ (ALL)

☐EKG (Diabetics, if available) Time: _____

☐Scan sent to provider Time: N/A

FEMALES ☐uHCG results: _____ (ALL) ☐N/A, LMP: _____

Patient with suspected GI bleed perform orthostatic vital signs and perform Hemoccult test.

Orthostatic vital signs:

Lying: _____ Sitting: _____ Standing: _____

Hemoccult test ☐Pos. ☐Neg. ☐Unable to provide sample

NOTES/DOCUMENTATION:

C/o intermittent N/V/D x 2wks and Tarry stool

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
MHendrick RN	MHendrick, RN	1/18/24 1618

YesCare
Say Yes To Exceptional Care

Nursing Encounter Tools (NETs)
Gastrointestinal (GI)
(GI Bleed Suspected/Lower GI Symptoms/Abdominal Pain-Male and Female/Nausea Vomiting)

Patient	Last	First	ID Number
	Smith	Kenneth	758

☐ EMERGENT INTERVENTION–*PROVIDER CONTACT REQUIRED*

If CPR or AED is initiated use Emergency Response Form (NA6291)

IF PATIENT IS EXPERIENCING AN EMERGENT CONDITION CONTINUE WITH EMERGENT INTERVENTIONS, ACTIVATE LOCAL EMS SYSTEM, AND PREPARE PATIENT FOR TRANSPORT

SCOPE OF PRACTICE GUIDELINES FOR YOUR STATE MUST BE FOLLOWED WHEN PERFORMING EMERGENT INTERVENTION

☐ Monitor the patient's vital signs
☐ Prepare patient for transport
☐ Recheck vital signs: Time: _____ Condition improved ☐ Y ☐ N
Pulse _____ R _____ BP _____/_____ Pulse Ox _____ ☐ RA ☐ O2 ____lpm/via _____

Name of provider notified: _____ Time:_____ ☐ EMS notified time: _____ Arrival time: _____

COMMENTS/ORDERS:

☐ URGENT INTERVENTION-*PROVIDER CONTACT REQUIRED*

☐ Abnormal vital signs
- ☐ Temp <97.8->100.3
- ☐ Pulse <60->110
- ☐ Respiration <12->20
- ☐ B/P <90/60->145/95
- ☐ SpO2<92%

☐ Absent bowel sounds (Assessed for full 5 minutes)
☐ Distended or rigid abdomen
☐ Rebound tenderness ☐ Unable to stand erect
☐ Nausea/vomiting and/or diarrhea > 24 hours ☐ Bloody (black)/tarry stools ☐ Bloody/coffee ground emesis ☐ Brown or bloody urine
☐ Signs of respiratory distress ☐ Abnormal fingerstick (Diabetic <60 or >240, Non-diabetic <70 or >200)
☐ Abnormal dipstick UrA ☐ Positive uHCG ☐ Hemoccult result positive ☐ Unintended weight loss or gain (*possible cancer or CHF indicators*)
☐ Other describe: _____

Reviewed with provider: ☐ MAR ☐ Health record
☑ Seen by provider Name: Dr. Delgado Time: 1610
☐ Contacted provider Name: _____ Time: _____
☐ Contacted Behavioral Health Name: _____ Time: _____
Provider orders received ☐ Y ☐ N ☐ Read back provider orders

Provider orders:
Zofran 8mg BID X 7days 100/100

Disposition ☐ Monitor/Observation (24 hour) ☐ Infirmary-level ☐ Other _____

ADDITIONAL COMMENTS/DOCUMENTATION:
1615 — Zofran 4mg ODT given — V.O. Zofran 8mg BID X 7days per Dr. Delgado. M Hendricks, RN

☐ NURSING INTERVENTION

CONTINUITY OF CARE
Seen by Dr. Delgado today
- ☑ No follow up required
- ☐ Referral to provider for current presenting complaint
- ☐ Referred to provider multiple visits for same complaint
- ☐ Referred to provider for evaluation of enrollment in CCC
- ☐ Nurse follow up scheduled
- ☐ Custody notified of special needs
- ☐ Referral to Behavioral Health
- ☐ Other: _____

NURSING INTERVENTION
REFER TO INTERVENTION GUIDE FOR AVAILABLE OTC MEDICATIONS
- ☐ OTC medication(s) given and documented in MAR

PATIENT EDUCATION
- ☑ Patient educated to contact medical if new symptoms develop or current condition symptoms worsen
- ☐ Written education provided ☑ Verbal education provided ☐ Patient educated on OTC medication(s)
- ☑ The patient demonstrates an understanding of self-care, symptoms to report, and when to return for follow-up care

ADDITIONAL COMMENTS/DOCUMENTATION:
C/o N/V/D x 2 weeks – intermittent – "I think it's anxiety" "I'll see Dr. Delgado when I take buspar" Denies cramps, denies blood, diarrhea.

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
M Hendricks RN	M Hendricks, RN	1/10/24 1614

Alabama Department of Corrections
Sick Call Request

r Sick Call Request:

Vomiting and diarrhea have not stop.

im): Kenny Smith AIS # Z-512 Date of Birth 7-4-65

Housing Area: L-59 Date: 1-17-24

orm Collected by Health Staff: RB (initials) Title: CW Date: 1/18/24 Time: 0330

Triaged (check as appropriate):

Sick Call Nurse Encounter Not Required

(1) ___ Referring to Chronic Care Manager

(2) ___ Written Response/Instruction Being Provided

Nurse Sick Call Encounter Required

(1) ___ Bring to HCU at this time for further evaluation

(2) ✓ **Evaluate** in next scheduled Nurse Sick Call Clinic

Title: Sharron Story-Cardwell, RN Date: 1/18/24 0330

Encounter (Nurse Evaluation Tool Completed):

Resolved by Nurse Encounter And Dr. Delgado saw pt @ sick call

2 ___ Referral for follow up required; to be scheduled

(a) ___ Medical Provider

(b) ___ Dental Clinic

(c) ___ Mental Health Services

y Fee Incurred:

$4.00 - Nurse

Housing no OTC charge

YesCare
Say Yes To Exceptional Care

Patient Information Education Log
Chronic Care

Facility Name	Holman			
Patient's Name Last	Smith	First Kenneth	MI	ID Number 2512
Birth date 7/21/65	Medication Allergies ☑ N ○ Y If Yes List:			
Diagnosis	HTN - HLD - DLD - HTG - GERD			

PIFS Title	Encounter Type	Date	Patient Initials	Provider initials
Asthma (NA6040)				
CAD (NA5075)				
CHF (NA5080)				
Cholesterol (Hyperlipidemia) (NA5079)	CCC	1-9-24	KS	MC
Chronic Care Clinic (NA5076)	CCC	1-9-24	KS	MC
Diabetes- General (NA6005)				
Diabetes- A1C (NA6054)				
Diabetes- Long Term Problems (NA6056)				
Diabetes-Checking Your Blood Sugar (NA6256)				
Diabetes-Taking Insulin (NA6257)				
HCV-(Hepatitis-C)-General (NA5079)				
HCV-(Hepatitis C)-Treatment (NA6057)				
HCV-(Hepatitis C) Liver Biopsy (NA6062)				
HIV (NA7251)				
HIV Medicines (NA7253)				
HIV My Treatment (NA7252)				
HIV Healthy Living (NA7254)				
HTN (Hypertension) (NA6058)	CCC	1-9-24	KS	MC
Seizures (NA6046)				
Sickle Cell (NA6066)				
TB General (NA6053)				
TB-INH (NA6067)				
Venous Stasis Ulcer (NA6068)				
Warfarin (medication) (NA6049)				

Education will be ongoing throughout your treatment. Your signature confirms that this education information has been reviewed with you.

Patient Signature	Patient Initials	
Kenneth Smith	KS	

Health Staff Signature	Print/Stamp Name	Initials
M Chandler LPN	MChandler LPN	MC

Chronic Disease Clinic Follow-Up

Inmate Name: Smith, Kenneth	
Number: Z512	Institution: HCF

List chronic diseases:

1) HTN	3) Chronic Migraine
2) HLD	4)
	6)

Attach pharmacy profile or list current medications: Lisinopril 30mg qd, Prilosec 20mg, Buspar 15mg bid, Remeron 15mg hs, Prozac 20mg @ noon - Zyrtec 10mg hs, Tylenol 325mg #ii bid prn, Imitrex 50mg prn, Lopressor 50mg bid

Subjective: c/o Nausea, diarrhea x 1 wk - vomited x1

Asthma: # attacks in last month?______	Seizure disorder: # seizures since last visit?______
# short acting beta agonist canisters in last month?______	Diabetes mellitus: # of hypoglycemic reactions since last visit?______
# times awakening with asthma symptoms per week?______	Weight loss/gain ↓(↑) 9 #lbs
CV/hypertension (Y/N): Chest pain? Ø SOB? Ø Palpitations? Ø	Ankle edema? Ø
HIV/HCV (Y/N): Nausea/vomiting? ______ Abdominal pain/swelling? ______	Diarrhea? ______ Rashes/lesions? ______

For all diseases, since last visit, describe new symptoms: [illegible handwriting]

[illegible handwriting] "nervous"

Patient adherence (Y/N): with meds? yes with diet? No with exercise? No Noncompliance counseling? No

Vital signs: Temp 97.4 BP 144/90 Pulse 84 Resp 18 Wt 231.8 O2 Sat 99% INR NA

PEFR #1 NA #2 NA #3 NA

Labs: Hgb A1C NA HIV VL NA CD4 NA Total Chol 244 LDL 157 HDL 45 Trig 209

Range of fingerstick glucose/BP monitoring: NA

PE: AOx3 [illegible] NAD [illegible]

HEENT/neck: [illegible]	Extremities: [illegible]
Heart: [illegible]	Neurological:
Lungs: [illegible]	GU/rectal:
Abdomen: +BS (soft NT ND	Other:

Assessment: [illegible]

		Degree of Control				Clinical Status			
		G	F	P	NA	I	S	W	NA
1	HTN ↓Na Diet	☒	☐	☐	☐	☐	☒	☐	☐
2	~~HLD [illegible] tx [illegible] refuses tx~~	☐	☒	☐	☐	☐	☒	☐	☐
3	Chronic Migraine; cont [illegible]	☒	☐	☐	☐	☐	☒	☐	☐
4	[illegible] - [illegible]	☐	☐	☐	☐	☐	☒	☐	☐
5	diet, [illegible] fluids, [illegible]	☐	☐	☐	☐	☐	☐	☐	☐
6		☐	☐	☐	☐	☐	☐	☐	☐

Plan:

Medication changes: [illegible]

Diagnostics/Labs: [illegible]

Reviewed Lab/Procedures/Reports with pt. ☒ Yes ☐ No ☐ N/A Indicated Treatment Plan changes discussed: ☐ Yes ☐ No ☐ N/A

Monitoring: BP:______X day/week/month Glucose:____X day/week/month/prn Peak flow:______ Other:______

Education provided: ☒ Nutrition ☒ Exercise ☒ Smoking ☒ Test results ☒ Medication management ☒ Other: HTN, HLD [illegible] Migraine

Next Visit (days)?: ☐ 180 ☒ 90 ☐ 60 ☐ 30 ☐ Other: ______ Discharged from CCC (clinic name): ______

HCV Treatment: Y (N) Missed doses: # NA (total) OHS ID Coordinator notified of noncompliance? Y (N) Date: ______

[Clearance] Level Provider Signature: [signature] Date: 1-9-24 Time: 1020

YesCare

Emergency Respo Tool (ERT) *Known or Suspected Overdose Naloxone (Narcan) Administration*

THIS TOOL IS NOT INTENDED TO REPLACE THE IMMEDIATE URGENT/EMERGENT CARE NEEDS OF ABC'S/BLS

DEMOGRAPHICS/VITAL SIGNS

Patient name:	Last: Smith			First: Kenneth	MI:	ID#: 2512		Age: 58
Vital signs:	T: 97.4	P: 73	R: 17	BP: 133/72	Pulse Ox: 97 % ☒ RA ☐ O2: /lpm			
*Notify provider	*T<97.8->100.3	*P<60->110	*R<12->20	*BP<90/60->145/95	Pulse Ox<92%			

☐ No known allergies ☐ Allergies

ACUTE DISTRESS: *PERFORM ABCs, CONTACT EMS, APPLY AED, ADMINISTER NALOXONE/NARCAN, NOTIFY PROVIDER, PREPARE FOR TRANSPORT*

☐ AIRWAY COMPROMISED ☐ BREATHING LABORED/RESPIRATORY DISTRESS ☐ CIRCULATION PALE/DIAPHORETIC

☐ NEURO LETHARGIC/SLOW RESPONSES/ANXIOUS

Indications for Administration of Naloxone (Narcan):

☐ Acute distress above ☐ Known or suspected overdose ☐ Decreased respirations ☐ Altered mental status
☐ Pinpoint pupils (with other indication(s))

SUBJECTIVE

HISTORIAN: ☒ Patient ☐ Other inmate ☒ Officer ☐ Other: Records
Name_____ Time/date: 12-24-23 ~~1700~~ ☐ Witnessed ☒ Unwitnessed
Substance: ☐ Known, describe: "joint" ☒ Unknown

ASSOCIATED FACTORS:
☐ Loss of consciousness ☐ Seizure ☐ Tremor ☐ Incontinence ☒ Nausea/vomiting ☐ Vomitus present Reported by pt's Atc.

MEDICAL HISTORY:
☐ CVA ☐ Metabolic condition ☐ Cardia hx/arrhythmias ☐ Pregnant ☐ Seizure history ☐ COPD ☐ Asthma
☐ Diabetic

SOCIAL HISTORY:
☐ Drug use history ☐ IV drug use ☐ Alcohol use Unknown.

OBJECTIVE

GLASGOW COMA SCALE (GCS)		
Eye Opening (E)	Verbal Response (V)	Motor Response (M)
4 = Spontaneous 3 = To voice 2 = To pain 1 = None	5 = Normal conversation 4 = Disoriented conversation 3 = Words, but not coherent 2 = No words, only sounds 1 = None	6 = Normal 5 = Localizes to pain 4 = Withdraws to pain 3 = Decorticate (Arms bent across chest) 2 = Decerebrate (Arms straight down side) 1 = None
E= 4	V= 5	M= 6
SCORE (E+V+M)= 15 (≤13 call provider)		

EYES:

Pupil size reference chart 2mm 4mm 6mm 8mm Pupils need to be noted in 1mm-10+mm
☐ PERRLA Pupil size Right 4 mm Left 4 mm ☐ Abnormal gaze/stare ☐ Nystagmus (involuntary eye movement)

RESPIRATORY/BREATHING:
Breathing ☒ Normal ☐ Labored ☐ Tachypneic ☐ Depressed ☐ Wheezing ☐ Accessory muscle use ☐ Cyanotic

CARDIAC:
Heart rate/rhythm ☒ Regular ☐ Irregular Abnormal sounds ☐ Murmurs ☐ Rubs ☐ Clicks ☐ Other:_____
Chest movement ☒ Symmetrical ☐ Asymmetrical

NOTES/DOCUMENTATION: Pt states, "I was smoking a joint & I hit it to hard." NO S/S of "joint" loaded other drug.

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
S Rowell RN	S Rowell RN	12-24-23

YesCare

Emergency Respon Tool (ERT) *Known or Suspected Overdose Naloxone (Narcan) Administration*

Patient	Last	First	ID Number
	Smith	Kenneth	2512

EMERGENT INTERVENTION–*PROVIDER CONTACT REQUIRED*

If CPR or AED is initiated use Emergency Response Form (NA6291)

SCOPE OF PRACTICE GUIDELINES FOR YOUR STATE MUST BE FOLLOWED WHEN PERFORMING EMERGENT INTERVENTION

APPROVED LIFE SAVING INTERVENTIONS FOR OVERDOSE (Check all that apply)

☐ Administer Naloxone/Narcan (select route below):

- Intranasal spray initial dose is 4mg intranasal, if no response may give doses of 4mg every 2-3 minutes until EMS arrives (*Preferred route of administration unless contraindicated*)
- Intramuscular or subcutaneous initial dose is 2mg IM or SubQ, if no response may give doses of 2mg every 2-3 minutes for a max of 10mg

☐ Administer O2 @ 2/lpm via NC to achieve Pulse Ox >95% (88% to 92% on COPD patients)

☐ Start IV (2 large bore 18-20 gauge if possible)

- #1 Size/location:__________ #2 Size/location: __________

☐ FSBS (Test all patients):__________ ☐ EKG ☐ Normal ☐ Abnormal ☐ MI/Ischemia

☐ EMS notified time:______ Arrival time:______ Attach AED if EMS is notified

☐ Provider notified:__________ Time:______

Disposition: ☐ Send out to ER ☐ Admit for infirmary-level care ☐ Place in observation ☐ Behavioral health referral initiated

N/A

Time	NALOXONE ADMINISTRATION DOCUMENTATION (Route/Dose/Patient response)		Pulse	R	BP /	Pulse Ox %
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
If no response, do EKG (if available) and consider other causes of symptoms while continuing Naloxone (Narcan)						
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg ☐ IM 2mg ☐ SubQ 2mg	☐ Responded ☐ Unresponsive				
MAY ONLY GIVE INTRANASAL BEYOND THIS POINT 10 MG MAX ON ALL EXCEPT INTRANASAL						
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				
	☐ Intranasal 4mg	☐ Responded ☐ Unresponsive				

N/A

ADDITIONAL DOCUMENTATION/ORDERS: Pt appears high s̄ distress, on "pot". Pt laughing & talking to staff. Slurred speech from "joint." NO s/s of EVAC

All significant negative and positive medical findings were documented

Nurse signature	Print/stamp	Date/time
E Rowell RN	E Rowell RN	12-24-23 0800

NA9811 Issued 08/2020

YesCare
Say Yes to Exceptional Care

Informed Consent for Psychotropic Medication

DEMOGRAPHICS

Patient Name: Smith, Kenneth
AIS #: 7512
Facility: Holman
Date of Birth: 7-4-65
Location: KLM
Sex: ☑ Male ☐ Female

MEDICATION

Medication Class	Medication	Dosage Range
Anxiolytic (Buspirone)	Buspar	15mg BID

REASON FOR USE OF PSYCHOTROPIC MEDICATION AND BENEFITS EXPECTED

Mental health disorder/diagnosis:

Patient education provided regarding:

☑ Nature of diagnosis, symptoms/signs for which medication(s) are prescribed
☑ Anticipated response to medication
☐ Alternative treatment options
☑ Type of medication, amount, frequency and route of administration and duration of treatment

BENEFITS

Benefits of taking the proposed medication are: (Check all that apply)

☑ Reduction in Symptoms: ☑ Improvement in Function

☐ Other benefits:

RISKS

Potential side effects associated with taking this medication include: (Check all that apply)

☐ Psychiatric:
☐ Neuro:
☐ Movement Related:
☑ GI: diarrhea, nausea
☑ Other: drowsiness, headache, fatigue, insomnia, blurred vision, nervousness
☐ Skin/Derm:
☐ Blood/Bone Marrow:
☐ Urogenital/Sexual:
☐ Musculoskeletal:

SIGNATURES

I have received verbal advisement and information for the medications prescribed. I understand the risks and benefits. I agree at this time to take the medication(s) and have had the alternatives explained to me. I understand that I may withdraw my consent at any time by informing any member of the medical/mental health staff.

Patient Signature X [signature] Date 12-4-23

Provider Signature [signature] Date 12-4-23

REFUSAL

My signature indicates that I understand the purpose of this medication, the benefits I may gain from taking it, the potential side effects and risks, and any alternative treatments. I also understand that I should discuss any questions or concerns with the doctor or nurse practitioner who prescribed this medicine At this time, I refuse to take the medication prescribed for me.

Patient Signature Date

Provider Signature Date

YesCare
Say Yes To Exceptional Care

Informed Consent for Psychotropic Medication

DEMOGRAPHICS

Patient Name: Smith, Kenneth
AIS #: 262512
Facility: Holman
Date of Birth: 7-4-65
Location: K, LM Community
Sex: ☑ Male ☐ Female

MEDICATION

Medication Class	Medication	Dosage Range
Tetracyclic Antidepressant (Mirtazapine)	Remeron	15 mg q hs

REASON FOR USE OF PSYCHOTROPIC MEDICATION AND BENEFITS EXPECTED

Mental health disorder/diagnosis:

Patient education provided regarding:

- ☑ Nature of diagnosis, symptoms/signs for which medication(s) are prescribed
- ☑ Anticipated response to medication
- ☐ Alternative treatment options
- ☑ Type of medication, amount, frequency and route of administration and duration of treatment

BENEFITS

Benefits of taking the proposed medication are: (Check all that apply)

- ☑ Reduction in Symptoms:
- ☑ Improvement in Function
- ☐ Other benefits:

RISKS

Potential side effects associated with taking this medication include: (Check all that apply)

- ☐ Psychiatric:
- ☐ Neuro:
- ☐ Movement Related:
- ☑ GI: Constipation
- ☑ Other: Restless, racing thoughts, dizziness, blurred vision, dry mouth, ↑ weight, dre
- ☐ Skin/Derm:
- ☐ Blood/Bone Marrow:
- ☐ Urogenital/Sexual:
- ☑ Musculoskeletal: weakness

SIGNATURES

I have received verbal advisement and information for the medications prescribed. I understand the risks and benefits. I agree at this time to take the medication(s) and have had the alternatives explained to me. I understand that I may withdraw my consent at any time by informing any member of the medical/mental health staff.

Patient Signature [signature] Date 12-4-23

Provider Signature [signature] Date 12-4-23

REFUSAL

My signature indicates that I understand the purpose of this medication, the benefits I may gain from taking it, the potential side effects and risks, and an alternative treatments. I also understand that I should discuss any questions or concerns with the doctor or nurse practitioner who prescribed this medicin At this time, I refuse to take the medication prescribed for me.

atient Signature Date

Provider Signature Date

YesCare
Say Yes to Exceptional Care

Informed Consent for Psychotropic Medication

DEMOGRAPHICS

Patient Name: Smith Kenneth
AIS #: 2512
Facility: Holman
Date of Birth: 7-4-65
Location: KLM
Sex: ● Male ○ Female

MEDICATION

Medication Class	Medication	Dosage Range
SSRI Anti-depressant (Sertraline)	Zoloft	
SSRI Anti-depressant (Citalopram)	Celexa	
SSRI Anti-depressant (Paroxetine)	Paxil	
SSRI Anti-depressant (Fluoxetine)	Prozac	20 mg q noon

REASON FOR USE OF PSYCHOTROPIC MEDICATION AND BENEFITS EXPECTED

Mental health disorder/diagnosis:

Patient education provided regarding:

- ☑ Nature of diagnosis, symptoms/signs for which medication(s) are prescribed
- ☑ Anticipated response to medication
- ☐ Alternative treatment options
- ☑ Type of medication, amount, frequency and route of administration and duration of treatment

BENEFITS

Benefits of taking the proposed medication are: (Check all that apply)

- ☑ Reduction in Symptoms:
- ☑ Improvement in Function
- ☐ Other benefits:

RISKS

Potential side effects associated with taking this medication include: (Check all that apply)

- ☐ Psychiatric:
- ☐ Neuro:
- ☐ Movement Related:
- ☑ GI: Constipation
- ☑ Other: dizziness, drowsiness, nausea, dry mouth, loss of appetite, ↑ BP, fatigue, sweating
- ☐ Skin/Derm:
- ☐ Blood/Bone Marrow:
- ☑ Urogenital/Sexual: difficult urination
- ☐ Musculoskeletal:
- Blurred vision

SIGNATURES

I have received verbal advisement and information for the medications prescribed. I understand the risks and benefits. I agree at this time to take the medication(s) and have had the alternatives explained to me. I understand that I may withdraw my consent at any time by informing any member of the medical/mental health staff.

Patient Signature [signature] Date 12-4-23

Provider Signature [signature] Date 12-4-23

REFUSAL

My signature indicates that I understand the purpose of this medication, the benefits I may gain from taking it, the potential side effects and risks, and any alternative treatments. I also understand that I should discuss any questions or concerns with the doctor or nurse practitioner who prescribed this medicine. At this time, I refuse to take the medication prescribed for me.

atient Signature Date

Provider Signature Date