Nos. 23-6562 & 23A688
REDACTED

In the Supreme Court of the United States

KENNETH EUGENE SMITH,
APPLICANT
v.
COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
RESPONDENTS

REDACTED RESPONDENTS' APPENDIX TO OPPOSITION TO APPLICATION FOR A STAY OF EXECUTION PENDING PETITION FOR WRIT OF CERTIORARI AND BRIEF IN OPPOSITION

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IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

KENNETH EUGENE SMITH,

Plaintiff,

vs. **CASE NO.: 2:23-cv-00656-RAH**

JOHN Q. HAMM, et al.,

Defendants.

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MOTION FOR PRELIMINARY INJUNCTION

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BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Wednesday, December 20, 2023, commencing at 9:20 a.m.

APPEARANCES:

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Proceedings reported stenographically; transcript produced by computer.

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EXAMINATION INDEX

EXAMINATION INDEX, continuing:

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(The following proceedings were heard before the Honorable R. Austin Huffaker, Jr., United States District Judge, at Montgomery, Alabama, on Wednesday, December 20, 2023, commencing at 9:20 a.m.:)

(Call to order of the court)

THE COURT: Good morning. Can everybody hear me?

COUNSEL IN UNISON: Yes, Your Honor.

THE COURT: All right. First we'll just begin the matter of Kenneth Eugene Smith versus John Q. Hamm, et al.

Let me just give you a little bit update on me. I discussed it with you yesterday. I was diagnosed with COVID on Saturday. Under the current medical recommendations, they require that you isolate or quarantine for five days. The fifth day is today. So for court purposes, given the fact that it's the holiday season and protecting everybody in that courtroom, including the court family, witnesses, everybody there, I think it's best that I participate remotely. Rest assured, though, I can hear and see everything where I am just as if I was sitting up there on the bench. Just keep in mind that when you do speak, speak into the microphone. Also keep in mind that it is a hot mike, so to speak, so especially if you are at counsel table, just keep in mind that if you whisper to somebody next to you, it easily could be picked up on the mike for everyone to hear.

I have reviewed all of the materials, well,

within reason, that have been provided to me except for the articles and perhaps some of the deposition testimony. I've read all the affidavits and declarations. There were some videos that were submitted. I've seen those as well. I've also been downstairs and inspected the mask. So I feel like I've (technical interference) of things.

Who is going to speak on behalf of Mr. Smith today? Who's the primary spokesperson?

MR. GRASS: Your Honor, I'm Robert Grass. I'll be the primary spokesperson for Mr. Smith.

THE COURT: And then for the defendants, who will that be?

MR. ANDERSON: Your Honor, this is Rich Anderson. I will be the primary spokesperson for the defendants.

THE COURT: And then, Mr. Grass, coming back to you, who all do you have with you today that is representing Mr. Smith?

MR. GRASS: Your Honor, we have Mr. Johnson from the Bradley Arant firm; and we have my colleagues from Arnold & Porter, Jeff Horowitz, Angelique Ciliberti, David Kerschner; and we have Eliza Hopkins, who has not made an appearance but who is assisting -- assisting us today.

THE COURT: Okay. And, Mr. Anderson, on your end.

MR. ANDERSON: Yes, Your Honor. Of course, it's me;

and then we have Polly Kenny, Beth Hughes, Jordan Shelton, and John Hensley.

THE COURT: Okay. When we spoke yesterday, both sides were going to consult. Are there any agreements on anything as we proceed into the morning -- or into the day's events? Any --

MR. ANDERSON: Yes, Your Honor. We have come to a couple of agreements. One is kind of a housekeeping matter.

Both parties have presented to Your Honor binders of their exhibits and declarations. I've spoken with opposing counsel this morning and a little bit last night, and we have agreed that with the exception of -- Mr. Smith has objections to two declarations from the defendants and the defendants have an objection to one declaration from Mr. Smith. Otherwise, the parties will stipulate to the admissibility -- or we can go ahead and put into the record for Your Honor's purposes the remainder of the exhibits. And we can identify those -- the ones we have objections to.

THE COURT: Okay. Let's go ahead and do that so we can get it out of the way.

MR. JOHNSON: Your Honor, Andy Johnson.

The plaintiff has an objection to the Antognini declaration, and the Court is aware we made a motion to strike. So that's what that objection is based on. We do not want to put that aside through this process, so we're standing on that

objection that we can argue now or later, if the Court desires. And also the declaration of Mr. Houts, Attorney Houts. Those are the two we have objections to. Otherwise, that was our agreement.

MR. ANDERSON: And from defendants' perspective, there is one declaration. That is of Dr. Groner, G-R-O-N-E-R. I believe it's Exhibit #H. As I understand, Dr. Groner is not here today, so the defendants would object to the admission of that declaration.

THE COURT: And all other exhibits will be admitted by stipulation or agreement?

MR. ANDERSON: Yes, Your Honor.

MR. JOHNSON: Yes, Your Honor.

And just for clarification, the objection to Antognini goes to his original and his supplemental. Any -- any testimony from him is covered under our motion.

THE COURT: So for purposes of the record, as it concerns the plaintiff's exhibits, just get me the numbers that will be admitted by stipulation.

MR. JOHNSON: Your Honor, that would be #A through -- #A1 through #A50 and then the witness statements #B1, #2, and #3. Not #B4. That's the one there's some objection to. But #B1, #2, #3, #5, #6, #7, and #8.

THE COURT: Mr. Anderson?

MR. ANDERSON: Yes, Your Honor. For the defendants,

that's going to be -- in the -- the first binder, there is declarations #3 through #11. There is an external hard drive that has Exhibits #13 through #23 and a second binder that has Exhibits #24 through #52 -- no, wait. I'm sorry -- through #44. Oh, and also on the external hard drive are Exhibits #45 through #52, Your Honor.

THE COURT: Those will be admitted.

As it -- let's go back to the exhibits that there are objections to, and let's start with the defense objection to Exhibit #H of the plaintiff, Dr. Groner. What's the objection?

MR. ANDERSON: Simply that Dr. Groner -- the -- the agreement to admitting testimony by declaration between the parties, that was the witness would -- excuse me -- witnesses would be made available for cross-examination. And because Dr. Groner is not here, I can't cross-examine him. So that's -- that's the extent of our objection.

THE COURT: Mr. Grass, your response?

MR. GRASS: Your Honor, Dr. Groner's declaration was disclosed on November 20th when we filed our preliminary injunction motion. The defendants had every opportunity to depose Dr. Groner if they wished to do that. They did not ask for Dr. Groner's declaration [as spoken]. And as far as we can tell in their opposition papers, Dr. Groner's declaration was not addressed at all. They didn't seem to dispute Dr. Groner's

statements in his declaration, and so we didn't bring him here today.

THE COURT: And then the objections by the plaintiff to the Antognini declarations -- that would be the original submission and the supplemental -- and then the Houts declaration, what are those objections?

MR. GRASS: Your Honor, as to Dr. Antognini, Dr. Antognini was contacted by the Attorney General in 2021, retained, as we understand it from his deposition, in August of 2022. He was supplied with information prior to the finalization of the protocol in August 2023.

And in fact, his declaration describes demonstrations that he saw prior to the finalize -- finalization of the deposition. I'm -- excuse me, Your Honor -- final to the -- prior to the finalization of the protocol. He was given a tour of the facilities from where the storage tanks are located through where the gas flows into the execution chamber through the mask, and our expert, Your Honor, was denied the same access. And we don't think it's appropriate for Dr. Antognini to be allowed to testify about information that was denied to our -- our -- our own expert.

And, furthermore, the defendants have objected generally to providing information based on what they call the pre-decisional period, which is, as we understand it according to the defendants, anything prior to August 25, 2023, when the

protocol was finalized. So we -- we don't think that there's an asymmetry in the information available to both sides, and we don't think it's fair that Dr. Antognini can testify about things to which our expert was denied access.

And I apologize, Your Honor, but as to Mr. Houts, our objection is that he -- his declaration, he seems to be serving as a quasi-expert on various things about -- related to his experience scuba diving and other things that he says gives him -- makes him qualified to opine on air coming through the mask, and we don't think he's qualified to offer those opinions.

THE COURT: Dr. Antognini, he's been deposed; is that correct?

MR. GRASS: Dr. Antognini was deposed last Friday, December 15th.

THE COURT: Will he be testifying today?

MR. GRASS: My understanding is that he will.

THE COURT: Okay. And then as to Mr. Houts, will he be testifying today?

MR. GRASS: Your Honor, we -- the parties have agreed that direct testimony can be put on through declarations. My -- Mr. Houts has provided a declaration. Our understanding is that he will be available to be cross-examined today.

THE COURT: Are there any other objections to the -- to the exhibits?

MR. GRASS: None from the plaintiff, Your Honor.

THE COURT: Mr. Anderson, your response.

MR. ANDERSON: Yes, Your Honor. With regard to Dr. Antognini, the -- we filed it yesterday, our response for the Court, to that motion to strike his testimony. It sets forth the -- most of our arguments. But it -- it boils down to this: that the State of Alabama has always known that there would be litigation over lethal -- excuse me -- nitrogen hypoxia.

Even when Mr. Smith was actively asking for it, we were certain that a lawsuit would ensue no matter how we chose to carry it out, and we could not begin preparing for the actual claims until the actual claims were before us. And in this case, Mr. Smith didn't file his action until I believe it was November 9th. His experts did not appear until November 20th. And we have been -- for the first -- first of all, we have been very active in trying to both prepare our defense and to make information available to the plaintiff that we think is relevant to January 25th. We've allowed the mask inspection.

I do note that with regard to Dr. Antognini, that he saw the complete system in August. At that point, we couldn't know what sort of claims -- what part of the system would be challenged. And Mr. Smith has not raised any claims, as we argued before, about the remainder of the system. So we -- you know, we -- we dispute that there's something unfair

there.

But the other thing -- the other aspect of this is that Your Honor has set a scheduling order in this case. You know, we're on an expedited discovery schedule. We provided, at defense counsel's request, identification of our expert. We made him available for deposition. We have -- we have complied with this Court's order. And we do not believe that the motion to strike is warranted, especially given the expedited nature of the proceeding.

With regard to Mr. Houts, we do not offer Mr. Houts as an expert. Mr. Houts is a lay witness who is able to give opinion under Rule 701 based on his rational perceptions. His statements regard his experiences and his sources of knowledge inform the Court about how he's able to make these rational perceptions. He is not opining on something. He is telling the Court facts of what he observed. So we -- we believe that Mr. Houts' testimony is admissible. And, of course, Your Honor, we do not have a jury here. Your Honor is the fact finder and can make decisions about what you want to rely on and what weight you think you need to give to various parts of the testimony and evidence. So we think that that rationale for excluding the testimony also would be -- would weigh against a motion to strike Mr. Houts.

That's our -- our position on those, Your Honor.

THE COURT: All right. As it concerns the objections

on both sides, I'm going to overrule the objections. I'll take it all into consideration as it concerns the weight and credibility. And as we get into today's events, there may very well be some things that you want to call out to my attention as to why it's disbelieveable or lacks credibility or foundation, and just bring those to my attention.

Let me ask you this, Counsel. Now that everybody has shown their hand a little bit -- and I'll direct this more to you, Mr. Grass, then Mr. Anderson. But in light of the videos, in particular concerning the use of the mask, are you still proceeding on your preliminary injunction on all of the initial items -- that would be the Eight Amendment, the RLUIPA, or First Amendment claims -- or are you withdrawing any of those?

MR. GRASS: Your Honor, we're still proceeding on all of our claims.

The First Amendment claim was not part of the preliminary injunction in the first place, so we will not -- you will not be hearing evidence on that today or hearing argument. We do think that in light of some of the discovery that we've received, some of the particular allegations relating particularly to the Eighth Amendment claim you will not be hearing evidence about. For example, the issue of potential trapping of carbon dioxide under the mask and the issue of potential impurity of nitrogen, we don't intend to put

on any evidence about those issues.

THE COURT: So let's --

MR. GRASS: And, Your Honor, I apologize. I was remiss when you asked me to identify my colleagues. I also wanted to identify our client, Kenny Smith, who is with us here today.

THE COURT: Of course.

Your Eighth Amendment claim, give me the short synopsis of it for purposes of today in light of where we currently stand.

MR. GRASS: So our Eighth Amendment claim, Your Honor, is that the protocol, as it exists, exposes Mr. Smith to the risk of superadded pain. And the reason is primarily the use of a mask rather than other alternatives that would be available to deliver nitrogen to Mr. Smith. And, again, in particular, there are two issues that we believe expose Mr. Smith to superadded pain and that the protocol and the procedures, as we've learned about them during discovery, do not adequately protect against.

One is the issue of air leakage under the mask. If breathing air can -- the plaintiff's theory is that pure nitrogen being supplied to a human will cause that person's death by depriving the person of oxygen. That principle, at least in general, is really not in dispute, Your Honor. But the issue is that if breathing air can infiltrate the mask,

then the person will not be breathing pure nitrogen, will be potentially subject to issues like being placed in a permanent -- excuse me -- a persistent vegetative condition, having a stroke, or experience -- experiencing the sensation of suffocation. And we don't believe that the mask adequately protects against that. And that's a general issue for any mask.

And the other issue that using a mask to deliver nitrogen causes is the potential for vomiting into the mask, which can cause asphyxiation. And I think Your Honor will hear evidence that once the nitrogen is turned on, the department has no plan, will not remove the mask and make any attempt to cure that issue, and that will leave Mr. Smith potentially exposed to asphyxiation. And we will also have evidence, Your Honor, that Mr. Smith is particularly -- he's at a heightened risk for nausea.

Deprivation of oxygen itself can cause nausea. And Mr. Smith has PTSD from his experience last November when ADOC tried but failed to execute him, which heightens his risk for nausea. And should he vomit into the mask and ADOC -- excuse me. I'm using that shorthand for the Department of Corrections -- refuses to remove the mask at that point, there's a very real risk that he will be asphyxiated rather than causing death by the way the department hopes.

And the second element, Your Honor, as you know,

is that the law provides us to offer feasible and available alternatives. And unlike many other cases that Your Honor has heard, this is not so much a case that asks for a different method -- method entirely. We've proposed alternatives that would permit the department to -- as they've put it, to go forward with nitrogen hypoxia by delivering the nitrogen through different methods. And specifically, nitrogen can be delivered through a hood and -- or -- or a closed chamber. And we think that that would substantially reduce the risk of both the problems that we've identified, which are air leakage under the mask and potential vomiting into the mask.

THE COURT: Okay. What about the firing squad? Are you still --

MR. GRASS: Your Honor, that's another -- I apologize for interrupting.

THE COURT: Are you still advancing that as a feasible alternative?

MR. GRASS: We are. We've offered feasible alternatives that we think that the department can use and still use nitrogen. If they don't want to do that for some reason, we have offered them even another alternative, which is the firing squad. And that's where Dr. Groner's declaration comes in. Dr. Groner has reviewed the Utah protocol for using a firing squad, and he's explained that a person subject to that would likely be rendered unconscious almost immediately

and die almost immediately.

And, you know, I know that the -- the -- the defendants, in their papers, had some speculation about what they suggested Mr. Smith would be concerned about with that protocol. And I think in our reply papers we explained that the things that they identified are actually addressed in the protocol, about things like where the criteria that are used to identify the sharpshooters and the tests that they have to go through to be accepted as sharpshooters. And we think in comparison to the department's protocol for nitrogen hypoxia, all those questions are unanswered.

We don't know the criteria by which the execution team is going to ensure that the mask is airtight. We don't know how they're selected. There's some -- there's some suggestion in the protocol that the execution team members, if they see that the mask has been displaced in some way, can make efforts to fix it, but we don't know how they're going to make that determination, whether they're qualified to do it and what exactly they're going to do to fix it.

So we think there's a contrast between what, for example, the Utah protocol provides to ensure that the people accomplishing the execution, the people on the execution team, are qualified to accomplish what they are intended to accomplish and the lack of detail in the Alabama Department of Corrections' protocol on the same issues regarding the

execution team and how they're going to ensure that the mask is, as the language of the protocol I think is, adequately placed. There don't seem to be any written criteria in any way that explain that.

THE COURT: Are you satisfied with the Utah protocol?

MR. GRASS: We are -- yes, Your Honor. We -- Dr. Groner, as I said, has reviewed the protocol, and we are.

THE COURT: So at present, there are no concerns about the purity of the nitrogen being used? I know that was an initial allegation, but have your concerns since been addressed?

MR. GRASS: Your Honor, at least on the evidence as we have it now, our concerns are addressed. As Your Honor is aware, there -- there's a motion pending. We think that evidence was withheld that we're entitled to. We reserve our right, should we -- should Your Honor agree with us and permit us access to that evidence, to make additional submissions. But as the evidence stands today, we don't intend to put on any evidence on the issue of the purity of the nitrogen.

THE COURT: And then on your RLUIPA and ARFA claim, summarize that for me, at least as it concerns the preliminary injunction.

MR. GRASS: Yes. Your Honor, as you know, RLUIPA and ARFA are very related statutes. The only real difference is that the federal statute requires us to show a substantial

burden on Mr. Smith's religious exercise, whereas the Alabama Religious Freedom Amendment requires only a burden. And the Eleventh Circuit has said that means that it's different in that respect; it doesn't require a substantial burden. So there's less of a burden under ARFA than there is under RLUIPA. But our RLUIPA and ARFA claims are very much related to our Eighth Amendment claim in the sense that they arise from what we contend are the problems with the mask.

So a mask can be -- the placing can be affected or the seal can be broken by speaking, among other things, voluntary and involuntary movements. And our RLUIPA and ARFA claims allege that Mr. Smith, who has a plan with his spiritual advisor that includes audible prayer, is put to a very difficult choice of potentially engaging in audible prayer, which may risk dis- -- dislocating the mask in a way that allows air to leak under it and, therefore, expose him to the risk of some of the dire consequences, including being placed in a persistent vegetative state or a stroke or -- or other complications, or abstaining from audible prayer entirely. And our contention is that's a substantial burden under RLUIPA or it's a burden, at a minimum, under the Alabama version.

And we're -- we acknowledge that there is an affirmative defense available for if -- if the Government can show that what they've done is the least-restrictive alternative to further compelling governmental interests. And

we don't believe that they'll be able to establish that.

Our -- again, our understanding in some of this is -- from Mr. Smith's experience last November is that they -- around ten or more corrections officers comprise the execution team who will escort Mr. Smith to the execution chamber. The mask will be placed on him immediately, before he is permitted to engage with his spiritual advisor and to make his final statement. But our understanding is -- again, from the last time that Mr. Smith went through this, is that three of those corrections officers will remain in the execution chamber for the entirety of the process. And once Mr. Smith is strapped to a gurney, we don't understand why three corrections officers can't place this mask after Mr. Smith is given an opportunity to engage with his spiritual advisor and to make his last statement, without being masked, and then to -- to place the mask on Mr. Smith. We -- we think at least what the plan is currently, which is to mask him immediately upon entry into the execution chamber, is not the least-restrictive alternative to afford Mr. Smith his -- his right to exercise his religion.

THE COURT: So your preference would be that upon entering to the execution chamber, that he would then be allowed to give his final -- make his final statement and audibly pray and then the mask put on; is that right?

MR. GRASS: That's correct, Your Honor.

THE COURT: And as it concerns the -- well, and the

concern -- is the concern that with the mask being on, he cannot audibly pray, or is the concern that with the mask on, because he is going to audibly pray, it is going to dislodge -- potentially dislodge the mask, and because of that recognized concern, he does not want to audibly pray?

MR. GRASS: Correct. The latter, Your Honor.

THE COURT: All right. So you're -- you're not advancing a claim that with the mask being on, he is unable to audibly pray; it's that he would be reluctant to pray because of how it may impact the mask; is that right?

MR. GRASS: Correct. With the mask on -- we -- we are not alleging that he cannot speak with the mask on. We're alleging that puts him into an untenable choice.

THE COURT: Okay. And you're not advancing any type of claim about the spiritual advisor being able to touch him and where he can touch him or the ability to anoint him with oil?

MR. GRASS: Your Honor, we haven't advanced that claim. I know that Reverend Hood, who I believe is also here today, has advanced that claim independently, represented by his attorneys.

THE COURT: Okay. Well, does your client want to be anointed with oil?

MR. GRASS: Yes, he does, Your Honor. There is a plan submitted to the department, as I understand it, about what

will happen in the -- in the execution chamber between Mr. Smith and his spiritual advisor, which includes anointing with oil, last rights, reciting scripture, and other -- other things that they intend to participate in in the execution chamber.

THE COURT: Okay. And, Mr. Grass, does that summarize the -- in general, the claims that you're proceeding under the preliminary injunction?

MR. GRASS: There's an additional claim, Your Honor, which is an equal protection claim. That claim is based on the fact that Mr. Smith is similarly situated to others -- condemned people in Alabama who are also subject to execution by nitrogen hypoxia. He is being treated disparately from those other people because in our view, Alabama is -- has scheduled his execution in violation of their own custom to wait until all direct appeals and post-conviction appeals are concluded.

Mr. Smith had a -- had filed a second Rule 32 petition in the Alabama circuit court in May. That was filed before there was any motion to -- for authority to execute him. I think Your Honor should contrast that with some of the examples that the Attorney General -- or I should say the defendants' counsel has offered, where second -- or successive Rule 32 petitions were filed days, in some -- in at least one case, and weeks, in others, before an execution had already --

had been scheduled. We've tried to keep Your Honor up to date on the goings-on in that state proceeding. The circuit court dismissed the proceeding.

We appealed to the Court of Criminal Appeals in Alabama. That appeal was also filed before Alabama sought authority to execute Mr. Smith. The Alabama Court of Criminal Appeals affirmed on -- well, maybe a week ago Friday. On Friday, they overruled our petition for rehearing, and Monday on this week -- of this week we filed a petition for certiorari in the Alabama Supreme Court. So we are pursuing that claim. We intend to continue to pursue that claim.

And we -- we think also, Your Honor, that the evidence will show that at the time that Alabama sought permission to execute Mr. Smith, which was on August 25th of this year, there were 21 inmates whose -- who are subject to execution by nitrogen hypoxia whose appeals had exhausted, according to the defendants.

And, furthermore, Your Honor, even if you accept the defendants' position, as we understand it today, that Mr. Smith's appeals, what they call his conventional appeals, exhausted when the United States Supreme Court denied certiorari on his federal habeas petition -- that occurred on February 22nd, 2022 -- and if you look at that list of 21 people whose appeals had exhausted, 18 of them, Your Honor -- 18 -- their appeals exhausted before Mr. Smith's, even if you

accept the defendants' position. And we don't accept the defendants' position that his appeals have exhausted.

And so that begs the question of why Mr. Smith has been selected as the first person to be subject as to what is indisputably a novel method-of-execution ever performed in Alabama or the United States, or the world for that matter, as far as we know. And we think the answer to that, Your Honor, is, as you know, Mr. Smith had a case pending in this court at that time, and when the defendants sought to -- sought from the Alabama Supreme Court authority to execute Mr. Smith on August 25th, they simultaneously moved to dismiss that case as moot. And that happened to happen on the eve of their discovery -- discovery obligations ripening.

The initial -- Your Honor had, shortly before that time, issued a scheduling order. The initial disclosures were due on April 29th, and responses to our discovery requests were due the following week. Those discovery requests had been outstanding for some nine months by that time. And so by bringing forth Mr. Smith as the person to be executed, the only reason seems to be to avoid discovery into what happened when the department failed to execute Mr. Smith last November. And that seems to be the only thing that distinguishes him from the 21 people whose appeals indisputably exhausted, 18 of whom indisputably exhausted before -- even if you accept that Mr. Smith's did in the first place, exhausted well before

Mr. Smith's.

Some of those people -- at least one of them is a decade. His appeals exhausted in 2011. Mr. Smith's appeal, even if you accept the defendants' position -- and, as I said, we don't, but even if you accept it, didn't exhaust until December -- excuse me, Your Honor -- February 2022. And there are only two people on this -- that list whose appeals exhausted after that. So it seems to leave the only basis for choosing Mr. Smith was to rid the State of the obligation of having to disclose what happened last November. And we don't think that that's a rational basis that protects them from an equal protection violation, Your Honor.

THE COURT: I believe the State has argued that -- well, first, you did raise that with the Alabama Supreme Court; is that correct?

MR. GRASS: Your Honor, we did. At the Alabama Supreme Court, we did say that they should not issue -- or permit authority for the department to go forward for that reason.

THE COURT: Are you going to file a further appeal with the U.S. Supreme Court?

MR. GRASS: Your Honor, we haven't made that decision yet, but we think that the claim -- that the equal protection claim that we're asserting here is distinct from anything that is going on in the Alabama Supreme Court. We -- here we're

challenging the decision of the officials who made that decision. The Alabama Supreme Court didn't decide to -- that Mr. Smith, as opposed to anyone else, should be subject to execution. That was a decision made by the defendants. And so we think that -- that that's a different claim that isn't barred by anything that we did in the Alabama Supreme Court.

And as -- as it relates to the Rooker-Feldman Doctrine, if that's Your Honor's concern, one, in their papers, the State asserted that argument as to a potential due process claim. We didn't see it in the equal protection portion of their opposition to -- or their motion to dismiss. But I would also invite Your Honor to look at *Powell versus Thomas*, which is a case decided in this district in 2011. The cite is 784 F. Supp. 2d 1270. The pin site is at page 1276 and note one. And I would just like the opportunity to describe to Your Honor what we think the case stands for.

That was a case where the plaintiff had brought a method-of-execution challenge to Alabama's lethal injection protocol at the time, after he unsuccessfully sought a stay of his execution in the Alabama Supreme Court for the same reason. In other words, his -- that the lethal injection protocol at the time violated the United States Constitution. And the court -- and I'm quoting now -- declined to apply the narrow Rooker-Feldman Doctrine because Williams does not identify or complain of an injury caused by the Alabama Supreme Court's

decision but, rather, complains of the future conduct of the ADOC officials in implementing the lethal injection procedure. And we think that our equal protection claim is equivalent to the claim that was at issue in ***Powell versus Thomas***.

THE COURT: Okay. I understand your -- your position is that those who voluntarily elected nitrogen hypoxia should go before your client. How should the State constitutionally prioritize who goes first versus who's last?

MR. GRASS: Well, Your Honor, it's not so much that necessarily the people who elected, but that the people who elected and who -- whose appeals have exhausted should go before our client, because we contend that his appeals haven't exhausted. And Alabama has a custom, or at least they've represented that in pleadings to the Eleventh Circuit in the ***Woods*** case, which ultimately the Eleventh Circuit quoted their language, that they have a custom to await seeking execution dates until all conventional appeals have been exhausted, which they include State post-conviction appeals, federal habeas appeals. And because Mr. Smith has a State post-conviction proceeding pending, we don't think his appeals have exhausted. But even -- even if they have, Your Honor, we think a rational basis for deciding how to prioritize executions is whose appeals have exhausted first.

If the custom is to wait until appeals have exhausted, then it seems to stand to reason that if the Alabama

Department of Corrections believes that Mr. Smith's appeals exhausted in February of 2022, then folks whose appeals exhausted in February 2011 -- well, I -- I don't know if it's February, but in 2011 or 2012 or 2014, as many have, should go ahead of Mr. Smith. And if -- and at a minimum, Your Honor, there ought to be -- there needs to be a rational basis for how this is done. If the State is going to depart from its custom, there ought to be a rational basis for doing that. And there -- there seems to have been none here other than Mr. Smith had a pending federal proceeding and it appears that the State didn't particularly want to disclose information that otherwise would have been required shortly after they sought his execution by nitrogen hypoxia.

THE COURT: Okay. Thank you, Mr. Grass.

Mr. Anderson.

MR. ANDERSON: Yes, Your Honor.

THE COURT: Why don't you step up to the lectern.

MR. ANDERSON: Okay. Yes, Your Honor.

THE COURT: And really just keep it short, as -- as Mr. Grass was. Give me the State's response.

MR. ANDERSON: To -- well, there was a lot there, Your Honor. What -- what -- is there a specific?

THE COURT: Just start with -- let's start with the Eighth Amendment claim.

MR. ANDERSON: The Eighth Amendment claim. Yes, Your

Honor.

Well, 250 years ago or so when the Founding Fathers separated from England and gave us a constitution, one of the things they prohibited was cruel and unusual punishments. Actually in the -- in the Bill of Rights. And what the founders had in mind was practices that had been employed by the nation they just left, punishments that were intended to superadd pain or humiliation on to a sentence of death. Think about William Wallace being disemboweled in London or Thomas Cranmer or Master Ridley or Hugh Latimer being burned alive at the stake.

That is what the founders had in mind in banning cruel and unusual punishments, and that's why, in more recent times, the United States Supreme Court has required petitioners who are seeking to challenge a method-of-execution to show that the method proposed by the State cruelly superadds pain to the method of death; that is, that it creates unnecessary intentional pain or humiliation that is -- goes beyond what is sufficient to cause death.

And in the present case, you are going to hear evidence that the method-of-execution that the State will employ on January 25th is the most humane system yet devised by man. You will hear that the respirator employed by the State does have a secure fit, that it will deliver pure nitrogen to Mr. Smith, that he will quickly lose consciousness and will die

shortly thereafter.

The -- you know, the evidence either that you've already received or that you'll hear today is in sharp contrast to the evidence of Smith's crime, where 25 -- 35 years ago, he and his accomplice murdered Ms. Elizabeth Sennett in a way that didn't demonstrate any concern over superadded or unnecessary pain. But in this case, the method that the State will use to bring justice to Mr. Smith and to his victim's family is one that, as you've heard this morning, in general, he doesn't even challenge. His -- his challenges are restricted to the respirator that the State will use to deliver nitrogen.

But you'll hear from one of his own experts that the respirator fit securely; that he couldn't dislodge it; that he didn't rebreathe -- well, I guess we -- we're not -- we've dropped rebreathing carbon dioxide, but that he had no problems with rebreathing carbon dioxide and that he couldn't detect any entrainment of air. So as far as the Eighth Amendment claim goes, the -- the State believes that it will employ a method that will successfully and without any unnecessary pain bring about Mr. Smith's death.

As far as the -- the kind of related claims regarding the mask and Mr. Smith's right to -- or his -- his -- his claims regarding his desire to audibly pray or his desires to speak to his spiritual advisor and the impact the mask will have on that, you will hear evidence that not only witnesses

for the State, but also Mr. Smith's expert were able to communicate while wearing the mask. You will hear and -- or you will have received evidence that after the statement is made, the mask will be readjust- -- will be inspected to see if it needs readjustment, and if it does, it will be readjusted. You will hear that -- from Mr. Smith's expert that when he was allowed to wear the mask, it was readjusted while on his face and it made for a tighter fit.

The State has considered that -- those objections, those concerns Mr. Smith has raised, and addressed them. We believe that the mask will remain secure. And to the extent that it can be shifted or dislodged or the proper placement disturbed, it will be replaced. And that is something that's allowed for in the protocol. It's already been testified to, that it will be done, in deposition. You'll be -- you'll be seeing that evidence.

THE COURT: Mr. Anderson, before you move on --

MR. ANDERSON: Yes, sir.

THE COURT: -- Mr. Grass said the request is that he be allowed -- or that Mr. Smith be allowed to make his final statement and audibly pray upon entry into the execution chamber before the -- the mask is put on. Is the State willing to do that; and if not, why?

MR. ANDERSON: Your Honor, that has been part of the evidence that we've already submitted to you as a -- an

affidavit from a 30(b)(6) witness for the State, Cynthia Stewart.

We do have concerns -- security-based concerns regarding that stage or that part of the protocol. At the point that Mr. Smith is brought into the execution chamber, that is the point at which the majority of the team is available. After that point, witnesses begin to arrive. And we have witnesses from the victim's family and witnesses for Mr. Smith who need to be, just for the orderliness and peacefulness of the process, kept apart. They're in different rooms.

ADOC has to have security personnel for each of those rooms in addition to other locations. So after Mr. Smith is brought into the room, much of the team will disperse. And ADOC, their -- their security concerns dictate or require them to put on that mask. It just -- to minimize the possibility of disruption or combativeness or, indeed, of -- of Mr. Smith's own dignity in front of witnesses, to have that done to avoid the possibility of -- of active resistance by having adequate security staff on hand.

That is the -- that's ADOC's concern with regard to masking him or putting the respirator on him at the point that he's brought into the chamber.

THE COURT: When he's brought into the chamber, the mask will not be on, though?

MR. ANDERSON: That is correct, Your Honor.

THE COURT: Right?

MR. ANDERSON: That's correct, Your Honor.

THE COURT: I'm struggling what -- with what the security concern is when he's brought in and at that point is allowed to make his final statement or his final words or his -- his audible prayer. What is the security concern at that point moment versus, you know, a few minutes down the road, so to speak?

MR. ANDERSON: I -- I think I see what you're saying, Your Honor. And I mean, I don't think that ADOC, the defendants, would have a concern about doing it at that point. The problem is that in the protocol process, there are no witnesses there because the -- the -- the witnesses have not yet been escorted into the viewing rooms at that point. Now, if Mr. Smith wants to pray at that point, he -- he certainly can. I believe that could be done. But the problem is once the --

The members of the execution team are also the people who provide kind of a security and escort for the witnesses as they come in. So the process is Mr. Smith would be brought in, would be secured on the gurney, would be masked, then a portion of the team would disperse to handle other duties, which includes bringing in the witnesses. So there would be no one -- there would not be the -- Mr. Smith's

witnesses would not be present in the witness room at that point of the procedure.

THE COURT: Well, walk me through the timeline. He's brought in. Is the mask put on when he is restrained or when he is not restrained?

MR. ANDERSON: And my understanding, Your Honor -- and I'm -- I believe it is done after he is restrained. And I'm sure someone will correct me if I am wrong, but I believe that's correct.

THE COURT: When he is brought in, where are the witnesses at that point?

MR. ANDERSON: I am not 100 percent certain of that, Your Honor. They may be in vans. Because they're -- they're kept -- witnesses are kept at separate locations off site and brought in when the procedure is ready to -- you know, when we're kind of ready to go. I'm not sure whether they would be in separate vans on site or if they would be en route. I don't know the answer to that, I'm afraid.

THE COURT: And how long does it take to put the mask on?

MR. ANDERSON: Well, that is going to be a matter that depends, in large part, on Mr. Smith. You know, we are -- we have -- ADOC personnel have practiced for combativeness and resistance. But of course, if there is resistance or combativeness on Mr. Smith's part, it would take longer.

Ordinarily -- you know, I myself have placed the mask on someone. It takes moments. But, you know, I certainly haven't attempted to do so on Mr. Smith.

THE COURT: Were you present for the other instances when individuals from your office put the mask on and were in the gurney?

MR. ANDERSON: Some of them, Your Honor.

THE COURT: How long did it take to put the mask on them?

MR. ANDERSON: You know, less than two or three minutes, I would think. You know, less -- less than a couple of minutes.

THE COURT: All right. You can move on. Why don't you address the Fourteenth Amendment claim.

MR. ANDERSON: Okay. Let's see. This is Mr. Smith's claim regarding his -- his place in line?

THE COURT: Yes.

MR. ANDERSON: Well, the -- Mr. Smith's -- there are a couple of issues here. And I'll apologize if I don't do as thorough a job here. We have addressed this in papers.

But the gist of it is, Your Honor, that Mr. Smith has been -- it has been time for his execution since last year. He was -- the Attorney General's Office moved to set his execution last year, prior to the unsuccessful attempt. And at that point -- you know, his -- his time has and had come. With

the unsuccessful attempt in November, certainly we needed -- well, because the -- because the orders setting execution periods now are limited, we had to reapply to the Alabama Supreme Court to ask for another execution date once nitrogen hypoxia was available.

And the Attorney General's Office has no power to set execution dates. We have the authority to move for execution dates. And the entity with the power to set execution dates and to actually determine the language under Alabama law is the appropriate time for the execution. That's from Rule 8 of the Rules of Appellate Procedure, that under Rule 8, the Alabama Supreme Court determines the appropriate time for setting the execution. It is now done as a time period, as Your Honor is aware. But once the Supreme Court has made its decision, it is the -- the final word on when that appropriate time is. And so neither of the defendants made the decision that it was the appropriate time for Mr. Smith's execution. And in any regard, it has been the appropriate time since a year and a half ago.

THE COURT: Okay. All right. Thank you, Mr. Anderson, unless you have anything else to say.

MR. ANDERSON: No, sir, Your Honor. I believe that is all that we have.

THE COURT: Mr. Grass, would you like to proceed with your first witness?

MR. GRASS: Your Honor, with your indulgence, we would like to preview some of the evidence for you in a short PowerPoint and then call our first witness.

THE COURT: Sure.

MR. GRASS: Thank you, Your Honor.

Your Honor, you have considered these types of claims on several occasions before, probably more -- more than you would like, so we won't belabor this standard. But here is the standard, as you set forth in Mr. Smith's last case, for a class of one equal protection claim. So we have the burden to show that Mr. Smith is similarly situated to other inmates, that he's been treated disparately from them, and that there's no rational basis for a difference in the treatment.

Mr. Smith is similarly situated to other condemned people on death row in Alabama who will be executed by nitrogen hypoxia. You are looking at an excerpt from the deposition of Cynthia Stewart-Riley, regional director of the Alabama Department of Corrections. She was designated as the defendants' Rule 30(b)(6) witness on their nitrogen procedures and their current execution protocol. This testimony was in the context of the -- Your Honor may recall the election form for nitrogen hypoxia that was distributed by the officials at Holman in 2018. Ms. Stewart-Riley was the warden at the time. And you can see her testimony there that Kenny should not be treated differently than any other inmate who elected to be

executed by nitrogen hypoxia. We plainly agree with that sentiment.

This, Your Honor, you're looking at a pleading that the defendants filed -- or I should say that the then current commissioner and Ms. Stewart, who was then the warden, filed in a case regarding Nathanial Woods. And this states the custom of the State to wait to move for an inmate's execution until he has exhausted his conventional appeals: direct appeal, state post-conviction, and federal habeas. I think Your Honor will see that the evidence in this case will confirm that that remains the State's custom. And in this case, they have violated the custom.

This is -- so we are showing you now, Your Honor, Mr. Smith's second petition for relief under Rule 32 that was filed in the state court on May 12th, 2023. We spoke about this previously. I think it's significant. And Your Honor should take into account that this case was filed well before any motion to seek Mr. Smith's execution was filed by the State in this case and nor did we have any inkling that any such motion was imminent.

We spoke about this also, Your Honor. This is the list of Alabama death row inmates subject to execution by nitrogen hypoxia as of August 25th, 2023, which is when the State moved for Mr. Smith's execution. This was provided to us by the State in response to an interrogatory that we posed to

them. The items are not numbered on this list, but I will represent that there are 21 inmates on this list. You can see that the dates their appeals exhausted range from October 2011 to March 2023. And so there were 21 inmates whose appeals had exhausted, while we contend Mr. Smith's had not, on August 25th, 2023, and the State, nevertheless, chose Mr. Smith for execution.

This is the same list, Your Honor, but we've placed Mr. Smith on the list assuming -- and as I've repeated several times, we don't concede -- that Mr. Smith's appeals are exhausted. But if you accept that they exhausted when the United States Supreme Court denied certiorari, that would be February 22nd, 2023. And you can see that 18 of these inmates' appeals exhausted before Mr. Smith's would have, he is tied with another, and there are only two on this list whose appeals exhausted after his.

And that begs the question of why we are here talking about an imminent execution on January 25th for Mr. Smith. And we think, Your Honor, that the evidence shows that the reason is that Mr. Smith had an appeal pending before Your Honor and that the motion before the Alabama Supreme Court to seek Mr. Smith's execution permitted the defendants in that action to seek dismissal of that federal litigation just before their discovery obligations came into effect.

Initial disclosures were due August 29th. What

you see on this slide is the defendants' motion to stay discovery in that case filed on August 29th. Mr. Smith had, before this motion was filed, served his initial disclosures on the State. There were more significant discovery requests that the State would have been obligated to provide a response to the following week. And by taking Mr. Smith out of order, we would say -- and substantially out of order, we would say -- the State avoided discovery into what happened last November when the State strapped Mr. Smith to a gurney for four hours, attempted multiple times to access his veins, were unable to do that, left him, when they finally unstrapped him, unable to walk on his own, take his clothes off on his own, or pretty much do anything on his own, and as we will show you today and refer to later on in the slides, also left him with posttraumatic stress disorder.

Moving on, Your Honor, to our Eighth Amendment claim. Again, Your Honor has much experience with these types of claims. We've put the standard for proving that claim as Your Honor has described it previously. So we -- the evidence will show that what the State is proposing to do in January will cruelly add -- superadd pain beyond what's needed to effectuate a death sentence. And there will also be evidence, Your Honor, to show that there are feasible and readily available methods to carry out the sentence that would significantly reduce a substantial risk of pain.

Just by way of explanation, Your Honor, the plan is to deliver nitrogen to Mr. Smith through a mask that will cover his face. There are other ways to deliver nitrogen. The State has chosen this method. And we think that that causes several problems that the evidence will support.

The first problem, Your Honor, is potential air leakage under the mask. That is air from -- infiltrating the mask from outside, which will permit -- or lower the percentage of nitrogen that Mr. Smith is breathing. We're all -- right now, Your Honor, we're all breathing around 80 percent nitrogen, around 20 percent oxygen. The question -- the problem is that the way the State is proposing to do this will create a serious risk that Mr. Smith will have sufficient oxygen available to him to do serious harm to him short of resulting in his death.

And what you're looking at on the left is Dr. Yong. Dr. Yong is a witness -- an expert witness retained by Mr. Smith. You will hear from him later this morning. And you can see his evidence that a person exposed to less than 100 percent nitrogen could transition to a persistent vegetative state, have a stroke, or experience the painful sensation of suffocation instead of dying.

On the right of the screen is some testimony from the deposition of Dr. Antognini. Dr. Antognini, as you've heard earlier this morning, is an expert that the defendants

have retained. And this proposition is not disputed.

Your Honor, the science in this area is largely in the areas of assisted suicide or industrial accidents. Now, assisted suicide, I want to make clear, is not a perfect analogy. Those are willing patients who are instructed on how to use methods to end life and who practice those methods. Nevertheless --

And -- and on your left, Your Honor, you're looking at Dr. Philip Nitschke. Dr. Philip Nitschke is a right-to-die advocate. He has a great deal of experience in methods of ending life for willing participants, including the introduction of inert gases like helium and nitrogen to bring about the end of life. And Doctor -- you will also hear from Dr. Nitschke later this afternoon. He is an expert witness retained by Mr. Smith.

But you can see on these slides that even in the context of assisted suicide with willing participants, there have been serious problems with using masks to deliver nitrogen or helium or other inert gases. And in fact, some time ago, the use of masks to accomplish that have been abandoned among people who are attempting assisted suicide because masks can be dislodged. It may depend on the facial features of the person on whom the mask is placed. Voluntary and involuntary movements can loosen the mask. Talking can loosen a mask. Facial hair complicates placing a mask on a person. And so you

will hear that evidence -- or receive that evidence from Dr. Nitschke.

On the right of the screen is some of the scientific literature. This again is in the context of assisted suicide. And you'll see the conclusion of the authors here that, *we believe a mask breathing apparatus is problematic because it is very difficult to achieve and maintain a gas-tight seal between the face and the mask. Even if the initial mask fit is gas tight, subsequent involuntary movements of the head, neck, and facial muscles are likely to spoil the fit.*

Excuse me, Your Honor.

Even tiny leaks may substantially allow ingress of oxygen into the breathing environment.

I -- I apologize. I'm technologically inept, but I think that we need to close the large screen, if we can, for the next slide due to confidentiality concerns.

Thank you.

Woops. I was a slide too early. I apologize, Your Honor.

So Dr. Yong and Dr. Antognini, who we've already introduced, this is -- they are both anesthesiologists who have experience using masks to deliver gases to patients, although they don't deliver nitrogen to anyone to end life. But here too they agree that there are difficulties placing masks caused

by the possibility of the outside environment leaking under the mask.

And now I -- I would appreciate it if you could turn off the large screen. Thank you.

So the question, Your Honor, remains what about the mask that the department intends to use. And, Your Honor, what you're looking at is excerpts from the user's manual that the manufacturer has provided with the mask. And you can see that the user manual clearly requires or recommends strongly, and in fact, warns, that you need to test the mask before use to make sure that the outside environment is not penetrating the mask.

At the bottom of the slide you see a warning, *If you cannot satisfactorily perform a negative pressure check, do not enter the contaminated area*. The contaminated area in this case is the normal breathing air that will exist outside the -- the environment outside the mask. And the -- so the user manual is recommending a negative pressure test.

There are also test kits to assess whether the mask has leaks. And I would note also that there is -- bullet point 15, Your Honor, in the middle of the slide says the, *Positive pressure of air in the respirator does not reduce the importance of fit testing. Fit testing must be done before the supplied air respirator is selected and used*. That's significant, Your Honor, because you may hear evidence from the

defendants that they believe that the rate of nitrogen flowing to the mask will push out any oxygen that might be leaking into the mask. But the user's manual clearly says that that should not be relied on and that a test should be done.

Would you please turn back on the screen. Thank you.

So the department doesn't intend to do any testing to ensure that the mask that they place on Mr. Smith is not leaking after they place it on him, it's not leaking oxygen under the mask. And this is -- what you're looking at is deposition testimony from Ms. Stewart-Riley. This is an excerpt from her deposition which clearly states they have no intention of using any sort of test kit nor do they intend to use the negative pressure test that is recommended by the user manual.

The second problem that we have identified with use of the mask and that we think supports the proposition of superadded pain to Mr. Smith is the problem of vomiting into the mask, which, as you see, all the experts that you will hear from today agree that vomiting into a mask can cause asphyxiation.

Now, defendants' own documents acknowledge that insufficient oxygen causes nausea. This is a -- what you're looking at is a document produced by the department that appears to be a PowerPoint to -- about workplace safety,

presumably for prison staff.

I'm sorry. Could you please close the screen. I apologize, Mr. Anderson.

THE COURT: Can you give me the exhibit number and page?

MR. GRASS: Yes, Your Honor. I'm sorry. And the exhibit numbers are all on the slides. But the exhibit is Plaintiff's Exhibit #A34. And the page is Bates number ADOC_Hypoxia_000756.

So this is a --

THE COURT: Well, let me stop you again.

The tabs that I have on the three-ring binder are by numbers, not by A, B, C, D. Is there a tab number?

MR. GRASS: It's #34, Your Honor. As I understand it, you should have two binders. One are exhibits, and the binder with what we're calling B exhibits include our declarations.

THE COURT: I've got it now. Thank you.

MR. GRASS: So, Your Honor, as I was saying, this is an internal department document that talks about the dangers and hazards associated with nitrogen gas in the workplace and presumably to -- for training prison staff in light of the fact that nitrogen is now present in their workplace.

And on page 756, you will see that there is a list of common hypoxia signs and symptoms. On -- on the right of that slide under *Symptoms*, you will see the second bullet

point says *Nausea*. I would also point out, Your Honor, that under *Signs,* at the very bottom of those bullet points, you see *trembling* and you see *muscle spasms.* That is also significant because, as we discussed earlier, voluntary or even involuntary movements can have an effect on the placement of the mask.

I think we can turn the screen back on, please. Thank you.

Now, not only does nitrogen itself cause a risk of nausea, but Mr. Smith is at particularly heightened risk of nausea because he suffers from PTSD from the failed attempt to execute him in November.

What you see are excerpts from Dr. Katherine Porterfield's declaration. You will hear from Dr. Porterfield. She is the psychologist who has evaluated Mr. Smith since his failed execution last November. And you will see some of her conclusions on this slide. All of these clinical findings indicate that Mr. Smith is highly impaired with chronic symptoms of PTSD and depression. And she notes that, *I have seen survivors panic, disassociate, aggressively resist, and plead not to recount such events, as well as suffer nausea, pain, and urgency of the bowel and bladder.* And *Mr. Smith is frequently nauseated, especially if he has a reminder of the attempted execution.*

And, Your Honor, I would submit that there's no way to avoid him being reminded of his experience last

November. He is, right now, going through the exact same procedures that lead up to this proposed execution in January. He's appointed a spiritual advisor. He's going to be required to make lists of witnesses. He is doing all of this in the same locations in the prison where he was last November. He lives among the execution staff that participated in his last execution. We have been told -- or I shouldn't say we have been told. Ms. Stewart- Riley has testified that 10 of the 12 execution members will be the same for this proposed January execution as for November. So PTSD is a real serious issue in Mr. Smith's case in light of his unique circumstances of having survived an execution.

We -- these are ADOC's -- I apologize -- the Department of Corrections' medical records, mental health records for Mr. Smith. And if Your Honor had any doubt about his diagnosis, we think his medical records put that to rest. He's been diagnosed by clinicians at the department with PTSD. I think if you can see -- or if you look at the record, to the left-most of the slide, you will see reference to date of onset, 11/22. November '22 coincides with Mr. Smith's previous -- or -- or the department's previous attempt to execute Mr. Smith. And if you go through these records, you will see symptoms including fixation on the events of November, fearfulness, depression, anxiety, and other well-known symptoms of PTSD.

So given the risk of vomiting, it would be prudent for the department to have some procedures to address that, should it occur. Again, we -- Ms. Stewart-Riley testified about this. She testified to certain procedures. If there is vomiting while breathing gas as it is supplied into the mask, those procedures, in our view, as Dr. Yong will explain, are inadequate. The department intends to clear Mr. Smith's airway, should this happen, by a finger sweep when suction is necessary. But worse yet, Your Honor, is that they have absolutely no plan to do anything should vomiting occur after nitrogen is introduced into the mask.

And this, again, is testimony from Ms. Stewart-Riley. I think that we can play this testimony. It's short. It's about a minute -- a minute long.

(Audio played)

MR. GRASS: Your Honor, we think that is unacceptable and exposes Mr. Smith to serious risk of superadded pain if the department, as Ms. Stewart-Riley testified, has absolutely no plan to do anything if Mr. Smith vomits into the mask while nitrogen is flowing. That will -- may cause death, but it will cause death by asphyxiation in a gruesome manner.

THE COURT: Mr. Grass, I'd like to take a break. We've been going about two hours, so why don't we stand in recess for about ten minutes and everybody can stand, stretch, or go to the restroom. Okay?

MR. GRASS: Thank you, Your Honor. Sure.

(Recess from 10:57 a.m. to 11:11 a.m.)

THE COURT: Mr. Grass, are you ready to proceed?

MR. GRASS: I am, Your Honor.

THE COURT: You may proceed.

MR. GRASS: Thank you, Your Honor.

I just wanted to address quickly the defendants, in their papers, repeatedly say that we've offered no way forward. We have offered alternatives that are feasible and available, and we -- and also reduce the risk that we've identified from delivering nitrogen through a mask. And those are a hood -- using a hood to deliver nitrogen or using a closed chamber.

And we've shown on the left side of the screen an excerpt from a document that was produced by the defendants. It's a document that was prepared for an Oklahoma legislator when Oklahoma was considering nitrogen as a means of execution. And the document -- I should say, by the way, that there -- presumably the document was used in the development of the plan, although there were objections to questions around clarifying or confirming that information.

And you can see that the Oklahoma paper specifically references use of a hood sufficiently attached to the subject's head and a tank of inert gas to create a hypoxic environment. This is consistent -- and I think, Your Honor, if

you'll look at the exhibit itself, which is Plaintiff's Exhibit #A32, consistent -- the discussion of the history of introducing nitrogen is consistent with what you'll hear from Dr. Nitschke, that there were problems in the assisted-suicide context delivering nitrogen through a mask and so the trend became to deliver it through a hood. And that seems to be what the authors of this Oklahoma paper were recommending to the legislator in Oklahoma.

On the right side of the screen is an excerpt from Dr. Antognini's deposition where he concedes that using a mask in lieu -- excuse me, Your Honor. I misspoke -- using a hood in lieu of a mask or a closed chamber in lieu of a mask would reduce the risk caused by vomiting into a mask. So I think, again, there's really not much dispute about whether there are feasible and available alternatives that would reduce some of the risks caused by the department's plan to use a mask.

And consistent with that also, as I mentioned before, is -- will be the testimony of Dr. Nitschke, which you will hear, who also testified -- or represented in his declaration that masks have been abandoned as a form of assisted suicide to deliver nitrogen and a way to bypass the inherent problems caused by use of a face mask is to use a capsule, hood, or container.

Finally and very briefly, Your Honor asked

earlier about our -- our -- our RLUIPA and ARFA claims. And as I explained then, these are largely based on the complications caused by using a mask to deliver nitrogen and the choice -- the untenable choice it puts Mr. Smith in to -- to pray audibly and incur risks or forego praying audibly altogether. And I just want to make one comment about the least restrictive alternatives and some of the concerns that the department has expressed about potential noncompliant inmates.

And, Your Honor, as we understand it, some, but not all, of the corrections officers leave the execution chamber after the condemned person is strapped to a gurney and, at least under the plan established in the protocol, masked. But our understanding is also that at least three remain in the execution chamber the entire time. And because Mr. Smith will be strapped to a gurney immediately upon entering the execution chamber, it's difficult to understand why these remaining corrections officers would not be able to place the mask on Mr. Smith after he has an opportunity to speak and to pray audibly, unencumbered by a mask.

And unless Your Honor has additional questions for me at this time, that concludes our preview. We are ready to call our first witness. And if it would be helpful to Your Honor, I can hand up a copy of the PowerPoint that we just showed so that Your Honor will have it available in chambers.

THE COURT: Please do. You can give that to my deputy

there, and then you can proceed with your first witness.

MR. GRASS: Thank you, Your Honor.

MR. HOROWITZ: Good morning, Your Honor. Jeffrey Horowitz on behalf of Kenny Smith.

THE COURT: Good morning.

MR. HOROWITZ: Our first witness on behalf of Kenny Smith will be Dr. Robert Jason Yong. We'll present him -- his direct testimony via declaration, Exhibits #B1 and #B8 in your binder. #B1 is his declaration. #B8 is his supplemental declaration.

Dr. Yong is the chief of pain medicine and serves as the medical director of the pain management center at Brigham & Women's Hospital in Boston, Mass, which is affiliated with Harvard Medical School.

And with that, I will tender Dr. Yong for cross and just reserve the right for a brief redirect, if necessary.

MR. ANDERSON: Good morning, Dr. Yong. I -- I don't know if you can see me. I can see you. I'm Rich Anderson on behalf of the defendants in this case.

COURTROOM DEPUTY: Mr. Anderson, can I swear him in first, please?

MR. ANDERSON: Oh, I'm sorry.

COURTROOM DEPUTY: Dr. Yong, can I get you to raise your right hand, please.

(Robert Jason Yong, M.D., sworn)

MR. ANDERSON: My apologies.

COURTROOM DEPUTY: I'm sorry. Go ahead.

MR. ANDERSON: I understand that Dr. Yong has a limited time. And we're going to try to get through this and hopefully accommodate him.

ROBERT JASON YONG, M.D.

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified via teleconference as follows:

CROSS-EXAMINATION

BY MR. ANDERSON:

Q. Doctor, I'm going to have a few questions for you this morning.

First, I want to get right to the point and ask you about the -- the respirator that's going to be used for Mr. Smith's execution. Without saying the name of that respirator, can you tell me if you're familiar with it?

A. I am familiar in that I read the manual.

Q. Okay.

A. And I am familiar with masks and similar design.

Q. Okay. And are you aware that the Department of Corrections made that respirator available to Smith's counsel for examination on December 13th?

A. I am.

Q. Okay. But you didn't participate in that examination?

A. I did not.
Q. All right. Dr. Nitschke did. Is that your understanding?
A. That is my understanding.
Q. And has -- has Smith's counsel provided you with any other opportunity to examine that actual respirator by purchasing one or anything like that?
A. I have not purchased one or physically examined it.
Q. Okay. So you've certainly never put it on?
A. Not this specific one.
Q. Okay. Have you ever even touched it?
A. No, I have not.
Q. You've never seen it with your own eyes?
A. Not physically.
Q. Okay. Well, let me get a little more general. You said you had experience with similar masks. What experience do you have? Do you understand what a -- what a supplied air respirator is?
A. Yes.
Q. What experience do you have with supplied air respirators?
A. The experience that I have as an anesthesiologist dealing with delivery of oxygen and gases through a mask to a patient that is undergoing an anesthetic. We -- we --
Sorry. Go ahead.
Q. Well, let me ask you this. Do you use supplied air respirators to deliver anesthetic gases?

A. No. We use anesthesia masks and breathing circuits and machines and ventilators.
Q. Okay. So when you say through your experience, you don't mean you have actual experience using supplied air respirators to deliver gases to anyone?
A. Not those specific respirators. But they are very similar in mechanism and the physiology as well as the pathophysiology remaining constant.
Q. How many -- well, let's -- let's ask you about that. How many straps does -- do you typically use the same model of anesthesia mask or different models?
A. We typically use the same models for the masks as -- from case to case if we're dealing with adults. We have various types. We have a pediatric one if we are dealing with pediatric patients, and there are various sizes of those masks. But in general, we use a standard adult-size mask for the delivery of anesthesia.
Q. A standard adult-size mask. Okay. Do those masks have any straps?
A. There is the option to have straps with prongs that sit on the front of the mask that can be strapped to the patient's scalp, but as anesthesiologists, we prefer manual holding of the mask. Because even in the compliant patient, the mask can move and dislodge and bend and become -- the seal become broken with the -- with the straps, and so that's why we'll manually

hold the mask on a patient.
Q. And if it became dislodged or shifted, you would have to readjust it, correct?
A. We would.
Q. And in your declarations, you talk about mask ventilation. And correct me if I'm wrong, but that's where you're actually breathing for your patient, correct?
A. There are different types of ventilation that happen, one where you can do a mechanical ventilation, breathing for them. But in general, where using a mask, the patient is spontaneously breathing.
Q. All right. Do you have a copy of your declaration there with you?
A. I can pull it up.
(Brief pause)
A. Yes, I do.
Q. Okay. If you would, go with me to page 6 of your report. The first paragraph on -- on page 6, under the heading *Challenges with nitrogen hypoxia*, the last sentence of that paragraph, would you read that for me, beginning with *Once the patient?*
A. It says, Once the patient is no longer able to breathe independently, the mask -- the anesthesiologist's mask ventilates the patient for the duration of the anesthesia.
Q. And I am a layman, so I will apologize if I get this wrong,

but I want you to correct me if I do. But when you are -- when you are having to breath for your patient, it's the pressure -- you're creating the pressure that inflates the patient's lungs. Is that correct?

A. So I guess there's two parts of it, so one where you're holding the mask onto the patient and the patient is spontaneously breathing, and whether they're conscious or unconscious, they maintain that ventilatory drive. If you have to give the anesthetic part of it where you paralyze the muscles so that you have exposure for surgery, then the patient is no longer able to breathe, conscious or unconscious. And it's at that point we would give positive pressure ventilation, and we would ventilate through usually a controlled airway. So we would usually, at this point, put an LMA in or a breathing tube in to ventilate the patient for the remainder of that case. If we're using a mask, then we will often assist with -- with bag ventilation.

But to answer your question, when we are having a patient that is unable to breathe, then we will squeeze a bag to provide some pressure in the airway to be able to ventilate the patient.

Q. Okay. Thank you.

And in that situation where you're having to use the bag to create the pressure, a leak or a poor seal could be fatal. True?

A. I mean it -- it would be un- -- unoptimal. And, you know, we -- we -- we try to limit the breakages of the seals and try to get as good a seal as possible. And we have different techniques with how we hold our hands, the different grips that we have to -- to roll the mask to decrease the chance of a broken seal.

Q. And in that context, because you're trying to create pressure inside of the mask, trying to force air in to -- to breathe for the patient, you're really worried about air escaping out of the mask; is that correct?

A. In this case, we would be worried about the air escaping out because we're trying to deliver oxygen or potentially anesthetic gases through that mask.

Q. Okay. Well, Dr. Yong, let's go back to kind of -- I guess we're still with anesthesiology as you practice it. How often do you use a bag over your patient's head with a hose taped inside of it to deliver gases to your patient?

A. I'm not sure I understand the question.

Q. Well, that's just -- that's the question. I mean, when you're delivering gases to a patient, how often -- or how much experience do you have with putting a bag over their head with a hose taped inside of it and a somewhat snug elastic seal around their neck to deliver gases? I mean is the answer none?

A. Well, we wouldn't deliver anesthesia in that mechanism.

Q. Okay. And -- and, Doctor, how often do you employ a -- a

hood in delivering anesthetic gases?
A. We typically will do a mask ventilation and then switch the circuit to a controlled airway when we get a chance to.
Q. And so the answer to that is you do not use hoods, correct?
A. We do not typically use hoods in delivering anesthetics because we want control of the airway. We want to be able to have the access to put a breathing tube in or also oral adjunct. Because if they are unconscious and spontaneously breathing, sometimes they do obstruct where the tongue falls backwards, and then they're not able to move the air. So we'll put in an oral airway or a nasal airway to help keep those airways patent.
Q. Okay.
A. You need access to the face and the head to be able to do that, so we try not to put them in any kind of hood or bag, as you mentioned.
Q. And, Doctor, in your -- in performing anesthesia, how often do you work with patients who know that they are going to die if you are successful in your work?
A. That's contrary to what we do in medicine.
Q. Okay. I suppose I -- I'm really -- what I'm asking is how much experience do you actually have with patients who are actively resisting you or might actively resist you?
A. Well, I would say occasionally we do have patients who are potentially mentally challenged and resistant to the anesthetic

that we're trying to deliver, so we do have techniques that we have for patients who are not as compliant. But I would say the vast majority of the times that we are performing an anesthetic the patient is compliant.

Q. Well, what techniques do you have for noncompliant patients?

A. We'll have multiple hands and assistants to hold the patient. We have different techniques on how we hold the mask and the head together in -- in -- in trying to deliver the -- the medication. We may invoke a -- an IV induction, where we give medications through the IV and give a lighter amount so then the patient will be sedated to the point where then we can pre-oxygenate. And also there are Ketamine darts that we will sometimes use for -- for patients who are noncompliant, where that also does the same purpose. It sedates them so then we can then provide the pre-oxygenation necessary.

Q. Okay. Now, let's go back to masks.

In your report, in your declaration, you opine that in your opinion, it's important to keep outside air out of a mask or respirator that's being used in this context for an execution. True?

A. That's correct.

Q. Okay. And it's fair to say that you would not want to use a mask that was intentionally leaky.

A. That's correct.

Q. Okay. Are you aware that Mr. Smith's attorneys have identified a mask known as the MoJo 2 as a, quote, custom fit mask for defendant?

A. I am unaware of -- of the mask.

Q. Okay. So you have not heard of the MoJo 2?

A. No.

Q. Okay. And if I represented to you that the MoJo 2 produced by the Sleepnet company had intentional leakage rates to allow air to flow into the mask, would you think that would be an appropriate mask for using in a nitrogen hypoxia setting?

A. I would have to see the specifics of -- of -- of the mechanism of action and the mask itself or the manual to -- to see what you're referring to.

Q. Okay. Well, let me see if I -- maybe I can do this to avoid the necessity of having to do something technological here.

If a mask was designed to allow air to flow into it intentionally, would you believe that was an acceptable substitute or -- or acceptable mask to use in a nitrogen hypoxia execution?

A. I guess it depends on -- on -- kind of a hypothetical. It -- it depends on the atmosphere, the environment, what gases are potentially getting entrained as well. I'm not sure I have enough --

Q. Okay.

A. -- data to go on to make an opinion.
Q. So there are a lot of variables that would come into play?
A. There -- there would be a lot of variables in -- in -- in any situation. But to offer an opinion on adequacy, I -- I would -- I would need to know more -- more information on --
Q. Okay.
A. -- on the situation.
Q. But you've never seen the MoJo 2 mask?
A. I have not.
Q. All right. So you have no opinions as to whether it would be a suitable mask for use?
A. I -- I -- I don't have any opinions on the suitability of that specific mask.
Q. Okay. Doctor, I think it's fair to say that your -- you've offered opinions that are critical of the protocol that the Department of Corrections intends to use for Mr. Smith's execution. Agreed?
A. I have concerns. And my opinions highlight those concerns.
Q. Okay. Are you aware that a number of other states have adopted nitrogen hypoxia as a method-of-execution?
A. I'm not aware.
Q. Okay. Well, let me ask you. Have any other states asked you for your help to develop their nitrogen hypoxia protocols?
A. No.
Q. If a state asked you to help develop an execution protocol,

would you agree?
A. That -- that would be contrary, really, to -- to -- to my -- my vow as a physician to -- to help patients and -- and -- and the Do No Harm in -- in -- in physically -- or like to -- to assist in anything like that.
Q. So you don't intend your opinions here today to be taken as advice for how ADOC should carry out Mr. Smith's execution, correct?
A. Correct.
Q. While we're on the subject of advice or help, are you aware that Mr. Smith has selected hypoxia -- nitrogen hypoxia as his preferred method-of-execution?
A. I'm not sure of the details.
Q. Okay. Well, if you advised Mr. Smith that complying with ADOC procedures -- that is, remaining calm and noncombative -- would reduce the chances for unexpected harm or discomfort, do you have any reason to believe he wouldn't listen to you?
MR. HOROWITZ: Objection. It's beyond the scope, Your Honor.
A. I have no therapeutic relationship with the -- the patient. I have no understanding of the patient -- or the subject would or would not listen to my advice.
MR. HOROWITZ: Your Honor, I'm sorry. I'm sitting in the jury box, so perhaps you didn't hear me. But I objected to the last question, and I would move to strike it from the

record. It's beyond the scope.

THE COURT: Overruled. He can answer.

MR. ANDERSON: I think he has. We'll just let that stand.

Q. Is your opinion based on any assumption on whether Mr. Smith will or won't resist the method-of-execution he's soon to obtain?

A. My -- my -- my concerns are about the physiology and pathophysiology of what happens in that state. It's -- it's not reliant on an assumption of compliance or noncompliance.

Q. Okay.

A. It's just thinking of the considerations if X, Y, or Z were to happen. As -- as -- as physicians, we try to think of what could happen, contingencies, mitigate those contingencies, and -- and plan accordingly. And so the -- the concerns I have are regarding if something were to happen in the -- in the process, how the lack of addressing the protocols and mitigating those risks are -- are highlighted in my report.

Q. Okay. Let's go back to the subject of mask leakage and your concerns about room air intrusion.

How many case reports or scholarly articles do you cite that report on a person who breathed pure or nearly pure nitrogen gas and was left in a persistent vegetative state as a result? How many cases do you point to in your declarations?

A. And so the -- the issue with that question is that there's

not an abundant body of literature that discusses case reports or a series or validated studies to show what happens in these types of situations.

The case reports that I highlight in there are case reports that are typically either -- or they're -- they're typically suicides. And so with those, the person/ subject has a defined end point that they are consenting to and -- and looking to achieve. And so they're very different circumstances entirely. But the issue still remains in that if there were enough entrainment of room air and enough oxygen, that the body could still be left in a persistent vegetative state.

Q. So you've discussed that there -- there are a number of scholarly articles that speak to intentional inhalation of inert gases. How many of those studies describe a person who ended up in a persistent vegetative state? Is the answer none?

A. Well, again, there are very few studies or case reports or case series that -- that document this. And so the -- the lack of having a -- an example does not eliminate the possibility of something happening.

Q. Sure, anything is possible, Doctor. But the question I asked is how many accounts did you cite in your paper -- in your declarations of a person who was left in a persistent vegetative state by breathing pure or nearly pure nitrogen?

MR. HOROWITZ: Objection. Asked and answered.

MR. ANDERSON: No, it's not answered.
MR. HOROWITZ: Objection.
MR. ANDERSON: He has given me no answer. He's dodged the answer because the answer is none.
THE COURT: Overruled.
Q. Isn't that true, Doctor?
MR. HOROWITZ: I would ask the State's attorney to please direct his comments to the Court and not directly to me.
MR. ANDERSON: My comments are directed to the Court, Your Honor. And regardless, you have overruled the objection.
Q. So you may answer, Doctor.
A. Yeah, so it's -- it's -- it's a very different circumstance having case reports on postmortem analyses of suicides from intentional inhalation of nitrogen to determining what will happen if someone were to be given that as part of the execution protocol.
Q. I think you've answered my question well enough now.
MR. HOROWITZ: Objection. Move to strike.
Q. Doctor, have you reviewed any government documents, such as Occupational, Safety, and Health Administration reports?
A. I have seen mentions of the OSHA reports with environmental workplace.
Q. How many OSHA reports have you reviewed that identified a person who was left in a persistent vegetative state by breathing nitrogen -- or excessive nitrogen?

A. Again, the -- the numbers on those are also very small. But there would be zero.
Q. Thank you.
Doctor, this is a very basic question. But what percentage of people who are in a persistent vegetative state have no heartbeat?
A. The -- you would -- you would have a heartbeat if you were in a persistent vegetative state.
Q. All right.
A. The underlying physiology is still persistent, the breathing and the heart rate.
Q. Okay. And, Doctor, do you have any opinion as to how long a person can survive if they're breathing less than 2 percent oxygen?
A. Again, this is all completely experimental. We have no data on it. That's the -- that's the thing about this situation is that there is -- there is a dearth of information, data, peer-reviewed literature about it. But the -- the understanding is if you have 2 percent oxygen concentrations, that that is not compatible with life.
Q. Okay. And would the same be true for 3 percent oxygen?
A. The same answer. We don't have enough data to -- to -- to give absolutes. There are -- there are lots of human variation in physiology and pathophysiology. And so if we're to play this number game, is it 3 percent, is it 4 percent, is it 5.5,

you know, it -- it -- it's -- it's an impossible exercise because we just don't have enough data. And it's just not -- it's not something that we would have the data on because -- because of -- of the ethics around it.

Q. Okay. I'm going to move on to a different topic.

Doctor, you talked -- in your -- in your declarations, you mention the issue of nausea or vomiting, correct?

A. Correct.

Q. Okay. And just to kind of get a baseline here, not everyone who is nauseated vomits. True?

A. Correct.

Q. And in your practice as an anesthesiologist, are patients sometimes given a -- what's referred to maybe as a nothing-by-mouth order prior to a procedure that requires anesthesia?

A. Correct.

Q. Okay. And in that kind of circumstance, how long before the procedure would they be instructed not to eat?

A. Depending on the substance, but I would say typically eight hours is the guideline.

Q. Doctor, are there any antiemetics that you would prescribe to a patient to reduce vomiting?

A. We do prescribe antiemetics or administer it during the cases. They -- they help to decrease the incidents but not to eliminate.

Q. You talked about that -- you opined in your declaration

about the need for a suction device or that you typically use a suction device in the operating theater, correct, to -- to remove vomit?
A. We, as part of our standard anesthesia checklist, make sure that we have suction available. And that's for many different reasons including if a patient were to vomit, being able to suction out the emesis.
Q. Now, you're not opining that vomiting is universally fatal if you don't have a suction machine?
A. I'm not opining that vomiting is universally fatal, more that you have mitigations that are there if something were to happen.
Q. Okay. Thank you.
Doctor, tell me how much experience do you have with administering anesthesia through a chamber, where the patient is in a chamber and you're outside of the chamber?
A. That's not typically how we do anesthesia, so I wouldn't have experience with that.
Q. And how big -- what would the volume of a chamber to administer nitrogen be? You opine that a chamber would be preferable. How big would that chamber be?
A. I'm -- I'm -- I'm -- I don't know how to answer a question that's -- that's a -- that's a hypothetical. This -- this is -- you know, I'm here to provide my medical opinion on the protocol and not to opine on what should or should not -- or

what should be done instead.
Q. Just to clear something up, you -- you don't actually ever administer -- anesthesiologists don't administer anesthesia through a chamber. True?
A. We don't administer anesthesia through a chamber. There are times where we're not physically in the room, such as MRIs or different chemotherapy parts, but it's -- it's for just periods of time during the anesthetic.
Q. And I believe in your declaration you mentioned a sealed chamber, correct?
A. If you can point me to where.
MR. HOROWITZ: Can you point us to where you're referring?
MR. ANDERSON: Yeah. I think it's in here.
Q. It's possible I made a mistake here, Doctor, so let's move on.
Oh, wait. I take it back.
Turn with me to page 10 of your report. At the top of the page, you describe -- you say, *If the mask does not fit or a chamber is not completely closed, entrainment of room air can occur*, correct?
A. That's how it reads.
Q. Okay. How would you introduce nitrogen into a completely closed chamber?
MR. HOROWITZ: Objection. Beyond the scope.

MR. ANDERSON: I don't think so. He's opined to a completely closed chamber.

MR. HOROWITZ: I'm going to ask you not to address me directly.

THE COURT: Objection is overruled. He can answer.

A. With -- even with completely closed chambers, there's typically an inflow. The same thing as a mask. If you have a mask, you have an inflow. And so that -- that -- that would be -- you know, again, that's -- that's a little bit beyond what we would do as -- as -- as an anesthesiologist in delivering anesthetics through -- through the chamber, as we discussed.

Q. Doctor, I just want to -- well, let me -- let me back up.

And presumably, if you were introducing a gas to a closed chamber, you would also have to have an outlet. True?

A. I -- I don't understand the -- the -- that hypothetical. They're -- they're the same thing as the -- as the mask --

Q. Okay.

A. -- with the MoJo that you had discussed. There -- there's a lot of hypotheticals that would have to be assumed and walked through to make an opinion.

Q. I think I'm just about done here, Doctor. I'm going to -- let's see. I want to talk to you just for a little bit, Doctor, about hypoxia in general.

It's true, isn't it, that different people react in

different ways to hypoxia in environments?
A. There's a lot of variability in -- in human physiology, yes.
Q. For instance, person one might get a headache while person two did not?
A. That would be possible.
Q. Yeah. Person one might be fine while person two might become nauseated?
A. That is also possible.
Q. Person one might become nauseated and vomit and person two might become nauseated and not vomit. True?
A. There are variabilities in human physiology, yes.
Q. And the time to onset of symptoms is going to vary also, isn't it?
A. There are, again, variations in human physiology.
Q. And there could be no symptoms at all also. Isn't that true?
A. In hypoxia, you will have loss of consciousness. You know, you'll -- you'll -- I guess with low -- low-ish oxygen concentration, yeah, you can have no symptoms at all. It's possible.
Q. But if the concentration of oxygen is sufficiently low, you could have immediate unconsciousness without any pre -- or prior symptoms. Isn't that true?
A. Again, we don't have enough data to give you numbers:

standard deviations, averages, how long it takes. So immediates -- to say immediate, it would be difficult to quantify that. You -- you would have a lot of variability in -- in responses.

Q. And, Doctor, you -- you've testified that there's -- there's not enough data -- or not a lot of data to know -- well, let me ask you -- I'll just ask you this. How long would a person have to be exposed to 100 percent -- or let's say 1 percent oxygen environment, 99 percent nitrogen environment. How long would they have to be exposed to that before they died?

A. It would be the same answer. We don't have enough data to give you a range of averages, standard deviations, you know, one-offs. And we just don't have enough data because it's all experimental. And so it would -- it would be difficult to give you, you know, a precise average of how long it would take someone to -- to lose consciousness.

Q. Just a moment. I'm going to see if I have a couple more, and hopefully we can get you finished.

(Brief pause)

Q. Doctor, are you -- are you familiar with or do you have any opinions about the process that the federal government uses to approve mask designs for supplied air respirators?

A. I -- I don't have any expertise on the regulations and approvals.

Q. Okay. Now, you -- you've rendered a number of opinions based on your experience with mask ventilation. Do you understand that the Department of Corrections does not intend to engage in mask ventilation, a medical procedure or technique, during the execution of Mr. Smith?

A. The definition of mask ventilation is a little bit broad in that you can have mask ventilation where the patient is spontaneously breathing and you can have mask ventilation where you're actually bagging a patient and providing airway pressure to help assist breathing or to breathe for the patient. And so it -- it runs that gamut. And so in this case, using a mask and having a patient spontaneously breathing is mask ventilation, technically.

Q. Just a moment.

(Brief pause)

Q. Let me just very briefly go back to your anesthesia masks that you typically use. Are these what -- what are sometimes referred to as a half mask?

A. We refer to them as -- as masks, as anesthesia masks. That's covering the nose and -- and the mouth and the sometimes lower part of the jaw.

Q. Okay. Do they extend -- do they have any strapping or cup or anything like that to hold the chin in place?

A. We are usually holding the chin in place with our hands as we have the mask on the -- on the patient with -- with our

hand.
Q. Okay.
MR. ANDERSON: That's all I have, Your Honor.
THE COURT: Mr. Horowitz, do you have any questions?
MR. HOROWITZ: I do, Your Honor.
Doctor, I understand you have a meeting at noon, and I'm wondering if you can just indulge me for five to ten minutes, or do you need to --
THE WITNESS: Yeah. If you don't mind, I'll just send a text. Is that all right?
MR. HOROWITZ: It's okay by me if it's okay with Your Honor.
THE COURT: Yes.
(Brief pause)
THE WITNESS: Okay. Sorry about that.

REDIRECT EXAMINATION

BY MR. HOROWITZ:
Q. So, Doctor, I'm just going to take you back through a few things you were asked about, just a few. We're not going to rehash all of it. But one of the things I want to give you a chance to explain, when you were being asked about your experience with supplied air respirators and respirator devices, you said that you're focused on the physiology and pathophysiology which remains constant. Could you explain what you meant by that?

A. Yeah. So whatever the source of delivering air to a patient with the mask, there are still physiologic responses and pathophysiologic responses that happen with certain states.

In this case, in low-oxygen states, the physiology remains relatively constant. In low-oxygen states, you can get agitated, have nausea, potentially vomit, and a lot of those pathophysiologic mechanisms are -- are still there independent of route of delivery or -- or -- or reason for that physiologic state, in this case, hypoxia.

We -- we deliver anesthesia through a mask that is standard. We -- we -- we have familiarity with fit testing and with -- with protocols for masks, and we -- the silicone nature of the materials as well and -- and how that potentially can cause leakage.

Q. What's fit testing?

A. Fit testing is where you would put a mask on and either do negative pressure or positive pressure, but you want to feel for any kind of leakage or breakage of the seal during that process.

Q. A few times, Doctor, you talked about the absence of data, no data, and said that this is all experimental. One question was about the 2 percent oxygen level being -- being compatible with life.

My question is a little broader than that, though. When you say that there's no data and it's experimental and

that's the point, what do you -- what do you mean by that?
A. Yeah. The issue with this case is that there is a dearth of information on what happens with extremely low oxygen concentrations to the human body. And that lack of data makes it so that the averages and how long it takes, they are corollaries or extrapolated from trying to look at environmental disasters or -- or other states.

In this case, they look at postmortem, so not observed suicide deaths. And, you know, I think that's -- that's difficult to draw conclusions from just based off of that information.

Q. You were asked questions about nausea and vomiting and not everybody who has nausea vomits. Do you recall that?
A. Yes.
Q. And the State asked you about something called a nothing-by-mouth order. You reviewed the protocol that -- for the -- for the nitrogen hypoxia methodology, the method-of-execution Alabama intends to use?
A. I did.
Q. Was there anything in the protocol about a nothing-by-mouth order?
A. I did not see any mention of a nothing-by-mouth order.
Q. And to be clear, a nothing-by-mouth order, I think you said, is -- is an order not to eat for eight hours before receiving the gas?

A. In general, yeah. Eight hours is for -- for full -- full meals.
Q. And you were asked about an antiemetic in this context. What -- what is an antiemetic?
A. An antiemetic is a medication that can help decrease nausea. It decreases the incidence. It doesn't take it away. And with antiemetics, we typically do it to where -- at the end of the anesthetic so that when they wake up, they are less likely to have nausea.
Q. Was there anything in the protocol that you reviewed that referred to an antiemetic in any manner, shape, or form?
A. No.
Q. And does medicine treat somebody with posttraumatic stress disorder, PTSD -- does anybody treat that with a nothing-by-mouth order?
A. No.
Q. And what about an antiemetic? Do -- do doctors treat individuals who have PTSD with an antiemetic?
A. No.
Q. You were asked about vomiting into the mask. If Mr. Smith vomits into the mask before he is deceased and the nitrogen is flowing, what can happen to Mr. Smith?
A. That was one of my main concerns, is that without protocols or mitigation, my worry is that the subject would breathe in their own vomit and asphyxiate or choke on -- on their own

vomit.
Q. Choke to death on their own vomit, right?
A. That would be my concern.
MR. HOROWITZ: Nothing further, Your Honor.
THE COURT: Mr. Anderson, do you have any more questions?
MR. ANDERSON: Just one, Your Honor.

RECROSS-EXAMINATION

BY MR. ANDERSON:
Q. Doctor, are there medications that doctors can prescribe to treat PTSD or PTSD symptoms?
A. There are medications that we implement. Usually with PTSD, it's a multimodal, multidisciplinary approach to managing patients suffering with PTSD.
Q. What sort of medications might you prescribe?
A. It depends on the scenarios and symptoms and other medications that they're on, comorbid psychiatric diseases that may be at play. But you can think about antidepressants, anti-anxiety medications. Some of the potential for neuropathic agents as well can -- can help with that. Some of the interventions that we do can help with PTSD as well.
MR. ANDERSON: Okay. That's all I have. Thank you.
THE COURT: Thank you, Dr. Yong.
THE WITNESS: Thank you very much.
THE COURT: Mr. Horowitz or Mr. Grass, who's going to

be your next witness?

MR. HOROWITZ: I'm going to turn it over to Mr. Johnson, Your Honor.

THE COURT: All right. Mr. Johnson.

MR. JOHNSON: Mr. Smith would call Commissioner Hamm now, Your Honor.

THE COURT: It's noontime. How long do you think you'll be with Commissioner Hamm?

MR. JOHNSON: Relatively short, Your Honor. But I think it's probably -- I don't think we can do it in 15 or 20 minutes. It's going to be 25 minutes to an hour, I would think, with redirect and cross.

THE COURT: Okay. Let's take our lunch break. It's a little after 12. Let's plan to resume at one o'clock.

We're in recess.

(Lunch recess from 12:08 p.m. to 1:04 p.m.)

THE COURT: Counsel, are we ready to proceed?

MR. JOHNSON: Plaintiff Kenneth Eugene Smith calls Commissioner John Q. Hamm to the stand.

JOHN Q. HAMM

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Will you please state your name for the record.
A. John Hamm.
Q. And, Mr. Hamm, do you have an official title within the state of Alabama?
A. Yes, sir. I'm commissioner of the Department of Corrections.
Q. And you were appointed by the Governor, correct?
A. That is correct.
Q. You became commissioner in January of 2022, correct?
A. Yes, sir, that is correct.
Q. And as the commissioner of the Department of Corrections, you have certain responsibilities that you are to enforce throughout the state and responsibilities that you are to carry out throughout the state. Is that fair?
A. That is a fair statement, yes.
Q. Okay. And I took your deposition last week. Do you remember that?
A. Yes, sir.
Q. Okay. One of the things we talked about was the protocol for executions within the state. Do you agree?
A. Yes, sir.
Q. And in part of that deposition, we talked about how the -- there are certain statutes in Alabama that designate methods of execution. And those same statutes give certain responsibilities to the commissioner of the Department of

Corrections to carry out executions within the state?
A. That's a fair statement.
Q. Okay. I have -- we have marked and is in the record Exhibit #A1. And you and I talked right before you entered the stand -- before you took the stand what is in the official record is the unredacted version of Exhibit #A1. Do you agree with me?
A. I agree with that.
Q. Okay. And can you identify what Exhibit #A1 is for us?
A. #A1 is the Alabama Department of Corrections Execution Procedures for Lethal Injection, Nitrogen Hypoxia, and Electrocution.
Q. Okay. Throughout today there have been references to a protocol during our hearing. Do you agree that Exhibit #A1 is the protocol we've been referring to?
A. It appears that is it.
Q. Okay. Within that protocol -- and then just for record purposes, you and I are going to be trying to read from the redacted version so that we don't read out loud any of the portions that are deemed highly confidential by the State. But if, at any time, you need to refer to one of those, you have it in front of you. And we can take steps if you need to read from the unredacted version. You understand that?
A. Yes, sir.
Q. Section I.A. of the protocol, do you have it there in front

of you?
A. Yes, sir.
Q. Okay. It says in the final line, *Approval authority for changes or amendments to this protocol is the Commissioner of the Alabama Department of Corrections*. Do you agree with me?
A. That's what I read.
Q. Okay. And that's you, correct?
A. That is correct.
Q. And when you and I were together last week, I asked you if that really means you or if there's a committee of people that put it together, if there are votes taken, and you said, no, it's 100 percent you. Do you remember that?
A. Yes, sir.
Q. Okay. The State gives you that responsibility, correct?
A. That is correct.
Q. So when this was adopted in August of 2023, it was your responsibility and it was your official act within the state that adopted this protocol?
A. That is correct.
Q. And by adopting this protocol, you replaced a prior protocol that was in place in the state. Do you agree?
A. Yes, sir.
Q. That prior protocol dealt with electrocution and lethal injection. It did not address nitrogen hypoxia. Do you agree?
A. I agree with that.

Q. Okay. So prior to adopting what we have as Exhibit #1, can you tell us what -- if there were any other drafts of this protocol considered by you before you adopted this one?

MR. ANDERSON: Your Honor, at this point, I think I'm going to have to interpose an objection into questioning regarding deliberative process. The defendants have had an objection to that in discovery. We maintain that objection now and would ask the -- one, it's not relevant; and questions regarding drafts or prior protocols don't tell us anything about what will happen on January 25th. And so within -- absent the ruling on their motion to compel and our standing objection to getting into deliberative process, we object.

THE COURT: Your response?

MR. JOHNSON: Yes, Your Honor. This entire hearing and many of the claims being brought by Mr. Smith pertain to this protocol and whether it is a constitutional protocol.

Also, alternatives that were considered by the State or that should have been considered by the State or that were ruled out by the State for whatever reason should be the subject of discovery, should be explored with witnesses so that we can address the constitutionality of what we actually have here and how it was arrived through these procedures.

So we think it's as we briefed it, Your Honor. I don't want to shortcut our briefing on this issue, but we believe that this is discoverable information and it is

valuable information for the Court to determine the claims in this case.

THE COURT: Well, I'm going to -- the question pertains to other versions of the protocol; is that right?

MR. JOHNSON: Drafts of the protocol prior to this one being adopted.

THE COURT: That's -- can you limit it further than just an -- open-ended drafts? Because all I've heard from your end are issues concerning alternative uses, for example, with hoods or some sort of chamber.

MR. JOHNSON: Sure, Your Honor.

THE COURT: Or to account for a potential threat of vomiting.

MR. JOHNSON: Yes, Your Honor. Just may the record reflect that we would like broader discovery into that and would like broader questioning of this witness? But I understand the Court's ruling, and I'll move on in accordance with it.

Q. (Mr. Johnson, continuing:) Was a -- was a hood ever considered in lieu of a mask for this protocol, Commissioner Hamm?

MR. ANDERSON: I would have to object, Your Honor.

THE COURT: Objection is overruled.

A. I do not recall a hood being considered.

Q. Were you ever made aware of any testing related to hoods as

a means of delivering nitrogen during the execution process?

MR. ANDERSON: Same objection, Your Honor.

THE COURT: Overruled.

A. No, sir, not that I'm aware of.

Q. As far as you know, nobody on your team or under your direction considered the viability of using a hood and whether or not it would be a better means of delivering nitrogen than the mask that was selected?

MR. ANDERSON: Same objection, Your Honor.

THE COURT: Overruled.

A. I cannot say that any member of the executive staff with ADOC didn't have a conversation about that, but I am not aware of one.

Q. You weren't privy to any such conversation?

A. No, sir.

Q. You weren't given any information about hoods to review?

A. No, sir.

Q. Before your adoption of this protocol, you weren't given a protocol that had *hood* instead of *mask* as part of it, and you got to choose between the two of them? That never happened?

MR. ANDERSON: Your Honor, I understand your rulings, and I'd ask if I can just have a standing objection to questions about --

THE COURT: You have a continuing objection on this line of questioning.

MR. ANDERSON: Thank you, Your Honor.

Q. (Mr. Johnson, continuing:) A lot of people were talking at the same time there, so I apologize for that, Commissioner Hamm. Did you understand my question?

A. Please repeat your question.

Q. Okay. There was never a time where you were offered a protocol using a hood as a method of delivering nitrogen and as opposed to the one protocol that was adopted, and you didn't choose between the two of those as to which one, in your official capacity, to adopt for the State?

A. That is correct. I was not offered one or the other.

Q. Okay. Did you ever consider provisions for the protocol relating to the circumstance that's been discussed several times today and will be discussed again where the person being executed vomits in the mask?

A. I don't recall that particular situation.

Q. And is it your understanding that the protocols currently drafted and the plan as articulated by the corp- -- the 30(b)(6) witness for the Department of Corrections to be that if someone being executed vomits while the mask is on and nitrogen is being administered, nothing will be done in that situation but to let it happen?

A. That is correct.

Q. Okay. That's your understanding, as the commissioner, to be the protocol in that circumstance?

A. Yes, sir, that's what we've decided.
Q. And when you say that's what you've decided, can you tell the Court what deliberation that you had relating to what to do in the circumstance of vomiting in the mask when nitrogen is being applied?
MR. ANDERSON: Same objection, Your Honor.
THE COURT: Overruled.
A. We just had conversations about, like I said, sitting around, hypotheticals. Like I think the last witness talked about hypotheticals. So we sat around and came up with those ideas -- or excuse me -- the side effects, so what would we do in that situation.
Q. Did you consider that vomiting in a mask could cause asphyxiation?
Sorry for mispronouncing that.
A. Yes, sir.
Q. Did you consult with any medical personnel about how to lessen that risk?
A. No, sir.
Q. Did you talk to any medical personnel about how to alleviate that risk?
A. No, sir.
Q. Did you talk to any medical personnel about what to do in that situation, as it's happening, to prevent asphyxiation?
A. I did not.

Q. Okay. You certainly had medical personnel available to you to ask that question.
A. I could have sought out medical advice, yes.
Q. Okay. Did the State have medical personnel involved in this process of developing this protocol that you signed?
A. The Department of Corrections did not have medical personnel involved.
Q. But the State did?
A. The State did.
Q. Were you ever involved in meetings with medical personnel where the issue of vomiting in the mask was discussed at all?
A. No, sir.
Q. Have you had an opportunity to review the declarations of the experts in this case who talk about the effects of vomiting in the mask?
A. I have not.
Q. Did you ever -- as part of this process of adopting the protocol, did you ever consider the use of a chamber? I asked you earlier about a hood. Was it ever -- was there any -- ever any consideration of the use of a chamber in lieu of a mask?
A. No, sir.
Q. And similar question as before. You were never given a protocol that had a chamber as part of it and the one with the mask and got to choose between the two of those, correct?
A. That is correct. I was not presented an either/or.

Q. You were present earlier, I believe, in the courtroom when there was some discussion of the religious aspects of an execution, where someone enters the chamber and then is immediately placed in the mask before they have the opportunity to pray. Were you here for that discussion?

A. Yes, sir, I was.

Q. Did you ever consider a protocol that allowed for religious observance within the execution chamber?

MR. ANDERSON: Your Honor, just to make sure I have my record clear, we do have a continuing objection to the entire line of questioning about deliberations. Is that the Court's understanding?

THE COURT: You do.

MR. ANDERSON: Thank you.

A. I don't recall any discussions about religious activities. We did have discussions about last statements.

Q. If we look at the protocol together, Section I, General, Section D says *This document is public*. Do you see that?

A. I do.

Q. So this protocol that we have before us as Exhibit #A1 became public in August of 2023. Do you agree?

A. Yes, sir, sometime in August.

Q. And if I were to represent to you it became public on August 25th when it was filed in Mr. Smith's -- and proceedings related to Mr. Smith, would you have any reason to disagree

with that?
A. I would not.
Q. Okay. The first time the public became aware of this protocol would have been when it was made an exhibit to filings in Mr. Smith's case?
A. I would have to assume so.
Q. And if I told you that was August 25th, you'd have no reason to disagree with it?
A. That is correct.
Q. Okay. And even though this document says it's public, as we've discussed earlier, it's not really public because there are parts of it that are redacted. Do you agree?
A. That is correct.
Q. If you could turn with me --
MR. JOHNSON: Well, let me strike that.
Q. This is the first protocol that the State has ever had for nitrogen hypoxia. Do you agree?
A. To my knowledge, yes, sir.
Q. You've never seen another one?
A. No, sir.
Q. And we talked about this in your deposition, but as far as you know, there's never been another state to attempt an execution with nitrogen hypoxia?
A. That is correct.
Q. And to your knowledge, the federal government has never

tried to use nitrogen hypoxia for an execution?
A. Not to my knowledge.
Q. And you told me you didn't know about everywhere else in the world. But then I followed it up and asked are you aware of anywhere in the world where nitrogen hypoxia has been tried, and you said no.
A. That is correct.
Q. So as far as you know and as far as I know, Mr. Smith will be the first person where nitrogen hypoxia is used in an execution attempt?
A. That is correct.
Q. And he will be the first person attempted -- it goes without saying, but we'll say it anyway. He will be the first person where nitrogen hypoxia will be attempted to be used under this protocol?
A. That is correct.
Q. It will be a new experience for the folks at the Holman Prison, correct?
A. It will be the first one.
Q. Okay. And nevertheless, it was not -- it will not be the first time that Mr. Smith has undergone an execution procedure at Holman, correct?
A. That is correct.
Q. In fact, you were present in November of 2022 -- November 17th of '22 when the State attempted to execute him using

lethal injection?
A. That is correct.
Q. You were there and observed that in your official capacity?
A. Yes, sir.
Q. And in fact, you were the person who called it off when it could not be completed?
A. That is correct.
Q. That was your decision at the time in your role as the commissioner of the Department of Corrections?
A. That is correct.
Q. Similarly, it will be your decision during the procedure for nitrogen hypoxia as to whether or not to call it off for any reason?
A. That would be correct.
Q. If you can turn with me to page 5 of the protocol, there's a section called *Executions Prior to Execution Week*. Do you see that?
A. Yes, sir, I do.
Q. And I may be wrong, but I believe that section is the first section that refers to the execution team in Section A?
A. I see that it does refer to the execution team.
Q. It says *On a day designated by the warden, prior to the week of the scheduled execution, the warden and assistant warden will meet with the execution team*. Do you agree with me?

A. That's what I read.
Q. And then *Team members will be given the opportunity to resign from the execution team* at that time?
A. That's what I read.
Q. Okay. When I took your deposition, it was your understanding at that time that the execution team for Mr. Smith's nitrogen hypoxia execution would be the same execution team from his lethal injection attempt back in November of '22, correct?
A. I have no reason to say that it's not.
Q. And I believe another witness, the 30(b)(6) witness for ADOC, said 10 of the 12 people will be the same. Do you have any reason to disagree with that?
A. No, sir.
Q. Okay. And there is a captain of the team -- execution team, correct?
A. That is correct.
Q. As part of the protocol and part of the procedure?
A. That is correct.
Q. And it's my understanding that the same captain of the execution team from the November 17, '22, attempt will be the same team captain for the scheduled nitrogen hypoxia execution attempt?
A. That is correct.
Q. If you can go with me to page 9. It's the section of the

protocol Roman numeral VII, *Placement of Condemned Inmate in the Holding/Observation Cell*.

There's an observation cell there at Holman, correct?

A. Yes, sir.

Q. That's where a condemned inmate is taken in the days prior to the execution?

A. Yes, sir.

Q. It's the same -- there's only one observation cell there; is that correct?

A. Yes, sir.

Q. So the same observation cell that was used for the lethal injection attempt on Mr. Smith will be the same cell used in the nitrogen hypoxia attempt?

A. I would have no reason for it not to be.

Q. Yeah. The State hasn't built a different observation cell for this procedure?

A. We're building, but not that.

Q. If we can turn to page 12. We're now in the Roman numeral IX, *Execution Date,* section. If we look at Section B at the top, it references the last meal. Do you see that?

A. Yes, sir.

Q. When does the last meal take place for a condemned inmate?

A. I'm not sure of the particular time that day.

Q. But it's on the day of the execution?

A. Yes, sir.

Q. It's in the afternoon of the day of the execution?
A. That's pretty much going to have to be. Sometime.
Q. And will it take place in the same physical space, the same room in -- January 25 that it took place in November of '22?
A. I have no reason for it not to be taking place at the same place.
Q. If we can turn to page 15. There we get to Section Roman numeral X, the *Execution of Sentence*. And execution of sentence is carrying out the execution. That's the final procedure that actually implements death by the State. Do you agree?
A. That is correct.
Q. And Section A of this section discusses implementing nitrogen hypoxia executions; is that correct?
A. Yes, sir.
Q. Okay. Skipping down to Roman numeral III of Section A there, and I'm going to read it because it's short. *Condemned inmate will be escorted to the execution chamber by the execution team and placed on the gurney. The pulse oximeter will be placed and secured on the condemned inmate*.
There's been some reference today to the execution chamber. Is the execution chamber to be used for nitrogen hypoxia the same execution chamber that's used for lethal injection?
A. Yes, sir, it is.

Q. It's the same execution chamber that was used with Mr. Smith's lethal injection attempt back in November of '22?
A. That is correct.
Q. And there's a gurney in there, correct?
A. Yes, sir.
Q. And only one gurney in there, correct?
A. Yes, sir.
Q. So the same gurney that was used in November of '22 will be used in January of next year for the nitrogen hypoxia execution attempt; is that correct?
A. That is correct.
Q. So it's probably clear from that question, but Mr. Smith will be strapped to the same gurney that he was before?
A. Yes, sir.
Q. If we turn to the top of page 16, this is continuing in the same section. There's Roman numeral V there that discusses the placement and adjustment of a mask on the inmate's face. Do you agree with me?
A. That's what I read.
Q. And this protocol refers to it as a mask, correct?
A. It does.
Q. Okay. And it says there that *the execution team captain verifies that the mask has been properly placed* in the middle of that paragraph?
A. That's what I read, yes, sir.

Q. Okay. What -- I don't see them in the protocol, so I'll ask you. Are there written procedures for making sure that a mask is properly placed, what that would mean, being properly placed?

A. It is not in the written protocol.

Q. The next sentence goes on to say, *The execution team members responsible for secondary post will be dismissed from the execution chamber after the mask has been properly placed*, again using that term *properly placed*. Do you see that?

A. I do.

Q. What does it mean to be properly placed, this mask?

A. Put on the face as it was intended to be used.

I mean, it is a mask that was used for a specific purpose. So, I mean, you wouldn't have it sitting on his head like a hat. So it would be placed as anyone would think a normal mask would be placed on someone's face.

Q. Okay. You heard some testimony in the courtroom today already that infiltration of outside air, like you and I are breathing right now, into the mask may present a problem in the execution. You heard that testimony?

A. I heard that, yes, sir.

Q. So in order to be properly placed, one would have to ensure that there's no outside air coming in.

A. That was his opinion.

Q. Okay. Assuming his opinion is correct, what's done in the

execution chamber to make sure that no outside air gets under the mask?

A. Well, that's a hypothetical on his opinion being correct.

Q. Even so, what is done to make sure no outside air comes in?

MR. ANDERSON: Objection. Calls for speculation.

MR. JOHNSON: Your Honor, I don't think that calls for any speculation to ask what's done to make sure no outside air is coming in.

THE COURT: The objection is overruled. He can answer.

A. I don't know specifically what the team captain does to make sure the air does not get in, but I'm sure they -- they do practice quite regular.

Q. Do you agree with me there's nothing in the protocol that would let us know what's going to happen to make sure there's a proper fit?

A. That is correct.

Q. I can't look through this today and know what's going to be done to know if it fits proper?

A. That is correct.

Q. Rolling down to the bottom of page 16, Roman numeral XIV there says, *The warden will activate the nitrogen hypoxia system*. That's the first -- first part of that section, correct?

A. Correct.

Q. Okay. And if we go to page 17, Roman numeral XV, you and I talked about this a good bit in your deposition. This says, *After the nitrogen gas is introduced, it will be administered for, one, 15 minutes or, two, five minutes following a flatline indication of the EKG, whichever is longer.* Do you see that?

A. I do see that.

Q. Do you agree with me that there's no time period there at which the nitrogen cath -- nitrogen gas would be cut off in the absence of a flatline?

A. It's either 15 minutes or five minutes following the flatline indication of the EKG, whichever is longer.

Q. Whichever is longer. So if there's no flatline, there's no reason to turn off the gas, correct?

A. It does not state that, correct.

Q. So if there's no flatline after 30 minutes, the person being executed would continue to receive nitrogen gas as part of this protocol?

A. That's a possibility.

Q. If there's no flatline after an hour, the same would be true; the person would be continuing to receive nitrogen gas in the absence of a flatline?

A. Well, I think we discussed that would also go into me making a determination of when to call off the execution.

Q. And I'm glad you mentioned that because you're correct. You would have the authority in your capacity as the

commissioner to call off the execution at that time or to abort or to turn off the gas?
A. Correct.
Q. And I believe you told me in your deposition you would use your judgment on that?
A. That is correct.
Q. But sitting here today, we don't know a specific time. We can't look at the protocol and know the time where you would turn it off as per the protocol in the absence of a flatline?
A. It just has those two things. That's correct.
Q. So if the condemned is receiving some percentage of breathing air through a leak or malfunction of the mask or otherwise, enough to maintain a reading on the EKG, they would continue to receive nitrogen gas as long as they're not flatlining?
A. Like I said, that would be a determination I would have to make.
Q. And do you understand that someone exposed to nitrogen gas yet not flatlining could have all sorts of injuries as a result of that yet not die?
MR. ANDERSON: Objection. Vague. Speculative.
THE COURT: Overruled.
A. Yeah. I mean, I -- I don't have personal knowledge of that.
Q. If a doctor or someone qualified to opine said they could

have brain damage from that, would you have any reason to disagree with them?
A. I wouldn't say I would disagree, but that -- that would be their opinion.
Q. You understand that people could have injuries where they maintain a heartbeat yet have permanent injuries or serious injuries in spite of maintaining a heartbeat?
A. Yes, that is correct.
Q. Okay. I asked you at your deposition if there's any length of time, in your view as the commissioner, where someone strapped to a gurney, not flatlining, and receiving nitrogen gas -- is there any length of time in that situation where you, as commissioner, would consider that to be cruel and unusual punishment?
A. And I think my answer was no, I would not think it's cruel and unusual punishment.
Q. And we know that the only firm deadline in the law for cutting off that nitrogen outside of your own judgment -- the only firm deadline that would cause it to be cut off is the expiration of the death warrant period.
A. Outside of these two things, that -- you could say that. But it just depends on what time we start as well.
Q. Yeah. Regardless of what time you start, under the -- the new guidelines by the Governor and by Alabama -- the Supreme Court of Alabama, there will be a deadline at which the

execution period ceases or lapses?
A. Correct. Correct.
Q. That's now 30 hours, I believe, where it used to be 24?
A. Yes, sir.
Q. So you have six more hours than you had in November of 2022 when you were attempting a lethal injection execution?
A. That is correct.
Q. And we've covered it, but I want to make sure we've covered it. I think we've covered it, but I want to make sure. Is there's no written procedure here that discusses what would happen if someone vomits in the mask while nitrogen is being applied? There's nothing in the protocol as to that?
A. That is correct. There's nothing in the protocol.
Q. Okay. And we talked about this earlier, but the fitment of the mask process that's not written down, about the proper placement, you agree with me that any concerns about proper placement could be resolved through use of a hood?
A. Repeat your question, please, sir.
Q. Sure. I'm skipping back a little bit, so I apologize. We asked you several questions about proper placement of the mask. We talked about that. And I want a wrap that up by asking isn't it true that you could alleviate any concerns about proper placement by using a hood instead of a mask?
A. I would say not necessarily because then there would be issues with the hood. So I'm not going to say I agree with

that.
Q. Okay. The post-execution procedures, if you'll turn with me to page 20, Section A, Roman numeral III, discusses nitrogen hypoxia as a means of execution. And it states, *Prior to permitting the physician's entry into the execution chamber to pronounce dead*. Do you see that section?
A. I do see that.
Q. And that's to take place after there is a flatline and the execution team believes that the condemned has passed away, correct?
A. That is correct.
Q. And only at that time will physicians be allowed to enter the execution chamber. Do you agree?
A. That is correct.
Q. So that goes without saying, during the execution process, there will not be a physician in the room to assist if there are any problems like you and I have been discussing?
A. That is correct.
Q. Do you remember that in your -- during your deposition, you and I looked at an Alabama statute together, part of the Alabama code?
A. Yes.
Q. And you were familiar with that code section. It was -- the first part of the code section was addressing the methods of lethal injection that are available in Alabama. Do you

agree?
A. Methods of lethal injection or --
Q. I'm sorry. Methods of execution that are available in Alabama.
A. That is correct.
Q. And part of that says that the -- discusses whether or not a means of execution is available or unavailable. That's the term used in the Alabama code.
A. Something to that effect, yes, sir.
Q. Okay. And you told me in your deposition that you were not the person who made that determination for Mr. Smith, and that determination is what means of execution are available for him.
A. Wait, now. Repeat your question.
Q. Yes. The determination of what means of execution are available for Mr. Smith, is that a determination that you made, you, commissioner of the Department of Corrections?
A. In the context of we have things ready for electrocution: the necessary equipment for lethal injection and now the necessary things for nitrogen hypoxia. Yes, we would make that determination that we would be able to carry out whichever method the Supreme Court says or whoever comes up for a death warrant.
Q. Okay. This may be a better way to do it. Can you -- I hate to do this to you, but can you grab the other binder there. We can put that one away and move on to the other

binder there, please.

And if you'll turn to the -- towards the back of it, I'd like to ask you about Exhibit #40, #A40.

A. 4-0?

Q. 4-0.

A. All right.

Q. Are you there with me?

A. Yes, sir.

Q. Okay. Do you recall that Mr. Smith had another case in this court before the same -- before Judge Huffaker relating to the lethal injection method-of-execution?

A. I remember being in Judge Huffaker's court, yes, sir.

Q. Okay. And do you remember you were a party to that case, as the commissioner, just like you are in this case, correct?

A. Yes, sir.

Q. Okay. What we're looking at in Exhibit #40 is a filing that was made in that case, the lethal injection case, back in August of this year. You can see at the top in blue it has the code -- the Court puts that number on us -- on there for us. But it says Document 104, and it tells us when it's filed, August 25th, 2023. Do you see that?

A. I do see that.

Q. And, again, that date is significant because that's the date you and I have discussed was the date the protocol was actually made public for the first time. And on that same day,

these lawyers, on your behalf, moved to dismiss that lethal injection case. Did you know that?
A. So what it -- that's what the document says, yes.
Q. In fact, the document, in paragraph three, says that, *Defendant Hamm* -- that's you -- *has determined that nitrogen hypoxia is an available means of execution and will be used in the execution of plaintiff,* plaintiff being Mr. Smith, correct?
A. That is correct.
Q. Okay. What did you do, Defendant Hamm, to determine that nitrogen hypoxia was both available and would be used in the execution of Mr. Smith?
A. Well, as you stated, we have approved the nitrogen hypoxia protocol, and operationally, we were able to carry out execution by that method.
Q. So did you decide that nitrogen hypoxia would be used for Mr. Smith?
A. I do not decide which method will be used on the individual inmates.
Q. Who does that?
A. That would -- I'd have to surmise someone at the Attorney General's Office asked the Supreme Court for a death warrant. That's something they ask for.
Q. Okay. So it was actually someone else who determined that nitrogen hypoxia would be used in the execution of Mr. Smith? That wasn't you?

A. Like I said, I don't pick and choose which method gets used on a particular inmate.
Q. Okay. Well, turn -- turn -- well, start reading at -- the last two words on page 1, Exhibit #40, which says, *Further, under the unique circumstances of this case* -- Mr. Smith's lethal injection case -- *Defendant Hamm has determined that lethal injection is not available as to plaintiff*. Do you see that?
A. Yes, sir.
Q. The unique circumstances of Mr. Smith's case are what?
A. I would have to think that, you know, Mr. Smith had already had an attempt at lethal injection, plus he had this pending litigation against me, that we also have nitrogen hypoxia available at that time --
Q. Okay.
A. -- so that would be the method.
Q. So you agree that the unique circumstances involved the failed execution attempt in November of '22?
A. I would have to say yes. But there's a lot of water under the bridge between now and then.
Q. Yeah. And that's kind of my point. You knew in -- you knew November 18th of 2022, the day after the failed execution, that you couldn't execute Mr. Smith by lethal injection anymore. Do you agree?
A. No, sir, I do not necessarily agree with that, that I knew

the next day.
Q. Okay. Well, you knew that you tried the night before and failed?
A. That is correct.
Q. Okay. And you knew there was ongoing litigation about that issue in front of this judge?
A. I don't know if it was filed the next day or not, but --
Q. It --
A. -- at some point there was litigation because I do remember being in Judge Huffaker's court.
Q. And I'll just represent to you that that case was pending at the time of the execution and it continued after the failed execution.
A. Okay.
Q. But those unique circumstances, you knew those in late November at least, early December of 2022, correct?
A. Like I said, I'm not going to agree to that because -- I'm not saying I did or didn't know then, but I'm not going to agree that I did know.
Q. Okay. You didn't make any specific finding or analysis of Mr. Smith's medical condition sometime between November of '22 and August of '23 that changed your mind?
A. I personally did not.
Q. Okay. Did anybody on behalf of the State make some medical analysis or medical determination between November of '22 and

August '23 that changed the State's mind on the method-of-execution for Mr. Smith?
A. I'm not aware of a medical evaluation.
Q. If they did, they didn't tell you about it?
A. That is correct.
Q. You also said one of the unique circumstances being referenced there was the ongoing litigation that Mr. Smith had. Do you agree with that?
A. Yes, sir.
Q. Can you flip with me back to Exhibit #35, please.
(Brief pause)
Q. Are you there with me?
A. Yes, sir.
Q. Okay. As you and I talked about at your deposition, you've been involved in more lawsuits than you want to be involved in. Is that fair to say?
A. That is a very fair statement.
Q. Okay. And you understand what's meant when lawyers use the term *discovery* --
A. Yes, sir.
Q. -- in a civil case like this?
A. Yes, sir.
Q. We've talked about it. They take depositions, you exchange documents, you have exchange of information from one side to the other. You understand that, right?

A. Yes, sir.
Q. Okay. And Exhibit #35, if we look back at the top like we did with Exhibit #40, you see this was filed on August 29th of '23. Do you see that?
A. I do see that.
Q. So that would have been four days after October -- excuse me -- August 25th of '23, correct?
A. That is correct.
Q. Okay. So if August 25th was on a Friday -- and I believe it was -- this would have been filed the next Tuesday, on the 29th?
A. I have no reason to disagree.
Q. Okay. And this was filed on your behalf as a defendant to this case. And in paragraph one it states that, *On August 8th, the parties had the Rule 26 conference and agreed upon a date of August 29th, 2023, for initial disclosures*. Do you see that in paragraph one?
A. I do read that.
Q. Meaning your initial disclosures in that case were due on August 29th. It's clear from this filing on your behalf, correct?
A. That is correct.
Q. And you understand, don't you, that if you had had to make initial disclosures, you would have had to disclose information about Mr. Smith's failed execution in November of 2022?

A. I don't know how to answer that because this -- the Attorney General's Office files this. And what y'all requested on discovery, I have no idea.
Q. Okay. Are you aware of ever having conducted -- participated in any discovery in Mr. Smith's lethal injection case?
A. No, sir, I have not.
Q. And for example, I didn't get to take your deposition in that case. I only got to take it in this case, correct?
A. That is correct.
Q. And as far as you know, in that case, no documents were produced relating to the failed execution attempt on Mr. Smith?
A. I have no knowledge of that.
Q. And none of the people involved in that were identified --
A. I mean, I --
Q. -- as part of that litigation?
A. I have -- I did not participate in that.
Q. And is it fair to surmise that, as you had said earlier, one of the unique circumstances that the State was suggesting made lethal injection unavailable and the unique circumstances that made nitrogen hypoxia available for Mr. Smith was because you didn't want to engage in discovery in this court in that lethal injection case?
A. I can't say that.
Q. You agree that it certainly looks that way from what we're

looking at?

MR. ANDERSON: Objection, Your Honor.

THE COURT: I am struggling with some of the relevancy in this, Counsel, because I'm going to be quite frank with you. In the prior litigation, people repeatedly represented to me -- I think statements were made by counsel for Mr. Smith that he did not want to be executed by lethal injection and that his preferred method was, in fact, nitrogen hypoxia; and at some point, the decision was made by the State to honor that request.

So the reasons for that, I don't see where there's much relevance here today, even if it may have been related for the reason of getting out of or relieving themselves of having to respond to discovery. I'm just struggling with the relevance here.

MR. JOHNSON: Okay. Your Honor, I'm sorry that it's taking me a minute. I'll get there. I think it will be clear in a second.

But to be more -- to -- to hopefully put that -- put Your Honor at ease, there's a difference between asking for nitrogen hypoxia as a means without a protocol, for instance, and being first in line and the next one to be executed in light of my clients's Fourteenth Amendment rights. And if the basis for executing him is he's a litigant protecting his rights, that's not a rational basis. That's unconstitutional.

And if we have a witness here admitting that the basis for executing him was to get out of initial disclosures and get out of discovery process, that, to us, would be highly relevant to our client's constitutional rights.

THE COURT: Well, certainly you're not asking to unwind what's happened in the other case, are you?

MR. JOHNSON: No, Your Honor.

THE COURT: Because as a result of that case, the State is forever precluded from conducting an execution by lethal injection. That is off the table forevermore --

MR. JOHNSON: Yes.

THE COURT: -- unless you want to revisit it.

MR. JOHNSON: No, Your Honor.

THE COURT: So what's the question?

MR. JOHNSON: It's been too long for me to remember now, Your Honor. Could the court reporter read it back before the objection, please?

(The court reporter read the requested portion of the record)

THE COURT: I could not hear the court reporter, so you'll have to re-ask or rephrase the question.

Q. (Mr. Johnson, continuing:) The question was it certainly looks like, from what we're looking at here, that one of the unique circumstances in the case was Mr. Smith's litigation and the impending discovery.

MR. ANDERSON: And I'm going to object again to asked and answered. The witness was already asked if he made the decision based on discovery, and he said I don't know anything about that. So the State would object.

THE COURT: It doesn't sound like much of a question. Objection sustained.

Q. (Mr. Johnson, continuing:) If you would, would you please look at Exhibit #A29 with me.

(Brief pause)

Q. Okay. This is a list of other nitrogen hypoxia death row inmates and the dates upon which their conventional appeals were exhausted. Do you see that?

A. I see the list, yes, sir.

Q. In fact, it doesn't say conventional appeals; it just says dates appeals exhausted. Do you see that?

A. That is what I see, yes, sir.

Q. There -- I think -- if we counted them out in your deposition, I think there are 21 of them. The earliest in time where the date of appeal was exhausted is in October 2011. Do you agree with me?

A. I agree.

Q. Okay. And if Mr. Smith exhausted, according to the State, his conventional appeals on February 22nd, 2022, that would put him third from the bottom on this list. Do you agree?

A. He'd be tied for third from the bottom, yes, sir.

Q. Tied for third.

And everybody above him on it -- on that list would be someone who had their appeals exhausted earlier than he did by -- some of them by as many as 11 years.

A. Yes, sir.

Q. You were here in the courtroom earlier when Mr. Anderson said the reason Mr. Smith is being executed is because it's his time. Do you remember him saying that, using those words?

A. Yes, sir.

Q. Okay. It would also be the first person on this list -- I'm not going to read their name for purposes of this hearing, but we have it in the record. It would also be that person's time, correct?

A. I cannot answer that, sir, because --

Q. Do you --

Okay. I don't want to cut you off. Go ahead.

A. I was just going to say that's the reason -- those people sitting at the table representing me, that's what they do. I -- I don't -- I don't know.

Q. Do you agree that the people on this list are similarly situated to Mr. Smith in that --

MR. ANDERSON: Objection. Calls for a legal conclusion.

THE COURT: Let's let him finish the question first.

Q. Do you agree that this group of people are similarly

situated to Mr. Smith in the respects that they have exhausted their appeals, according to the State, and that they have elected nitrogen hypoxia and are awaiting execution?

MR. ANDERSON: Objection. Calls for a legal conclusion.

THE COURT: I'm going to sustain the question to the extent it asks -- calls for a legal conclusion, but I will allow him to answer it strictly from a factual standpoint.

A. That is what this document says, death row inmates who have elected nitrogen hypoxia and whose conventional appeals are exhausted.

Q. Do, you sitting here as the commissioner of the Department of Corrections, know of any reason why Mr. Smith should be treated differently than the people on this list?

A. My personal knowledge, no, sir.

Q. Do you have any reason -- are you aware of any reason, sitting here today as the commissioner of the Department of Corrections, why Mr. Smith should be the first person executed by nitrogen hypoxia in the state of Alabama?

A. I have -- I don't have an opinion of that. I don't -- I don't know. I mean, that's --

Q. You're not aware of any basis why he would be first, are you?

A. Not first or last. No, sir.

Q. Looking at this list, it certainly appears there are people

who exhausted their appeals long before he did. Do you agree?
A. Based on the document, that is correct.
Q. And you understood when I deposed you and you understand now that the State has taken the position in the past that it's their custom to set people for execution after their conventional appeals are exhausted?
MR. ANDERSON: Objection. Calls for speculation.
THE COURT: Overruled. He can answer to the extent he knows.
A. That's what I've heard today, yes, sir.
Q. You don't have any reason to disagree with that, do you?
A. No, sir.
Q. Okay.
MR. JOHNSON: At this time, I will pass the witness, reserving redirect.
THE COURT: Mr. Anderson, any redirect?
MR. ANDERSON: Just a few, Your Honor.

CROSS-EXAMINATION

BY MR. ANDERSON:
Q. Commissioner Hamm, of course, I'm Richard Anderson. I'm just going to have a couple of questions for you.
I'm going to take you back to August 25th of this year. Do you know of anyone on August 25th of 2023 other than Mr. Smith who had -- who had a pending lawsuit in which he had asked for lethal -- in which he'd asked for nitrogen hypoxia as

a method-of-execution?
A. I'm not aware of any.
Q. Do you know of anyone else who had a pending motion -- or pending method-of-execution challenge in which he asked for nitrogen hypoxia who had previously -- ADOC had been unable to obtain intravenous access for?
A. Not that I'm aware of.
Q. Do you file motions to set execution dates, Commissioner?
A. No, sir, I do not.
Q. Do you make the decision for when it is the appropriate time to carry out an execution; that is, do you authorize yourself to carry out an execution?
A. No, sir.
Q. Does the Supreme Court do that instead?
A. That is correct.
Q. The Alabama Supreme Court, I should say?
A. Yes, sir, the Alabama Supreme Court.
Q. You were asked some questions earlier about the -- the portion of the protocol that refers to a proper fit or properly fitting the mask. Are you the person assigned to put the mask on Mr. Smith?
A. I am not.
Q. How many employees do you have -- well, they're not your employees. They're the State of Alabama's employees.
A. That is true.

Q. But how many people work in your agency, approximately?
A. Approximately 2,900.
Q. Do many of the people in your agency have special skills that you don't have?
A. Yes, sir.
Q. Undergo training that you don't undergo?
A. That is correct.
Q. As commissioner of the Department of Corrections, you're the main defendant in a fair number of lawsuits. Is that fair to say?
A. A large number of lawsuits.
Q. Anytime the Department of Corrections is sued, you are, generally speaking, the main defendant. Fair enough?
A. That is correct.
Q. Do you know -- do you have personal knowledge of everything filed in cases in which you are a defendant?
A. Absolutely not.
Q. Earlier on you were asked a question about medical personnel and whether you had referred to medical personnel in respect to the protocol.
Now, you have -- you have attorneys who work for you, correct?
A. That is correct. We have a legal division.
Q. But when the Department of Corrections is sued, especially in method-of-execution cases, it's actually the Attorney

General's Office who represents you. Is that true?
A. That is correct.
Q. And when you were referring to medical personnel that the State had available, were you referring to the Attorney General's trial preparation expert?
A. Yes, sir.
Q. Did the Attorney General's trial preparation expert ever confer with you?
A. No, sir.
Q. Do you have any understanding about whether or not medical personnel will generally refuse to provide guidance on executions?
A. My personal knowledge is yes.
Q. You were here in the courtroom this morning when Dr. Yong testified?
A. Correct.
Q. Did you hear him testify that he would not assist in guiding a state to -- how to perform an execution?
A. That's what I recall him saying.
Q. You were asked some questions about people who had -- who had elected hypoxia back in 2018. Do you have any knowledge of whether or not Mr. Smith elected hypoxia in 2018?
A. No, sir, I do not. I was not with the Department of Corrections at that time.
MR. ANDERSON: Nothing further, Your Honor.

THE COURT: Any further questions of this witness?

MR. JOHNSON: Just briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Commissioner, you were just asked by your counsel whether or not you were aware of any other inmates who had ongoing litigation and who had a failed lethal injection attempt.

A. Correct.

Q. Do you remember that? That was the first question I think he asked you.

A. Yes, sir.

Q. You are aware that there was somebody fitting that criteria who you settled your claim with; is that correct?

A. I don't -- I know of one other individual we had a failed execution on, but I don't know the legal status.

Q. Yeah. And that was Alan Miller, correct?

A. Correct.

Q. And he -- you failed in your execution attempt of him by lethal injection prior to failing to execute Mr. Smith that way?

A. I believe that is correct.

Q. And he had a similar lawsuit here before Judge Huffaker when that happened?

A. Like I said, I -- I don't have personal knowledge that I can recall.

Q. Well, that -- that puts me in a bind because you had -- you responded to your own lawyer that you didn't know, and I'm trying to remind you that there was such a person.

Do you remember that now that I've given you that --

A. Well, I remember -- I do remember Alan Miller, but his legal status I do not.

Q. Okay. Were you aware that Alan Miller's claims were settled by agreement between the State and him?

A. I don't recall that.

Q. He isn't going to be executed between now and January 25th, is he?

A. No, sir.

MR. JOHNSON: That's it, Your Honor.

MR. ANDERSON: Nothing further from the defendants.

MR. JOHNSON: Thank you.

THE COURT: Thank you, Commissioner.

MR. ANDERSON: Your Honor, may the commissioner be excused? I understand defendants have no -- or excuse me -- plaintiffs have no objection.

MR. JOHNSON: No objection.

THE COURT: He can be excused.

THE WITNESS: Thank you, Judge.

THE COURT: All right. Your next witness.

MR. JOHNSON: Plaintiff calls Dr. Nitschke, Philip Nitschke, to the stand.

PHILIP NITSCHKE, Ph.D., M.D.

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Can you please state your name for the record.

A. Yes. My name is Philip Nitschke.

Q. Dr. Nitschke, did you prepare and sign two declarations that were meant to be your testimony in this case?

A. Yes, I prepared two declarations.

MR. JOHNSON: Okay. For the record, those are submitted and accepted already as Exhibits #B2 and #B7. We'll offer that as his direct testimony and pass the witness.

THE COURT: Mr. Anderson, any questions?

MR. ANDERSON: Just a couple of questions, Your Honor. We have a deposition of Dr. Nitschke too that we would like to introduce into the record. This would be Defendants' Exhibit #53. And I apologize, Your Honor. In the rush to get things assembled, it didn't make it into our stack yesterday. But I've -- of course, plaintiff's counsel was a party to this deposition, and we discussed it this morning. So I'm going to provide that and a copy to the court reporter first.

And I've just got a couple of other questions for

you, Doctor.

THE COURT: Was that deposition previously admitted this morning?

MR. ANDERSON: I am moving it into evidence right now. And I'm --

Is there an objection?

MR. JOHNSON: None. It goes in with everything else the same way.

THE COURT: All right. It's admitted.

CROSS-EXAMINATION

BY MR. ANDERSON:

Q. Dr. Nitschke, we -- I'm Richard Anderson representing the defendants. We met the other day at your deposition, correct?

A. Yes, we met the other day.

Q. And we talked a good bit that day about the Max Dog Brewing and the exit bag method of assisted suicide; is that right?

A. Yes, we talked about those methods of assisted suicide.

Q. And you explained to me -- correct me if I'm wrong. You explained to me about -- or we talked about the bag system whereby you pull the bag over your head and tighten it a bit around your neck with an elastic band.

Could you explain for me how that bag system prevents air infiltration from outside?

A. Yes, I can explain this. The bag system effectively creates an environment -- a total environment, like a

container, in which you are suddenly immersed, so you're suddenly surrounded completely with an inert gas, nitrogen.
Q. And I understand that your system allows for CO_2 to exit or -- or gases in general to exit through the neck of the bag?
A. Yes, that's correct. The flow of gas -- the ingress of the nitrogen makes sure that the exit of that nitrogen takes with it any exhaled carbon dioxide.
Q. And what prevents room air from coming into the bag through the same method?
A. The -- the high flow rate of the gas from outside of the bag, when it's pulled down, exiting around the lower part of the neck makes it impossible for air to come back into that environment of pure nitrogen.
Q. And just one more question. Well, I take it back.
First of all, can people have nausea and not vomit?
A. Yes. People can be nauseous and not vomit.
Q. And can people have nausea due to exposure to nitrogen with the bag system?
A. I imagine that they can. It's -- it's -- it's a recognized consequence of exposure to high levels of nitrogen.
MR. ANDERSON: That's -- that's all I have, Your Honor. Thank you. In addition to Dr. Nitschke's deposition.
THE COURT: Further questions?
MR. JOHNSON: None, Your Honor.
THE COURT: The witness can be excused.

Is that correct, Counsel?

MR. ANDERSON: As far as we're concerned, yes.

MR. JOHNSON: Yes, Your Honor.

THE COURT: Thank you, Dr. Nitschke.

THE WITNESS: Thank you.

THE COURT: Next witness.

MR. GRASS: Your Honor, plaintiff calls Kenneth Eugene Smith.

KENNETH EUGENE SMITH

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. GRASS:

Q. Good afternoon, Kenneth.

A. How you doing?

Q. Do you recall in June of this year signing a declaration in Jimmy Barbour's case?

A. Yes, sir, I do.

Q. Was that true and correct when you signed it?

A. Yes, sir, it is.

Q. And did that declaration also incorporate some provisions from a complaint in your own case?

A. It did.

MR. GRASS: Your Honor, we tender Exhibit #B5, which

is Mr. Smith's declaration. And the provisions that were incorporated in that declaration are in Exhibit #A23.

THE COURT: That declaration has already been admitted, correct?

MR. GRASS: Yes. We -- we tender that as Mr. Smith's direct testimony. I have a few additional questions for him.

THE COURT: Okay. You can proceed.

Q. You're aware, I -- I take it, Kenny, that the Governor scheduled your execution for January 25th?

A. Yes, sir.

Q. How did you become aware of that?

A. I believe my wife told me. She had heard first, yeah.

Q. Did you have any communications with the warden about it?

A. I did, yeah. He come to my cell -- well, he didn't. He sent officers to my cell approximately ten a.m. in the morning or so to bring me up to his office to read the warrant to me, to have me sign some papers and that sort of thing.

Q. Did your status within the prison change after you --

A. Yes, sir.

Q. -- spoke with the warden?

A. Yeah, it did. Immediately. They put me on single-walk, which is -- basically, it's isolation. I can no longer be around the other men of death row, men I've known for 35 years.

Q. You've been at Holman for 35 years?

A. 33 at Holman.

Q. What kind of relationships have you developed with other inmates at Holman during that time?
A. Oh, God. Brothers. Some of them are young enough to be my sons, and so I've reared a couple of them. But brothers, absolutely. I've known them longer than I knew my brother in the street.
MR. ANDERSON: Your Honor, I'm going to have to object to the relevance.
THE COURT: I'm going to give him some leeway. The objection is overruled.
Q. (Mr. Grass, continuing:) Do you counsel some of those inmates?
A. I do, yes, sir.
Q. Has single-walk status also affected your ability to visit with people from outside the prison?
A. Yes, sir, it has. Yeah.
Q. How so?
A. Well, they only let me see so many people.
If you mean for visitation purposes?
Q. Yes.
A. Yes. So I have a -- a strict visitation for -- for during this time period, and it doesn't really deviate. So when I make my list out, I make my list out.
Q. Is the visiting space at Holman a communal space?
A. It is, except for guys like myself. They won't allow me to

be on the visitation yard with other inmates and their families. So they have to accommodate one of us, either -- it would either be them or it would be me, and so one of us gets knocked out of a visitation with our family.
Q. So if any other inmate has scheduled an appointment for a visit, then you're not permitted to visit at the same time?
A. That's right.
Q. Does that affect your ability to visit with your family members?
A. It does. The same problem, yeah.
Q. Does that affect your ability to visit with your counsel?
A. It does and has.
Q. How does single-walk status affect your ability to participate in religious activities?
A. Well, prior to me saying something, speaking up about it, about being on single-walk like this, I couldn't go nowhere. I couldn't attend church or nothing. But when I complained about it, they gave me one -- one -- one day a week to attend a church service.
Q. Who did you complain about it to?
A. To the warden, to the captain, to you guys. Y'all complained to the ADOC, which, in turn, to the AG's office.
Q. By *you guys*, you mean your lawyers?
A. My counsels, yes, sir.
Q. How did you complain to the warden?

A. Written. A written letter.
Q. Did the warden respond to your written letter?
A. No, sir. I seen him several weeks later. And he came by my door with -- it's a seg board, what they call it. They go around to all the guys that are segregated and -- so him, mental health, and classification. So they go around to see those guys. And I caught him when he come by, and I asked him about my letter. And he said -- he said, oh, it's policy, me being on single-walk. I said, no, sir, it's not; it's not in the protocol. He said, well, it's my policy, and kept on moving and said that --
MR. ANDERSON: I'm going to object to the hearsay as well, Your Honor, and move to strike.
THE COURT: I'm going to overrule. Let's move on.
Q. (Mr. Grass, continuing:) Did the warden give you any explanation of the policy?
A. A security risk was what he said.
Q. Since you've been incarcerated, have you been -- ever had any disciplinary infraction involving violence?
A. No, sir. Never.
Q. Has anyone ever informed you that you're a security risk to other inmates?
A. No, sir. Never.
Q. How about to prison staff?
A. No, sir. Never.

Q. Are you aware of anyone else at Holman who's a security risk to you?
A. No, sir. No one.
Q. I want to change subjects, Kenny. Have you arranged for a spiritual advisor to assist you?
A. Yes, sir, I have. Reverend Jeffrey Hood.
Q. And do you and Reverend Hood have a plan for how he will assist you?
A. We do.
Q. What is that plan?
A. We plan to -- to have prayer together, verbal prayer, read some scripture, take communion -- or the sacrament. He intends to anoint my head with oil and lay hands on me.
Q. And to accomplish that plan, that will include your praying audibly?
A. Yes, sir, absolutely.
MR. GRASS: Thank you, Kenny. I have no more questions at this time. The defense counsel may have a few questions for you.
THE COURT: Mr. Anderson, any questions?
MR. ANDERSON: Just a couple, Your Honor.
CROSS-EXAMINATION
BY MR. ANDERSON:
Q. Mr. Smith, the -- January 25th is not the first date you've been set for execution, correct?

A. Correct.
Q. That was November 17th of last year, correct?
A. Yes, sir.
Q. And prior to that, when you received your execution -- your November 17th execution date, were you placed on single-walk?
A. I was.
Q. Okay.
A. This is a new thing.
MR. ANDERSON: That's all I have. Thank you.
THE WITNESS: This is a new thing, this single-walk. It's only been going on for a couple of years.
MR. ANDERSON: I'm sorry. That is not the question I asked you.
THE WITNESS: The 33 years of my time at -- at Holman Prison, the inmates are left out amongst the other men.
MR. ANDERSON: That's not the question I asked you.
THE COURT: Thank you. Mr. Anderson, you can have a seat.
Counsel, are there any other further questions of Mr. Smith?
MR. GRASS: Just a few, Your Honor.
THE COURT: And I think I can predict what that question may be. Go ahead.
REDIRECT EXAMINATION
BY MR. GRASS:

Q. Mr. Smith, you -- you told us before that you've been at Holman for 35 years?
A. Yes, sir.
Q. During that time, has the single-walk been the policy for all inmates after they are given an execution date?
A. No, sir. No. No, we're -- the -- all of my time there up until like, like I said, two and a half, three years ago, the policy was all the men are left out with us until the week of their execution. And that is as much for the condemned inmate as it is for the -- the other men. So...
MR. GRASS: Thank you, Mr. Smith. I have no more questions.
MR. ANDERSON: Just one, Your Honor.
THE COURT: Okay. Just one.

RECROSS-EXAMINATION

BY MR. ANDERSON:
Q. You're not the only person who's been placed on single-walk prior to an execution date; is that correct, Mr. Smith?
A. In the past three years, you'd be right.
MR. ANDERSON: That's it. Nothing else, Your Honor. Thank you.
THE COURT: Thank you, Mr. Smith.
THE WITNESS: Thank you, sir.
THE COURT: Your next witness.
MR. KERSCHNER: Thank you, Your Honor.

Plaintiff next calls Dr. Katherine Porterfield. Dr. Porterfield will be remote. She's a clinical psychologist with a Ph.D. in clinical psychology and works at the Bellevue Program for Survivors of Torture. She's evaluated and treated individuals who have experienced war trauma and torture.

We tender Dr. Porterfield through her declaration and supplemental declaration of her testimony. And these can be found at Exhibits #B3 for her declaration, and her supplemental declaration can be found at Exhibit #B6.

I will tender the witness to defense counsel and will reserve time for redirect.

Thank you, Your Honor.

KATHERINE PORTERFIELD, Ph.D.

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified via teleconference as follows:

CROSS-EXAMINATION

BY MS. HUGHES:

Q. Dr. Porterfield, my name is Beth Hughes. And I represent the defendant in this case.

You note in your report --

A. Good afternoon.

Q. Good afternoon.

You note in your report that you performed several assessments on Mr. Smith and that those measures were

administered after interviewing the person and on the phone; is that correct?
A. Yes. I'm just having a little trouble hearing you. I believe you said administered assessments; is that correct?
Q. That's correct.
A. So to answer appropriately, I just want to clarify. I assessed Mr. Smith across many different occasions. As part of that, I administered standardized measures. So I believe that was what you were asking.
Q. All right. What -- what standardized measurements -- did you conduct any of those standardized measurements over the phone?
A. I did not.
Q. Okay. And you performed the Test of Memory Malingering, or the TOMM, on Mr. Smith to determine whether he was malingering; is that correct?
A. I did administer that test, yes.
Q. And what is the TOMM?
A. So the TOMM is called the Test of Memory Malingering.
If you'll indulge, I'd like to just open my report, which has been provided to me by counsel, just to get to that section of the report.
Q. That's -- that's fine.
A. Thanks.
(Brief pause)

A. Yes. So the TOMM, as I said, is the Test of Memory Malingering. And it is a -- it's a measure in which you administer images to a subject and ask them to do their best to retain a memory of the image. And in doing so, this -- you're assessing their -- how much they are, what you call, participating with best effort, essentially trying to do their best versus an individual who might be having a motivation to do poorly so that the person could seem, you know, to be impaired in some way. So this is how this measure was specifically designed and standardized by those who created it.

Q. And did you -- do you give it two or three times to check their memory?

A. Yes. What you do is you follow the procedure, which has, you know, been standardized by the designers, not by me. And you first give images to the subject and then you wait, and then you give another set of images and you ask them to recall the images they previously saw. So you're essentially doing a -- what's -- what looks like a memory test.

Q. Okay. Did -- did you administer the Structured Interview of Malingered Systems test, the SIMS?

A. I did not.

Q. Did you administer the Detailed Assessment of Posttraumatic Stress, the DAPS, to test his malingering?

A. I did not.

Q. The SIMS takes 30 to 45 minutes to complete, doesn't it?

A. I don't know. I did not administer that.
Q. Are you qualified to administer the SIMS?
A. If I was trained on it, I imagine. I believe psychologists can do so.
Q. So -- but you haven't been trained on the SIMS?
A. Correct.
Q. So do you know whether it's widely used to assess malingering in general and in PTS -- PTSD specifically?
A. I -- I don't know. I've heard of it. And there's a variety of tests that get used.
Q. But the TOMM is not specifically designed to test PTSD and malingering. It doesn't have specific tests to test for PTSD?
A. Just to clarify, right. So the TOMM is not testing for posttraumatic stress disorder, which I tested Mr. Smith for across other measures. The TOMM is a specific measure to examine the person's effort at presenting themselves in what you call, you know, good effort or truthful effort on measures of -- of memory. So it's a very specific kind of test.
Q. And --
A. And I did another -- there was another scale of mine that looked at what we call faking or malingering bad.
Q. And what was that?
A. Pardon? I'm sorry.
Q. What -- what -- what test did you use that -- that also looked at malingering?

A. So there's a test in my report on page 27, the Trauma Symptom Inventory-2. And that test has a number of subscales. So there's a test on that for what you call fake bad, basically, which means the person is responding in a way to exaggerate their presentation. That's another way to understand malingering. So there is a subscale of that that was important to me to examine in Mr. Smith.

Q. Did you put that in your report?

A. Yes. I have -- I'm sorry. For just a moment I'm just going to read what I put.

(Brief pause)

A. I -- I put a comment in a bullet point that said he demonstrated good effort to answer questions truthfully, complete tasks presented to him. No indication of malingering.

So that would be the -- that's where I'm referencing it.

Q. But you didn't -- you didn't put that particular scale that he -- that he did -- that he -- that it was a valid scale?

A. It looks -- I -- I don't believe I put a specific sentence about that, correct.

Q. How much experience have you had evaluating and diagnosing death row inmates?

A. I have worked for about ten years working on a variety of evaluations in the context of criminal cases, many of which have been capital case.

Q. How many?
A. I'm going to have to pause. I -- I did not think to -- to put this as a -- as a tally. Just give me a second.
I would say I have evaluated probably about 20 to 25 individuals.
Q. Okay. Would you expect a death row inmate to have increased anxiety as his execution date grows closer?
A. I think that would be normal, yes.
Q. Would you agree that disassociation and depersonalization are normal or expected responses for an inmate as his execution draws near?
A. I would not expect that, no.
Q. Why not?
A. Well, that would -- let me back up a minute. So -- so disassociation is a very broad term of a kind of set of symptoms. And -- and disassociation has to do with what we think of as a disconnect between a person's consciousness and their sensory perception.
Disassociation is a very -- can come in very specific ways, you know, multiple different types of disassociation. And one of them you just referenced. I think you said depersonalization. Those are symptoms that are usually endemic or part of posttraumatic stress, so they are not necessarily something that just emerges in a person when they are under stress, such as having an adjustment disorder, as we see in

Mr. Smith's records. So those are more endemic to posttraumatic stress.

Q. In your report, on page 7, you discuss Mr. Smith's traumatic childhood and psychosocial history; is that correct?

A. I'm just going to turn to that page, please.

(Brief pause)

A. Yes.

Q. At the conclusion of your report, you say that those traumas likely worsened his current symptom presentation; is that correct?

A. Yes.

Q. But you don't describe how those experiences likely affected him or how those experiences are tied to the attempted execution, do you?

A. Well, I do in -- in the sentence you just said, which is I said that I think they were -- they contribute to his responses. And that's how I described it, that they would contribute but not be central to the symptoms he's now presenting with.

Q. And in your report, you also cite that Mr. Smith has been triggered by walking past the execution chamber and seeing certain guards. Is that correct?

A. Can you reference the page? I believe that's correct because I recall it, but I do -- I do like to see, just to make sure.

Q. I mean, it's -- I think it's all throughout your report. But...
A. So could you give me the two examples again that you're referencing? I apologize.
Q. Walking past the execution chamber and then seeing certain guards.
A. Yes, both of those are things that I recall that Mr. Smith had what we call hyperarousal reactions to.
Q. And you indicated in your report on pages 21, 28, and 30 that he has experienced nausea when he recalls the events of his first execution attempt. Is that correct?
A. Yes. He has -- I -- I -- just looking at the pages for a minute, you said 21 and 28, correct?
Q. Correct. And 30.
A. Yes, that's correct.
Q. Has he reported that he vomited after experiences -- experiencing this nausea?
A. Not to me.
Q. Do you know has he -- has he reported that to anyone?
A. Not that I'm aware of.
Q. How many times did he report nausea during those experiences of seeing the guards or going past the execution chamber?
A. Mr. Smith reported chronic nausea very frequently, coming on all the time, as -- as I recall, throughout the year.

Q. How many times in the last two months has he reported to you that he experienced nausea that led to vomiting?
A. I just would like to look at how many times I've spoken with him. If I could pause for a moment?
Q. Okay.
(Brief pause)
A. Could you please repeat the question?
Q. How many times in the last two months -- or how about in November -- how about let's do August, September, and November has he reported to you that he experienced nausea that led to vomiting?
A. That led to vomiting. I did not hear that.
Q. Okay.
A. He did not report that to me.
Q. And you have no professional experience and/or training with mask wearing and vomiting; is that correct?
A. Correct.
Q. And you have no professional opinion about using a chamber or an exit bag instead of a bag; is that correct?
A. I don't know what that refers to. No.
Q. I don't see anywhere in your report where Mr. Smith indicated to you that he experienced nausea during the last execution attempt; is that correct?
A. I apologize. Can you refer in the report to what you're talking about?

Q. No. What I said is I don't see anywhere in your report where Mr. Smith indicated to you that he experienced nausea during the last execution attempt. Is -- is there anywhere in your report where you note that he experienced nausea during the last execution attempt?

A. Do you mean during the actual failed execution itself?

Q. That's -- that's exactly what I'm talking about.

A. Okay. Just excuse me for a moment. I'd like to look in my record -- my report.

(Brief pause)

A. Yes, he reported other physical symptoms during that, but he did not report nausea to me.

Q. And you've reviewed the unredacted protocol from Mr. Smith's nitrogen execution; is that correct?

A. I did.

Q. And there's no opportunity for central line placement in the nitrogen protocol, is there?

A. I -- I'm really not an expert on those matters, so I -- I -- I don't feel comfortable saying whether there's something in the protocol or not.

Q. Okay. Well, do you know whether he'll be poked with needles in the nitrogen protocol?

MR. HOROWITZ: Objection, Your Honor. This is outside the scope of the doctor's testimony.

THE COURT: Counsel, I am struggling with the line of

questioning.

MS. HUGHES: Okay.

Q. All right. Mr. Smith experienced anxiety and depression before his first execution attempt; is that correct?

A. Yes, he did.

Q. And he also experienced nightmares and trouble sleeping before his first execution attempt, correct?

A. I would have to, again, look at my report for a moment, please.

Q. That would be on page 14 and 15, I believe.

A. Thanks.

(Brief pause)

A. He reported -- again, if you could just say that question one more time, please.

Q. Just a minute.

(Brief pause)

Q. He also experienced nightmares and trouble sleeping before his first execution attempt; is that correct?

A. I believe he had trouble sleeping. I -- I don't recall nightmares before. If you would point that out to me.

Q. I can't find that right now. I just -- you -- you say that he had trouble sleeping.

A. I don't believe --

(Multiple speakers)

(Court reporter interrupts for clarification)

Q. You did say that he had trouble sleeping before his first execution attempt?
A. That is correct.
Q. So he was actually experiencing PTSD symptoms before his first execution attempt, wasn't he?
A. No. He was experiencing anxiety and depression and some trouble sleeping. But as the record documents by his providers in the DOC, he was not diagnosed with posttraumatic stress disorder at that point. So he was experiencing other symptoms.
Q. He was experiencing symptoms that are very similar to PTSD symptoms before his first execution?
A. Some of them overlap, yes. So there -- there can be overlap between what he was experiencing, which was adjustment disorder, and some of the symptoms of posttraumatic stress disorder, yes.
Q. And all of the symptoms he's reporting now are basically -- or based on what Mr. Smith told you; is that correct?
A. Could you repeat the question?
Q. Your -- your -- in your report, where you talk about the symptoms of PTSD that he's now experiencing, that's basically based on his self-reports to you?
A. No, that's not correct.
Q. And your opinion, because of the PTSD, is that Mr. Smith may experience nausea in the next execution attempt, not that he actually will experience nausea; is that correct?

A. That it would be possible, yes, given that he has experienced it chronically, yes.
Q. It's not that he will certainly experience nausea; is that correct?
MR. KERSCHNER: Objection. That's asked and answered.
THE COURT: Objection overruled. She can answer.
A. I'm sorry. Could you ask that again?
Q. Yeah. It's -- you -- you can't -- you can't say positively that he will experience nausea during his next execution attempt, can you?
A. To say that positively, no. No.
Q. You -- you testified for -- for a terrorist in the case of the United States versus Ghailani in 2010; is that correct?
A. I testified for someone charged with terrorism offenses, yes.
Q. Do you recall that case?
A. I do.
Q. In that case, Mr. Ghailani had conspired with Bin Laden to plant embassy bombing; is that correct?
MR. KERSCHNER: Objection, Your Honor. I don't see the relevance of this.
MS. HUGHES: I'll get to the relevance.
THE COURT: Counsel, the relevance?
MS. HUGHES: In -- in her report, she says that *Kenny Smith's experience subjected him to severe trauma, the*

intensity of which I have rarely seen in 25 years of practice as a trauma psychologist. **And I just want to get into the facts of that case and the trauma that that defendant experienced compared to what -- to the trauma experienced by Mr. Smith.**

THE COURT: I'll give you a bit of leeway on it.

Q. So he was captured and turned over to the CIA and was kept in a place outside the United States for two years; is that correct?

A. So I worked on this case from 2008 to 2010. And I apologize, but it's difficult to refresh my memory without -- without a record. So I -- I will be -- I have to be careful about what I can, you know, recall, as well as there was a fairly large amount of this that was classified, which required a closed courtroom for me to speak about it. So I'm actually -- I'm struggling with how much I can discuss some of this for those two reasons.

Q. Okay. If I tell you that the -- the district court opinion says that he was captured and turned over to the CIA, where he was interrogated outside the U.S. for roughly two years, do you have any reason to dispute that?

A. The district court opinion, no, not at all.

Q. And according to the district court opinion, you said that he was subjected to enhanced interrogation techniques during that time.

A. That sounds accurate, yes.
Q. And that he suffered from PTSD. Would that be correct?
A. I believe so, yes.
Q. While you couldn't describe the specific techniques that were used against Mr. Ghailani, the district court noted that those techniques would be attention grasp, facial hold, insult, facial slap -- that was in parentheses -- abdominal slap, prolonged diapering, sleep deprivation which is over 72 hours, stress positions, cramped confinement, and waterboarding. And that's how the district court described enhanced measures.
Do you have any reason to doubt that that was the enhanced measures?
A. So just to clarify, those -- I believe that's the district court listing the enhanced measures at that point that had been determined as what were called enhanced interrogation. So I'm not commenting about whether or where they took place because that's classified, but I -- but I can tell you I -- that if the district court listed the enhanced interrogation techniques, then that would be accurate.
Q. You testified that he had been subject to those enhanced interrogation techniques; is that correct?
A. So again, I'm -- I'm trying to recall. And if the -- if the record that you have says that I testified about the use of enhanced interrogation on Mr. Ghailani, that is correct.
Q. Okay.

A. Yeah. I apologize, but it's tricky, given classification.
Q. Right. And I -- I understand that the interrogation techniques are still classified, so you can't testify to the exact interrogation techniques. But he was subjected to some, if not all, of those measures; is that correct? Would that be a correct statement?
A. Are -- are you reading that again? I -- I'm -- I'm struggling again with classification because I am -- you know, I am not to confirm or deny things that are classified.
Q. Okay. Well, then I'll just move on.
If he was subjected to those, would it -- would that have been, over the whole two-year period, more than once, more than twice?
MR. KERSCHNER: Your Honor, I'm going to again object. It's been asked and answered. And the witness has already suggested that we're getting into classified information that has -- really has limited relevance here.
MS. HUGHES: I'm -- I'm not asking for any of the classified information. I'm just asking would he have been subjected --
THE COURT: Counsel, again, what's the relevance? We're going way out there.
MS. HUGHES: Okay. It's just to show that this case is not any more different than Ghailani's. And I would say Ghailani's was much worse than what he was subjected to.

That's okay. We'll move on.

MR. KERSCHNER: And I'll object to counsel's expert testimony.

THE COURT: I'll read the opinion. How about that?

MS. HUGHES: Okay. And the cite to it, Judge, is 751 F. Supp. 2d 508, Southern District of New York, 2010.

That's all I have.

MR. KERSCHNER: Your Honor, if I may, a quick redirect?

THE COURT: You may.

REDIRECT EXAMINATION

BY MR. KERSCHNER:

Q. Good afternoon, Dr. Porterfield.

A. Good afternoon.

Q. Based on your assessment, Kenny Smith having been through an execution already, how is Mr. Smith's condition different from other inmates in which you have worked with that are on death row?

A. Well, qualitatively, quite different because it is that he has been through the experience of being attempted to be executed. So I -- I had not -- I've never seen that with a death row inmate.

Q. So is it fair to say it's not an apples-to-apples comparison between Mr. Smith and other inmates who have not had a failed execution attempt?

A. I would say it's qualitatively very different, yes.
Q. And would you say that Mr. Smith being isolated from his family and friends on single-walk would exacerbate his condition?
A. I believe so, yes.
Q. You talked a little bit about and you were asked a little bit about chronic nausea. Are there any other symptoms you experienced when evaluating Mr. Smith relating to nausea that would lead you to believe that he -- he may experience nausea or vomiting during another execution attempt?
A. Well, Mr. Smith demonstrated and reported across time several fairly common what we call GI symptoms, gastrointestinal symptoms, that can accompany posttraumatic stress. He had nausea, he had gulping and sort of hiccuping that can accompany the sort of adrenaline rush that -- that is believed to be part of what causes the GI distress. He had difficulty with gastrointestinal issues around evacuation, so urgency of needing to use the restroom and -- and difficulty with diarrhea and some -- I was just trying to remember. Yes, I -- I believe those. And just some issues of sort of a reflux type of symptom. So those would be all GI-type symptoms he reported across time.
Q. And did you review any records that you received that confirmed your PTSD diagnosis?
A. The PTSD diagnosis, yes, there were several records from

the DOC that did confirm that.
Q. And I just want to ask one last question. Have you worked on behalf of prosecutors before?
A. I have.
Q. Sorry. Go ahead.
A. No. I have, yes.
Q. So you've not only worked on behalf of inmates, right?
A. I've worked for defense and prosecution, yes.
MR. KERSCHNER: No further questions. Thank you.
THE WITNESS: Thank you.
MS. HUGHES: We don't have anything further, Judge.
THE COURT: All right. Let me ask this, Counsel. I do plan to take a break. Will there be another witness from the plaintiff?
MR. GRASS: None for the plaintiff, Your Honor.
THE COURT: So we'll move to the defendants response; is that correct?
MR. HOROWITZ: Your Honor, if I may.
I'm sorry, Mr. Grass.
We're not going to put on a live witness. We're just going to want to confirm that you have some things just before we close our case and pass it. But, yes, no live witness.
THE COURT: Okay. We'll pick up with that after our break. We'll be in recess for approximately 15 minutes.

Thank you.

(Recess from 2:57 p.m. to 3:16 p.m.)

THE COURT: Counsel, ready to proceed?

MR. HOROWITZ: We are, Your Honor.

Your Honor, just basically a couple of housekeeping matters, if you will, before we pass our case. The first would simply be that we'd like to just make sure that we --

I'm sorry. Are we back on?

COURTROOM DEPUTY: He wants to know who's speaking. If you can get closer to the mike.

MR. HOROWITZ: How about I come over here.

COURTROOM DEPUTY: Yeah, that's fine.

MR. HOROWITZ: Your Honor, a couple of housekeeping things before we pass our case for purposes of the hearing today.

The first is we just want to make sure we direct your attention to the deposition of Cynthia Stewart, who appeared on behalf of the defendants as the 30(b)(6) witness. It's in your binders that have been admitted into evidence for purposes of the hearing, tab #A31. A lot of discussion with respect to the protocol. Some of it, you know, will be things that you've heard, a lot of things that you haven't heard, things about training and some other issues. But in the interest of time and everybody's sanity, as you have the full

transcript, we do think it's worth your read, top to bottom.

And then the second thing, of course, is we have a pending motion to compel on the deliberative process. And we would like to just reiterate that we believe that the State's failure to allow us to take any discovery on anything pre August 25th, 2023, with respect to the protocol and, in particular, the development of the protocol we believe has -- has hamstrung us a bit on presentation of our likelihood of success on the merits today. We, of course, would like to reserve our right, should you rule in our favor, to discover and present evidence that is relevant to those issues.

But with that, Your Honor, we will, of course, pass the case to the State at this time.

THE COURT: Mr. Anderson.

MR. ANDERSON: Yes, Your Honor.

THE COURT: Do you intend to present any witnesses or evidence?

MR. ANDERSON: We do, Your Honor. We have a number of witnesses, beginning with Mr. Joseph Antognini.

(Joseph Antognini, M.D., sworn)

MR. ANDERSON: And, Your Honor, Dr. Antognini's declaration and supplemental declaration are contained in the defendants' supplemental exhibit list, one of the white binders, binder one, and these are marked and already admitted as defendants' Exhibit #1 and defendants' Exhibit #2.

And with that, we would tender the witness for cross-examination.

MR. KERSCHNER: And, Your Honor, I just want to note that you have the deposition of Dr. Antognini, which is Exhibit #A33. I will try to keep this brief as I can, because you do have that full transcript that covers much of his opinions and some of the issue that I will address briefly here.

JOSEPH ANTOGNINI, M.D.

The witness, having first been sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

CROSS-EXAMINATION

BY MR. KERSCHNER:

Q. Dr. Antognini, I am correct that you are an anesthesiologist?

A. Yes.

Q. And the last time you actually provided anesthesiology to a patient, that was about four or five years ago?

A. Yes.

Q. And when you use a mask in your practice, your goal is not to prevent oxygen from getting into a patient, right?

A. That is correct.

Q. And you've never induced nitrogen hypoxia on a human being?

A. I have not.

Q. You've never witnessed that procedure being done?

A. No.
Q. And you've never published any articles or given any presentations on the use of nitrogen in the termination of an individual's life?
A. No.
Q. You've never published any articles or given presentations relating to the administration of nitrogen gas to a person?
A. No.
Q. You have no experience in the design or use of masks that are designed to completely seal out oxygen from getting into that mask, correct?
A. No.
Q. I am correct?
A. I'm sorry. Maybe --
Q. Let me re-ask.
A. Yeah.
Q. Am I correct that you don't have any experience in the design or use of masks that are designed to completely seal out oxygen from getting into the mask?
A. Yes, you are correct. I apologize for not understanding your question.
Q. That's okay. I think that was me asking a double negative. I apologize.
And you have never done any research or published any articles on the types of masks that can be used when delivering

nitrogen to a person in a way that is designed to end their life?
A. I have not done anything like that, no.
Q. Before your contact in this case, you've never had any experience with the type of mask being used in the execution of -- the planned execution of Kenny Smith?
A. If you mean the supplied air respirator type of mask, if that's what you're referring to, I have not had that experience with that mask.
Q. In fact, the first time you inspected that type of mask to be used in the execution of Kenny Smith that is planned would have been when you visited Holman Correctional Facility on August 16th, 2023, correct?
A. That is correct.
Q. One of the other things you discuss is protection factors for masks in your report?
A. Yes, I do.
Q. And looking at protection factors for masks is not something you do in your daily job, right?
A. That is true. I do not do that.
Q. In fact, for this case, you learned about protection factors by simply doing internet digging, correct?
A. I certainly did internet digging. But it takes more than just internet digging to -- to arrive at an opinion. And I certainly have the credentials and the scientific background to

use that information to arrive at an opinion -- a scientific opinion. So it was a little bit more than internet digging.
Q. Before this case, you had not offered any opinions about protection factors for masks, correct?
A. No, I have not. I have not offered prior opinions.
MR. KERSCHNER: Your Honor, we actually would move to preclude Dr. Antognini from providing testimony about the mask that's going to be used in the execution of Kenny Smith. Dr. Antognini has no experience with this. He's never looked at this type of mask or analyzed this type of mask. He just testified that the first time he's ever been involved with these kinds of masks was when he was retained in this case. I would, therefore, like to exclude specific paragraphs in his report that pertain to the mask to be used and the mask technology. And I'm happy to tell you those paragraphs.
THE COURT: Identify those paragraphs for me. I will take it -- I will note it and take it under submission.
MR. KERSCHNER: That's paragraphs 9 through 12 and 18 through 30 of his declaration.
THE COURT: You can continue with your next line of questioning.
Q. (Mr. Kerschner, continuing:) Doctor, in the setting of nitrogen hypoxia, the amount of time it takes someone to lose consciousness or pass away is dependent on the amount of oxygen that is -- that a person will inhale, right?

A. Yes, that's -- that's correct. Over time, obviously.
Q. And you don't cite any peer-reviewed scientific literature that will tell you the percentage of oxygen, over time, that will lead a person to die in nitrogen hypoxia?
A. Well, I certainly cite literature that tells us the level at which someone will die is going to be less than 6 percent. If that's achieved in a minute versus five minutes, it's still going to cause death. So it's really the concentration, not so much the time.
Q. But, Doctor, you don't cite any peer-reviewed literature supporting that position in either your declaration or your supplemental declaration, correct?
A. There is no human data, for obvious reasons.
Q. You would agree someone who is oxygen deprived, death and loss of consciousness are not the only things that can happen to the person, right?
A. Depending on the amount of oxygen deprivation, yes, that's true, it doesn't necessarily mean just death or -- I'm sorry -- death or --
Q. Loss of consciousness?
A. -- loss of consciousness. That is correct.
Q. And you don't disagree that, for example, if someone is oxygen deprived, it could be a situation where they end up with irreversible brain damage but then does not lead to their death?

A. That is the remote possibility in the situation, as I understand it and have opined, in the execution study. It's a remote possibility.
Q. So I am correct?
A. It's a possibility, yes.
Q. You give patients a nothing-by-mouth order before anesthesia, right?
A. Yes.
Q. And that's a standard approach you give to patients is not to eat or drink anything before the induction of anesthesia, right?
A. Yes. That's standard practice for -- for most of our cases that are elective cases.
Q. And when a person loses consciousness, they lose their airway reflexive passageway and get relaxation of the juncture between the stomach and esophagus, and that could lead to vomiting, right?
A. Well, it -- in an anesthetized patient -- and I -- I believe that was the patient you described in front of me -- you don't -- you can get regurgitation, passive regurgitation. That's not the same as vomiting. You can get passive regurgitation of stomach contents, which can go up into the airway -- into the mouth and then into the airway.
Q. So you would agree that when a person loses consciousness, there could be stomach regurgitation that gets into the airway?

A. That can happen, yes.
Q. And if a patient is under general anesthesia or being induced to general anesthesia and the patient regurgitates the contents of their stomach, you would agree that it is an emergency that can't just be ignored, right?
A. It's something that needs to be taken care of right away, yes. There could be complications if it's not taken care of right then and there.
Q. And one way you do that is by -- if the patient is removing -- wearing a mask, is remove that mask, right?
A. Yes.
Q. And you could then turn that patient on their side?
A. Typically, that's what we would do, at least turn their head, if not their whole body.
Q. And another way is to actually put a tube down their throat and pump out the contents of -- of the vomit, right?
A. That is correct. We would use suction to do that.
Q. And when you reviewed the protocol that's going to be used for the execution of Kenny Smith, you didn't see anything that indicates that that option is available to the ADOC, correct?
A. I do not believe there's anything in the protocol, as I recall, related to that.
MR. KERSCHNER: And, Your Honor, at this point, we will defer -- refer you to the rest of Dr. Antognini's deposition transcript instead of going through it here, in the

interest of time.

Thank you very much.

THE COURT: Okay.

MR. ANDERSON: Just a couple of redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q. Dr. Antognini, if a person has a passive regurgitation that you've just testified regarding after loss of consciousness, a patient, you generally plan for them to return to consciousness at some point. Is that true?

A. That is absolutely correct, yes.

Q. And you mentioned complications. Would that -- could that involve things like -- let's see if I can remember -- pulmonary infection from -- from aspirated stomach contents?

A. Yes. It's called -- it's called -- aspiration pneumonitis is the term.

Q. Thank you, Doctor.

If -- if someone is unconscious through anesthesia or having been rendered unconscious by hypoxia, do they feel pain?

A. No.

MR. ANDERSON: Nothing further, Your Honor.

THE COURT: Okay.

MR. KERSCHNER: Your Honor, if I just --

Never mind. No further questions, Your Honor.

THE COURT: Thank you, Doctor. You can be excused.

MR. ANDERSON: Your Honor, the defendants call Cynthia Stewart-Riley.

And, Your Honor, you have before you and we've already admitted three documents with relation to this witness. In defendants' binder one, we have defendants' Exhibit #3, which is the declaration of Cynthia Stewart-Riley; Exhibit #4, which is an affidavit by Ms. Stewart-Riley; and Exhibit #5, which is also an affidavit by Ms. Stewart-Riley.

And with that, we would tender Ms. Stewart-Riley for cross-examination.

I'm sorry. And one other item with relation to this witness, Your Honor, is one of the videos that you've seen -- or that you have. #45 is a video of Ms. Riley.

CYNTHIA STEWART-RILEY

The witness, testified as follows:

CROSS-EXAMINATION

BY MR. HOROWITZ:

Q. Good afternoon, Ms. Stewart.

A. Good afternoon.

Q. Is it okay if I call you Ms. Stewart or --

A. That's fine.

Q. Okay. You and I met -- was it last week, a few days ago, earlier this week -- I can't remember -- at your deposition, right?

A. Yes, correct.

Q. And it was over video, so we weren't in the same room together.
A. Correct.
Q. All right. Well, it's nice to see you in person.
I'm not going to be long with you because you and I spent a few hours together, right?
A. Correct.
Q. We -- we went through the whole deposition process and pretty much covered, I think, all of the things that I wanted to cover. But subsequent to that -- well, let me ask you this. There's two declarations that the Attorney General's Mr. Richardson [as spoken] just referenced. You and I talked about those declarations during your deposition, right?
A. I don't --
Q. I'm sorry. The affidavits. Yeah, the affidavits.
A. We talked about the affidavits, correct.
Q. Yeah. We covered each of those, right?
A. We did.
Q. Okay. And then you have a new declaration that was submitted more recently for purposes of this hearing today, the declaration of Cynthia Stewart-Riley, and that you signed on the 18th of December 2023, right?
A. Correct.
Q. Okay. And just to be clear, your first involvement with the nitrogen hypoxia protocol was after the protocol was

approved by the commissioner and became public on August 25, 2023, right?
A. Correct.
Q. And prior to that time, you didn't have any expertise or experience with a nitro -- nitrogen hypoxia protocol, right?
A. Correct.
Q. And you weren't involved in the development?
A. Correct.
Q. But part of what you did when you did get involved is you were shown some videos and looked at some things that occurred during the development process, right?
A. Correct.
Q. And you recall that during your deposition, I tried to ask you about those things, what videos you saw, what materials you reviewed, who you spoke to about the development process, and your -- your counsel would not allow you to answer those questions. Do you recall that?
A. I do.
Q. Okay. Let me ask you now, just so it's clear for the record, what materials were you given to review that were part of the development process of the protocol?
MR. ANDERSON: And, Your Honor, I'm going to interpose our objection regarding deliberative process and pre-decisional materials.
THE COURT: And I'll give you my same ruling on it.

Let's keep it specific to the issues that I've heard today.
Q. We talked at your deposition about the mask that was selected to be used in the nitrogen hypoxia execution of Kenny Smith, right?
A. Correct.
Q. And that's a mask that is not specifically designed for use in an execution, is it?
A. Correct.
Q. That's a mask that's actually designed to do the opposite of what the State of Alabama is intending to do with it, is it not?
A. Correct.
Q. It's -- it's designed to bring air into a person's lungs so that they can survive in conditions of bad air quality, right?
A. Correct.
Q. And what the State has done is they went and found a mask that -- that they are going to use to do the opposite; and that is, is to pump nitrogen in so that Mr. Smith cannot get oxygen and that he dies by means of hypoxia, right?
A. Correct.
Q. Okay. What I wanted to know about was the selection process for this mask. This is a mask that's used for industrial purposes, right?
A. Correct.
Q. And, of course, you're not using it for industrial

purposes, right?
A. We're not.
Q. And it's -- there's OSHA certifications for this mask to be used in industrial settings, right?
A. Correct.
Q. And we talked about those during your deposition?
A. We did.
Q. Right. But you said those don't apply here because you're using the mask to try to execute -- or put Mr. Smith to death, not to save his life, right?
A. I did.
Q. Okay. What I want to know is how this mask was selected. Do you know how the mask was selected?
MR. ANDERSON: And I'm going to object, Your Honor. The same objection.
THE COURT: Overruled. She can answer, if she knows.
A. I do not.
Q. Do you know if other masks were considered?
MR. ANDERSON: The same objection, Your Honor.
THE COURT: You can have a standing objection if you want it, Mr. Anderson.
MR. ANDERSON: Thank you, Your Honor.
Q. Do you know if other masks were considered, Ms. Stewart?
A. I -- I wasn't part of that.
Q. Okay. And when you -- I know you weren't part of it, but

was that information provided to you when you got involved as of August 25, 2023?
A. Not that I can recall.
Q. Do you know whether there were any discussions between the manufacturer of the mask -- and I won't mention the name, but the manufacturer of the mask and those who were developing the protocol -- who developed the protocol?
A. Can you repeat your question, please?
Q. Yeah. Do you know if -- well, let me -- let me back up one second.

You got involved -- when you got involved in August of 2023, did you learn who was involved in the development of the protocol?
A. No, sir.
Q. Did you learn of any consultants that were involved?
A. No, sir.
Q. Did you know -- did you learn of anybody from the Attorney General's Office who was involved?
A. I'm -- from counsel -- for being my counsel?
Q. Anyone. Anybody.
A. For --

MR. ANDERSON: I'm going to object to the extent that the question is asking for people involved in a legal capacity with development or in giving legal advice to the ADOC or Ms. Riley and raise that objection, Your Honor.

THE COURT: Yeah. Rephrase the question and see if you can rephrase it in a fashion that does not call for the disclosure of otherwise privileged communications.

Q. Yeah, I'm not asking for anything the Attorney General said to you or you said to the Attorney General. What I'm just asking is do you have an understanding as to who was involved in the development of this protocol? Who worked on it?

A. I do not.

Q. Do you know whether anybody from the Attorney General's Office -- without telling me anything anybody said to you in particular, but do you know if anybody from the AG's office was involved?

A. Yes.

Q. Who was involved?

A. (No response)

Q. Who was involved?

A. I don't particularly know their names. I know that's my counsel, and we have had conversations. But as far as knowing the particular names, I do not.

Q. So were these folks attorneys?

A. Yes.

Q. Are they sitting at the table to my left here?

A. As far as my counsel, yes.

Q. Okay. Other than attorneys from the Office of the Attorney General, are you aware of anybody else who was involved in the

development of this protocol?
A. I am not.
Q. You were shown some videos, I believe you said, that were created before August of 2023, right?
A. Yes.
Q. Okay. And you understand that -- and we talked about this at your deposition, and I talked to Mr. Richardson about this. You understand --
MR. ANDERSON: Anderson. I'm sorry. It's Anderson. Richard Anderson.
MR. HOROWITZ: I'm sorry.
MR. ANDERSON: Close enough.
MR. HOROWITZ: Yeah, Mr. Anderson. I'm so sorry. I'm trying to go quick, and this is what happens.
Q. You talked to your counsel at the deposition about those videos. You recall that, right?
A. Yes.
Q. And you know that those videos have not been produced to myself or Mr. Smith's team of attorneys in this case? You know he's withheld those from us, right?
A. I do not.
Q. You don't recall that conversation?
A. No. When I -- what I can recall is the video that I referenced was the one that I was present in. I also talked about some OSHA videos that I have seen. But I'm not -- I

don't -- I'm not aware of anything that hasn't been turned over, no.
Q. I thought you told me at your deposition that you were aware of videos that were taken before August of 2023. You're aware that they exist, right? I mean, your attorney said that they exist, and we talked about it.
A. Right. But I was -- can I finish?
Q. Yes, ma'am.
A. I was talking about the videos which I had seen.
Q. Okay. Some of those videos you just Googled and found on YouTube, right?
A. Yes.
Q. Now, you were the warden at Holman and oversaw executions for a few years, right?
A. Excuse me? Can you repeat that?
Q. Yeah. You oversaw executions at Holman for a couple of years, right?
A. Yes.
Q. And those were all done by lethal injection?
A. Yes.
Q. And you've never overseen an execution via nitrogen hypoxia, right?
A. Correct.
Q. And you're not aware of any state or anyplace in the world, frankly, that has ever conducted an execution via nitrogen

hypoxia, right?

MR. ANDERSON: I'm going to object to the relevance on this, Your Honor.

THE COURT: Objection is overruled. She can answer.

I think that -- so that question was asked of somebody else earlier.

MR. HOROWITZ: That's right. I'm trying not to retread old territory. I apologize.

Q. But if you could answer, because it's a predicate for what I'm going to ask.

A. Correct.

Q. And so what I'm -- what I want to understand, then, is we talked a lot about the mask at your deposition and the mechanism of -- the mechanism by which the execution will occur, right? We talked a lot about that at your deposition?

A. Correct.

Q. And what -- what -- what I wanted to get at was the State of Alabama didn't have an existing model to follow when this protocol was put together, right?

A. Regarding the protocol being put together, I wasn't a part of that.

Q. Okay. But you understood that no -- nobody had ever put together the actual mechanism, the actual mask, the actual tube, the actual everything? You understood that that had never been put together before when the State of Alabama

underwent this process to put it together, right?

MR. ANDERSON: Your Honor, I'm going to object to relevance again. To this witness's knowledge of what other states did, how is that relevant to Mr. Smith's claims?

THE COURT: I'm going to let her answer it. But, quite honestly, she was not involved with the protocol, so I'm not sure what knowledge she's going to have. But she can answer it.

A. Can you repeat that one more time?

MR. HOROWITZ: If you could read it back, please.

(The court reporter read the requested portion of the record)

A. Correct.

Q. And I understand that once you got involved, there were some videos done -- and I think we're going to hear from those folks from the Attorney General's Office -- and you were there when those videos were taken, right?

A. Correct.

Q. And we talked about that at your deposition, right?

A. We did.

Q. But one of the things, as far as you know, this mechanism that's been put together has never been used or tested to actually put any living being to death, right?

A. Correct.

Q. The very first time anything that is living -- any living

person, any living mammal, any living anything that this is going to be used to be put to death is when it's Kenny Smith, right?
A. In a judicial execution, correct.
Q. I know -- I know you like the word *judicial execution*, but at the end of the day, you didn't test it on any species?
MR. ANDERSON: Objection. Asked and answered, Your Honor.
THE COURT: Overruled.
Q. You didn't test it on any species, right?
A. Correct.
Q. It's never been tested on a rodent, a rat, right?
MR. ANDERSON: Objection, Your Honor. Asked and answered.
THE COURT: Overruled.
A. Correct.
Q. It's never been tested on any sort of -- God help me, but a dog, right?
MR. ANDERSON: Objection, Your Honor. Argumentative. Asked and answered.
THE COURT: Let's move on to your next point, Counsel. I get your point.
Q. We talked -- the last thing I just want to emphasize, when we talked at your deposition about the protocol, there are no formal documents that have been put together that support the

protocol, right?
A. Can you rephrase the question?
Q. Yeah. We talked at your deposition about this. I'm trying to shortcut it. But I just want to be clear that the method-of-execution that is going to be followed when you apply it to Kenny Smith, that's set forth in the protocol, right?
A. Correct.
Q. And there's no additional documents, there's nothing that was written by ADOC or the State or the Attorney General that sets forth anything that is to be done with regard to Mr. Smith other than what's set forth in the protocol, right?
A. We do have some things as far as -- that's in the -- that's not in the protocol.
Is that what you're asking?
Q. Yeah. Well, tell me. Because when I asked at your deposition, I got a different -- so I'm curious. What are you -- just -- what are you talking about?
A. You know, I think I mentioned the breastplate. I said some things are common sense and some things are not mentioned. As far as like the breastplate, I don't think that's a part of the protocol.
Q. Right. You've come up with some things, right, when -- when you guys have done your -- your training, right?
A. Correct.
Q. Right. But you haven't written any of this down anywhere,

right?
A. Correct.
Q. There's no place I can go to look at that shows me what you guys have come up with outside the protocol, where it's written down?
A. That's correct.
Q. Okay. And when things -- we spoke at your deposition and you just said it again. The things that weren't written down, a lot of it you said was just plain common sense, right?
A. Correct.
Q. And I asked you if there was a place I can go and look at where all these commonsense procedures were written down, and you told me there is none, right?
A. Correct.
MR. HOROWITZ: Your Honor, I pass the witness.
THE COURT: Okay. Mr. Anderson, any follow-up questions?
MR. ANDERSON: No redirect, Your Honor.
THE COURT: Thank you, Ms. Stewart. You can be excused.
MR. ANDERSON: And the State will call -- I'm sorry. I'm used to that. Defendants will call Lauren Simpson.
(Lauren Simpson sworn)
MR. ANDERSON: And, Your Honor, we have -- you have -- we have for you in the binder a declaration from Ms. Simpson,

which is Defendants' Exhibit #9. And also Ms. Simpson's declaration identifies -- or refers to a number of video exhibits for which she was the videographer. I believe those are #19, #21 through #23, and #50 through #52. Those would be the video exhibits that you have on a hard drive -- or that the clerk has on hard driven.

And with that, we would tender Ms. Simpson for cross-examination.

LAUREN SIMPSON

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

CROSS-EXAMINATION

BY MR. HOROWITZ:

Q. Ms. Simpson, good afternoon.

A. Good afternoon.

Q. We've not met before?

A. No, we have not.

Q. I think you know by now I'm Jeffrey Horowitz. And I'm one of Kenny Smith's attorneys. I'm going to ask you a few questions?

A. Yes, sir.

Q. I plan to be brief.

A. Okay.

Q. Famous -- don't trust an attorney when he says that.

A. Never.
Q. Never.
Are you yourself an attorney?
A. I am.
Q. And you're employed by -- who are you employed by?
A. The Office of the Attorney General, State of Alabama.
Q. And what's your role with that office?
A. I am an assistant attorney general in the capital litigation division.
Q. And what do you do in the capital litigation division?
A. I work on cases from post-trial, typically direct appeals through Rule 32 through federal habeas and 1983 method-of-execution litigation. I have -- appear in all stages.
Q. How did it come about that you were one of the folks that -- that acted as a -- a volunteer for purposes of -- of wearing the mask and going into the execution chamber and what you described in your -- your declaration?
A. We needed --
MR. ANDERSON: I'm going to object, Your Honor. I think it's outside the scope of the declaration.
THE COURT: I think it's a fair question. Objection is overruled.
A. We needed people who were willing to go down and wear the mask. And as I'm in the capital litigation unit, it made sense that a capital litigation attorney who is familiar with Holman

Correctional Facility would volunteer for this.

MR. ANDERSON: And also, Your Honor, I should have added an objection based on trial preparation and attorney work product, to the extent it gets into any of that.

MR. HOROWITZ: Your Honor, I'm not going to respond to that, but I think you know what my response would be in light of the declaration that was submitted.

THE COURT: (Technical interference), but on the other hand, your side did submit a declaration on her behalf, so you kind of opened the door on it. But we'll handle these on a question-by-question basis.

You can proceed, Mr. Horowitz.

Q. (Mr. Horowitz, continuing:) When you volunteered to -- to participate, you knew that -- that you weren't actually going to be executed, right?

A. Yes.

Q. And you knew that there wouldn't actually be nitrogen pumped into the -- the mask while you were wearing it, right?

A. Yes.

Q. And in fact -- well, let me ask you this. You don't have posttraumatic stress syndrome -- I don't even know what that -- PTSD, posttraumatic stress disorder, do you?

A. Not to my knowledge.

Q. And you've never actually -- the State of Alabama hasn't actually tried to execute you by lethal injection before at one

time, right?
A. No, sir.
Q. And they didn't fail to execute by lethal injection, right?
A. No, sir.
Q. So you didn't have any of those factors when you went in there and this video was created, right?
A. No.
Q. Were you involved in the development of the protocol?
MR. ANDERSON: Objection, Your Honor. Outside the scope.
THE COURT: I'll let her answer just a yes or a no.
A. I will say yes.
Q. What was your role in the development of the protocol?
MR. ANDERSON: Objection, Your Honor. Outside the scope. Goes into deliberative process. Goes into attorney/client privilege. We're way outside of the declaration now.
THE COURT: Your response, Mr. Horowitz?
MR. HOROWITZ: Yeah. Your Honor, they put in a declaration from a team member who actually was involved in the development of the protocol, and I believe, if I can ask my next question, also interacted with one of the experts who they put on the stand.
And, you know, we've been stonewalled. And it's just -- it's classic. We can give you the parts we like because it's helpful to us, but we're not going to give you the

stuff that we don't want you to have. It's -- it's just -- it's -- it's, you know, goose versus gander. It makes no sense. It makes no sense at all. And now I have a witness here who was involved in the development of the protocol who's on the stand providing testimony, and I'm being precluded from asking her about the very thing she's talking about.

THE COURT: Well, this also is a witness who was wearing the hat as an attorney and presumably would have been wearing the hat as an attorney if she was involved in the protocol. It's my understanding she's being tendered as a witness because she volunteered to put on the mask down at Holman. I -- I think there's a difference there. So address my observation, Mr. Horowitz.

MR. HOROWITZ: Sure. They could have used somebody, by the way, who wasn't an attorney. It didn't have to be somebody from the Attorney General's Office, but they chose to do this. And so --

You know, and I also think that if you read the declaration, Your Honor, they're -- it's obvious what they're trying to do. They're trying to -- they're trying to suggest that -- that this is going to work and that it's safe and that it's effective and that -- you know, and that's what this is designed to prove up. And I want to challenge that. And part of the way I want to challenge that is by understanding how we even got to the point where the contraption that I'm being

shown in these videos is the contraption that's being used. We don't know. We don't know how they got to this. We don't know what problems occurred. We don't know what bumps in the road occurred along the way. And we don't know what --

THE COURT: And your question --

MR. HOROWITZ: I'm sorry.

THE COURT: Your question is was she involved in the development of the process.

Ms. Simpson, if you were, was it in your role as an attorney for the State of Alabama?

THE WITNESS: Yes, Your Honor.

THE COURT: I'm going to sustain the objection on that question.

Q. (Mr. Horowitz, continuing:) Did you interact with Dr. Antognini in your role as -- as an attorney general, an attorney on behalf of the State of Alabama? Did you interact with him prior to June of -- I'm sorry -- August of 2023?

A. Yes, sir.

MR. ANDERSON: Objection, Your Honor. Move to strike. Outside the scope of the declaration. And again we're getting into the attorney/client role that Ms. Simpson has had.

THE COURT: Well, she's already answered the question. Let's move to the next question. Objection is overruled.

MR. HOROWITZ: That's all I have for now, Your Honor.

THE COURT: All right.

Mr. Anderson, any further questions?

MR. ANDERSON: No questions, Your Honor.

THE COURT: Thank you, Ms. Simpson.

THE WITNESS: Thank you, Your Honor.

MR. ANDERSON: Defendants call Cameron Ball.

(Cameron Ball sworn)

MR. ANDERSON: And, Your Honor, with respect to Mr. Ball, we have a declaration, which is Defendants' Exhibit #11, also tab #11 in the book one binder that y'all have from us, which has already been admitted.

With that, we would tender Mr. Ball for cross-examination.

CAMERON BALL

The witness, having first been sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

CROSS-EXAMINATION

BY MS. CILIBERTI:

Q. Good afternoon, Mr. Ball. You and I have not met before. My name is Angelique Ciliberti. And I represent Mr. Smith. And I have just a few questions for you. Okay?

A. Okay.

Q. You're an attorney; is that correct?

A. Yes.

Q. And on November 30th, 2023, you participated in a

demonstration where you wore the mask?
A. Yes, I did.
Q. And that demonstration was filmed?
A. Yes.
Q. You remained calm during that demonstration; is that correct?
A. Yes.
Q. In fact, I believe in your declaration you state that you found the sound of the breathing air soothing?
A. Yes, I did say that.
Q. Is it fair to say that you understood, going into this demonstration, that you were not going to be executed?
A. Yes, that is fair to say.
Q. You understood that the nitrogen was not going to be turned on, correct?
A. Yes.
Q. And in fact, the nitrogen was not turned on?
A. I don't think so.
Q. You have never been diagnosed with PTSD?
A. No.
Q. The State of Alabama has never attempted to execute you before; is that correct?
A. That's correct.
Q. And during the demon- -- demonstration, you did not vomit into the mask, correct?

A. That's correct.

MS. CILIBERTI: No more further questions, Your Honor.

THE COURT: Mr. Anderson, any questions?

MR. ANDERSON: Nothing, Your Honor. Thank you.

THE COURT: Thank you, Mr. Ball.

MR. ANDERSON: And I -- I'm sorry, Your Honor. I neglected to -- I don't think I mentioned that Mr. Ball was depicted in videos #17 and #49.

And next the State calls Jasper Roberts, Jasper B. Roberts.

(Jasper B. Roberts sworn)

MR. ANDERSON: And, Your Honor, with respect to Mr. Roberts, you have before you in the binder defendants' Exhibit #10, which is Mr. Robert's declaration. And he is also depicted in videos #18 and #46.

With that, we would tender him for cross-examination.

MR. HOROWITZ: Your Honor, I know this is going to come as a great shock, but I think we're not going to cross-examine. I think you can assume that the questions would be virtually identical to what Ms. Ciliberti just asked the prior witness.

So with that --

THE COURT: And I assumed yours would be identical as well.

MR. HOROWITZ: Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Roberts.

MR. ANDERSON: Your Honor, that's a correct assumption I think, and I think it's also correct for -- we have Thomas Govan, Audrey Jordan, Alana Cammack also on our list who would have submitted declarations. I anticipate their testimony would be essentially identical. So if we can just stipulate to putting those in?

MR. HOROWITZ: Yeah. And that our cross-examination would be the blistering cross of Ms. Ciliberti.

MR. ROBERTS: May I be excused, Your Honor?

THE COURT: You may. Thank you.

MR. ANDERSON: And the State has one remaining witness, which is James R. Houts, who has submitted a declaration, but we'll get him in here. There's an objection also on that, Your Honor.

(James Houts sworn)

MR. ANDERSON: And, Your Honor, the defendants have offered the declaration of Mr. Houts with a couple of exhibits attached to it, which is identified in your binder as tab #12. And as we discussed this morning, Mr. Smith has an objection to the admissibility of that declaration, and so I suppose we need to resolve that issue, Your Honor.

THE COURT: I thought I had already ruled on it earlier.

MR. ANDERSON: Did you? Oh, that's right. I think you said you were going to take it into account.

MR. HOROWITZ: Yeah. I think he -- I think you said, essentially, you'll take it under advisement, allow us to maybe do the examination; you'll consider it when you deliberate and consider all the evidence.

MR. ANDERSON: Right. That's right. I'm sorry. I just -- I remembered I had an objection out there in my head.

So with that -- with the identification of Mr. Houts's declaration, we would tender him for cross-examination.

MR. HOROWITZ: And, of course, Your Honor, my examination is subject to our objection to the entire declaration.

THE COURT: That's noted.

JAMES HOUTS

The witness, having first been sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

CROSS-EXAMINATION

BY MR. HOROWITZ:

Q. Good afternoon, Mr. Houts. How are you?

A. Good afternoon. Fine. Thank you.

Q. I understand you're former military and you actually served. So first of all I want to thank you for your service.

I deeply appreciate it. I've got to ask you some questions now, and I've got to be a little fussy lawyer with you, so I apologize in advance. I mean no disrespect.

But my first question is you said you retired. When did you retire from the military?

A. In November of last year.

Q. We're here, of course, to talk about this nitrogen hypoxia protocol that is the set method-of-execution for -- for Kenny Smith. You understand that, right?

A. Yes, sir.

Q. And are you an attorney?

A. Yes, sir.

Q. My understanding is -- and I know this because I've seen it in the transcript and this came up in one of Kenny's cases. You told the Court in September of 2022 -- September 12th of 2022 -- it actually was this court before this judge, Judge Huffaker -- that the protocol -- the nitrogen hypoxia protocol was actually ready at that time. Do you recall that?

A. I do.

Q. It turns out that that wasn't the case, though, right?

A. Yes, sir.

Q. And so my first question is at that time, it seems that you had knowledge of the development of the protocol?

A. That's fair. I did.

Q. My first question is what happened with respect to the

September 12th, 2022, representation that it was ready such that it turned out it was not ready? Can you explain that to me?

MR. ANDERSON: Your Honor, I'm going to object at this point to the extent that the question goes into deliberative process and pre-decisional matters that are privileged by my clients and, in addition, attorney/client privileged communications between Mr. Houts and the defendant he was then representing.

THE COURT: Mr. Horowitz, I think I understand the reason for what you want to ask the question, but for the record, what is it?

MR. HOROWITZ: Because what we want to understand is if there were problems with the protocol, what they were and how they were addressed to get to the point where we have the protocol that exists today.

Again, we're shooting in the dark. And this is the witness who they've now put on the stand and put in a declaration from who affirmatively represented it was ready in September of 2022 when it turns out it wasn't, and we don't know why that was.

MR. ANDERSON: And, Your Honor, the matter that you are here to decide today is whether Mr. Smith is a -- has a substantial likelihood of succeeding on the merits of his -- among other things, his Eighth Amendment claim, which deals

with the method-of-execution. And the -- the facts that concern that are the facts that concern what protocol the State of Alabama will employ on the night of January 25th when the execution is set to take place, not facts regarding prior protocols or discarded protocols or deliberated-on protocols. And all of those things are subject to the same -- the same privileges that we have asserted previously.

THE COURT: I'm going to sustain the objection at the moment. Move on to your next point, Mr. Horowitz.

MR. HOROWITZ: Of course. And, Your Honor, obviously, part of the reason I'm asking these questions is you understand that if you change your mind at some point or when you fully consider the briefing, these are questions we really would like answered because we do think they go to our claims and the merits of our claims in this case.

THE COURT: Of course. It's noted.

MR. HOROWITZ: Thank you.

Q. (Mr. Horowitz, continuing:) So the declaration that you put in, it was represented as part of sort of our argument to exclude your testimony that this was a lay person coming in and offering, you know, opinion testimony. And I guess my question is do you consider yourself to be an expert in the development of nitrogen hypoxia protocols?

A. No. But I don't know that such an expert exists. But no, I -- as I stated in my declaration, I consider myself a private

pilot, a master scuba diver, and a retired military officer with specialized training in chemical, biological, radiological, and nuclear response units.

Q. Right. And so I guess my question, then -- and it's a little tough for me because of the Court's ruling at the moment. But did you apply that expertise that you just described in scuba diving and flying and gas masks to the military -- did you apply that expertise directly in development of this protocol?

MR. ANDERSON: And I'm objecting, Your Honor, on the same grounds.

THE COURT: Rephrase your question.

Q. Prior to August 25 of 2023, did -- did the State seek your expertise in flying as part of its development of the protocol?

MR. ANDERSON: Same objection, Your Honor. Deliberative process and pre-decisional in addition to --

THE COURT: I sustain the objection, but that may be something I look at later.

MR. HOROWITZ: And questions about scuba diving and gas masks to the military, I think those are the other two areas covered in the declaration, Your Honor.

THE COURT: That's noted.

MR. HOROWITZ: Thank you.

Q. (Mr. Horowitz, continuing:) And obviously, and I don't mean to be facetious, but when the nitrogen hypoxia protocol is

applied to Mr. Smith -- well, let me -- let me ask it this way. You're not suggesting that scuba diving --

MR. HOROWITZ: You know what? We don't even need to do this. I think I'm going to let you off the hook. I think the Judge knows exactly where I'm going with this. And I think I'm just going to pass the witness.

Let me just look at my notes, if I could indulge, Your Honor?

THE COURT: Please.

(Brief pause)

MR. HOROWITZ: Your Honor, those much more sage and wise than I also agree that we should just pass the witness.

Thank you.

THE COURT: Thank you, Mr. Horowitz.

MR. ANDERSON: And no redirect, Your Honor.

May the witness be excused?

THE COURT: He may.

Thank you, Mr. Houts.

THE WITNESS: Thank you, Your Honor.

MR. ANDERSON: And the State has no further witnesses, so we -- I keep doing that. I apologize, Your Honor. Defendants have no further witnesses, so we would close our case.

THE COURT: Okay. All right. Counsel, I guess the question is the next step. If either side wishes to file a

supplement to their briefing, I'm going to give you an opportunity to do so. The unfortunate thing is, for you-all, I would like to see it by the end of next week, noon Friday. It's probably the worst week of the year to force you to work, but it is what it is.

Mr. Anderson, I did have a couple of follow-up questions or clarifications for you.

MR. ANDERSON: Yes, Your Honor.

THE COURT: One is this issue of the single-walk status that came up today.

MR. ANDERSON: Yes, Your Honor.

THE COURT: I really haven't picked up on it as to whether it's an issue in the case. But has the policy changed as it concerns when they go on a single-walk status?

MR. ANDERSON: Not since the --

THE COURT: I was under the impression it was seven days before. And now has that changed?

MR. ANDERSON: My understanding is that for at least several years -- and I don't -- I don't have an answer to when it began -- the policy has been that the single-walk status begins once the death warrant is received, once the date is set. I think the understanding, as Stewart-Riley indicated in her -- either her deposition or her affidavit -- I think it was her affidavit, actually -- was that the policy is a security concern; that the idea that once a man has a date that he is

set to meet his maker, things can get more serious and more hazardous. And that's my understanding of it. But I -- it is not -- it is not something that is new and applied only to Mr. Smith.

THE COURT: So the single-walk status that was applicable last year to the November execution is the same as it is for the January -- this upcoming January?

MR. ANDERSON: That's correct, Your Honor. I think -- the only possible exception is that I know there's been an accommodation made to allow Mr. Smith to attend some communal worship services. I don't know if that accommodation was made last time or if it was requested, for that matter. I just don't know.

MR. GRASS: Your Honor, the --

THE COURT: Mr. Grass --

MR. GRASS: I apologize, Your Honor. May I be heard?

THE COURT: You may.

MR. GRASS: Your Honor, the single-walk status will be 78 days this time around. Mr. Smith was notified on November 8th of a scheduled execution on January 25th. That 78 days encompasses Thanksgiving, which has already passed, Christmas, which is coming up, New Year's. To our knowledge, it's unprecedented for anyone to be on single-walk status for -- for that long a period of time.

THE COURT: How long was he on single-walk status with

the first execution?

MR. GRASS: The first execution was -- the execution itself was November 17th, and the -- the order authorizing the execution was the end of September, so it was about six weeks.

THE COURT: Okay. And then back to you, Mr. Anderson.

MR. ANDERSON: Yes, Your Honor.

THE COURT: The last meal, what time of day is that?

MR. ANDERSON: I am -- I'm -- I -- I think it's generally done in mid-afternoon, but I am not certain of that. I -- I think -- and I -- I -- I hesitate to -- to make too many representations because I have -- you know, I've had conversations on that issue and I think I recollect being told that it was mid-afternoon, maybe at one of the points where -- maybe when he comes back from visiting with family or something. But I don't -- I'm not sure, Your Honor.

MR. GRASS: Your Honor, I --

THE COURT: Is that by policy, or is that within the discretion of the warden?

MR. ANDERSON: That would not be by -- I am not aware of any written policy that would dictate that time. It may be -- you may be able to extrapo- -- I -- I think the -- actually, I know the protocol mentions it. To the extent the protocol puts it at some point in the sequence of events, you might be able to extrapolate the time based on that. But I am not aware of a requirement that it be at a particular hour of

the day, I guess is the way I would answer that.

MR. GRASS: Your Honor, I can tell you that in November of last year, Mr. Smith's last meal was delivered around four p.m. I don't know if that is typical or not.

THE COURT: Okay. Well, my observation there is a lot of the testimony today goes to the risk of vomiting. And -- well, one of the takeaways -- or somebody said it was -- you know, obviously, the more time passes between the meal and the event, the less the risk of vomiting, which is why I asked the question about the last meal versus the time of the execution.

And, Mr. Anderson, back to you again.

MR. ANDERSON: Yes, Your Honor.

THE COURT: Walk me through -- and I know we -- we talked a little bit about the -- about this at the beginning of the morning -- making the final statement, the audible prayer. What is the security concern with letting him audibly pray with the mask off when he enters the chamber?

MR. ANDERSON: I don't -- I don't actually know that there is a security concern with letting him audibly pray when he enters the chamber, whether there could be a delay at that point to allow him to do that prior to being masked. But at that point, all of the security personnel are in the chamber and the witnesses are not there.

So if -- if need -- you know, if he required an audience for his final prayer separate and apart from, you

know, being able to talk to the spiritual advisor later -- because the spiritual advisor, as I understand it, would not be in the room at that point because they're transporting the prisoner. So that would be the complication. And that -- after that, the security personnel disperse to other stations. So I think it may just be a matter of conflicting -- conflicting needs and conflicting timelines.

THE COURT: So are the witnesses inside the prison?

MR. ANDERSON: At that point, Your Honor, they would not be. As -- as I understand it, ADOC's practice is to transport the witnesses -- or -- or to bring them into the rooms after the prisoner has been secured. I'm sure that's in part due to the, you know, possibility of disruption.

There are some -- we have had very combative prisoners before, and it creates a, you know, security situation and a bit of a spectacle. And so the process has been bringing the inmate in, securing him, then bringing in the -- and I don't know the sequence. I -- it's bringing in the victim's family and then the inmate's family, or it may be the reverse. But we do that -- or ADOC does that in sequence to keep those parties separate.

And then -- and -- right, and also there's media brought in during that process too. And all of that requires there to be ADOC personnel, correctional officers to transport those people, to do security checks on people, to escort people

into witness rooms, and then to maintain security at those witness rooms. So that -- that's where the personnel demand comes in.

THE COURT: Maybe I'm not asking the question correctly.

MR. ANDERSON: Okay.

THE COURT: Witnesses are -- are not allowed to enter the facility until the condemned inmate is strapped down and the mask is on?

MR. ANDERSON: That is -- that is my understanding, yes, Your Honor.

THE COURT: Okay. And that is because some of the security personnel that would be inside the chamber, they are needed outside of the chamber to facilitate and handle some of the witnesses.

MR. ANDERSON: That -- I believe that's correct, Your Honor, among other things, yes.

THE COURT: Okay. I -- I think that's something I want you to think about a little bit more on your end, and we may have to have a follow-up talk on it.

Where is the spiritual advisor going to be during this process?

MR. ANDERSON: While the inmate is being secured? I don't think I can answer that question. I'm not -- not refusing to answer the question. I just don't know that -- he

won't be in the execution room. He may be in -- there are some conference rooms in the -- kind of the administrative block. I don't know if he is there, or he may be outside. I just don't know the answer to that question, Your Honor.

THE COURT: During the execution itself, where will he be stationed?

MR. ANDERSON: I believe that he will be allowed to be in the chamber during the execution itself.

THE COURT: Will he be allowed to touch Mr. Smith?

MR. ANDERSON: It is my understanding that he will be allowed at least to touch him on the foot. I think the same -- the same requirements apply as they were with the lethal injection, that, you know, you not approach the head except for anointing him with oil, that sort of thing.

MR. GRASS: Your Honor, my -- my understanding is that the spiritual advisor has to sign an acknowledgment form that says he will steer at least three feet clear of the mask.

THE COURT: Right. I've read -- I've read that. I just -- first wanted to make sure he can touch Mr. Smith.

What about, Mr. Anderson -- and this may be more pertinent to the other lawsuit. But anointing with oil in the execution chamber, will the spiritual advisor be allowed to do that?

MR. ANDERSON: It is my understanding that that is part of the plan that Mr. Smith has submitted to the warden.

And I believe that the anointing with oil is -- will work with the -- with every -- all the other considerations. It is my understanding he's going to be allowed to do the anointment.

THE COURT: Okay. On the -- the mask itself -- and I -- maybe I've just missed it in some of the declarations, but the team member or members who are responsible for placing the mask on Mr. Smith, will they have read the instructions -- the manufacturer's instructions on how to place properly the mask before they do that?

MR. ANDERSON: Yes, Your Honor. I believe that Ms. Stewart mentioned that during her deposition, which you have in front of you.

There are portions of the instructions that won't be carried out because they're -- as she explained, they're not consistent with ADOC's purposes and -- or simply not feasible in ADOC's position. But they have -- certainly have the manual. And the -- as I am given to understand, the placement of the mask will be consistent with the first several steps of the -- what the manual says.

And -- and for the Court's information, it was -- it was me who put the mask on Dr. Nitschke during the examination, and I followed the manual instructions.

THE COURT: Counsel, that's all I have question-wise. Is there anything else we need to discuss before I end the proceedings for today?

MR. ANDERSON: Not that defendants are aware of.
MR. GRASS: Not from the plaintiff's side either, Your Honor.
THE COURT: And, again, I apologize for the circumstances under which we had to conduct this, but that's just the world we live in. But I have listened attentively. I've seen all the evidence. I will review everything that's been submitted to me.
MR. ANDERSON: I'm sorry. One thing, Your Honor.
I just -- my co-counsel just pointed out to me indeed the protocol -- and certainly at least the confidential, unredacted one you have before you -- indicates in Section 9 that the spiritual advisor will be in the chamber. I don't know if I was clear on that, but it's been pointed out to me that's in the protocol.
THE COURT: I understood that he was going to be in there; it was just a matter of where.
All right. Counsel, well, I will get an order out just setting noon next Friday as the -- as the deadline to file any supplemental briefs that you want. You're not under an obligation to do so, but if you wish to do so, get it in. And, again, it's unfortunate that it's next week, but it is what it is.
And I'm also looking at that motion to compel as well. If I think that we need to have another hearing

on that, I will reach out to you-all and set it up as promptly as we can. Okay?

MR. ANDERSON: Thank you, Your Honor.

MR. HOROWITZ: Thank you, Your Honor.

THE COURT: With that, we're adjourned for today. Thank you all.

(Proceedings concluded at 4:30 p.m.)

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COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

This 28th day of December, 2023.

/s/ Dee Coker
Registered Professional Reporter
Official Court Reporter

Appendix B - Deposition of Dr. Joseph Antognini (DE62-35), R.App.206a-291a - SEALED

Appendix C - Declaration of Dr. Joseph Antognini (DE62-60), R.App.292a-344a - SEALED

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

CIVIL ACTION NUMBER
2:23-CV-00656-RAH

KENNETH EUGENE SMITH,
Plaintiff,
vs.
JOHN Q. HAMM, Commissioner of the Alabama Department of Corrections,
and
TERRY RAYBON, Warden, Holman Correctional Facility,
Defendant(s).

DEPOSITION TESTIMONY OF:
DR. PHILIP HAIG NITSCHKE, M.D., Ph.D.

December 18, 2023
9:00 a.m.

COURT REPORTER: DEBORAH B. BRADEN, CCR

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties through their respective counsel, that the deposition of DR. PHILIP HAIG NITSCHKE, M.D., Ph.D., may be taken before Deborah B. Braden, CCR, Commissioner, at the offices of BRADLEY, ARANT, BOULT & CUMMINGS, Montgomery, Alabama, on December 18, 2023, commencing at approximately 9:00 a.m.

IT IS FURTHER STIPULATED AND AGREED, by and between the parties hereto, that the signature of the witness to this deposition is hereby waived.

IT IS FURTHER STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED, by and between counsel, that the filing of said deposition is hereby waived and may be introduced at the trial of this case or used in any other manner by either party hereto provided for by the Statute.

EXAMINATION INDEX

EXHIBIT INDEX

APPEARANCES

FOR THE PLAINTIFF(S):
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Jordan S. Shelton, Esquire
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Montgomery, Alabama 36130

I, Deborah B. Braden, CCR, a Court Reporter and Notary Public, acting as Commissioner, certify that on this date, pursuant to the Alabama Rules of Civil Procedure and the foregoing stipulation of counsel, there came before me at the offices of BRADLEY, ARANT, BOULT & CUMMINGS, Montgomery, Alabama, commencing at approximately 9:00 a.m. on December 18, 2023, DR. PHILIP HAIG NITSCHKE, M.D., Ph.D., witness in the above cause, for oral examination, whereupon the following proceedings were had:

THE REPORTER: Do you want usual stipulations?

MR. ANDERSON: Sure. That's fine.

MR. JOHNSON: Be great.

DR. PHILIP HAIG NITSCHKE, M.D., Ph.D., after having first been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. ANDERSON:

Q. Dr. Nitschke, I'm Rich Anderson, representing the defendants in this case. We've met before; that's correct?

A. Yes.
Q. I'm just going to have a few questions for you this morning, and I'll start out with a little bit of background. I think you're identified or you were identified to us as the director and chief researcher of Exit International; is that correct?
A. That's correct. I'm the director and the chief research person in that organization.
Q. Are there -- are you the director or is there a board of directors? Is there more than one director, I guess is what I'm asking.
A. Yes. There are more directors of Exit. There are two other directors. But I am the founder and director.
Q. Kind of executive director? You're the boss?
A. Yes.
Q. Is that fair?
A. I'm the boss.
Q. And is your wife also a director of Exit?
A. No. My wife is not a director of Exit. She's a director of another organization or company called Exit International Publishing.

Q. And you and your wife wrote together The Peaceful Pill Handbook; is that right? Or --
A. The handbook -- The Peaceful Pill Handbook has been authorized by both myself and Dr. Stewart.
Q. And that's Dr. -- is it Fiona Stewart?
A. Fiona Stewart is my wife.
Q. Are you employed by Exit? That's to say, do you draw a salary?
A. I have been drawing salary from Exit for the last year or two while I -- since I've been in the Netherlands.
Q. And when you were -- let me back up, then. You previously were in Australia, correct?
A. Yes. Correct. I came from Australia.
Q. And when did you move from Australia to the Netherlands?
A. I moved from Australia to Europe in 2016.
Q. Okay. And did Exit move with you? I guess -- I know Exit -- let me back up. Exit is a nonprofit corporation, correct?
A. Exit is a nonprofit corporation.
Q. Where is its corporate registration

located?
A. Its corporate registration is in Australia.
Q. Okay. So though you moved to Europe, Exit didn't move its registration to Europe with you or anything?
A. No. Exit set up another organization in the Netherlands called Exit International Publishing.
Q. And that's -- Exit is truly an international organization; is that correct?
A. Yes. Exit is truly an international organization.
Q. And you have branches in various countries?
A. Yes. Exit has branches in many countries.
Q. How many countries do you have branches in?
A. Predominantly, six countries would be the main -- main countries.
Q. And it's a membership organization; is that correct?
A. It's an organization which has membership

and also subscriptions. So we combine memberships and subscriptions to the organization.
Q. What's the difference between membership and subscription.
A. It gets -- the difference between membership and subscription is that membership gives you certain access to our material that we publish on a regular basis. Subscriptions are generally confined to access to updates to our published handbook on information on end-of-life choices.
Q. And I believe I've seen that you can subscribe to The Peaceful Pill Handbook; is that correct?
A. Yes. You can subscribe to the handbook.
Q. And does Exit still have a requirement that members be older than 50?
A. Exit has the requirement that a person who subscribes be over the age of 50 unless they can provide good reasons for -- for seeking subscription.
Q. And not to be blunt, but is one of those good reasons that they have a reason they want to die?
A. I suppose for a person who is under the age of 50 who is seeking access to the organization,

they would certainly be wanting information about how a person might end their life, but that may be for other good reasons.

Q. A scholar, for instance?

A. A typical example would be someone doing research.

Q. Now, what's the reason for the 50 -- requirement that people be over 50?

A. The organization has, in the past, been very aware of the sensitivity over providing information to people who could be considered young and vulnerable. It's a sensitive issue in society. And to try and avoid issues associated with provision of what some describe as dangerous information to young people, we set the age at 50.

Q. But you don't personally believe that no one under 50 should be able to use your techniques to end their own life?

A. My own situation is that I know of many situations where people under the age of 50 should have access -- I believe they should have access to that information.

Q. And am I correct that you personally

believe that if a person has a good reason, even a nonmedical one, they should have access to suicide assistance? A good reason to want to end their own life.

A. Under the conditions that I would say, a person who has good reasons -- they may be nonmedical -- and is of sound mind should have access to that information.

Q. And that's something you believe strongly, true?

A. It's been my personal, if you like, belief for many years.

Q. And that -- that belief has not been without cost to you, correct?

A. Yes. I think it's fair to say that it's caused some trouble.

Q. And the Medical Board of Australia -- let's see -- found that you were not a fit and proper person to practice medicine, and you had your license suspended; is that correct?

A. The Medical Board of Australia used their emergency pass to suspend my registration, which I was then subsequently able to challenge.

Q. And they -- when they granted you permission to practice medicine again, they placed some restrictions on you, didn't they?

A. Yes. After a long period of dispute, they accepted that I could have my registration returned, and they set conditions.

Q. And some of those conditions were that you not provide assistance on suicide and euthanasia; is that correct?

A. I'm not sure that that was a specific condition. I certainly -- the condition that I recall that caused most difficulty was that I not continue to be publishing my handbook.

Q. And afterwards, you famously burned your medical license; is that correct?

A. Yes. This came out -- this was at the end of many years of tension between myself and the medical board, and I burned my medical registration.

(Defendant's Exhibit Number 1 was marked for identification.)

MR. ANDERSON: Andy, I want to show you that.

BY MR. ANDERSON:

Q. Doctor, I want to show you what I've marked as Defendant's Exhibit 1. Is that a photograph of you?

A. That is a photograph of me.

Q. And is that you having a press conference at which you burned your medical license?

A. That's me burning my medical license in Darwin.

Q. And you did that because you refused to accept the conditions that the Medical Board of Australia placed on you?

A. I found the conditions intolerable and burned my medical registration.

Q. Was it before or after that that you began the Max Dog Brewing project?

A. The Max Dog Brewing project had been running well before this medical registration burning took place.

Q. And was Max Dog Brewing actually a separate company, or was it just something that Exit did? I guess, who owned Max Dog Brewing?

MR. JOHNSON: Object to form. Compound.

A. I think it's fair to say that no one owned it. It was a few individuals within the organization who were enthusiastic.
Q. And was one of those you?
A. I think it's fair to say I was the senior advisor.
Q. Did you ever drive around in a truck or a van with cylinders of Max Dog nitrogen and pass them out to people?
A. I drove around in a van with cylinders of nitrogen to demonstrate to people the process. We didn't use the van to distribute those substances or gases.
Q. And the purpose of Max Dog Brewing was to facilitate providing cannisters of nitrogen to people who could either end their own lives or brew beer, correct?
A. Yes. We made it clear that you could choose how you would use nitrogen; that it had many uses.
Q. And, again, correct me if I'm wrong, but you wanted to provide, quote, a peaceful and reliable death at a time of their choosing.

Do you recall saying that in an interview with Vice International?
A. I remember the interview, and I believe I was referring to our members. But I think I would have said that, yes.
Q. Right. And they could do it at a time of their choosing, because nitrogen in a cylinder has an indefinite or, in your words, infinite shelf-life; is that correct?
A. Yes. Nitrogen has a very long shelf-life.
Q. Is Max Dog Brewing still in operation?
A. No. Max Dog Brewing ceased operation, I think, about two years ago when the individuals who were involved decided they no longer wished to pursue.
(Defendant's Exhibit Number 2 was marked for identification.)
BY MR. ANDERSON:
Q. I'm going to show you a document I'm marking as Defendant's Exhibit 2. Do you recognize that?
A. Yes. I do recognize this particular printed page.

Q. Is that a printed version of a web page for Max Dog Brewing?
A. Yes. This is a print of the web page for Max Dog Brewing.
Q. And does that show that, at the time this was printed -- if you'll turn to the second page with me. I had to go into the internet archive to locate this page, but I located it, or at least this version of it, that was dated April 2nd, 2016.
Do you have any reason to doubt that this is a version of the April 2016 web page from Max Dog Brewing?
MR. JOHNSON: Object to form.
A. It looks to me like it was the page from that.
Q. And this indicates that, at the time, in Australia, you were selling a cannister -- a cylinder of nitrogen for 780 U.S. dollars; is that correct?
A. Yes. That would seem to be -- that would be the price that they were being offered for.
Q. What all did that come with, if you recall?
A. Sorry? Can I --

Q. If I had placed an order and you had approved the order in 2016, would you have -- you would have mailed me -- or Max Dog Brewing would have mailed me a cylinder of nitrogen, correct? Or shipped it to me.
A. The distribution of the cylinders was restricted to members of Exit International unless people provided evidence as to why they were interested in obtaining the cylinder.
Q. Did you hand-deliver them, all of them?
A. I was not involved in the distribution. It was other enthusiastic individuals.
Q. Okay.
A. But my understanding is that they were always sent out by courier.
Q. Do you know or do you recall, if I had placed an order for this cylinder of nitrogen, what would I have received?
A. If you placed an order for this cylinder through that web page, the person receiving the order would check whether you were a member of the organization.
Q. Sure.

A. If you are not a member of the organization, you would have been re-contacted and asked why you wanted access to this cylinder. And then deciding on your information that you then provided, they would have, however, continued or the order cancelled.

Q. And if I was a member of the organization and the order continued and it was sent to me by courier, what would I have received by courier?

A. You would have received -- I think, for this particular order, you would have just received the cylinder of compressed nitrogen, the 2-liter cylinder. The other items shown on that page would have been a separate order.

Q. Would you look with me on the -- this page under the Australia nitrogen cylinder, under add to cart, are there a number of bullet points there?

A. Yes, there are.

Q. Would you read off for me those bullet points?

A. Bullet point one: Australian cylinders contain 420 liters, 15 -- it says square -- cubic feet, it should -- and measure 11.5 centimeters by 50

centimeters and weigh 3.4 kilograms.

Bullet point two: Australian Max Dog Brewing kit ships with full nitrogen contents.

Bullet point three: Australian Max Dog nitrogen includes the custom regulator.

Bullet point four: Purchasers must be 50 years and over. Photo ID must be sent to sales@maxdogbrewing.com prior to shipping.

Bullet point five: Please note prices are in U.S. dollars.

Bullet point six: Please allow six weeks processing and delivery. Tracking details will be emailed once generated.

Q. And that next line, too, if you don't mind.

A. All cylinders have an indefinite shelf-life, making them convenient for long-term storage.

Q. Okay. Thank you.

Now, so your order would have contained a regulator?

A. Yes. I realize that I thought that the order was just -- and I read now in bullet point three that the order would have included the flow regulator

that's seen in the diagram.

Q. Okay. And I notice further down on the page in the featured products section there is a -- looks like an option simply for a regulator, pressure gauge, and hose, right?

A. Yes. At the bottom of that page, there is an option for those parts without the gas cylinder.

Q. Do you know whether a hose would have come with the full cylinder purchase we've just been talking about. And if you don't recall, that's fine.

A. I don't recall in detail. I would think so, but I don't know.

Q. And, presumably, whoever ordered -- successfully ordered that cylinder kit would be someone who would also have access to more information from your organization?

A. Yes. A person who ordered this would have been a member of Exit International and had access to that information.

Q. So purchasers, they could buy the means for a peaceful death, put them in the cupboard, set them aside until the day they were ready to die, yes?

A. Yes. That's accurate.

Q. Or they could just brew some beer?

A. Sorry?

Q. Or they could just brew some beer if they decided --

A. They could do both.

Q. And one of the benefits that you promoted for nitrogen was that it provided an undetectable death; is that true?

A. Yes. The question of detectability was an important one.

Q. And that's because suicide is a legally complicated issue, or why was that important?

A. Yes. That summarized that. Legally complicated, I think, is a concern to people. People who wish to take this action often do not want it to be known that they had had some part in the process.

Q. And undetectability assumes that someone other than the decedent is going to remove the apparatus, correct?

A. Yes. For it to be truly undetectable as the only method that is, someone needs to remove the equipment.

Q. How many suicides by nitrogen using this

sort of Max Dog system have you personally observed?
A. I suppose -- dozens, I suppose.
Q. Were you ever the person who removed the apparatus afterwards?
MR. JOHNSON: We'd object and instruct the witness not to answer on the grounds of there are a myriad of laws. I don't know what jurisdictions any of this would have taken place in, but I don't want him to testify. I don't think he needs to testify in any way that might incriminate him in any jurisdiction in any way.
MR. ANDERSON: Okay.
BY MR. ANDERSON:
Q. But the times that you witnessed it, people died peacefully, true?
A. Generally speaking, things went as planned.
Q. No signs of struggle, true?
A. When things didn't go as planned, it was not signs of struggle. There were other complications.
Q. Did you ever observe nitrogen to cause anyone any pain?

A. No physical pain. I never observed physical pain.
Q. Now, the Max Dog Brewing nitrogen system and with Exit's preferred systems generally, you use a bag, correct, to capture the gas?
A. Yes. That is correct. We use a bag.
Q. And one of the reasons that you like a bag is that it's very simple, and that no adjustments are required once it's on; is that true?
A. After long experience, the bag has proved to be by far the most effective means of delivering the gas.
Q. And one of the complications that -- I guess, let me back up and ask you this: Would you call your community or your movement assisted-suicide movement? right-to-die movement? euthanasia movement? How would you characterize what you're about?
A. I think all those terms have been used accurately enough. Right-to-die movement. Assisted-suicide movement.
Q. Is there a difference between suicide or assisted suicide and euthanasia?
A. Yes. There is a difference, in that the

generally accepted term of euthanasia involves someone doing it to you, as opposed to an assisted suicide, which is generally meant to refer to someone giving you the means to do it yourself.
Q. And we've talked about legal complications. One of the -- I guess is it fair to say one of the challenges that the right-to-die movement faces is that there are legal prohibitions against what you've just described, euthanasia, of someone doing it to you, someone actively participating in your death; is that true?
A. As you say, that's one of the challenges.
Q. And so is that a complication that assisted suicide faces is that once the person has taken the steps, has put the bag on their head or put on a mask, as an observer, you can't intervene if something -- if the mask slips or if the bag tears or something happens?
A. There's no way one can intervene.
Q. If, for instance, you're observing a suicide with the Max Dog system or similar system and someone makes a purposeless movement and pulls the hose out of the bag, you couldn't put the hose back

in, could you?
A. No. One could not put the hose back in.
Q. And from the perspective of Exit and the assisted-suicide community, that's one of the big drawbacks of masks, in your experience, that if they become dislodged, they can't be readjusted; is that true?
MR. JOHNSON: Object to form.
Go ahead.
A. Yes. There's been long -- involvement with masks has always been a difficult one.
Q. You understand, though, that in the present case that you're testifying in, Mr. Kenneth Smith's case, what will happen -- you know, absent court intervention, what will happen on January 25th is not an assisted suicide but an execution, correct?
A. I understand that.
Q. And you understand also that ADOC personnel will be available during the execution to make adjustments to the mask as necessary, true?
A. My understanding from reading the protocols is that there will be a secondary adjustment after the delivery of the final speech, but I saw no

reference to any after that.
Q. Are you aware that ADOC's representative, Cynthia Stewart, testified the other day that if the mask became dislodged or shifted after nitrogen began to flow, the execution team captain would readjust the mask? Are you aware of that?
MR. JOHNSON: Object to form.
Go ahead.
A. No. I'm not aware of that.
Q. And the mask shifting or slippage issue, that was one of the problems with the debreather device; is that correct?
A. Yes. A debreather depends on a good mask seal, and unless that can be established and maintained, the debreather was considered unreliable.
Q. And the debreather was a closed system; is that correct?
A. Yes. A debreather is a closed system.
Q. It had no supplemental source of nitrogen, correct?
A. That's correct. There's no supplementary source.
Q. And correct me if I'm wrong. I'm going

to see if I can -- see if my understanding is correct. With a debreather system, essentially, you -- it relied on removal or scrubbing of CO2 and exhaustion of oxygen by the person's own breathing to effectively increase the nitrogen concentration in the person's breathed air.
Is that fair to say? Is that close?
A. That's a good summary, yes.
Q. So the debreather device was not ever being supplied with external nitrogen, correct?
A. No. There was no -- there was no plan to do that.
Q. And the debreather -- well, let's see. There have been various iterations of the debreather; is that correct?
A. That's correct.
Q. And the debreather, the RD2 debreather, at least, used a silicone half-mask; is that correct?
A. That's correct, yes.
Q. Now, that's a different type of mask than the one that you wore at Holman Prison, correct?
A. Yes. That's correct.
Q. A silicone half-mask just fits over the

face and mouth; is that correct?
A. It fits over the nose and mouth, yes.
Q. That's what I mean. Thank you for correcting me. That's actually absolutely what I intended to say.
And how many straps did the debreather mask have on it, if you recall?
A. I don't fully remember or recall how many there were. I don't recall.
Q. Okay. And is it fair to say that your objections to masks, as you've expressed them, particularly in this case, is that air could possibly get into the mask?
A. That -- the mask presents problems for a number of reasons, but the main objection or concern is that there be some leakage, possibly undetected, that develops during the process.
Q. So you and Exit prefer to advise people to use bags for assisted suicide?
A. Our experience showed masks present so many problems, and those problems were almost all removed by the use of the bag. So we strongly urged people to make use of a bag.

Q. And this may save us some time. You don't have any general objection to nitrogen as a means of death; is that correct?
A. No. I proposed -- in fact, it was me that proposed the move from helium to nitrogen back in about 2012.
Q. Now, we talked a little bit about The Peaceful Pill Handbook. In that -- and perhaps in other sources; I don't know -- you advise your clients or your members to use -- that they can use an ordinary oven bag; is that true?
A. Yes. That's -- there's been some evolution of that concept, but, basically, that is it.
Q. And the basic components are a bag with an elastic band added at the bottom of it, to the open end of it, true?
A. Yes. That's correct.
Q. Or perhaps an elastic cord.
A. That could be adjusted -- a cord that can be adjusted with elastic -- elastic -- of elastic.
Q. And a supply hose is taped inside of the bag, correct?
A. That's correct.

Q. And that supply hose runs to a regulator such as a Max Dog regulator, true?
A. That's correct.
Q. And that regulator would then be attached to a nitrogen cylinder such as the Max Dog cylinder?
A. That is correct.
Q. Or any nitrogen cylinder.
A. Yes.
Q. And, again, correct me if I'm wrong, but the basic theory is that you would place the bag on the top of your head or the elastic, you know, over the top of your head, turn on the gas, exhale, pull it down over your head, perhaps tighten that a little bit, the collar, and then inhale?
A. What you've just outlined there is the advised procedure.
Q. And the theory is that the nitrogen flowing into the bag is going to flush out any exhaled carbon dioxide, correct?
A. That is correct.
Q. Out through the neck hole, for lack of a better term?
A. Yes. It's not a tight fit.

Q. And your bags don't have one-way valves or anything like that?
A. No. It's the flow of gas exiting around the neck that flushes away the carbon dioxide.
Q. What's the flow rate that you recommend?
A. For some time, we've recommended 15 liters per minute as the preferred rate.
Q. Do you have -- do you know -- I guess, not everybody uses the same bag; is that true? Fair enough?
A. That's true.
Q. So you really couldn't say what the volume of any particular bag someone used would be, could you?
A. No. I couldn't say with accuracy. One notices, though, when one fills the bag up, the time taken. And on the basis of that, a volume is established.
Q. Okay. Now, how many -- this is done, and in the observations -- the ones that -- the suicides that you've observed, these actions of placing the bag on the head, inflating the bag, pulling the bag down, tightening the bag, these are all done by someone who

wants to die, true?
A. Yes. They are people that are clearly keen for successful outcome; that is, their own death, and who have learned about and practiced the procedure.
Q. And how many studies or tests, evaluations, have you or Exit done using bags on uncooperative or unwilling subjects?
A. None.
Q. And what -- have you reviewed any studies or evaluations or tests on use of plastic bags and the system you've described on unwilling subjects?
A. No. I don't believe they exist, but I've not reviewed it.
Q. Because you didn't design the Mad Dog system -- I'm sorry. Mad Dog. Pardon me. Max Dog system --
I'm thinking it's Australia; it's bound to be Mad Dog.
A. I know. I understand.
Q. The Max Dog system, you didn't design it for executions, true?
A. That is true.

Q. And you're actually very much opposed to capital punishment, correct?
A. Most of my life, I've been an opponent of capital punishment.
Q. Is your Twitter handle @PhilipNitschke, your name?
A. Yes. That is my Twitter handle.
Q. I want to ask you about some of your tweets that I will mark and put into the record. And I refuse to call them Xs, so they're going to be tweets.
A. Okay. Tweets.
MR. JOHNSON: You're old school.
MR. ANDERSON: Elon --
(Defendant's Exhibit Number 3 was marked for identification.)
BY MR. ANDERSON:
Q. First, let me show you Defendant's Exhibit 3. Is this one of your tweets?
A. Yes. It looks like one of my tweets.
Q. And was this done, to your recollection, in response to a New York Times editorial?
A. Yes. That is my belief.

Q. I'll ask you if you recognize if that is the editorial you were referencing.
MR. JOHNSON: You're marking that as Exhibit 4?
MR. ANDERSON: We can, sure.
(Defendant's Exhibit Number 4 was marked for identification.)
A. I believe that is the article I was referring to when I made that comment.
Q. Let me have that one back so I can stick a sticker on it real quick, and I'll give it back to you.
All right. Would you read your tweet in response to the editorial?
A. Capital punishment is an abomination and must stop, and Exit fully supports those working to achieve this, but not by misrepresenting the science. Nitrogen hypoxia is not cruel and unusual. Rather, fast and effective and with no risk to others.
Q. And is it no risk to others because the nitrogen that provides the fatal element of the system is confined around the -- I suppose, the user's, the decedent's, head?

A. Yes. It's been considered that the escaping nitrogen into a large area of a room is not at any risk to other people.
(Defendant's Exhibit Number 5 was marked for identification.)
BY MR. ANDERSON:
Q. I'm going to ask you about another -- actually, it's a couple of tweets from August 10 of '21, and I've marked it as Defendant's Exhibit 5. This is -- this appears to be a tweet from you with a response from Exit International.
You don't handle -- are you the Exit International Twitter handle, too, or is that someone else?
A. It's sometimes me. It's sometimes other people.
Q. Okay. Now, in this case, would you -- would you read for us your tweet? You don't have to -- you don't have to say the -- just read the --
A. Okay. Oh, FSS, just when you finish perfecting Sarco that provides a peaceful, reliable, effective -- elective nitrogen death for rational adults, some U.S. arsehole decides to coopt the method

for capital punishment.
And that relates into a Newsweek article called Alabama finishes building nitrogen gas execution system.
Q. Now, under that, Exit International responded to that tweet and said, Yes. Have to agree. Capital punishment is a different issue, and if the U.S. insists on executing people, then harm minimizing strongly points to nitrogen.
A. That's correct.
Q. Do you know -- was that you or was that someone else there?
A. I don't -- I'm not certain about that.
Q. Do you agree with that sentiment, though?
A. Yes. I would agree with that sentiment.
(Defendant's Exhibit Number 6 was marked for identification.)
BY MR. ANDERSON:
Q. I'll ask you about another tweet from -- this is an older one from the 22nd of November, 2017. I've marked this as Defendant's Exhibit 6. Do you recognize that?
A. Yes. I do recognize that -- that tweet.

Q. Okay. Would you read that for us?
A. Nitrogen is ubiquitous. The process is humane; it doesn't require expertise; and it is cheap. I think of it as harm reduction.
That's a quote.
Q. Was that from a Professor Copeland?
A. That's my understanding, that I would have lifted that from the article referred to.
Q. Do you agree with that sentiment?
A. Yes. I generally agree with that sentiment.
(Defendant's Exhibit Number 7 was marked for identification.)
BY MR. ANDERSON:
Q. One more. Showing you what's marked Defendant's Exhibit 7. This is from 2014. We're reaching way back in Twitter history.
A. We are.
Q. And would you read that tweet for us?
A. From 2014, I tweeted, Why Max Dog nitrogen gives a peaceful, reliable, and totally undetectable euthanasia death. Nurse Betty shows how. And it gives a link.

Q. And it's a link to a YouTube video, right?
A. Yes. It's a link to a YouTube video.
Q. And that's one of the means that -- videos were one of the means that Exit and Max Dog Brewing had for showing people how to use the system to end their lives if they chose?
A. Yes. That is correct.
Q. Back to masks, I know you've been very critical of masks, but I have to ask: Would you agree that increasing the rate of gas flow to the mask would tend to minimize problems with entraining room air or reduce problems?
MR. JOHNSON: Object to form.
A. I would agree that that would be a possible strategy but would be cautious about saying it had the ability to eliminate the problem.
Q. But, in your opinion, it would reduce the problem, true?
MR. JOHNSON: Object to form.
A. It could be a strategy for reducing the problem.
(Defendant's Exhibit Number 8

was marked for identification and retained by counsel due to confidentiality concerns.)
BY MR. ANDERSON:
Q. I want to ask you some questions about your addendum report that you issued, I think, a couple of days ago. I'll give you a copy, and make sure that's the same one, because I'm going to mark that as Exhibit 8.
A. Yes.
MR. ANDERSON: Andy, I'm sure you have one, but there's another copy.
MR. JOHNSON: Yeah.
MR. ANDERSON: And I will note, I think, that I'm going to have to mark this as highly confidential because it has -- it discusses and has attached to it as an exhibit a document that's been marked as highly confidential, for attorneys' eyes only. So we would designate that exhibit and questions regarding it as highly confidential.
MR. JOHNSON: No objection.
MR. ANDERSON: Or at least questions regarding the highly confidential matters attached to

it. So I may not ask about it.
BY MR. ANDERSON:
Q. If you would, take a look at that and go with me to paragraph four on that first page. In paragraph four, you note that the mask is a, quote, one-size-fits-all design, that doesn't make any particular provision for various shapes and sizes, correct?
A. Yes. That is correct.
Q. And you'd agree, though, that masks that are designed to fit a broad range of wearers, they're designed to adapt to various features and aspects of people's faces.
MR. JOHNSON: Object to form.
A. Yes. The -- it was a design which would fit most people effectively.
Q. Now, in paragraph six on page 2 -- I guess the pages aren't numbered, but on the second page -- you describe wearing the mask that ADOC is going to use, correct?
A. Yes. That is correct.
Q. And you note that it was put on you by another person?

A. Yes. That is correct.
Q. And that person was me; is that correct?
A. Yes. That is correct.
Q. Now, you say that you were able to produce, quote, some loosening of the straps by extending your jaw, correct?
A. Yes. That was my experience.
Q. Was the mask actually loose on your face?
A. I would not describe it as loose. I would describe it as looser.
Q. Okay. Was it shifting around your face?
A. Not that I could see, no.
Q. And you moved your head around while you were wearing the mask, correct?
A. I did move my head around.
Q. Opened your jaw and moved your jaw around?
A. When the mask was first fitted, I moved my head around. I spoke. I did several movements that I would have thought were --
Q. Do you recall what you said while you were wearing it?
A. I can't recall the exact words.

Q. In fact, you said, It's pretty secure, didn't you?
MR. JOHNSON: Object to form.
A. I may well have.
Q. What was your answer? I'm sorry.
A. I may have said that.
Q. I was able to make a further adjustment to the mask, correct?
A. Yes. I noticed that, at some later stage, you came and made a further adjustment, which I was -- I was unsure of the reason. But it certainly made it fit tighter.
Q. Now, I notice in your supplemental declaration, you don't say that the mask fit you poorly. Did it fit you fairly well?
A. Yes. I think you would say it was a fair fit.
Q. And you have facial hair, correct?
A. Yes. There is facial hair. More or less, I've got some facial hair.
Q. And at a later stage in the time when you were wearing the mask, a valve cover was closed. Do you recall that?

A. Yes. I do recall the closing of the valve cover.
Q. And air began -- breathing air flowed into the mask at a higher rate, true?
A. Yes. I remember that.
Q. I noticed that -- well, let me ask this: Did you experience any distress from rebreathing carbon dioxide while you were wearing the mask?
MR. JOHNSON: Object to form.
A. No. There was no subjective experience which I would have thought associated with carbon dioxide.
Q. And do you understand that the mask that you wore had what are called exhalation valves?
A. Yes. I understand that's how it would vent the gas.
Q. And that's -- strike that.
When you were wearing the mask with the valve cover closed at the higher rate of flow, correct me if I'm wrong, but I believe you breathed in very deeply; is that true?
A. Yes. I took deep breaths; that's correct.

Q. Did you notice any entrainment of room air?
A. I didn't but probably couldn't have.
Q. In paragraph 15 of your supplemental report -- I think this is going to be on the fourth page -- you note that Mr. Smith has facial hair.
A. Mr. Smith has a lot of facial hair.
Q. If Mr. -- in your opinion, does that give you some concern about mask fit?
A. I note that it's mentioned in the specific information manual of the manufacturer of the mask that this is a reason for concern.
Q. Okay. If Mr. Smith were to shave, would that lessen your concern?
A. I guess it's true to say that if Mr. Smith shaved, that would -- facial hair would not be a concern.
Q. And you met with Mr. Smith, correct?
A. Yes. I had a chance to speak with Mr. Smith.
Q. Did you take any measurements of his face?
A. No. I did not take measurements of his

face.
Q. Did he appear to have any significant facial deformities?
A. No. Mr. Smith didn't appear to have any significant facial deformities.
Q. Any facial deformities at all?
A. No. I would not describe him as a person of any facial deformity.
Q. Now, how many studies or experiments or evaluations have you or Exit International conducted using a supplied-air respirator of the type that you wore at Holman for assisted suicide purposes?
A. We've never used such a mask for assisted suicide.
Q. But you understand that other organizations have used different kinds of masks in assisted suicides?
A. I think it's true to say that the period of experimenting with different types of masks took place over a decade ago, and there's been, as far as I'm aware, none since that time.
Q. Have you seen or are you aware of any studies or evaluations that were done in that time

period using a supplied-air respirator of the type that you wore at Holman?
A. No. In that period over a decade ago, that was not the mask that was used for those documented experiences.
Q. That would be more like the silicone half-mask that the debreather device used?
A. I would think that would be the case.
Q. If you would, in your supplemental declaration, I'm going to ask about the highly confidential user's manual briefly. So if you would, turn to your Exhibit 1.
MR. JOHNSON: Just for clarity of the record, that's Exhibit 1 of Exhibit 8.
MR. ANDERSON: Oh. Yes. Sorry.
MR. JOHNSON: Want to make sure, when we read it, we know what we're talking about.
MR. ANDERSON: Gotcha. Yeah. Yeah. I see. Yes. Sorry. Yes. That's right. Clarify that. Exhibit 1 to Exhibit 8 of the -- Exhibit 8 of the deposition.
BY MR. ANDERSON:
Q. Now, you have reviewed this manual,

correct?
A. Yes. I've reviewed this manual.
Q. And is it your understanding that supplied-air respirators of this type are typically used to protect life?
A. Yes. That's the understanding of why they've been designed.
Q. And in this manual, there are a number of instructions that are consistent with that intention, true?
A. Yes. That is correct.
Q. Do you recall reading cautions, only to use it with breathing air, grade D breathing air?
A. Yes. I recall reading that.
Q. And, obviously, for ADOC's purposes, that instruction would have to be disregarded, true?
A. Yes. That would be correct.
Q. Do you know what the N-I-O-S-H is?
A. National Industry of Health and Safety. I think so, yes. I can't be exactly sure.
Q. Right. It's sometimes called NIOSH?
A. Yes. Yes.
Q. Has to do with occupational safety and

health.
A. Yes. Yes.
Q. Are you familiar with the standards -- with what standards have to be met to obtain NIOSH approval for a respirator?
A. I'm not -- I wouldn't be able to quote you the exact -- but I'm aware the standards exist.
Q. Are you aware -- or to your knowledge, do those standards take into account the requirement that a mask be able to fit various head shapes, sizes, face structures, et cetera?
A. That is my understanding.
Q. Are you familiar with 42 CFR 84.135(a)?
A. No. I'd have to look that one up.
Q. And if I -- strike that. Never mind.
Would you agree that federal regulations that govern respirators have to take into account the ability of a single facepiece or a one-size-fits-all facepiece to fit varying facial shapes?
A. Yes. I understand that is the goal.
Q. And while you were wearing -- going back to your experience at Holman, while you were wearing the mask with breathing air flowing, did you detect

any contaminants or odd odors or any problems with the breathing gas?
A. I did not detect any air leakage, but --
Q. No, no. I'm asking you about the quality of the breathing air itself.
A. The quality of the air I was breathing was fine.
(Defendant's Exhibit Number 9 was marked for identification.)
BY MR. ANDERSON:
Q. Okay. Let me go back to your original declaration, which was attached to one of Mr. Smith's filings. I've got a copy of it here. Show you what's marked as Exhibit 9.
MR. ANDERSON: Andy, I've taken the first page off of that attachment to your pleading because it was just Exhibit A or Exhibit B or whatever it was.
MR. JOHNSON: Right.
BY MR. ANDERSON:
Q. I'm going to ask you just a couple of questions about this. If you would, turn with me to paragraph 5.3 on the fifth -- I guess it's the fourth

page of this exhibit. Just let me know when you're with me. You there?

A. Yes. I've got 5.3.

Q. And there you note that, quote, The only reliable way, close quote, to handle the face mask sealing issues was with a third party available to, quote, either reposition or apply pressure to the mask, close quote.

Is that correct?

A. Yes. That's correct.

Q. Much like I was available to adjust the mask when you wore it?

A. Yes. Some person other than the individual wearing the mask needed to adjust it.

Q. Sorry to change gears on you, but I'm going to go back to your supplement, which is the previous exhibit, Exhibit 8.

A. Yes.

Q. And if you would go with me to paragraph 18 of Exhibit 8. Now, the last paragraph of -- the last sentence -- pardon me. The last sentence of paragraph 18 reads: Successful use of hoods being used by compliant subjects seeking death cannot be

used to predict similar success where a face mask is to be used to execute noncompliant individuals.

Correct?

A. Yes. That's correct.

Q. But you'd agree with me, wouldn't you, that all of your experience with using bags or hoods with compliant individuals is not going to tell us much about how they would work with noncompliant individuals, true?

MR. JOHNSON: Object to form.

A. There are some -- many issues which have parallels, so I would not agree that it says nothing.

Q. Okay. Now, there have been a number -- am I correct in saying that there's been a number of studies and documented cases of failed or problematic suicides using inert gases where there was complication, like a tube detached or something like that?

A. Yes. That is true.

Q. And can you tell me or point me to any published case report --

Let me ask you this: Are you familiar with that there are a number of industrial reports

regarding fatalities using respirators or hoods in a -- with an inert gas environment?

A. Yes. I understand that there's been a number of published reports of accidents that have occurred.

Q. Can you point me to any that -- where a person wearing a full-face respirator connected to an inert gas source didn't die absent the intervention of co-workers or rescue personnel?

MR. JOHNSON: Object to form.

A. I don't think I can point to one where the person did not die.

Q. I may be about done.

That's all I've got for you this morning. Thank you, Doctor.

MR. ANDERSON: Andy?

MR. JOHNSON: I'm going to have just a couple follow-up, I think. Anybody want -- I don't think we need a break, but does anyone want to take a break?

MR. ANDERSON: Unless you're going to be 30 minutes, in which case --

MR. JOHNSON: No.

EXAMINATION

BY MR. JOHNSON:

Q. Doctor, we looked at -- you were shown some tweets earlier by defense counsel. They were marked Exhibits 3, 6, and 7 -- I think 3, 5, 6, and 7, I believe. Do you have those in front of you?

A. Yes.

Q. You were also shown Exhibit 4, which is an op-ed in the New York Times.

A. Yes, I was.

Q. At the time that you authored or published any of those tweets, had you seen the Alabama protocol for nitrogen hypoxia executions?

A. No, I had not.

Q. At the time you issued any of those tweets or published any of those tweets, had you seen the mask that's going to be used in Mr. Smith's execution?

A. No, I had not.

Q. At the time you issued those tweets or read that article from the New York Times, had you been to Holman Prison and seen the things that you saw during your inspection?

A. No. I had not had that experience.
Q. And at the time you issued any of those tweets or read that New York Times article, had you met with Mr. Smith?
A. No. I had not met with Mr. Smith.
Q. You had no familiarity with either the Alabama procedures or Mr. Smith's case at the time that you issued those tweets. Would you agree?
A. No. I had no experience yet.
Q. Have you ever testified before in any cases?
A. No, I have not.
Q. Never acted as an expert witness in the U.S., correct?
A. No, I have not.
Q. They may have some follow-up for you, but that's all that I have at this time.

EXAMINATION

BY MR. ANDERSON:

Q. And just, yeah, very quickly to follow up on that. I'm correct in my understanding that you have volunteered to testify on Mr. Smith's behalf?
A. Yes. I volunteered.

Q. You're only being compensated for expenses; is that correct?
A. Yes. That is correct.

MR. ANDERSON: That's all I've got, Andy. Thank you.

10:08 a.m.

FURTHER DEPONENT SAITH NOT

C E R T I F I C A T E

STATE OF ALABAMA)
BUTLER COUNTY)

I hereby certify that the above and foregoing deposition was taken down by me in stenotype, and the questions and answers thereto were transcribed by means of computer-aided transcription, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

I further certify that I am duly licensed by the Alabama Board of Court Reporting as a certified court reporter as evidenced by the ACCR number following my name below.

Deborah B. Braden

DEBORAH B. BRADEN, ACCR NO. 90

My Commission expires December 8, 2024

EXHIBIT B

Declaration of Philip Nitschke PhD MD

I PHILP NITSCHKE, Ph.D., M.D., declare under penalty of perjury under the laws of the United States of America:

1. Profile

1.1 Since 1997, I have been the director and chief researcher of the pro-assisted suicide organisation, Exit International.

1.2 Over the past two decades' experience I have developed significant expertise in self-help methods to bring about an elective, peaceful and reliable death.

1.3 These methods include: Lethal drug protocols (barbiturates, tricyclics, etc), poisons (eg. carbon monoxide, nitrite, etc), devices (eg. the Deliverance Machine) and inert gases (Helium and Nitrogen). They are discussed and continuously reviewed and updated in my *Peaceful Pill eHandbook* (see *www.peacefulpillhandbook.com*).

1.4 My involvement with the use of gas was central to the shift within the right-to-die movement away from the use of a plastic bag + sedatives and towards the more reliable system of plastic bag + positive inert gas flow. In 2014 I initiated the change from helium to nitrogen as the preferred inert gas.

1.5 I spent a number of years involved in experimental research physics with a focus on laser gas analysis of shock waves, completing my PhD in physics in 1973. In 1982 I returned to Sydney university to commence medical studies and on completion moved to Royal Darwin Hospital where I designed the 'Deliverance' assisted suicide machine. This machine was used by four of my terminally ill patients to lawfully end their lives in 1996 under the Northern Territory 'Rights of the Terminally Ill' Act, and is now on permanent display in the British Science Museum in London. My background allows me to critically analyse the proposal detailed in the Alabama protocol. My CV is attached as Exhibit 2.

2. Hypoxic Death using a Closed System with a Face Mask

2.1 Early methods used for an elective, hypoxic death involved the use of a plastic Exit bag/ hood combined with a significant dose of sedatives. The plastic bag provided a small enclosed, hypoxic environment. Sedatives were used to suppress the 'alarm response' caused by the rise in the level of carbon dioxide within the bag (from the exhaled breath of the user).

2.2 This method was found to be unreliable as those seeking to die often failed to take enough sedatives to suppress the alarm response. The time-to-death (TDD) was also consistently longer than preferred. The risk of vomiting was a further issue that led to the method's replacement.

2.3 In 1998 (at the first gathering of the NuTech research group in Victoria, BC), I was one of a team of researchers who observed and analysed the possible use of a 'closed system' De-Breather to produce a hypoxic death. The De-Breather used a facemask and re-circulated exhaled air to generate the required lethal environment of low oxygen (and low carbon dioxide). However, there were ongoing problems associated with maintaining a tight air-seal between the device and the user's face, especially once consciousness is lost. The use of a sealing facemask that could cover both the user's nose and mouth was further compromised by facial hair, even with the use of a medically designed anatomical facemask. The method was abandoned in 2002.

2.4 These trials are documented in the 2001 academic article 'Non-physician assisted suicide: the technological imperative of the deathing counterculture' by Canadian researcher, Russel Ogden, which was published in the journal *Death Studies.*[1] [2]

[1] https://pubmed.ncbi.nlm.nih.gov/11806409/

[2] Note there are extremely few academic papers documenting the methodology of hypoxic death in an elective, suicide situation. This is largely because of the ambiguous legal issues facing observers when a person enacts their suicide and questions about whether the presence of a researcher could act as a source of encouragement and/or tacit coercion: both of these issues remain impediments in university ethics approval procedures.

3. Hypoxic Death using an Open System of a Plastic Bag/ Hood + Inert Gas

3.1 In 1997, the bag + sedative protocol was replaced with a new approach where an inert gas would be fed into the bag. The first of these 'open systems' used helium which was pumped into a plastic bag/ hood. The gas entered the bag with a flow rate of ~15 liters/min and escaped into the atmosphere through the bag's loose neckband. This method ensured that there was no accumulation of carbon dioxide within the bag and, therefore, there would be no alarm response experienced by the user.

3.2 Attempts would subsequently be made to replace the plastic Exit bag with a sealing facemask that could cover both the nose and mouth. The gas flow would allow the exhaled gas to escape into the atmosphere. While the facemask was seen by some to be a more aesthetically acceptable method than a plastic bag, problems associated with mask leakage (as with the rebreather) forced a return to the full head-covering plastic bag. A trial of this procedure was conducted at the assisted suicide organisation Dignitas, in Switzerland. This 2010 study can be found in the *Journal of Medical Ethics*.[3]

3.3 In 2014, the open system protocol was again changed, with 100% nitrogen replacing helium as the inert gas of choice. This change in use was largely driven by increasing difficulty in obtaining uncontaminated helium.

3.4 In conclusion, the open system of a plastic Exit bag that is fed with nitrogen (at a sufficient flow rate to ensure minimum oxygen and carbon dioxide levels) is generally considered a more reliable means of providing a peaceful, hypoxic death. Good technique, practice and the willing involvement by the person seeking to die is essential. Concerns over vomiting remain.

3.5 Based on the comments and experience outlined above, I highlight the following concerns regarding the planned approach to execution using hypoxia by the State of

[3] https://pubmed.ncbi.nlm.nih.gov/20211999/

Alabama.

4. Summary

4.1 As discussed above, the various protocols developed by those active in the global right to die movement to produce a reliable and peaceful hypoxic death reveal a range of problems. This past experience should serve to inform those expecting to employ nitrogen hypoxia as an effective means of execution. The problems are identified below:

5. Air Leakage

5.1 The use of a sealing facemask has been abandoned because of the significant problems associated with maintaining an air-tight seal. Problems of mask fit, facial hair and dynamic changes associated with alteration of the user's facial and/ or muscle tone (as consciousness is lost or the person speaks) have been found to be unsolvable.

5.2 The smallest air leak greatly increases the time to loss of consciousness and uncertainty regarding the outcome. This uncertainty often led individual users to panic during their attempted suicide and abandon their plans for a peaceful death. Attempts to address the issue of facemask leakage, by increasing the flow rate/ delivery pressure of the gas (to reverse any inflow of oxygen especially during sudden deep inspiration), were only partially successful.

5.3 The only reliable way to deal with the issue of the seal of the facemask was with the cooperation of a third party (an 'assistant'). This person could recognise the problem and intervene to either re-position or apply manual pressure to the mask. Legally, this approach presented unacceptable risks.

6. ***Vomiting***

6.1 Early closed system which used a plastic bag + sedative drugs were slow with a greater possibility that the user could vomit during the procedure. This problem was reduced with the addition of inert gas, and the use of an open bag, but never fully eliminated.

7. **Points of Concern**

7.1 I have reviewed in detail (as much as this is possible) the redacted protocol relating to the planned nitrogen gas execution of Kenneth Eugene Smith (attached as Exhibit 1). My Concerns are as follows:

8. ***The Sealing of the Facemask***

8.1 I understand that Mr. Smith is to be strapped down, and some form of sealing facemask fitted. There is no information in the protocol on the design of the mask, or whether it has been made to custom-fit Mr. Smith's face (covering both his nose and mouth) so that there can be no introduction of room air/ oxygen upon deep gasping inspiration.

8.2 It is difficult to see how an effective air-seal could be initially established, let alone maintained, without Mr. Smith's participation and cooperation. In my opinion, this maintenance of an effective air-seal could only be achieved with the active involvement of a third party assistant: a person who would be able to monitor the situation and dynamically adjust and apply pressure to ensure that the facemask stays in place for the reasons discussed above (eg; changes in facial/ muscle tone upon loss of consciousness). There is no reference to any such person in the Protocol.

8.3 This is especially important given Mr. Smith is expected to deliver his final statement while 'wearing' the facemask, which could further dislodge the mask.

9. Head Restraint?

9.1 There is no reference in the protocol to any planned head restraint, or what would be the procedure upon the sudden and possibly violent movement of Mr. Smith's head: an involuntary (or voluntary) movement that could lead to dislodgement of the mask. This could occur as a deliberate act on the part of Mr Smith, or by the muscle spasms which can occur in the course of a person developing cerebral hypoxia.

10. Gas Pressure & Flow Rate

10.1 Details of the delivery pressure and flow rate of the nitrogen have been redacted from the protocol. If that is intended to address problems with facemask leakage by using a gas flow of 100% nitrogen with sufficient force to reverse any flow of atmospheric oxygen during deep inspiration, that will not always work. If there is any leakage, without further detail, it is not possible to comment on the effectiveness of such a strategy. What is clear is that there are no circumstances where the consequence of catastrophic mask dislodgement could be compensated by a high gas rate flow rate.

11. Complications from Compromised Respiratory Function

11.1 There is no reference in the redacted protocol to complications that may arise if Mr. Smith's respiratory capacity is compromised. Good respiratory function and gas exchange is necessary for the rapid loss of consciousness with nitrogen hypoxia. Individuals with specific (restrictive) lung disease experience a slow time to loss of consciousness using this method. These users often undergo considerable distress experiencing existential panic before they lose consciousness. Preliminary lung

function assessment (spirometry) is traditionally recommended in the right to die movement for those who seek to use nitrogen hypoxia to end their lives. If respiratory function is found to be compromised, the method is abandoned.

12. Vomiting

12.1 The issue of possible vomiting has not been addressed in the redacted protocol. Should Mr. Smith vomit, the planned 'humane' death from nitrogen hypoxia, would become a grim and uncertain death resulting from tracheal obstruction.

13. Conclusion

13.1 Based upon the details available in the protocol, there is good reason to be concerned about the planned procedure.

13.2 There is a significant possibility that Mr. Smith will be subject to incomplete cerebral hypoxia. A resultant vegetative state with permanent brain damage cannot be excluded.

14. Possible Modifications to the Planned Protocol?

14.1 If an execution subject is uncooperative, any procedure that relies on a facemask will be at risk of significant failure. One way to bypass the inherent problems of a facemask is to use a capsule, hood or container. The restraining gurney could then be placed within this contained environment. To effect a peaceful death the oxygen level within the container would need to be rapidly lowered from an ambient 21% to less than one percent. This would ensure an almost-immediate loss of consciousness with death following soon after.

14.2 Such a protocol would address the risks associated with any ingress of oxygen from surrounding air and eliminate any concern over carbon dioxide accumulation.

Although vomiting would still be a possibility, precipitants such as attempting one's final statement while wearing an alien head-mask would be removed. Facial expressions and emotions could also be clearly conveyed.

I declare the foregoing to be true and correct under the penalty of perjury under the laws of the United States of America.

/s/ Philip Nitschke
Philip Nitschke

Haarlem, Netherlands

20 November 2023

Exhibit 1

ALABAMA DEPARTMENT OF CORRECTIONS EXECUTION PROCEDURES

LETHAL INJECTION
NITROGEN HYPOXIA
ELECTROCUTION
August 2023

I. General

A. This procedure establishes the responsibilities, tasks, and procedures for the reception of a condemned inmate, for confinement, and for execution and day-of-execution preparation. Approval authority for changes or amendments to this protocol is the Commissioner of the Alabama Department of Corrections (the "ADOC").

B. Individual responsibilities or specific procedures to be followed by certain ADOC employees may be further set forth in ADOC's training materials for execution of persons sentenced to death. In such case, those training materials will not deviate from the responsibilities, tasks, and procedures set forth in this execution procedures protocol.

C. This procedure outlines the forms and documents used to ensure a professional and chronological order for all methods employed by ADOC to conduct judicial executions.

D. This document is public. Where redactions appear in this document, the reason(s) for redaction is provided.

i. "Security" denotes that the information could compromise or impede the ADOC's statutory duty to administer the maximum-security correctional facilities housing condemned inmates, including the protection of its employees, inmates, and visitors. Examples of such information include details that would reveal the location of dangerous materials inside of a correctional facility or that would provide a specific time, route, location, and/or number of personnel involved in the movement of an inmate inside of a correctional facility.

ii. "DPI" means "detrimental to the public interest." This marking denotes that the information relates to the security or safety of persons, structures, facilities, or other infrastructures and that the information could reasonably be expected to be detrimental to the public safety or welfare, or would otherwise be detrimental to the best interests of the public. When "DPI" is

used separately from "Security," this denotes that the information does not directly relate to the safety and security of a correctional facility, but public disclosure would create non-security risks to its infrastructure *or* to the security or safety of persons associated with ADOC.

iii. "Executive" refers to recorded information received by a public officer in confidence or recorded information "the disclosure of which would be detrimental to the best interests of the public." "Executive" *does not* include records or information "reasonably necessary to record the business and activities required to be done or carried out by a public officer so that the status and condition" of such activities can be known by the general public. This determination is a matter of state law.

iv. Some redactions meet the "Security" and "DPI" criteria because they are necessary to prevent this document from becoming a checklist or instruction manual for ADOC's nitrogen hypoxia system. Due to the system's location in a maximum-security correctional facility, certain information regarding the procedures for operating the nitrogen hypoxia system cannot be released. These redactions also include information pertaining to the security measures implemented to prevent the nitrogen hypoxia system from being activated by unauthorized persons.

v. Other redactions meet the "Security," "DPI," and/or "Executive" criteria because they obscure information about personnel deployments and staffing levels during pre-execution preparations and the execution procedure. This includes information about personnel movements within ADOC facilities at specific times or within narrow timeframes. These redactions also include information that would identify locations within an ADOC facility where potentially hazardous items or substances are stored or located, as well as places where the nitrogen hypoxia system can be controlled or accessed.

vi. Some redactions meet the "DPI" and "Executive" criteria because they are employed to protect the identity of product manufacturers whose products were purchased in "off the shelf" transactions. It is likely that the manufacturers of these products do not know that their publicly available products were procured by ADOC. Redaction of this information serves two principal purposes: (1) protecting these manufacturers from potential harassment and distraction, and (2) protecting ADOC's ability to obtain replacement products in the future.

E. This procedure applies to the conduct of judicial executions carried out by means of lethal injection, nitrogen hypoxia, and electrocution. Section 15-18-82.1 of the Code of Alabama (1975) permits a person sentenced to death to have one opportunity to elect execution by nitrogen hypoxia or electrocution. Otherwise, a sentence of death will be conducted by lethal injection.

F. A condemned inmate's election of a method of execution does not supersede the means of execution available to ADOC.

G. Amendments and revisions to the previous edition of this document were made (1) to implement the requirements of state law as to the use of nitrogen hypoxia as a method of judicial execution, and (2) to facilitate the public disclosure of the contents of this document to the maximum extent possible consistent with ADOC's responsibilities as to safety, security, and the public welfare. *The substantive procedures pertaining to lethal injection and electrocution as methods of execution have not changed with the issuance of this document.*

II. Reception of Condemned Inmate

Once a sentence of death has been imposed by a court of competent jurisdiction, the condemned inmate will be transferred directly from the committing county to the W.C. Holman Correctional Facility ("Holman"), W.E. Donaldson Correctional Facility ("Donaldson"), or Julia Tutwiler Prison for Women ("Tutwiler"). In the future, other facilities may be identified and utilized at the direction of the Commissioner. Any such directive shall not affect the validity of this procedure.

Upon arrival, the condemned inmate will be processed through regular admission procedures, to include a security search, a medical examination, and other identification measures (i.e., fingerprints, photographs, etc.) in accordance with ADOC policies, and all necessary interviews, personal history reviews, and other activities associated with the reception of non-condemned inmates as required by ADOC policy or as otherwise determined by the institution's warden.

III. Confinement

Section 15-18-82(b) of the Code of Alabama (1975) establishes Holman as the statutory location for the conduct of judicial executions. Holman is the ADOC facility possessing "the necessary facilities, instruments, and accommodations to carry out" a judicial execution.

Upon receipt of an instruction from the Governor of Alabama establishing the time frame for the execution of a condemned inmate confined at a location other than Holman, the wardens of Holman and of the correctional facility at which the inmate is confined will coordinate transport of the condemned inmate to Holman. Prior to the start of the "Death Watch" observation period, the condemned inmate will be confined and maintained in accordance with ADOC Rules and Regulations.

IV. Notification of Time Frame for Execution

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure,[1] the Governor of Alabama establishes the time frame for the execution of any sentence of death.

A. Upon receipt of an instruction setting the time frame for the execution of a condemned inmate confined at Holman, the Warden will advise the condemned inmate as soon as possible. All efforts should be made to notify the condemned inmate prior to any announcement by news media.

B. If the condemned inmate is confined at another ADOC facility, the ADOC will notify the warden of the institution where the condemned inmate is confined and request that the inmate be notified in a timely manner in accordance with paragraph C, below.

C. At the time the condemned inmate is advised of the instruction from the Governor setting the time frame for his/her execution, the Warden will inform him/her that:

i. The condemned inmate may select a spiritual advisor. That advisor may be present in the execution chamber at the time of the execution, except in the event the inmate has elected electrocution as their method of execution. In the event that an inmate has elected electrocution as their method of execution, any spiritual advisor will be required to exit the execution chamber after the condemned inmate has been provided the opportunity to make a final statement.

ii. An alternate spiritual advisor may be selected to serve in the event that the individual identified in paragraph C(i) cannot serve, or elects not to serve, at the time of the execution.

iii. The choice of spiritual advisor and alternate spiritual advisor must be made and communicated to the Warden within five days.

iv. The condemned inmate will further be informed that any spiritual advisor and alternate spiritual advisor identified will be required to submit a written plan to the Warden setting forth how the spiritual advisor intends to assist the condemned inmate in the exercise of his/her religious beliefs for the purpose of ensuring that such assistance will not interfere with the conduct of the judicial execution. The condemned inmate shall be further advised that this written plan must be submitted to the Warden for approval within fourteen days.

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1. Pursuant to section 15-1-1 of the Code of Alabama (1975), procedural aspects of state law apply only where rules promulgated by the Alabama Supreme Court have not been promulgated as to the same subject matter. The procedures for judicial stays of death sentences pending appeal and the setting of an execution date are governed by Rule 8 of the Alabama Rules of Appellate Procedure.

D. In accordance with Section III, above, whenever a condemned inmate is confined at another ADOC facility, the Holman Warden and the warden of the hosting institution shall, in accordance with established ADOC operational guidance, initiate preparation and planning to have the condemned inmate transferred to Holman as soon as practicable following receipt of the order from the Governor setting the time frame for the execution.

E. The Holman Warden shall notify the Warden of the G.K. Fountain Correctional Center ("Fountain") of the date of the scheduled execution. At this time, the Holman Warden will request that preparations be made so that the Media Center will be clean and the grounds will be groomed.

V. Preparations (Prior to Execution Week)

A. On a day designated by the Warden, prior to the week of the scheduled execution, the Warden and/or Assistant Warden will meet with the Execution Team.

i. Team members will be given the opportunity to resign from the team.

ii. Details of the scheduled execution will be discussed, and known, relevant information will be provided to the team members. This briefing will include disclosure of the method of judicial execution to be used for the execution of the sentence of death.

iii. Team members will be briefed on the requirements of this procedure specific to the method of judicial execution to be used for the execution of the sentence of death. Subsection B sets forth the issues to be addressed when the method of judicial execution shall be lethal injection, Subsection C sets forth the issues to be addressed when the method of judicial execution shall be electrocution, and Subsection D sets forth the issues to be addressed when the method of execution shall be nitrogen hypoxia.

B. **LETHAL INJECTION**

i. If lethal injection is to be the method of judicial execution, the Warden will notify members of the IV Team that they will be needed and shall schedule a time for a member of the IV Team to view the condemned inmate's veins.

ii. The Warden and/or Assistant Warden shall inventory the equipment and supplies on hand and verify that all items required to carry out this procedure are available for the execution. Any deficiencies shall be made known to the Warden immediately.

iii. Members of the IV Team participating in the upcoming execution shall attend and participate in at least one walk-through prior to each execution where lethal injection is to be the means of execution. At least one member

of the IV Team shall take an inventory of the supplies on hand while present at the facility for a walk-through. Any deficiencies in the supplies on hand shall be identified to the Warden immediately. At least one member of the IV Team shall inspect the IV Team equipment on hand while present at the facility for a walk-through. Any deficiencies in the equipment shall be identified to the Warden immediately.

C. **ELECTROCUTION**

i. If electrocution is to be the method of judicial execution, the Warden will arrange and facilitate inspection of the electrical system, step-down transformer, and other equipment to be used for the execution.

ii. The Warden shall assign a member of the Execution Team to inspect and verify that the electric chair, including all equipment affixed thereto, is in good working condition. The inspection required by this paragraph does not include inspection of the electrical components referenced in the previous paragraph. Instead, the inspection shall be focused on the structural integrity of the chair, the presence of any rust, corrosion, or other defects appearing on the metallic components, and the condition of the restraints and attachments. Any defects or items of concern shall be made known to the Warden immediately.

iii. The Warden shall make arrangements to acquire the saltwater sponges required to carry out a judicial execution by means of electrocution.

iv. The Warden shall arrange to have the headgear required to carry out a judicial execution by means of electrocution completed and fitted to the condemned inmate's head.

D. **NITROGEN HYPOXIA**

i. All team members will review the ADOC training materials on dangers and hazards associated with nitrogen gas in the workplace.

ii. The Warden, Assistant Warden, or Execution Team Captain shall ensure that the wall-mounted oxygen-deficient atmosphere monitors are tested. Testing will be performed according to the manufacturer's guidelines.

iii. All portable O_2 monitors and/or gas-measurement devices will be tested and inspected. All portable devices will be fully charged. Refresher training on use of portable monitoring/testing devices will be provided to team members as necessary by the Warden, Assistant Warden, or Execution Team Captain. Instructions on proper calibration of these devices are contained in Section I of Appendix C (ADOC Nitrogen Hypoxia Execution Procedures). The calibration of these devices will be checked in accordance

with Section I and will be witnessed by a team member other than the team member performing the check.

iv. Where nitrogen hypoxia is to be the method of execution, the Warden or Assistant Warden shall inspect the condition of each gas cylinder and verify that the volume of gas in each bank (i.e., nitrogen gas and breathing air) exceeds the minimum acceptable thresholds contained in Section III of Appendix C (ADOC Nitrogen Hypoxia Execution Procedures), utilizing the procedures set forth in that document.

v. The Warden and/or Assistant Warden shall inventory the equipment and supplies on hand and verify that all items required to carry out this procedure are available for the execution. Any deficiencies shall be made known to the Warden immediately.

E. The Warden will meet with the condemned inmate and advise him/her of the general schedule for the execution week, with due regard for the security requirements associated with timing and location of movements within the facility. The condemned inmate will be informed of his/her ability to submit to the Warden for approval an extended visitation list for the week of the execution.

F. If a spiritual advisor and/or alternate spiritual advisor were identified by the condemned inmate and the inmate submitted a written plan within the required timeframe:

i. The Warden or his/her designee shall meet with the spiritual advisor and/or alternate to review such plan and conduct orientation and training of the spiritual advisor and alternate in advance of the execution. The Warden, in his/her discretion, may conduct the review and initial orientation by phone, video teleconference, or other means.

ii. If nitrogen hypoxia is the method of execution, no spiritual advisor or alternate spiritual advisor shall be allowed into the execution chamber unless they review and sign the spiritual advisor nitrogen hypoxia acknowledgement form.

G. The Warden or his/her designee will contact physicians to determine whether they are willing and available to attend the execution and pronounce the condemned inmate's time of death on the date the execution is scheduled.

H. Prior to the start of the Death Watch observation period, the Execution Team Captain shall ensure that all functions of the observation/holding cell are working. In the event that deficiencies are noted, the Warden shall be notified immediately, and all necessary steps shall be taken to rectify and repair such deficiencies prior to the Death Watch observation period.

VI. Preparations (Seven Days Prior to Execution Date)

A. Members of the Execution Team will meet a minimum of two days during the execution week to walk through the steps of the procedure specific to the method of judicial execution to be employed, to include the removal of the condemned inmate from the designated cell to the execution chamber, the placement of the condemned inmate within the execution chamber, and the escorting of official witnesses (victim's representatives, condemned inmate's witnesses, media) into the viewing rooms. The Warden and the Assistant Warden will rehearse their roles in the execution process during these walk-throughs.

B. The Execution Team Captain will make assignments of Execution Team members for the Death Watch observation period preceding the execution of sentence.

C. On a day designated by the Warden, the Warden and/or Assistant Warden will meet with the Outside Security Team.

i. The Warden will inform the Outside Security Team of the number of official witnesses expected to be present at the execution, as well as the number of additional persons expected to be on site on the date of the execution. The Outside Security Team's Team Leader will be provided the identities of the official witnesses (if known) and the identity of the additional persons expected on site.

ii. The Team Leader of the Outside Security Team is responsible for assigning team members to the entry control points for Holman, as escorts for the condemned inmate's witnesses, and to the off-site security element.

D. The Warden or his/her designee will verify that the Commissioner's telephone line within the Commissioner's viewing room is working properly. Additionally, the Warden or his/her designee will verify that the microphone inside the execution chamber is working properly and can be heard inside each viewing room.

E. No later than the Monday of the execution week, the Warden or his/her designee will contact the physicians identified to pronounce the condemned inmate's time of death and ensure that they will be present on the date of the execution.

F. No later than the Monday of the execution week, the Warden or his/her designee will notify the Escambia County Coroner, the Mobile office of the Alabama Highway Patrol, the Escambia County Sheriff's Office, the Atmore Police Department, and the Porch Creek Indian Tribal Police Department of the date and time of the scheduled execution. The Warden or his/her designee may notify additional law enforcement agencies if, in the exercise of his/her discretion, such notification is warranted under the circumstances.

VII. Placement of Condemned Inmate in the Holding/Observation Cell

At least two correctional officers shall be assigned to observe the condemned inmate at all times during the Death Watch observation period preceding the execution. If the condemned inmate is female, female personnel will be assigned to this duty. No other correctional staff, civilian employees, contractors, or visitors—except for authorized and approved medical personnel—shall be allowed in the vicinity of the holding cell during this observation period without the approval of the Warden or the Warden's designee. No other inmate will be allowed in the vicinity of the holding cell during this time.

A. The condemned inmate will be moved to the holding/observation cell in the execution facility on the day and time directed by the Warden. Prior to the movement of the condemned inmate:

i. The holding/observation cell shall be thoroughly inspected for contraband.

ii. The Execution Team Captain shall verify that all functions of the cell continue in operating order.

B. Once placed in the holding/observation cell, the condemned inmate will be continuously observed by at least two correctional officers.

i. While performing observation duty, assigned correctional officers shall ensure that the condemned inmate remains under constant observation regardless of the offender's location or activity.

ii. In the event of an emergency, the assigned correctional officers shall contact the shift commander. Thereafter, the Execution Team Captain and Warden shall be contacted as soon as possible.

iii. All activities will be recorded in the permanent log. Information to be recorded in the permanent log includes, but is not limited to:

- the identity of any visitor received by the condemned inmate, including the date and time of the visit and the identity of the escort of such visitor;
- any time that the condemned inmate exits or is returned to the holding/observation cell;
- the times of any searches of the holding/observation cell and the identity of any correctional officers or other persons performing such search;

- the times the condemned inmate is served meals, the contents of the meals served, the approximate amount of food and drink consumed, and the identity of the person(s) delivering such meals;
- the times the inmate is (or appears to be) sleeping, reading, or watching television;
- the time of any telephone call placed by the condemned inmate (including the number called, the person called, and length of the call).

C. The observation/holding cell shall contain a bed and necessary linens. The condemned inmate shall be provided a single uniform of clothing at a time. All other items belonging to the condemned inmate will be kept and maintained outside of the observation/holding cell. The condemned inmate shall have access to his/her personal hygiene items, which shall be passed to the condemned inmate and returned to the correctional officers outside of the observation/holding cell upon completion/use of such items. The condemned inmate:

i. will be allowed a television placed in the area outside of the cell.

ii. will be provided access to a telephone. The condemned inmate shall advise the correctional officers assigned to the Death Watch of the number he/she wishes to call, and the correctional officer shall place the call. Each call or attempted call will be noted in the permanent log.

iii. will be allowed access to his/her mail. Mail will be provided to the condemned inmate for review and shall be passed back to the correctional officers when the condemned inmate has finished reading it. All legal mail will be opened in the presence of the inmate.

iv. will be allowed access to a Bible, Quran, Torah, or any similar religious text, and any other reading material approved by the Warden.

v. will receive necessary medical care and treatment. Health care personnel will bring any required medication to the observation/holding cell. Sick call will be provided in accordance with the institutional Rules and Regulations; however, it will be held in the Death Watch area.

vi. will receive institutional meals. Meals will be delivered to the condemned inmate by the Warden, Assistant Warden, or a correctional officer assigned to the Death Watch (other than the two members of the Death Watch required to be present at the observation/holding cell at all times).

VIII. Visitation During the Execution Week

A. Prior to the execution week, the condemned inmate may submit an extended visitation list to the Warden for approval. That portion of the extended visitation list approved by the Warden will be provided to the officers assigned to visitation and/or the Death Watch observation period.

B. The condemned inmate will be permitted contact visits during the execution week with family, friends, private clergy, and legal counsel, as approved by the Warden. Visitation will be from 8:30 a.m. until 1:30 p.m. on the Monday and Tuesday of the execution week and from 8:30 a.m. until 4:15 p.m. on the Wednesday and Thursday of the execution week. Visitation will be limited by the Warden in his/her discretion if necessary to maintain the orderly operation of the facility or to comply with the Governor's instruction setting the time frame for the execution of the inmate's sentence of death.

C. No more than fifteen visitors will be allowed in the visitation area at any given time.

D. The condemned inmate may elect to receive an institutional meal in the visitation area. The condemned inmate's visitors may purchase items from the vending machines for his/her consumption. Visitors will not be allowed to bring food or beverages into the correctional facility.

E. As security conditions permit, visitors will be allowed to leave the facility and return. They will be fully processed for admission each time they enter the facility. In the event public health precautions are in place (for example, COVID-19 requirements), visitors will be required to abide by those precautions or requirements.

F. The institutional or regional chaplain will be available to the condemned inmate and his/her family. The chaplain should visit with the condemned inmate daily during the execution week unless the condemned inmate expresses an opposition to such visits.

IX. Execution Date

A. The mess steward on duty shall prepare any institutional meals for the condemned inmate on the date of the judicial execution. No inmate shall be allowed to handle the condemned inmate's meals. The Warden, Assistant Warden, or a correctional officer assigned to the Death Watch observation period (other than the two members of the Death Watch required to be in the presence of the condemned inmate at all times) will deliver the condemned inmate's breakfast meal to the door of the observation/holding cell. The Execution Team member(s) posted on Death Watch will receive the meal and serve it to the condemned inmate in the observation/holding cell. This activity will be noted in the execution log.

B. The Warden or Assistant Warden will ask the condemned inmate whether he/she wishes to have a last meal and will explain the available options. If the condemned inmate requests a last meal, it will be served in the visitation area if the condemned inmate is receiving visitors; otherwise, the Warden, Assistant Warden, or a correctional officer assigned to the Death Watch observation period (other than the two members of the Death Watch required to be required to be in the presence of the condemned inmate at all times) will deliver the condemned inmate's last meal to the door of the observation/holding cell. This activity will be noted in the execution log.

C. At the time designated by the Warden, the correctional officers assigned to the Death Watch will inventory the condemned inmate's property. The condemned inmate will be provided the opportunity to designate those individuals to whom he/she wishes his/her property to be given following execution of the sentence of death.

i. The condemned inmate shall identify specific items of his/her personal property and designate those individuals whom he/she wishes to receive each item of property following the execution of the sentence of death. This information will be written out as a last will and testament, and the condemned inmate will sign the document in front of a notary public. In the event the condemned inmate designates a non-offender who will not appear as a witness to the execution as a recipient of personal property, the condemned inmate will be informed that the property will be disposed of in accordance with ADOC policies and procedures.

ii. Items identified by the condemned inmate for distribution to non-offenders who appear as witnesses to the execution shall be provided to such persons prior to their leaving the facility following the execution of the sentence of death.

iii. Items identified by the condemned inmate for distribution to other inmates will be presented the business day following the execution of the sentence of death.

iv. Items identified by the condemned inmate for distribution to non-offenders who do not appear as witnesses to the execution shall be made available to be picked up at the Warden's office the business day following the execution of the sentence of death. Such items shall be kept by the facility and made available to the named recipient for a period of thirty days following the date of the execution. In the event the named person does not appear and claim such property, the facility may dispose of it in accordance with ADOC policies and procedures.

D. At the time designated by the Warden, the Warden or his/her designee will obtain the funeral arrangements of the condemned inmate. Information obtained from the condemned inmate shall include the next of kin, the name of any funeral home to

which the remains should be turned over, and the name of a point of contact at such funeral home. This information shall be provided to the Escambia County Coroner and to the Alabama Department of Forensic Science.

E. The following tasks will be performed during the morning of the scheduled execution, at the times designated by the Warden:

i. **[ELECTROCUTION]** The designated members of the Execution Team will conduct the first of the three tests of the electric chair prior to the execution of the sentence of death.

ii. **[NITROGEN HYPOXIA]** The Warden or Assistant Warden will pressurize and assess the nitrogen hypoxia system. The system will be depressurized, with line pressures returned to 0 PSI after the assessment is completed. All lockout valves will be closed, locked, and secured at the conclusion of this testing.

iii. **[NITROGEN HYPOXIA or LETHAL INJECTION]** The gurney will be inspected by the Execution Team Captain or his/her designee to verify that it is in working order and is ready for use. The Warden shall be notified as soon as practicable after this inspection is completed.

iv. All wall-mounted oxygen-deficient atmosphere monitors will be inspected to ensure that they are powered (functioning) and that the audible alarm is set.

v. **[ELECTROCUTION]** The designated members of the Execution Team will conduct the second of the three tests of the electric chair prior to the execution of the sentence of death.

F. The condemned inmate will be permitted visitation from 8:30 a.m. to 4:15 p.m. (as needed), or until approximately two hours before the scheduled execution. Otherwise, the condemned inmate will remain in the holding/observation cell.

G. Two hours and fifteen minutes prior to the scheduled execution, the condemned inmate and any visitors will be provided with notice that visitation will conclude in fifteen minutes.

H. Two hours prior to the scheduled execution, the condemned inmate's extended visitation period will conclude, and the condemned inmate will be removed from the visitation area.

I. The following tasks will be performed during the afternoon of the scheduled execution, at the times designated by the Warden:

i. **[LETHAL INJECTION]** The lethal injection solutions will be prepared and placed into the primary and backup syringes. Normally, the Assistant Warden will prepare the necessary lethal injection solution.[2]

ii. **[ELECTROCUTION]** The designated members of the Execution Team will conduct the final of the three tests of the electric chair prior to the execution of the sentence of death.

iii. The Commissioner and/or Warden will meet with the victim's representatives and/or any surviving victims of the condemned inmate's crime at the designated meeting location.

iv. A medical examination of the condemned inmate will be completed, with the results recorded on a Medical Treatment Record or Body Chart. This process will not be performed at a time that interferes with the condemned inmate's extended visitation period.

v. **[NITROGEN HYPOXIA]** [Security/DPI] The Warden or Assistant Warden will initialize/pressurize the nitrogen hypoxia system in accordance with Section III of Appendix C (ADOC Nitrogen Hypoxia Execution Procedures) utilizing the procedures set forth in that document. As the system is pressurized, signage will be displayed [redacted] to notify personnel that the system is active and pressurized.

vi. **[NITROGEN HYPOXIA]** The Warden, Assistant Warden, or Execution Team Captain will retrieve the mask assembly, connect it to the breathing gas tubing, and stow it in the execution chamber at the designated location.

vii. All wall-mounted oxygen monitors will be inspected to ensure that they are powered (functioning) and that the audible alarm is set. **NOTE:** This inspection is in addition to the morning inspection required by this document.

viii. **[ELECTROCUTION]** The sponges prepared in accordance with Section I of Appendix A (ADOC Electrocution Execution Procedures) will be removed from the saltwater solution and positioned on the electrodes.

J. If the condemned inmate has a spiritual advisor present, that person may be escorted to the observation/holding cell and may be allowed to remain with the condemned inmate until such time as the condemned inmate is to be escorted to the execution chamber. At that time, the spiritual advisor will be escorted to a waiting room.

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2. The Warden, in his/her discretion, may designate a later time for this task to be performed based on circumstances—for example, if a stay or injunction has been entered and it appears that the scheduled execution may be delayed.

K. Prior to the start of the judicial execution procedures set forth herein, the Commissioner's telephone line to the Governor's and/or Attorney General's staff will be opened. The Warden will consult with the ADOC General Counsel and/or the Office of the Attorney General to ascertain whether a stay of execution has been entered or is expected to be entered, or whether the execution has been voluntarily delayed at the request of a court. In the event a temporary stay of execution has been entered (or the State has agreed to a voluntary delay), the Warden may adjust the times for actions required by this procedure in his/her discretion. The Warden shall notify the Execution Team Captain and Outside Team's Team Leader of his/her intent to adjust the times for subsequent actions to be undertaken by either issuing a "be prepared to" order or providing the additional amount of time to elapse prior to undertaking the assigned task.

L. At the time designated by the Warden, the witnesses will be transported to the Holman execution facility and will be escorted into the appropriate witness rooms. Team members performing escort duties will verify that the wall-mounted oxygen-deficient atmosphere monitors are operational and displaying a reading of 19.5% atmospheric oxygen or higher in each witness room prior to allowing witnesses to enter.

X. Execution of Sentence

A. **NITROGEN HYPOXIA.** Judicial executions conducted by means of nitrogen hypoxia will be performed according to the following procedure:

i. [DPI/Security] The Warden or Assistant Warden will conduct a final visual inspection of the nitrogen hypoxia system and verify that it has been initialized/pressurized and that [redacted] lockout valves [redacted]. Additionally, the Warden or Assistant Warden will perform a final verification that the breathing gas tubing is [redacted].

ii. [DPI/Security] [redacted] the breathing air lockout valve [redacted]. The breathing air supply will be opened and allowed to flow to the mask. The breathing air supply will be set [redacted]

iii. The condemned inmate will be escorted to the execution chamber by the Execution Team and placed on the gurney. The pulse oximeter will be placed and secured on the condemned inmate.

iv. Prior to placement of the mask onto the condemned inmate's face, a member of the Execution Team will place a portable O_2 meter directly into the inflow of the breathing gas into the mask for a period of at least fifteen seconds and verify that breathing air is being supplied.

v. The mask will be placed and adjusted on the condemned inmate's face. One Execution Team member will monitor the pulse oximeter while the Execution Team Captain verifies that the mask has been properly placed. The Execution Team members responsible for secondary posts will be dismissed from the execution chamber after the mask has been properly placed.

vi. After the mask is placed and fitted onto the condemned inmate's face, the pulse oximeter will be monitored continuously for two minutes.

vii. The spiritual advisor, if any, will be escorted to the execution chamber and permitted to carry out the previously submitted and approved written plan.

viii. [Security/DPI] After verifying that there are no stays of execution, injunctions, or voluntary agreements by the State to delay execution of sentence, the Warden will [redacted] verify that all tasks have been performed and that the members of the Execution Team are prepared to proceed. At the Warden's command, the curtains to the witness rooms will be opened.

ix. [Security/DPI] The Warden will enter the execution chamber [redacted] and read the execution warrant. The condemned inmate will be given the opportunity to make a final statement (no more than two minutes).

x. [Security/DPI] The Warden and Assistant Warden will depart the execution chamber [redacted].

xi. The Warden will communicate with the Commissioner or his/her designee a final time to verify that here has been no last-minute stay of execution.

xii. [Security/DPI] The Warden or the Assistant Warden will [redacted] nitrogen gas lockout valve. [redacted]

xiii. [Security/DPI] The team members inside the execution chamber will make a final inspection of the mask. Once proper placement is verified, [redacted]

xiv. [Security/DPI] The Warden will activate the nitrogen hypoxia system [redacted]

xv. After the nitrogen gas is introduced, it will be administered for (1) fifteen minutes or (2) five minutes following a flatline indication on the EKG, whichever is longer.

xvi. When the execution has been carried out, the Execution Team Captain will be notified via radio and will close the curtains.

xvii. The spiritual advisor, if any, will be escorted from the execution chamber.

B. **LETHAL INJECTION.** Judicial executions conducted by means of lethal injection will be performed according to the following procedure:

i. The condemned inmate will be escorted to the execution chamber by the Execution Team and placed on the gurney.

a. The IV Team will be escorted into the execution chamber to start the IV. The heart monitor leads will be applied to the condemned inmate. If the condemned inmate's veins make obtaining venous access difficult or problematic, qualified medical personnel may perform a central line procedure as set forth in Section II of Appendix B (ADOC Lethal Injection Execution Procedures).

b. Once the condemned inmate is prepared, the Warden shall be informed promptly. The IV Team will be escorted from the execution chamber. The IV Team will brief the Warden as to which line is the primary line for intravenous administration of the lethal chemicals.

ii. The spiritual advisor, if any, will be permitted to carry out the previously submitted and approved written plan.

iii. The Warden will communicate with the Commissioner or his/her designee a final time to verify that there has been no last-minute stay of execution.

iv. [Security/DPI] If there has been no last-minute stay of execution, the Warden will enter the execution chamber [redacted] and read the execution warrant. The condemned inmate will be given the opportunity to make a final statement (no more than two minutes).

v. [Security/DPI] The [redacted] Execution Team remaining in the execution chamber will receive the signal to proceed.

a. [Security/DPI] [redacted] Execution Team members inside the execution chamber will make last-minute checks of the IV lines. [redacted] will exit the chamber and signal [redacted] that it is okay to proceed. [redacted] will remain in the execution chamber, taking a position at the condemned inmate's left side.

b. [Security/DPI] When the signal to proceed has been received [redacted] the following will occur:

1. The Warden will begin administering the lethal injection solution to the condemned inmate. The lethal injection solution will consist of:

   - 100 mL midazolam hydrochloride
   - 20 mL saline
   - 60 mL rocuronium bromide
   - 20 mL saline
   - 120 mL potassium chloride

2. After the Warden administers the midazolam hydrochloride and subsequent saline flush, but before administration of the second and third chemicals, the team member positioned at the condemned inmate's left side will assess the consciousness of the condemned inmate by applying graded stimulation, as follows:

   - The team member will begin by saying the condemned inmate's name.
   - If there is no response, the team member will gently stroke the condemned inmate's eyelashes.
   - If there is again no response, the team member will then pinch the condemned inmate's arm.

3. In the unlikely event that the condemned inmate is still conscious, the Warden will use the secondary IV line to administer the backup dose of midazolam hydrochloride. After the backup dose of midazolam hydrochloride and subsequent saline flush are administered, the team member positioned at the condemned inmate's left side will repeat the graded stimulation process set out above. After confirming that the condemned inmate is unconscious, such will be documented, and the Warden will continue with administering the second and third chemicals.

4. When the secondary IV line is used for midazolam hydrochloride, it will also be used to administer the remaining chemicals.

5. When the execution has been carried out, the Execution Team Captain will be notified via radio and will close the curtains.

vi. The spiritual advisor, if any, will be escorted from the execution chamber.

C. **ELECTROCUTION.** Judicial executions conducted by means of electrocution will be performed according to the following procedure:

i. The condemned inmate will be escorted to the execution chamber and be placed in the electric chair. The prepared sponges will be placed in accordance with Section I of Appendix A (ADOC Electrocution Execution Procedures). The electrodes will be attached to the condemned inmate's left leg and head. The Warden will be notified once all preparations have been completed.

ii. The spiritual advisor, if any, will be permitted to carry out the previously submitted and approved written plan.

iii. [Security/DPI] After verifying that there are no stays of execution, injunctions, or voluntary agreements by the State to delay execution of sentence, the Warden will [redacted] verify that all tasks have been performed and that the members of the Execution Team are prepared to proceed. At the Warden's command, the curtains to the witness rooms will be opened.

iv. [Security/DPI] The Warden will enter the execution chamber [redacted] and read the execution warrant. The condemned inmate will be given the opportunity to make a final statement (no more than two minutes).

v. [Security/DPI] The Warden and Assistant Warden will depart the execution chamber [redacted] the Execution Team will remain in the execution chamber until notified to leave by the Warden. The spiritual advisor may remain during this time and minister to the condemned inmate. The spiritual advisor will not be permitted to remain in the execution chamber during an execution by means of electrocution.

vi. The Warden will communicate with the Commissioner or his/her designee a final time to verify that here has been no last-minute stay of execution.

vii. [Security/DPI] Team members will make final checks of the sponges and electrodes. Once proper placement and fit are verified, Execution Team members will exit the chamber, along with the spiritual advisor, if any, and will signal [redacted] that everything is prepared for the Warden to proceed.

viii. The Warden will activate the electric chair, flowing 2200 volts of electricity through the condemned inmate's body for twenty seconds. The amount of electricity will decrease to 220 volts for the next one hundred seconds.

ix. When the execution has been carried out, the Execution Team Captain will be notified via radio and will enter the execution chamber and close the curtains.

x. The exhaust fan inside the execution chamber will be activated and will remain on until after the physicians have completed the task of pronouncing time of death.

XI. Post-Execution Procedures

A. Witnesses will be escorted from the facility in reverse order of their entering the facility.

i. **[LETHAL INJECTION]** When their release has been approved by the Warden, members of the IV Team will be escorted from the facility.

ii. The physicians will be escorted [redacted].

iii. **[NITROGEN HYPOXIA]** Prior to permitting the physicians entry into the execution chamber to pronounce death, the Warden must:

1. Activate the exhaust fan located inside the execution chamber.

2. [Security/DPI] Verify that the nitrogen gas lockout valve [redacted]

3. Direct an Execution Team member to remove the mask from the condemned inmate's body and hang it from the IV stand.

4. [Security/DPI] [redacted] cause breathing air to flow through the mask for a period of *at least* ninety seconds to ensure that all nitrogen gas has been purged from the breathing gas tubing.

iv. The Warden will escort the physicians into the execution chamber. The physicians will perform a physical examination and pronounce a time of death. Thereafter, the physicians will be escorted from the facility. Representatives from the Escambia County coroner's office will then be escorted into the execution chamber to remove the body from the facility.

v. [Security/DPI] **[NITROGEN HYPOXIA]** The Warden or Assistant Warden will deactivate/depressurize the nitrogen hypoxia system, returning

all line pressures to 0 PSI, utilizing the procedures set forth in Section III of Appendix C (ADOC Nitrogen Hypoxia Execution Procedures). Once the system has been secured, signage used to notify personnel that the system is active and pressurized will be removed and stored. All lockout valves [redacted].

vi. The following day, designated personnel will perform a thorough cleaning of the execution chamber and [redacted].

vii. **Press Conference.** The Public Information Officer (PIO) for the ADOC or the Commissioner's designee will advise the news media that the Order of the Alabama Supreme Court has been carried out.

1. The PIO or the Commissioner's designee will provide the time of death, any last words the condemned inmate stated, and whether any unusual incidents occurred during the execution of sentence.

2. News media representatives who were unable to witness the execution will be provided an opportunity to ask questions of the news media representatives who attended the judicial execution as statutory witnesses.

3. Members of the condemned inmate's family will be provided an opportunity to address members of the news media and to make a statement. Witnesses attending on behalf of the victim(s) will also be provided an opportunity to address members of the news media and to make a statement. At no time will these two groups be allowed to intermingle.

B. **Interment.** The body may be released to the deceased inmate's relatives or authorized representative for funerial proceedings to be conducted at their expense. If the deceased inmate's body is not claimed by family or authorized representatives, it will be the ADOC's responsibility to provide a burial in accordance with state law.

C. An opportunity to meet with the Critical Incident Debriefing Team will be provided to any personnel who wish to do so.

D. The log will be typed by the Assistant Warden's administrative assistant and returned for signatures. Once all signatures have been obtained, the log will be forwarded to the Warden for review, approval, and signature. No copies of the log will be made without the permission of the Warden.

APPENDIX A

ELECTROCUTION (ELECTRIC CHAIR) EXECUTION PROCEDURES

August 2023

SECTION I

SPONGES AND SPONGE PREPARATION

Sponges will be acquired as needed in the event any condemned inmate elects to have their sentence of death carried out by means of electrocution. Acquisition of sponges should be initiated as soon as possible upon receipt of an execution warrant for any condemned inmate who has elected electrocution.

Sponges will be prepared for use according to the following instructions:

1. Sponges will be soaked in a salt and water solution for a twenty-four-hour period prior to the execution. The sponges should be taken from the saltwater solution approximately thirty minutes prior to the judicial execution.

2. Sponges will be temporarily tacked lightly to the electrodes for proper positioning. When positioned, remove the tacking stitches. When ready for use, soak the sponges in fresh water and squeeze dry. Sew sponges with black carpet thread to the screening, placing stitches not over ¾ inch apart and following around the outer edges, down the center, and around the binding posts. The object is to get a good firm contact. Do not pull the stitches too tight, thereby preventing the sponge from soaking up the solution.

3. The leg electrode will go on the left calf below the knee, placed so the binding post is on the outside making it more easily seen and accessed for attaching the electrical wire. The shortened strap should be on this same side so that the buckle can also be reached. When placing in position, pass the long strap around the leg and insert loosely through the buckle. Raise into position with the right hand and tighten the strap through the self-tightening buckle with the left hand. Draw the strap fairly tight, but not so tight that when muscle contractions occur during electrocution there would be danger of breakage.

4. The headset will be made prior to use to approximately fit the condemned inmate's head. Adjustment will be done by means of sliding straps on each side. Place the head set on the head, being careful not to come down too far on the forehead, if possible. Position the short strap with the buckle on the side that the operator will be working on. Pass the long strap under the chin and fasten snugly. Connect the wire to the binding post. Use number 8 R.C. flexible strand 2500 V. insulation for both the head and leg wires. Solder the ends so they won't separate and so the barred ends will go into the hole in the posts. Use the sponges saturated in the salt solution. Squeeze enough solution out with the flat of the hand so that excessive dripping will be avoided. In

making electrical current contact, be careful not to burn the sponge and the outer skin of the condemned inmate.

5. After use, cut the black threads, remove the sponges, and rinse carefully in fresh water. Be very careful not to cut the tan thread that the pieces of sponge are sewn together with. Remove and black thread pieces and rinse the screws thoroughly to remove all traces of saltwater, or corrosion will occur. Keep the straps soft with neatsfoot oil.

6. ***Only saltwater sponges are to be used.*** Sponges should be stored in a clean, dry place.

APPENDIX B

LETHAL INJECTION EXECUTION PROCEDURES

August 2023

Section I: Syringe Preparation

Section II: IV Team – Guidance and Instructions

SECTION I

SYRINGE PREPARATION

The following is the syringe sequence for conducting a judicial execution by means of lethal injection:

Syringe 1:	midazolam hydrochloride	50 mL – 250 mg
Syringe 1A:	midazolam hydrochloride	50 mL – 250 mg
Syringe 2:	saline (sodium chloride)	20 mL
Syringe 3:	rocuronium bromide	60 mL – 600 mg
Syringe 4:	saline (sodium chloride)	20 mL
Syringe 5:	potassium chloride	60 mL – 120 mEq
Syringe 5A:	potassium chloride	60 mL – 120 mEq

Any team member participating in the syringe preparation process shall wear medically approved gloves to ensure the safety of each team member and the integrity of the preparation process.

d. **Syringes 1 and 1A, midazolam hydrochloride procedure:**

1. Remove piercing pin from pouch.
2. Remove cover from piercing pin.
3. Remove flip top from vial of midazolam hydrochloride.
4. Insert piercing pin into the stopper with a downward, twisting motion.
5. Insert sixty-cubic-centimeter (60cc) syringe into piercing pin and twist until secure.
6. Pull back on the syringe to transfer the midazolam hydrochloride into the syringe.
7. For each syringe (1 and 1A), repeat items 1 through 6 as needed.

II. **Syringe 2, sodium chloride (saline) procedure:**

1. Remove piercing pin from pouch.
2. Remove cover from piercing pin.
3. Remove flip top from vial of sodium chloride, or any protective packaging from sodium chloride bag.
4. Insert piercing pin into the stopper with a downward, twisting motion.
5. Insert syringe into piercing pin and twist until secure.
6. Pull back on the syringe to transfer the sodium chloride into the syringe until 20 mL are drawn into the syringe.

III. Syringe 3, rocuronium bromide procedure:

1. Remove piercing pin from pouch.
2. Remove cover from piercing pin.
3. Remove flip top from vial of rocuronium bromide.
4. Insert piercing pin into the stopper with a downward, twisting motion.
5. Insert sixty-cubic-centimeter (60cc) syringe into piercing pin and twist until secure.
6. Pull back on the syringe to transfer the rocuronium bromide into the syringe.
7. Repeat items 1 through 6 as needed.

IV. Syringe 4, sodium chloride (saline) procedure:

1. Remove piercing pin from pouch.
2. Remove cover from piercing pin.
3. Remove flip top from vial of sodium chloride, or any protective packaging from sodium chloride bag.
4. Insert piercing pin into the stopper with a downward, twisting motion.
5. Insert syringe into piercing pin and twist until secure.
6. Pull back on the syringe to transfer the sodium chloride into the syringe until 20 mL are drawn into the syringe.

V. Syringes 5 and 5A, potassium chloride procedure:

1. Remove piercing pin from pouch.
2. Remove cover from piercing pin.
3. Remove flip top from vial of potassium chloride.
4. Insert piercing pin into the stopper with a downward, twisting motion.
5. Insert sixty-cubic-centimeter (60cc) syringe into piercing pin and twist until secure.
6. Pull back on the syringe to transfer the potassium chloride into the syringe.
7. For each syringe (5 and 5A), repeat items 1 through 6 as needed.

Repeat the above procedures for a backup tray of syringes.

Ensure that all items used to prepare the syringes are disposed of in the appropriate manner (i.e., SHARPS container or medical waste).

SECTION II

IV TEAM
INSTRUCTIONS AND GUIDANCE

[Security/DPI] The Warden, or his or her designee, will have two (2) intravenous infusion devices placed in the veins of the condemned inmate and a saline solution available for an infusion medium. Those persons engaged in this activity will be referred to as the IV Team. For these purposes, [redacted] (if necessary) will make up this team. The members of the IV Team shall be currently certified or licensed within the United States. One of the trained medical professionals on the IV Team will be named IV Team Captain by the Warden prior to the execution date.

A. An IV administration set shall be inserted into the outlet of the bag of normal saline solution. Two (2) IV bags will be set up in this manner.

b. The IV tubing shall be cleared of air and made ready for use.

c. The standard procedure for establishing IV access will be used. If the condemned inmate's veins make obtaining venous access difficult or problematic, qualified medical personnel may perform a central line procedure to provide intravenous access.

d. The IV tubing for both set-ups will be connected to the receiving port of the IV access—one (1) for the primary vein and the other for the secondary vein.

e. At this point, the administration sets shall be running at a slow rate of flow (KVO), and ready for the insertion of syringes containing the lethal agents. The Warden, or his or her designee, shall maintain observation of both set-ups to ensure that the rate of flow is uninterrupted. NO FURTHER ACTION shall be taken until the Warden has consulted with the Commissioner regarding any last-minute stay by the Governor or the courts.

APPENDIX C

NITROGEN HYPOXIA EXECUTION PROCEDURES

August 2023

Section I: Calibration of Oxygen Monitoring Equipment

Section II: Operation of the Nitrogen Hypoxia System

Section III: Minimum Acceptable Thresholds

Section IV: Miscellaneous Information/ Procedures

SECTION I

CALIBRATION OF OXYGEN MONITORING EQUIPMENT

[DPI/Executive] [redacted] **(Wall-Mounted) Monitors**

The calibration of the [redacted] wall-mounted [redacted] (oxygen-deficient atmosphere monitors) installed inside the execution facility should be confirmed once every 12 months. This process requires the use of a nitrogen gas and breathing air canister. The Warden shall coordinate this testing.

[DPI/Executive] [redacted] **Personal** [redacted] **O_2 Monitor**

The [redacted] (personal/portable oxygen-deficient atmosphere monitor) should be calibrated approximately once per month. Calibration of these devices is required prior to any execution conducted by means of nitrogen hypoxia.

The following instructions explain how to calibrate these devices:

1. Take the unit outdoors to an area of *fresh* air (avoid exhaust vents, smoking areas, etc.).

2. [redacted]

3. [redacted]

4. [redacted]

SECTION II

OPERATION OF THE NITROGEN HYPOXIA SYSTEM

GENERAL SAFETY REQUIREMENTS APPLICABLE TO ALL EMPLOYEES INVOLVED IN THE OPERATION OF THE NITROGEN HYPOXIA SYSTEM:

[Security/DPI] **NO PERSON SHALL BE PERMITTED TO ENTER [redacted] UNLESS THE FOLLOWING CRITERIA ARE SATISFIED:**

1. The wall-mounted oxygen-deficient atmosphere display for the [redacted] sensor (located [redacted]) indicates the presence of at least 19.5% oxygen in the breathing atmosphere of the [redacted]

2. [redacted] is present to observe the opening of the door [redacted] from a safe distance; and

3. [redacted] remains at the door [redacted] to ensure the safety of the individual initializing/pressurizing the system, except as indicated in the procedures outlined below.

[Security/DPI] **INITIAL SAFETY CHECK ([redacted]):**

4. Verify that both lockout valves (breathing air and nitrogen gas) [redacted].

5. Verify that both pressure gauges reflect 0 PSI line pressure.

6. Use the wall-mounted O_2 monitor to verify that at least 19.5% oxygen is present [redacted].

[Security/DPI] **INITIALIZATION/PRESSURIZATION OF SYSTEM (STORAGE AREA):**

7. Inspect all gas cylinders for damage, corrosion, cracks, or other signs of possibly dangerous conditions. This should include valves and pigtail connections and should verify that no seals or other components are protruding from the valve connections. *Verify that both supply room lockout valves are closed and locked.*

[Security/DPI/Executive] **Pressurizing Breathing Air Banks**

8. Activate the [redacted] manifold for the breathing air banks [redacted]. Allow the gas manifold to completely cycle through its initial operational checks.

9. Open the breathing air cylinders connected to [redacted] See Section III of these Procedures, below.

10. Verify that the [redacted] manifold registers the flow of breathing air and indicates that the pressurized bank has been placed "in service."

11. Open the opposite bank of breathing air cylinders [redacted].

12. Verify that the [redacted] manifold registers the flow of breathing air and indicates that the bank is in "standby" mode.

13. Before pressurizing the nitrogen gas component of the system, verify that the available supply in both breathing air banks meet the minimum acceptable threshold established by Section III. [redacted] Record the outgoing breathing air line pressure for reference and use during Step 19, below.

[Security/DPI/Executive] **Pressurizing Nitrogen Gas Banks**

14. Activate the [redacted] manifold for the nitrogen gas [redacted]. Allow the manifold to completely cycle through its initial operational checks.

15. Open the nitrogen gas cylinder connected to one bank of the gas manifold [redacted] See Section III of these Procedures, below.

16. Verify that the [redacted] manifold registers the flow of nitrogen gas and indicates that the pressurized bank has been placed "in service."

17. Open the other nitrogen gas cylinder comprising the second bank [redacted].

18. Verify that the [redacted] manifold registers the flow of nitrogen gas and indicates that the bank is in "standby" mode.

19. Verify that the available supply of nitrogen gas in both banks meets the minimum acceptable threshold established by Section III. [redacted] Record the outgoing nitrogen gas line pressure for reference and use during Step 19, below.

[Security/DPI/Executive] **Movement of Breathing Gases** [redacted]:

20. [redacted] the breathing air lockout valve [redacted] open the lockout valve [redacted]. *Breathing air is now flowing* [redacted].

21. [redacted] the nitrogen gas lockout valve and [redacted]. PRIOR TO ANY FURTHER STEPS, [redacted] SHALL PROCEED QUICKLY TO [redacted] AND ANNOUNCE LOUDLY, "POSSIBLE NITROGEN ASPHYXIATION HAZARD PRESENT." A placard reflecting activation of the nitrogen hypoxia system shall be displayed [redacted].

22. Afterwards, [redacted] will return to [redacted] and acknowledge that the audible warning has been provided. (Care must be taken to ensure that this process does not take longer than 60 seconds. In no case [redacted] for more than 60 seconds.)

23. [redacted] open the nitrogen gas lockout valve [redacted]. *Nitrogen gas is now flowing* [redacted].

24. For a period of one minute, [redacted] shall listen for the sounds of any leaks (escaping gas) from the cylinders, lines, valves, or joints. Verify that the outgoing line pressure readings for both manifolds remain steady and constant.

[Security/DPI] **Final System Preparations:**

25. [redacted] verify that nitrogen gas and breathing air are present [redacted] by inspecting the pressure gauges [redacted]. Verify that the line pressure indicated by each pressure gauge is consistent with [redacted] the gas manifolds. (See Steps 6 and 12)

26. Inspect the mask assembly (including the hose and attachment straps), [redacted] and the breathing gas supply tubing for damage or defects.

27. [redacted]

28. Connect the breathing gas supply tubing [redacted]. Ensure that the supply tubing attaches firmly and securely [redacted].

29. Connect the mask/mask hose to the supply tubing. Secure the hose or mask in place using the leg restraints on the gurney.

30. Place a portable O_2 meter directly beneath the mask's outflow (or in front of the hose opening), verifying that the mask/hose is securely attached to the gurney by the restraints and that the outflow of the mask/hose will flow over the meter's sensors.

31. [redacted] breathing air lockout valve. [redacted] open the lockout valve [redacted]. *This will cause breathing air to flow to the mask.*

[redacted] enter the execution chamber to verify that the portable O_2 meter shows that breathing air is being supplied to the mask. Meter readings should be observed for at least 60 seconds with readings remaining higher than 20% oxygen.

[Security/DPI] **Procedures for Pre-Execution Inspections Required by ADOC Protocol:**

NOTE: THESE INSTRUCTIONS DO NOT APPLY TO ACTIVATION OF THE SYSTEM FOR THE PURPOSE OF CONDUCTING A JUDICIAL EXECUTION BY MEANS OF NITROGEN HYPOXIA.

SKIP TO STEP 43 WHEN ACTIVATING THE SYSTEM FOR THE PURPOSE OF CONDUCTING A JUDICIAL EXECUTION.

33. [redacted] nitrogen gas lockout valve.

34. Ensure that no one is present inside of the execution chamber through audible and visual means.

35. [redacted] open the nitrogen gas lockout valve [redacted]. *THIS WILL CAUSE NITROGEN GAS TO FLOW TO THE MASK/HOSE!*

36. Loudly announce, "NITROGEN GAS PRESENT IN THE EXECUTION CHAMBER."

37. [redacted] listen for the portable O_2 meter to begin audibly alarming. [redacted] Verify that the portable O_2 meter audibly alarms for at least 45 seconds.

38. Restore breathing air [redacted]. Shut off the nitrogen gas [redacted] **the nitrogen gas lockout valve** [redacted]

39. Activate the exhaust fan inside the execution chamber.

40. Allow breathing air to flow for *at least* 60 seconds, or until the O_2 meter ceases to alarm (WHICHEVER OCCURS LAST).

41. Turn off the exhaust fan inside of the execution chamber.

42. Close the [redacted] breathing air lockout valve [redacted].

SKIP TO STEP 45.

Procedures for Execution by Nitrogen Hypoxia:

NOTE: THESE INSTRUCTIONS APPLY WHEN THE SYSTEM HAS BEEN ACTIVATED (STEPS 1–32) FOR THE PURPOSE OF CONDUCTING A JUDICIAL EXECUTION. STEPS 33-42 SHOULD HAVE BEEN SKIPPED IN THIS EVENT).

43. Close the breathing air lockout valve [redacted].

44. Recover the portable O_2 meter used for Steps 30-32 and stow the mask assembly in preparation for the judicial execution.

AT THIS TIME, THE SYSTEM IS IN "STANDBY" MODE UNTIL THE WARDEN IS PREPARED TO BEGIN THE PROCEDURE AS DESCRIBED IN SECTION X(A) OF THE ADOC EXECUTION PROTOCOL.

[Security/DPI/Executive] **System Shutdown Procedures:**

NOTE: [redacted] ***Always shut down the nitrogen gas component of the system prior to shutting down the breathing air component.***

45. When the system is ready to be depressurized, place a portable O_2 meter directly beneath the mask's opening (or in front of the detached hose), after ensuring that the mask/hose is securely attached to the gurney by the restraints and that the gas outflow is directed toward the meter's sensor.

46. [redacted]

47. Activate the exhaust fan inside the execution chamber.

48. Ensure that no one is present inside of the execution chamber through audible and visual means.

49. [redacted] close [redacted] both nitrogen gas banks. Close [redacted] both breathing air banks. [redacted]

50. [redacted] open the nitrogen gas lockout valve [redacted]. *This will cause nitrogen gas to flow into the mask/hose.*

51. Loudly announce, "NITROGEN PRESENT IN THE EXECUTION CHAMBER."

52. [redacted] listen for the portable O_2 meter to begin audibly alarming. [redacted] Keep the nitrogen gas activated until the reading on the pressure gauge indicates 0 PSI.

53. [redacted] verify that the outgoing line pressure reflected by the [redacted] is 0 PSI. Record the available supply of nitrogen gas remaining in each nitrogen gas bank. Deactivate the [redacted] manifold.

54. Close the nitrogen gas lockout valve [redacted]

55. [redacted] **NOTE: At this point, signage notifying personnel of the activation of the nitrogen gas portion of the system should be removed and stowed.**

56. Open the [redacted] breathing air lockout valve. *This will cause breathing air to flow to the mask/hose. Any nitrogen gas remaining in the supply line will be purged by the breathing air.* [redacted]

57. [redacted] Keep the breathing air activated until the reading on the pressure gauge indicates 0 PSI.

58. [redacted] verify that the outgoing line pressure reflected by the [redacted] manifold is 0 PSI. Record the available supply of breathing air remaining in each breathing air bank. Deactivate [redacted] manifold.

59. Close the breathing air lockout valve [redacted]

60. [redacted] verify the following:

    a. [redacted]

    b. [redacted]

    c. [redacted]

61. [redacted]

SECTION III

MINIMUM ACCEPTABLE THRESHOLDS

The following are the minimum acceptable supply thresholds for each breathing gas required to perform a judicial execution by means of nitrogen hypoxia:

Breathing Air: **500 PSI (each bank)**

Nitrogen Gas: **500 PSI (each bank)**

The Warden shall monitor and maintain an awareness of the gas supplies present in all breathing gas banks.

[Security/DPI] [redacted]

SECTION IV

MISCELLANEOUS INFORMATION & PROCEDURES

1. [DPI/Executive] **Turning off [redacted] O_2 Monitor "Fall" Alarm**

[redacted] O_2 Monitors use [redacted] to monitor movement. The devices are very likely to alarm if placed in a horizontal or leaning position [redacted]. While this is an important safety feature when personnel are working outside of another person's line of sight, this feature can cause temporary disruptions and unnecessary concern when the fall alarm activates while the nitrogen gas component of the system is pressurized.

[redacted] The "fall" alarm can be deactivated using the following procedure:

1. [redacted]
2. [redacted]
3. [redacted]
4. [redacted]
5. [redacted]

2. [Security/DPI/Executive] [redacted]

[redacted]

[redacted]

Exhibit 2

Resume
of
Philip Haig Nitschke

Personal Background

Date of Birth	[redacted]
Place of Birth	Ardrossan, South Australia
Residential Address	[redacted]
Contact	[redacted]
Email	philip@exitinternational.net
Websites	www.exitinternational.net www.peacefulpillhandbook.com www.exitswitzerland.com
Marital status	Married to Fiona Stewart (PhD, LLB)

Education

1988	MBBS (MD) University of Sydney
1973	PhD (Physics) Flinders University (Adelaide) Thesis: Laser diagnostics of normal ionising shockwaves.
1969	BSc (Hons) University of Adelaide Thesis: Laser holographic imaging.

Professional Background

1997 – 2023	Founder & Director, Exit International (End of life information & rights advocacy non-profit)
2022	Founder & Director, Exit Generation 501(c)3
1995 – 1997	Director, Ausdoc (Mobile, outreach medical service)
1989 – 1995	Resident Medical Officer & Radiation Protection Officer Royal Darwin Hospital

About Exit International

Dr Philip Nitschke founded Exit International in 1996 following the overturning of Australia's *Rights of the Terminally Ill Act*.

Exit International is a global life choices information and advocacy non profit organization. Key activities include:

- Community education program via public meetings & workshops
- Research & Development Program on peaceful/ reliable end of life methods (gases, poisons, drugs)
- *Peaceful Pill Handbook* book (see: www.peacefulpillhandbook.com)
- *Going to Switzerland: how to plan your final exit* book (this new book is the first of its kind to advise foreigners on assisted suicide in Switzerland) (see: www.exitswitzerland.com)

Clinical Expertise under Rights of the Terminally Ill Act

In 1995, the Northern Territory of Australia became the first place in the world to legalise a patient's right to request a legal, lethal, voluntary injection. This law operated for 9 months before being overturned by the Australian Federal Parliament.

On 22 September 1996, Dr Philip Nitschke became the first physician to ever administer a legal, lethal, voluntary injection.

A total of four people used the Australian law. The decision to use a three-drug protocol was determined by Dr Nitschke after research and consideration of US lethal injection protocol at the time. The 'Deliverance Machine' was developed to sequentially administer 3 drugs. Experience with the 3-drug protocol led to its abandonment in favour of a single drug (pentobarbital sodium).

With the overturning of the Australian euthanasia legislation in 1997 attention turned towards public education of the elderly and seriously ill (who fall outside of the strict criteria of Medical Aid in Dying MAiD). The work of Exit is predicated upon an active R&D program focused on lethal drugs, substances, the use of inert gases and poisons.

Principal Exit Books

The Peaceful Pill Handbook

The *Peaceful Pill Handbook* is co-authored by Drs Philip Nitschke and Fiona Stewart. The book was first published in 2006 with the aim of providing seniors and people who are seriously ill with the most up-to-date information about how to achieve an elective, peaceful and reliable death at a time of their choosing.

The *Peaceful Pill eHandbook* is principally published as an online subscription with constant updates. The contents of the book are constantly under review as reliable, accurate information about an elective, peaceful and reliable death is a fast-changing field. For example, there can be sudden changes in the availability of certain drugs and substances. Exit R&D also often leads to breakthroughs in methodology: for example, the shift from helium to nitrogen gas.

The contents of the *Peaceful Pill Handbook* include:

The Physiology of dying, All about lethal drugs & poisons, Lethal sedative drugs, Lethal cardiac drugs, US 5-Drug Mix, Supplementary drugs, Lethal Inorganic Salts, Inert Gases, Sarco, Poisonous Gases, VSED (voluntary stopping eating & drinking), Online Safety & Privacy, When it all goes wrong?, VAD – MAiD Laws around the World and the Swiss Option.

The appendix includes the Exit Reliability - Peacefulness Table which ranks all methods discussed, against these and other key criteria.

Since 2016, the book has been translated into Dutch, Italian, German, French and Spanish and continues to be the global go-to guide on end of life methods for the elderly and seriously ill.

See: www.peacefulpillhandbook.com

Going to Switzerland: how to plan your final exit

Going to Switzerland: how to plan your final exit is co-authored by Drs Fiona Stewart and Philip Nitschke. Published in July 2023, this book is the first and only book to provide practical guidance on how to access an assisted suicide in Switzerland.

As the only country to allow foreigners to fly in to die, *Going to Switzerland* covers the Swiss legal framework, qualification criteria, the differences between clinics including different drug administration protocols, issues around visas and immigration control, the involvement of family and friends as well as cremation and death certificates.

See: www.exitswitzerland.com

Inventions

Deliverance Machine
The 'Deliverance Machine' was developed for the self-administration of intravenous drugs and was used by four terminally ill patients in Australia to self-administer euthanasia in 1996-97. The Deliverance Machine was acquired by the British Science Museum in 1997.

http://www.scienceandsociety.co.uk/results.asp?image=10323706

http://en.wikipedia.org/wiki/Euthanasia_device

BBC News 'Euthanasia machine comes to UK', 5 June 2000.
http://news.bbc.co.uk/2/hi/health/778139.stm

3D-Printed Sarco Device
The Sarco euthanasia capsule has been created to provide an elective, lawful, low oxygen, low carbon dioxide death. The Sarco was unveiled at Venice Design (2019) and has since been exhibited at the Cube Design Museum NL (2020) and the Museum of Sepalchral Culture DE (2021).

See https://www.exitinternational.net/sarco (Sarco.design)

Publications (selected)

Books

Nitschke, P. & Stewart, F. (2005) *Killing Me Softly: Voluntary Euthanasia and the Road to the Peaceful Pill*. Penguin.

Damned if I Do (2013) with Peter Corris. Melbourne University Press.

Nitschke, P. & Stewart, F. (2006 - present) *The Peaceful Pill Handbook*. Exit International.

Stewart, F. & Nitschke, P. (2023) *Going to Switzerland: how to plan your final exit*. Exit International.

Chapters - Articles

Kissane, D., Street, A. & P. Nitschke 'Seven Deaths in Darwin: case studies under the Rights of the Terminally Ill Act, Northern Territory, Australia'. *Lancet* 1998; 352: 1097–102.

Nitschke, P. & Stewart, F. (2009) 'Dying Downunder'. In Nan Bauer-Maglin and Donna Perry *Final Acts: Death, Dying and the Choices We Make*. Rutgers University Press, New Jersey.

Media

Over the past 27 years, the work of Philip Nitschke in the area of end of life advocacy/ practices has been covered extensively by the global media including:

Reuters, AP, AFP, ABC News Nightline, Newsweek, CNN, Time Magazine, the New York Times, the Washington Post, the LA Times, etc.

An example of early coverage includes:

New York Times
Foreign desk 'Australian Man First in World To Die With Legal Euthanasia' *New York Times* 26 September 1996.
http://www.nytimes.com/1996/09/26/world/australian-man-first-in-world-to-die-with-legal-euthanasia.html?scp=1&sq=philip%20nitschke&st=cse

Documentaries

Philip Nitschke continues to be the subject of numerous documentaries & films including:

Sweet Death (2023) – Analeine Cal y Major, Mexico
Time to Die (2019) – Vice, UK
35 Letters (2015) – Winner Sydney Film Festival
License to Kill (2013) - Al Jazeera
Mademoiselle and the Doctor (2004) – Janine Hosking (Hollywood Film Festival Winner 2000 My Khmer Heart)

Parliamentary Presentations

Philip Nitschke is frequently invited to present to Parliamentary committees in Australia and elsewhere. He next appearance will be in Dublin Ireland at the Irish Joint Committee on Assisted Dying on 28 November 2023.

Keynotes

Philip Nitschke is a frequent keynote speaker on end of life issues at conferences, lecture, festivals & debates around the world. Most recently he presented at the technology conference 'Login23' in Vilnius, Lithuania.

Awards

1996	Rainier Foundation Humanitarian Award, USA
1998	Australian Humanist of the Year
2002	Charles Southwell Humanitarian Award New Zealand
2005	Finalist, Australian of the Year
2006	Finalist, Australian of the Year

Appendix F - Deposition of Cynthia Stewart-Riley (DE62-33), R.App.418-486a - SEALED

Appendix G - Declaration of James Houts (DE62-71), R.App.487a-510a - SEALED

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iMRI
Investigative Magnetic Resonance Imaging

Brain MRI Findings of Nitrogen Gas Inhalation for Suicide Attempt: a Case Report

Young-eun Kim, Donghoon Lee, Minji Kim, Hokyoung Hwang
Department of Radiology, Seoul Medical Center, Seoul, Korea

South Korea has the highest reported suicide rate among all countries belonging to the Organization for Economic Cooperation and Development. Nitrogen is a colorless, odorless and nontoxic gas. Nitrogen gas has, however, been recently used as a method of attempted suicide, its nontoxity notwithstanding. We herein report on an unusual case involving a 30-year-old male who presented with symptoms after a suicide attempt by nitrogen inhalation. Diffusion-weighted imaging of his brain was showed curvilinear high signal intensity in the bilateral frontal and right occipital cortices, with subtle low apparent diffusion coefficient value. In addition, T2-weighted images and fluid attenuated inversion recovery images revealed subtle high signal intensity in the bilateral frontal cortices, basal ganglia and occipital cortices with contrast enhancement.

Keywords: Nitrogen; Suicide; Magnetic resonance imaging

Case Report

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INTRODUCTION

According to the Organization for Economic Cooperation and Development (OECD) report in 2015, South Korea had the highest suicide rate among all countries that belong to the OECD.

In contrast to the pattern in most OECD countries, death rates from suicide in Korea have risen significantly in the last decade (1). Recently, several organizations and internet communities in favor of assisted suicide have promoted the use of nitrogen (N2) gas to that end (2). Nitrogen gas has caused accidental deaths in industrial or laboratory explosion, and during scuba diving and anesthesia (2). Although it is reported that industrial nitrogen asphyxiation hazards resulted in 80 deaths during the period 1992 through 2002, there is a paucity of documentation regarding nitrogen gas as a means of committing suicide (2, 3). Nitrogen is a colorless, odorless, nontoxic, and generally inert gas that is a normal component (78.09%) of the atmosphere, at standard temperature and pressure (4). However, nitrogen can be hazardous when it displaces oxygen resulting in hypoxic damage (2, 3). Nitrogen intoxication manifests with various symptoms such as progressive fatigue, loss of coordination, purposeful movement and balance, nausea, a complete inability to move and unconsciousness (2, 4). Here, we describe a case of brain magnetic resonance imaging (MRI) findings associated with nitrogen gas inhalation, which have been rarely reported previously.

CASE REPORT

A 30-year-old man visited the emergency department with complaint of numbness of the bilateral upper extremities. He had a past medical history of a diagnosed "gambling disorder". He reported that a week before, he attempted suicide by inhaling pure nitrogen gas with people he had met through an internet suicidal community, however, he did not present with any symptoms. His stated reason for attempting suicide was financial difficulty. He reported that five days prior to the emergency room visit, he attempted suicide again, on this occasion by inhaling nitrogen gas through a plastic bag. And after that he lost consciousness for a while. A few hours later, he recovered consciousness but awoke with symptoms of diplopia, headache and stiffness of both hands with slow progression over the course of the past three days. On hospital visiting day, he presented with complaint of numbness and cramping of both hands.

His vital signs were stable on admission. His laboratory tests were all within normal range including the hemoglobin level (13.8 g/dL), partial pressure of oxygen in the arterial blood (PaO2) (107 mmHg), and saturation of oxygen in the arterial blood (SaO2) (98.4%).

An initial brain computed tomography (CT) was obtained and revealed no significant abnormality. Diffusion-weighted imaging (DWI) of the brain (Magnetom Avanto 1.5T, Siemens, Erlangen, Germany) was obtained and showed curvilinear high signal intensity in the bilateral frontal and right occipital cortices with subtle low apparent diffusion coefficient (ADC) value (Fig. 1).

On hospital day five, electroencephalography was

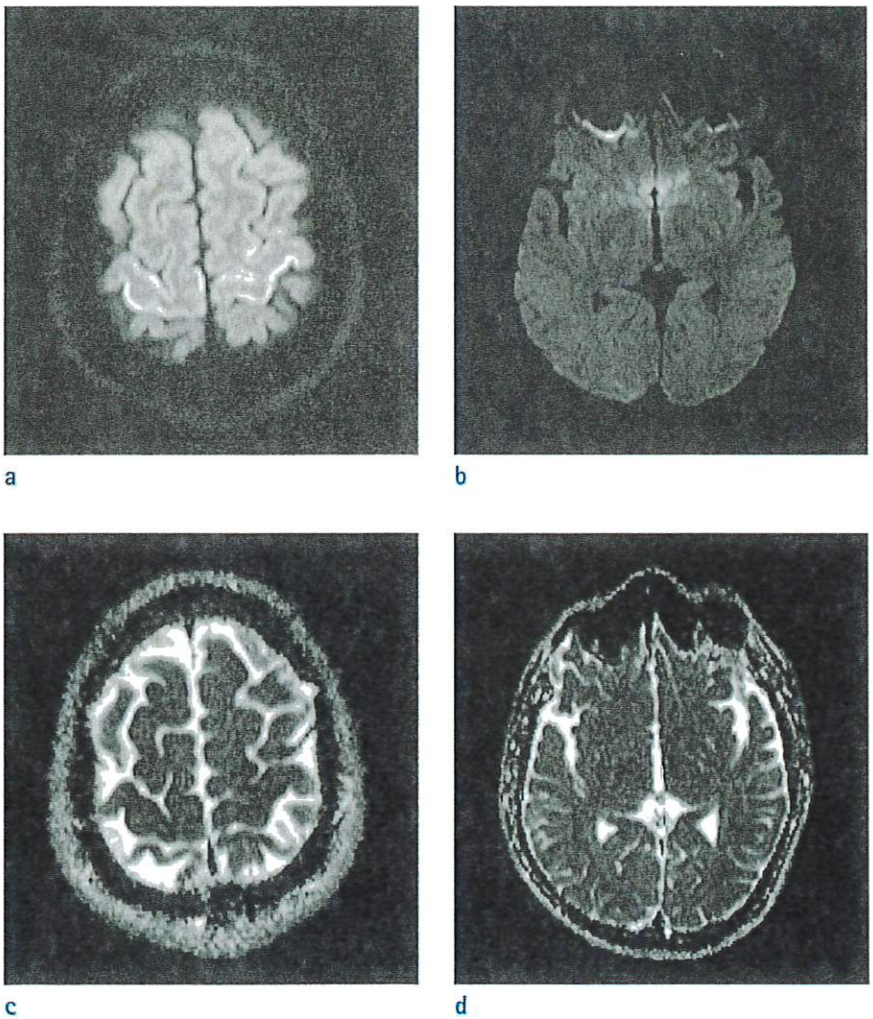

Fig. 1. A 30-year-old man after suicide attempt by nitrogen inhalation through a plastic bag. (a, b) Diffusion-weighted image shows curvilinear high signal intensity (SI) in the bilateral frontal and right occipital cortices. (c, d) Apparent diffusion coefficient map shows low value in the bilateral frontal and right occipital cortices.

performed and showed no abnormality.

MRI was obtained on a 3.0T system (Achieva, Philips Healthcare, Best, The Netherlands) on hospital day ten. T2-weighted images (T2WI) and fluid attenuated inversion recovery (FLAIR) images revealed subtle high signal intensity in the bilateral frontal cortices, basal ganglia (Fig. 2) and occipital cortices (Fig. 3). The lesions of the occipital cortex show irregular enhancement on the contrast-enhanced T1-weighted images (T1WI) (Fig. 3).

The patient's symptoms improved with supportive care and psychiatric management. He was discharged, without any documented neurological deficits, on hospital day fifteen.

DISCUSSION

Suicide has become a critical issue in South Korea, according to the OECD report (1). Potential means and methods of suicide commonly appear on web searches and are easily accessed over the internet (5). Nitrogen gas as a means of suicide was invented by Dr. Philip Nitschke in 2007, and has been frequently and widely described since that time (2). Last year, suicide by nitrogen gas received coverage on the news in Korea. Nitrogen is safe to breathe only when mixed with the appropriate amount of oxygen. Nitrogen is a colorless, odorless, nontoxic and generally inert gas that is a normal component (78.09%) of the atmosphere, at standard temperature and pressure (4). However commercial nitrogen gas is usually stored in large

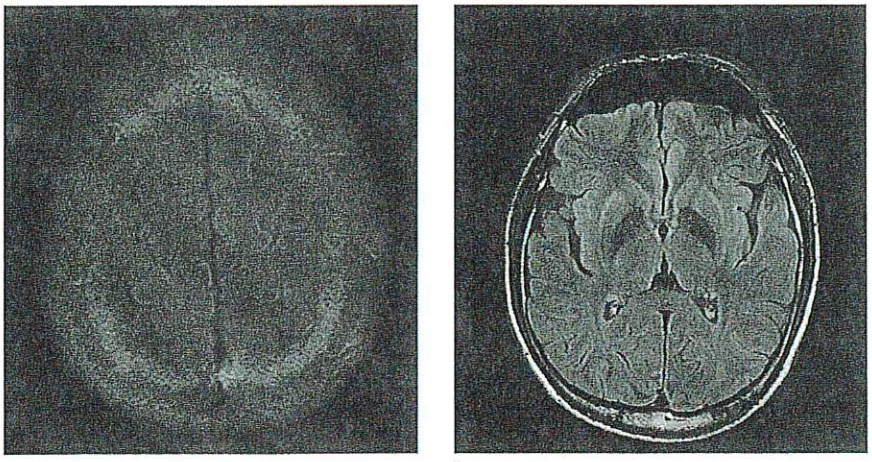

Fig. 2. Follow-up MRI (ten days later), FLAIR image shows curvilinear high signal intensity in the bilateral frontal and bilateral basal ganglia. FLAIR = fluid-attenuated inversion recovery

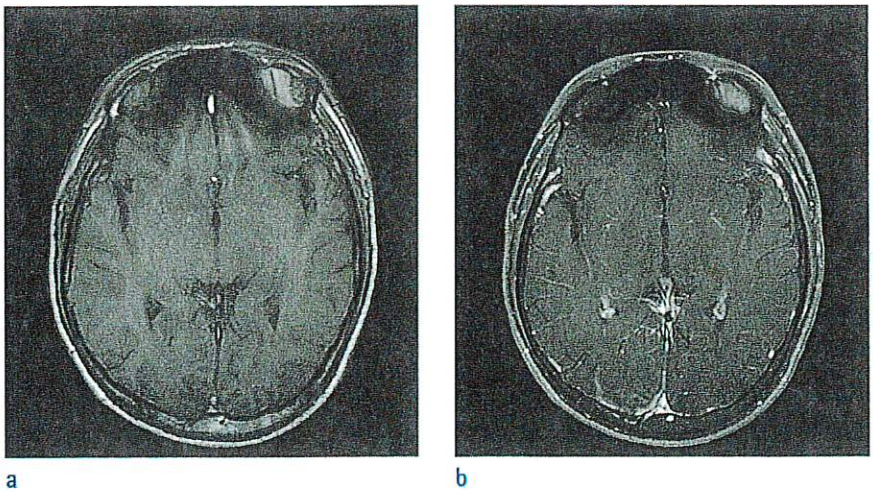

Fig. 3. Follow-up MRI (ten days later). (a) Axial T1-weighted MR image shows iso-signal intensity in the bilateral occipital cortices. (b) Axial contrast-enhanced T1-weighted MR image shows irregular enhancement in the bilateral occipital cortices.

cylinders (2). These pure nitrogen gas can be hazardous when it replaces oxygen and causes various symptoms such as progressive fatigue, nausea, partial or complete physical paralysis and/or unconsciousness (2, 3). Nitrogen gas has caused accidental deaths in industrial settings and laboratory explosions, as well as during scuba diving and surgical anesthesia (2). When a diver rapidly ascends from depth, nitrogen gas bubbles form in the tissues and bloodstream (nitrogen narcosis). Nitrogen gas embolisms usually present, radiographically and clinically, with a stroke-like appearance of the gray matter, and can also cause white matter abnormalities due to the high lipid-solubility of nitrogen (6). There are, however, few if any radiographic reports reflecting MRI findings arising, purely and solely, from nitrogen gas inhalation. Furthermore, the incident of nitrogen gas inhalation related to the suicidal attempt was reported from a medical-legal perspective. These reports have described only autopsy - postmortem - findings and there are very few reports regarding survivors of nitrogen gas inhalation in the standard atmosphere (2, 4). The hypoxia triggered by pure nitrogen inhalation is associated with serious complications affecting the brain, and it is critical to recognize the imaging findings which are specific to nitrogen intoxication (7).

In our case, DWI and FLAIR high signal intensity lesions were observed in the brain cortex. These MRI findings are identical when compared with those produced by the hypoxic injury. In moderate-to-severe cases of hypoxic encephalopathy, vulnerable areas are the brain cortex, especially the perirolandic, and medial occipital cortices with precentral gyri, and these findings are probably due to cytotoxic edema (7, 8). Cortical enhancement is usually seen after a few weeks, and is likely due to breakdown of the blood-brain barrier and impaired autoregulation. However, it is thought that early gyral contrast enhancement could be related to the severity, or extent, of the hypoxic brain damage leading to the breakdown of the blood brain barrier and reperfusion of the hypoxic ischemic brain (9).

Tur et al. (10) reported on a case of nitrogen gas inhalation which occurred in the context of an industrial accident. It was noted that the patient initially presented with altered mental status and involuntary movement. After high-flow oxygen therapy, the patient was awake and alert ten hours after the incident, and was eventually discharged without residual neurologic deficit. It is similar to our patient's clinical presentation. Treatment of nitrogen intoxication mainly consists of supportive care and a concerted effort to prevent or obviate any additional or ongoing injury (8). In addition, nitrogen gas is lighter than air. Therefore, it disperses quickly in the atmosphere. Therefore and although nitrogen gas may serve as an effective means of committing suicide, this method of self-murder would not prove inimical to the health of, or fatal, to anyone that might happen to stand next to the body during recovery (2). Furthermore, any patient who has attempted suicide, should receive appropriate psychiatric intervention and treatment (5).

Other gases used in suffocation and suicide are more commonly-encountered gases such as carbon dioxide, carbon monoxide and methane that result in depression of the central nervous system by exclusion of oxygen (4, 5). In some cases, the method of the attempted suicide is difficult to determine as often, would-be suicide victims arrive in a state of unconsciousness or if conscious, they are embarrassed or otherwise unwilling to provide a complete or truthful medical history or explanation for their current condition. However, some gases do produce specific and characteristic imaging findings on brain MRI. Carbon monoxide most often involves the globus pallidus, although the cerebral white matter and basal ganglia are frequently involved as well (5). If brain MRI findings of carbon monoxide inhalation involve other basal ganglia, it is difficult to make a differential diagnosis, from possible nitrogen inhalation or other deep anoxic injury. It has been determined that the caudate and putamen are the most vulnerable in hypoxic insult (5, 7).

In conclusion, we are reporting on a rare case of nitrogen inhalation occasioned by a failed suicide attempt which, on radiographic examination, presented as DWI and FLAIR high signal intensity in the frontal and occipital cortices with contrast enhancement of occipital cortices. Awareness and sensitivity to these attributes, these specific characteristics, will hopefully allow for earlier diagnosis and optimal management of the sequelae of acute nitrogen inhalation brain injury.

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Hong Kong Journal of Emergency Medicine

Asphyxia due to accidental nitrogen gas inhalation: a case report
一個不慎吸入氮氣引致窒息的個案

F Çalışkan Tür and E Aksay

Intoxications resulting from asphyxiate gases, such as nitrogen can cause hypoxia and even death. We present a case of a patient with nitrogen intoxication due to inadvertent industrial exposure. In this case, the patient survived and the outcome was different from those reported in the literature. For patients presenting to the emergency department from a workplace with a history of loss of consciousness after using of self-contained breathing apparatus, possibility of nitrogen or other simple asphyxiate gas intoxication should be considered seriously. (Hong Kong j.emerg.med. 2012;19:46-48)

窒息性氣體中毒例如氮氣能導致缺氧甚至死亡。我們發表了一個由於工業上的疏忽接觸造成氮氣中毒的個案。這個案例中的病人能存活其結果有異於文獻中的其他病人。在急症室，有些從工作地點來看病的病人，如果有一個曾經使用過獨立式呼吸器並有昏迷的病史，那麼我們就要認真地考慮他患有氮氣和其他簡單的窒息性氣體中毒的可能性。

Keywords: Inert gas narcosis, nitrogen narcosis, occupational exposure, petroleum, poisoning

關鍵詞：惰性氣體的麻醉、氮氣麻醉、工業上的接觸、石油、中毒

Introduction

Nitrogen is an inert, gas which is heavier than air. It is also colourless, odorless and tasteless gas and constitutes to approximately 78% of the Earth's atmosphere. Nitrogen like argon, methane, propane and carbon dioxide considered to be a simple asphyxiate gas. It displaces oxygen from the inhaled air causing life threatening condition. Reduction of atmospheric oxygen to less than 25% of normal can produce unconsciousness in seconds and death within minutes.[1] Toxicity and deaths related to nitrogen inhalation in underwater diving with self-contained underwater-breathing apparatus (SCUBA) and suicide victims have been reported in the early literature.[2] However, there is a limited incidence of asphyxiation in work-related industrial incidents due to nitrogen. We presented a workplace incident in an oil refinery, resulting from the inhalation of pure nitrogen gas, and potential risk factor for toxic gas inhalations is emphasized.

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Case

A 41-year-old oil refinery worker with the initial diagnosis of 'harmful gas intoxication' in workplace was referred to our hospital from a small community hospital. The patient had used a self-contained breathing apparatus combined with a helmet inside a closed tent during sand blasting for metal surface cleaning. The patient was suspected to connect by fault his air-respirator to nitrogen source instead of oxygen. According to his colleagues, the patient was found collapsed inside the tent though the down time was not known. Initial first aid was provided on site by the co-workers and the patient was sent to a nearby emergency department. He was found to have difficulty of breathing and altered mental status. His initial vital signs were reported as blood pressure 140/90 mmHg, SpO_2 87% on room air, and blood glucose 9.9 mmol/L. The patient was started on high flow O_2 and was given

nebulised salbutamol (5 mg) and intravenous (IV) metilprednisolone (160 mg) prior to the transfer to our hospital.

The patient's vital signs upon presenting to our emergency department (ED), approximately 3 hours after the incident, were as follows: blood pressure 117/71 mmHg, pulse 111 bpm, respiratory was laboured and rate was 30 per/minute, SpO_2 93% on room air (if he was deoxygenated) and he was lethargic with a Glasgow Coma Scale of 10. No fever was noted. Involuntary movement in the form of rapid sitting up from a supine position was observed. On physical examination his breathing sounds were clear and equal bilaterally. Bilateral subconjunctival haemorrhage was noted. No sign of head trauma were observed. Laboratory results including cardiac markers and electrolytes were normal except for the following: glucose at 10.6 mmol/L, urea 16.1 mmol/L, aspartate transaminase 41 U/L (range <35 U/L), creatin kinase 403 U/L (range 171 U/L), amylase 229 U/L (28-100 U/L), white blood cell 23.9 K/uL (range 4-10 K/uL). Venous blood gas analysis revealed the following: pH 7.37, pCO_2 39 mmHg, pO_2 35 mmHg, HCO_3 22.5 mmol/L, BE -2.8 mmol/L. Computed thorax tomography revealed pneumonic consolidation in the bilateral posterior segments of lower lobe (Figure 1). Cranial computed tomography was normal. Five milligram of midazolam was administered intravenously for agitation. The patient's vital signs two hours after the arrival on our ED were as follow: blood pressure 99/56 mmHg, pulse 106 bpm, respiratory rate 24 per/minute and SpO_2 97% with supplemental oxygen (10 L/min via face mask).

A neurosurgery consultation was undertaken 10 hours post incident and the patient was noted to be alert, awake and oriented with no neurological deficit. There was no need of neurosurgical intervention. The patient was evaluated by an anesthesiologist due to high respirator rate and lethargy and was initially considered admitting to ICU. Owing to the lack of intensive care unit beds, the patient was transferred to a specialised chest disease hospital.

He was fully alert next day but he had no recall of the event with anterograde amnesia of the subsequent 24 hours. He was treated with cefuroxime 750 mg q8H intravenously and clarithromycin 500 mg/per day orally for 14 days. Patient did not develop any fever. He had paracardiac heterogenic hyperdensity shown on his first chest X-ray and multiple basal atelectasis shown on the thorax tomography examination. The abnormality resolved on follow up chest X-ray examination. The clinician had investigated him for tuberculosis for 3 weeks. The patient was discharged without any permanent sequel or complication.

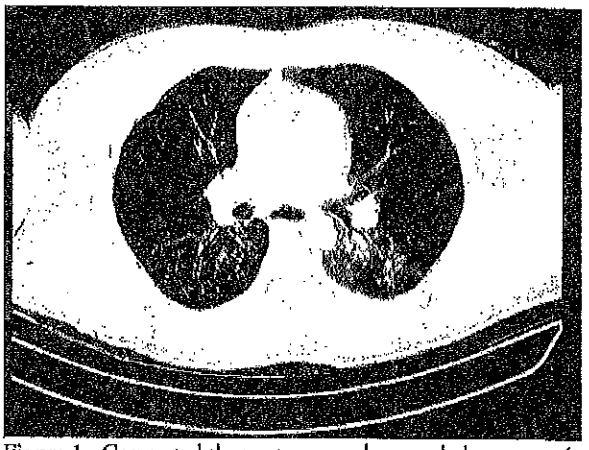

Figure 1. Computed thorax tomography revealed pneumonic consolidation in bilateral lower lobe posterior segments. A manikin study to compare video-optical intubation stylet versus Macintosh laryngoscope used by novice in normal and simulated difficult airway intubation.

Discussion

In industrialised nations, contact with chemicals has a serious potential risk of intoxication. Simple asphyxiates, such as acetylene, hydrogen, neon, argon and nitrogen are used in petro-chemical, aviation and automobile industries in welding and illumination gases. They can reach dangerous levels in closed and poorly ventilated quarters.[1-5] However reports related to asphyxiate gas inhalation toxicity in the literature are mainly associated with divers using scuba equipment and suicide victims. Dorevitch et al reported fatal asphyxiation incidents of the construction workers in the United States between 1990 and 1999. toxic gas inhalation.[5] It was mentioned that nitrogen and argon were the most frequently encountered asphyxiate gases (10.3% and 4.6% respectively). The rescuers were also exposed to excessive asphyxiate gases death rate of the rescued workers was stated as 10.3%. The most common mechanism cause of the incidents was similar to our case: wrong connection of the air and the victimized workers were exposed to excessive asphyxiate gases.

Although nitrogen is considered to be nontoxic to humans, it does not support life and may rapidly lead to asphyxia (2-3 minutes) through the depletion and displacement of oxygen. Nitrogen is therefore a suffocating gas that results in depression of the central nervous system, similar to carbon dioxide.[6] The pathophysiology would vary according to the inhaled oxygen concentration. An oxygen concentration from: 6-8% would cause fainting within a few minutes. An oxygen concentration below 6% would lead to fainting within a few seconds, with possible severe brain damage or even death if unattended.[5,7] Severe convulsions have been observed with pure nitrogen asphyxia after 2-3 minutes[7] In the animals, vigorous jumping (possible avoidance movement) have been observed due to asphyxia with nitrogen. This was also seen in our patient. Subconjunctival haemorrhage due to compression of the neck veins by the face mask had also been described.[8]

Our patient presented to the emergency department with the classical symptoms of nitrogen toxicity findings: sudden loss of consciousness, desaturation, lethargy, involuntary movement, dyspnoea, and subconjunctival haemorrhage. Although, hypoxia and lethargy could occur due to disease conditions like epilepsy and substance/ drug exposure, the patient's history was highly compatible with simple asphyxiate gas intoxication.

The recommended treatment is as follows: patient should be placed in clean, well-ventilated area and prompt resuscitation should be started.[9] There is no specific antidote for nitrogen gas intoxication. For those patients who could be promptly evacuated, they usually have mild exposure and good prognosis. However, prolonged exposure may result in complications (like inhalation injury, seizures, coma, and cardiac arrest) and is associated with a poor prognosis. Bronchodilators can be given in patients with bronchospasm. Use of corticosteroids is controversial because it increases the incidence of bacterial pneumonia as a late complication of inhalation injury. In our patient, unnecessary high dose of metilprednisolone had been administrated in community hospital (that could be related to the heavy body weight and state of bronchospasm of the patient). Patients are proposed for observation for up to 24 hours due to upper airway obstruction or lower airway complications. In our case, treatment with supplemental oxygen and nebuliser therapy led to good outcome of lung symptoms.

Notably, this type of work incident and poisoning is completely preventable. The use of direct reading instruments with alarms for hydrogen sulfide, carbon monoxide, and oxygen or other asphyxiate gases could have prevented the majority of poisoning fatalities.[5] Checking the compressed air sources should be done before the use of air-line respirators. Using colour codes, writing the content and pin systems (different gas cylinders with different connection pins) may prevent misconnection and the tragic events. Training on the use of air-supplied respirators is a must for these workers.

Conclusion

Gases with asphyxiate properties are used in a variety of industries and services. They are nontoxic to humans in low concentrations. However, it can be life threatening in cases of severe exposure. In workplace accident, for patient who presents to the emergency department with a history of loss of consciousness while using self-contained breathing apparatus, nitrogen or other simple asphyxiate gas exposure should be taken into consideration seriously.

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Death by self-inflicted asphyxia with helium – First case reports from Norway and review of the literature

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ABSTRACT

An increasing number of asphyxia suicides by inhalation of inert gases have been reported from different parts of the world over the last decade. So far this phenomenon has not been described in our country. This article presents the first two case reports from Norway of presumed suicide by asphyxiation due to helium inhalation from a closed plastic bag over the head. In both cases a forensic autopsy, which included comprehensive toxicological analysis, was requested and performed. In the two cases death was attributed to asphyxia due to helium inhalation, and suffocation due to a plastic bag over the head and aspiration of gastric contents, respectively. Toxicological analysis revealed no findings contributing to the deaths. The absence of toxicological and autopsy findings to determine the cause of death in such cases may represent challenges of clinical and forensic significance. In contrast to the promotion of this method by euthanasia interest groups for the terminally ill reported suicides by helium asphyxiation primarily involve relatively young individuals suffering from psychiatric and/or substance use disorders, and not from terminal illness.

Keywords:
Suicide, asphyxia, helium, gas, toxicology

INTRODUCTION

Over the last decade an increasing number of asphyxia suicides by inhalation of inert gases have been reported from different parts of the Western world. Case reports of suicides by this method have been published from the United States, Australia and Europe [1-5]. A few cases from Sweden and Denmark have been described, but not from the other Nordic countries, including Norway [1,2]. Interest groups advocating euthanasia, e.g. so-called "right-to-die"-organizations, have promoted this method on the internet and in books, magazines and films as a way of "self-deliverance" for the terminally ill. Arguably the most widespread source is *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying*, a controversial book giving practical guidance and detailed instructions on how to plan and commit suicide, including the use of inert gases in a plastic bag over the head [6].

Inhalation of pure helium gas under atmospheric pressure may cause asphyxia through the displacement of O_2 and CO_2. Because of effective removal of CO_2 respiratory drive is inhibited. Continued inhalation of helium is reported to induce loss of consciousness within 5-10 s and hypoxic death within few minutes [7-9].

In this article the first two case reports from Norway of presumed suicide by asphyxiation due to helium inhalation from a closed plastic bag over the head are presented, and aspects of clinical and forensic relevance are discussed. The article provides a brief overview of the current literature on self-inflicted asphyxia with helium.

The deaths took place in Central Norway in the period 2009-2011.

Case reports

Case 1. A 43 year old male was found dead in his apartment with two gas cylinders labeled helium next to him. Two plastic tubes were connected to the gas cylinders and placed under a plastic bag over his head. The plastic bag was fastened with tape and a cord around the neck. No suicide note was found. The police were at the scene when the deceased was found. A forensic autopsy was requested and performed, which showed decompositional changes, but no injuries or diseases that could explain the death. Toxicological analysis showed ethanol and tetrahydrocannabinolic acid in urine, but no positive findings in blood. It was not excluded that the detected level of ethanol in urine was a result of post-mortem microbial formation. No certain cause of death could be established. Based on the external circumstances death was attributed to asphyxia due to helium inhalation and the presumed manner of death was suicide.

Case 2. A 31 year old male was found dead by his wife in their home with a plastic bag over his head and two helium cylinders next to him. The cylinders were connected to the plastic bag with tubes. The plastic bag had an integrated, adjustable cord in the opening. Paramedics, who were first at the scene, reportedly found the gas cylinder valves open. A suicide note was found on a table in the living room. The police was notified about the death and investigated the scene. A forensic autopsy was requested and performed, showing bilateral eyelid petechiae and large amounts of gastric content in the esophagus, pharynx and large and small airways. No injuries or diseases were found. Toxicological analysis showed non-toxic/therapeutic concentrations of lamotrigine (2.6 mg/L), citalopram (0.17 mg/L) and

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diazepam (0.017 mg/L). The medical examiner's conclusion as to the cause of death was suffocation due to a plastic bag over the head and aspiration of gastric contents. Based on autopsy findings and outer circumstances the death was presumed to be a suicide.

DISCUSSION

The reported cases illustrate the absence of specific findings at autopsy and routine toxicological analysis in deaths assumed to be caused by asphyxiation with an inert gas. The detection of helium in specimens from the deceased in such cases may be of value to tentatively distinguish between helium exposure, exposure to a merely oxygen-deficient atmosphere and external obstruction as the mechanism of death, but there are, to the author's knowledge, no established procedures for quantitative measurement and interpretation of helium levels in body fluids or tissues. Several methods for helium detection in bronchopulmonary air samples have been published, using headspace gas chromatography-mass spectrometry with nitrogen or hydrogen as carrier gas [10-12]. These methods, however, require special techniques and equipment at autopsy and laboratory analyses, and have not been refined and validated for routine application. A recently published gas chromatography-thermal conductivity detection method for helium in post-mortem blood and lung, brain and liver tissue specimens provides a simpler sampling procedure, but the authors emphasize that the method is solely for screening purposes, and that it was not possible to establish an incontrovertible identification of helium [13]. Accordingly, the cause of death in such cases generally has to be assessed from investigations of the circumstances and scene of death. This raises the question whether this death method may be used to conceal murder, e.g. by removing necessary equipment after death or leave behind a scene seemingly implying suicide. As interest groups for euthanasia refer to this method for assisted suicide for the terminally ill, and even provide practical advice of how to cover such acts, concern has been raised about the event and possible neglect of concealed suicides as well, in which the deceased has been aided by one or more persons in the practical procedures and subsequent disposal of applied implements [5,14,15]. If death in such cases is attributed to the underlying disease, this may have practical implications with regard to insurance settlements, cause of death statistics etc., as well as a more socio-religious aspect by the possible omission of stigmata often associated with suicides.

In Switzerland assisted suicide is permitted by law, providing that it is performed "without selfish motives", and that the individual who wishes to die carries out the final act (e.g. drug administration, mask application, helium inhalation, etc.) independently [9]. Following these terms and conditions Swiss law allows anyone to assist in suicide. In practice, "right-to-die"-organizations have led this activity with routine reporting of these deaths to the authorities [9]. One of these organizations has evaluated helium asphyxiation as an alternative to drug-induced euthanasia (usually performed with barbiturates), seeking to establish a method for assisted suicide not requiring the presence and assistance of medical personnel. This has facilitated studies of the course of such deaths. An examination of video recordings of four assisted suicides by oxygen deprivation with helium and a face mask with reservoir bag has been published [9]. In this study the authors reported wide variation in both time to unconsciousness and time to death. Time to unconsciousness ranged from 36 to 55 seconds, whereas time to death was 5-10 minutes in three of the cases and more than 40 minutes in one. These variations were attributed to differences in mask fit. No attempts to adjust the masks were made by the assistants once it had been positioned, since this would likely be in conflict with the law, which prohibited assistance in the final act. Seemingly uncoordinated movements were observed, but none of the dying individuals touched the mask or attempted self-rescue. In a different study two cases of self-asphyxiation with helium and a plastic bag over the head instead of a mask were observed and described [8]. In this study the reported time to unconsciousness was 10-12 seconds. In our case 2 autopsy revealed bilateral eyelid petechiae and large amounts of gastric content in the airways. These findings challenge the assumption that death by this method is painless and without air hunger, as asserted in Final Exit.

Our two cases were both relatively young, white men with no documented diseases. In particular, they did not fulfill any criteria for terminal illness. Toxicological analysis revealed psychoactive substances in blood in one case, and an inactive cannabis metabolite in urine in the second case; both common findings without any particular negative prognostic significance. This conflicts with the promotion of this method by euthanasia interest groups for terminally ill patients, and is in concordance with most previously published cases. In a systematic investigation of asphyxia suicides involving helium from North Carolina a majority of the decedents were not terminally ill, but suffered from psychiatric and/or substance use disorders [16]. The suicides involving helium in this material also tended to occur almost exclusively in relatively young white males [16].

The link between the description of this suicide method in Final Exit and the sudden increase in reported cases has also been investigated. In 2003 seven fatalities involving plastic bag suffocation in conjunction with helium use was reported from Arizona [4]. These fatalities coincided with the first account of the method in Final Exit. Such deaths had not been previously observed in this region, and although right-to-die literature was absent from all scenes the authors concluded that the deaths likely reflected exposure to this information. A retrospective review of helium-related suicides in Australia over a 25-year period from 1985 to 2009 and Swedish data obtained between 2001 and 2009 showed recent and striking increases of such cases in all investigated areas, with no identified cases before 2000 [1]. In light of the availability of helium and the promotion of this method of suicide, the authors stated that this might represent a newly emerging trend in suicide deaths. An earlier study from New York City found a substantial increase in the number of asphyxiations by plastic bag (without inert gas) in the year after the first publication of Final Exit, but insignificant changes in the number of suicides by other methods and the overall suicide rate [17]. Final Exit was found at the scene of 9 of the 33 suicides by asphyxiation in this material. Very few of those who had probably consulted the book had a history of terminal disease or evidence of this at autopsy, and at least one third of all suicide cases where Final Exit probably was consulted had a psychiatric history that included a previous suicide attempt, hospitalization or treatment. This further corroborates the apprehension that the promotion of this method by "right-to-die"-societies impinges deeply troubled or mentally ill persons, who may otherwise have benefited from therapy, rather than the terminally ill. Interestingly, an investigation of the prevalence and correlates of helium inhalation in adolescents under residential treatment for delinquent behavior in Missouri showed that helium users were significantly more likely to be Caucasian, live in rural/small town areas, and to have histories of mental illness, auditory hallucinations, and alcohol and

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marijuana use than nonusers [18]. Helium users in this material also reported significantly more current psychiatric distress, suicidality, traumatic life experiences, and antisocial attitudes, traits and behaviors than nonusers. How this relates to suicidal asphyxiation with helium, however, is not known.

Herein, we have presented the first two case reports from Norway of presumed suicide by asphyxiation due to helium inhalation from a closed plastic bag over the head. These cases add to an increasing number of asphyxia suicides by inhalation of inert gases reported from different parts of the world over the last decade. Considering the striking rise in reported cases, recognition of this phenomenon and its potential pitfalls for clinical and forensic practice is of importance, particularly for medical examiners, toxicologists and crime scene investigators. In contrast to the promotion of this method by euthanasia interest groups for the terminally ill reported suicides by helium asphyxiation primarily involve relatively young individuals suffering from psychiatric and/or substance use disorders, and not from terminal illness.

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