

February 15, 2024
House Bill 2782

Testimony of Joel B. Zivot, MD, FRCP(C), MA, JM

Opposed

Dear Chair and Members of the Committee,

I am a Georgia licensed physician with specialties in anesthesiology and intensive care medicine and currently practice at Emory University in Atlanta, Georgia. I have additional training in bioethics and the law. Because of my training and practice, my opinion has been sought many times on the technique of execution widely known as lethal injection. I have also provided extensive testimony and commentary on the new method of execution known as nitrogen hypoxia. I was a consulting expert and testifying witness in the case of prisoner Kenny Smith, who Alabama executed with nitrogen gas on January 25, 2024. After reviewing HB 2782, I wish to raise my serious concerns that if this bill were to become law, Kansas would find itself a party to the unlawful act of cruel torture.

Bills of this nature may be thought of as an instruction manual. After reading, a person should be able to carry out the described task. HB 2782 fails by using terms that are too vague. First, the bill states an intent to cause death “*by hypoxia administered in such a way to cause death in a swift and humane manner.*” The term “hypoxia” refers to a state where the body is exposed to a reduced quantity of oxygen necessary to maintain the normal body functions. When oxygen is completely absent, it is known as anoxia. In a medical setting, forced hypoxia is not a medical treatment and patients suffering from hypoxia do so because of combinations of a severely injured heart and lungs. Sometimes people always require supplemental oxygen and must bring an oxygen tank and nasal cannula everywhere they go. These people live difficult and painful lives. In the most severe cases, people need to be attached to a mechanical breathing machine via a tube surgically inserted into the neck. Sometimes people have been exposed to low-oxygen environments in industry. Sometimes people use low oxygen in an attempt to commit suicide. Neither of these examples are comparable to execution by forced hypoxia. Neither fully capture the terror and cruelty of being executed by low oxygen.

Though HB 2782 does not specify what gas would be used in place of oxygen, the recent use of nitrogen gas by Alabama provides the necessary example. Based on my medical knowledge of the human body and my understanding of the chemistry of nitrogen gas, I predicted in my reports and testimony that death in this way would be slow and tortuous. I predicted that Mr. Smith would suffer a seizure¹, which he did. I was concerned Mr. Smith would experience terror and pain as his body detected the low oxygen in his blood. Through his clear mask, the signs of terror on his face were easy to see. He bucked and strained as he slowly suffocated. The State of Alabama predicted, based on nothing, that the prisoner would be unconscious in seconds and dead in minutes. Multiple witness accounts confirmed my

¹ Stephen Cooper & Joel Zivot, JURIST, *Alabama’s Nitrogen Gas Execution Will Be Cruel and Unusual Punishment*, <https://www.jurist.org/commentary/2024/01/alabamas-nitrogen-gas-execution-will-be-cruel-and-unusual-punishment/> (Jan. 11, 2024).

predictions.² The entire time to die may have been as long as 30 minutes. His death was so tortuous that experienced death penalty witnesses remarked that they had never seen such a terrible thing. Kansas stands to gain nothing by using any form of hypoxia as an execution method. It is anything but the “swift and humane” method that the bill apparently wants to promote. Moreover, the vagueness of HB 2782 seems to allow the State to use an even more shocking, visceral suffocation method to kill.

The already-existing portion of the law regarding lethal injection causes similar concern. It claims that death will be caused by “*injection of substance or substances in a quantity sufficient to cause death.*” One presumes substance means a pharmaceutical, but the language permits the inclusion of anything that could be injected. By leaving *substance* undefined, Kansas risks acquiring substances that if injected, would kill in a tortuous manner. Vagueness of this nature is intended to give Kansas flexibility owing to the known difficulty of acquiring the traditional pharmaceuticals used for lethal injection. However, even as traditionally practiced, lethal injection is fraught. My own research has proven this. Unlike the claim that lethal injection is akin to falling off to sleep and then dying, autopsy evaluation shows that prior to death in almost 80% of executions, the prisoner’s lungs fill with frothy blood. Death³ through this method is more like drowning in your own blood than dying while sleeping. Studies show that drowning is an extremely uncommon suicide method, likely owing to the common understanding that death in this way is terrifying. Kansas will not find a substance that when injected, will cause death in a swift and humane manner. No such substance exists.

HB 2782 compounds these already-existing problems with lethal injection because it removes a scientific agency – the Kansas Department of Health and Environment – from the certification and safety process. It instead grants the secretary of corrections an extraordinarily wide latitude of responsibility in carrying out the execution. The secretary is granted extreme discretion in both the types and details of execution. Decision making of this nature is a serious responsibility and requires an extraordinary fund of knowledge. Changes can be catastrophic, as dramatic failures in both lethal injection and in the use of nitrogen gas have shown. Hope is not a plan and HB 2782 hopes the secretary is able to provide a method of execution that comports with the constitution. The secretary does not have the necessary tools to carry out this task, especially without additional scientific oversight.

Further, this delegation to Corrections, implied secrecy, and lack of oversight, makes execution a mockery of justice. Complex tasks require openness and scrutiny to be done properly. The profession of medicine knows this and has adopted a culture of safety, quality, and openness. Consequently, the medical profession is doing a better and better job and achieving better and better outcomes. The public is the beneficiary. Vagueness and secrecy around the

² Kim Chandler, ASSOCIATED PRESS, *An Eyewitness Account of What Happened at the Nation’s 1st Nitrogen Gas Execution*, <https://www.pbs.org/newshour/nation/an-eyewitness-account-of-what-happened-at-the-nations-1st-nitrogen-gas-execution> (Jan. 27, 2024) (witness Kim Chandler); Logan Sparkman et al., THE HILL, *Witness Describes Alabama’s First Execution by Nitrogen Gas* (Jan. 27, 2024) (witness Lauren Layton); Andrea Ramey, NBC15 NEWS, *Witness to Nitrogen Epoxy Execution: “Never Seen Such a Violent Execution,”* <https://myNBC15.com/news/local/witness-to-nitrogen-epoxy-execution-never-seen-such-a-violent-execution> (witness Lee Hedgepeth).

³ Joel B. Zivot et al., *Execution by Lethal Injection: Autopsy Findings of Pulmonary Edema*, available at <https://www.medrxiv.org/content/10.1101/2022.08.24.22279183v1> (Aug. 27, 2022).

carrying out of justice will naturally produce the opposite result. Nationally, the execution botch and failure rate can be tied directly to this posture of secrecy. This successive failure teaches the state nothing and instead, hardens the heart of the state as it simply doubles down on torture. Tellingly, I was not allowed to witness Mr. Smith's execution in Alabama. Kansas should not walk the same road of secrecy. It should add oversight and transparency rather than remove it.

The terms of HB 2782, if adopted, would be the shame of any state. My own autopsy research shows that lethal injection, in any form, is flawed on its face. Death by hypoxia will all be cruel and tortuous. Secrecy will prevent progress and drive a wedge of distrust between the electorate and the legislature. Reject HB 2782 and help Kansas step back from the unlawful cruel torture it intends.

Sincerely,

/Joel B. Zivot /

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