



## FORUM

# Justice Until Death: The Necessity of Swift and Good-Faithed Capital Punishment

Justin Murdock

**Abstract.** There are two factions when it comes to the debate over capital punishment: one believes it is legitimate retribution for heinous criminal acts, while the other believes it is the epitome of archaic punishments which violate the principles of the Eighth Amendment. Capital punishment in the United States is limited to five main methods: lethal injection, electrocution, lethal gas, hanging, and firing squad. Lethal injection remains the most popular method of the death penalty. Consequently, in states that continue to employ lethal injection, cases of botched execution have long posed issues. One such example is the recent botched lethal injection of Kenneth Eugene Smith. I argue that given these instances of negligence in applications of capital punishment, more states should use newly-available alternative methods, such as nitrogen hypoxia, when administering capital punishment.

### I. Background

The case study of focus sparked one of the greatest, most drawn-out legal fights pertaining to capital punishment. Kenneth Eugene Smith was convicted of murder in 1989 by a jury vote of 10-2 and sentenced to death row for grotesquely killing Elizabeth Dorlene Sennett in a murder for hire. Smith appealed his case for a retrial through *Kenneth Eugene Smith v. State* (2000), which resulted in a jury vote of 11-1 to sentence him to life without parole. However, the judge invoked §13A-5-47(e) of the 1975 Alabama Code, which allowed him to overrule the jury's

recommendation, and sentenced Smith to death. In 2017, however, Alabama introduced a statute to abolish the ability for judges to override a jury's decision. Nevertheless, the law was not retroactive, so when Smith appealed to the Federal Supreme Court, he was denied review.

Smith argued in the same appeal that the Alabama Department of Corrections violated his due process rights under the Fourteenth Amendment since he was not accordingly notified of a nitrogen hypoxia alternative when made available in 2018 in Alabama. Following his final unsuccessful objection to his capital sentence, Smith later had his execution administered. Smith was strapped into a gurney and not fully anesthetized, resulting in the jabs in his limbs and groin feelings “like a knife”. This execution was administered quite late, and since the death warrant restriction expired at midnight, the process had to be called off. Smith's failed execution is just another piece in Alabama's history of botched executions: the state also botched the executions of Alan Miller and Doyle Lee Ham, with officers sleeping on their jobs and the inmates suffering from delays and chemical burns resulting from improper injections. All these cases have been united in their application of the Eighth Amendment based on their grotesque execution.

The final court decision in Smith's case accords with the national precedent on capital punishment but opens interesting nuances to the penal issue. The reigning District Judge R. Austin Huffaker Jr. dismissed the appeal, stating that the violations alleged against the Alabama Department of Corrections (ADOC) should not pose a constitutional issue according to the Eighth Amendment—specifically its prohibition on “cruel and unusual punishment.” Past plaintiffs such as Miller and Ham have also cited a violation according to the Eighth Amendment, showing that based on precedent, the negligence of ADOC raises the question of constitutionality of the method of capital punishment rather than the practice of capital punishment itself. Essentially, the intended punishment inherently is not deemed a constitutional violation, but the actual application raises questions into the viability of the action.

Given the facts of Smith's case and prior cases demonstrating consistent problems of negligence and inefficiency, this article brings two claims about the motive behind capital punishment and the future regarding lethal injection practices. To clarify, this article is not intended to discuss the merits of the death penalty as a whole. This concept has been disputed many times in court, often siding with its federal legality, so arguing against it in this piece would be futile. Instead, this article breaks apart specific kinds of capital punishment. In particular, the death penalty should be administered both swiftly and in good faith. If the accessory pain associated with the method of capital punishment goes beyond and impairs the ability to

administer a swift execution, it could rise to cruel and unusual punishment. Since lethal injections are prone to failures that can lead to violations of the Eighth Amendment, courts should instead open viable, convenient alternatives such as exploring the safer nitrogen hypoxia execution method to accomplish the motives of the death penalty.

## II. Legal Bases

Two parts of two amendments are fundamental to determining the legality of the punishments Smith, and others like him, suffered: the Eighth Amendment's prohibition on "cruel and unusual punishment" and the Fourteenth Amendment's prohibition on the abridgement of "due process." Especially when alternatives are available but not fully delineated to the defendant, like Smith, the Fourteenth Amendment is crucial in piecing together the defendant's rights against government punishment. If the purpose of these amendments is to protect minorities and the vulnerable by ensuring equal rights for all, any mishandled implementation of this measure could be viewed as the government exceeding its due authority to administer fair punishment. Therefore, this shows that the administration of botched lethal injection procedures, at least by the ADOC, should search for viable alternatives to avoid remaining within the bounds of the Eighth and Fourteenth Amendments.

While justices have typically sided with the government in capital punishment cases, key insights have nevertheless been shed about the merits of certain procedures, such as Smith's botched lethal injection. For instance, in a 7-2 decision in Baze v. Rees (2008), the Supreme Court addressed the constitutionality of a four-drug lethal injection. While the Court concluded that the lethal injection as a concept did not violate the Eighth Amendment, members of the Court suggested that if states consistently utilize methods without sufficient justification compared with better alternatives, that may amount to cruel and unusual punishment. Additionally, Bucklew v. Precythe (2018), decided 5-4, involved an appeal in which Bucklew argued that his pre-existing medical condition of blood-filled tumors subjected him to excessive pain when receiving a lethal injection, culminating in "cruel and unusual punishment." Again, the Court did not find the death penalty to amount to an unconstitutional punishment. However, Justice Gorsuch's remarks do hint at this article's claims of swift and good-faith execution practices. Saying that the punishment should not provide "superadd[ed] . . . terror, pain, or disgrace," he wrote that the death penalty should ideally be quick, but is not guaranteed to be entirely pleasant or easy. While there will undoubtedly be some degree of pain associated

with the highest level of punishment there is in the country, inmates do still have rights that are supposed to prevent the administration of that punishment from being unnecessarily painful. ADOC's negligence, however, caused it to infringe upon these rights.

### III. Conclusions

Given the history of repeated botches and potential alternatives, insights from concurring and dissenting opinions should be kept in mind when witnessing this persistent negligence in capital punishment. If developments in nitrogen hypoxia make it a reasonable alternative, like in Alabama in 2018, defendants should be informed of such rights. Even if this novel practice has just surfaced in the realm of capital punishment, it should still be explicitly available if the state deems it to be safe. Even if nitrogen hypoxia is not safe according to other states' laws, it is still abundantly clear that the ADOC failed its procedure and demonstrated incapability in administering lethal injection. If states still stalwart this process and refuse to provide viable alternatives, as even Supreme Court justices have opined, states will unfortunately continue to find themselves in a flurry of contested Eighth and Fourteenth Amendment violations.