JILL PRYOR, Circuit Judge, Dissenting:

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

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

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

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

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

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

Respectfully, I dissent.

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