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11 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
12 IN AND FOR THE COUNTY OF MOHAVE

13 STATE OF ARIZONA,
14 Plaintiff,
15 vs.
16 JUSTIN JAMES RECTOR,
17 Defendant.

NO: CR 2014 - 01193

DEFENSE MOTION TO PRECLUDE THE
IMPOSITION OF DEATH AS A
POTENTIAL PUNISHMENT

(ASSIGNED TO THE HON. LEE JANTZEN)

18 COMES NOW Defendant Justin James Rector, by and through undersigned
19 counsel, who hereby moves this court to eliminate death as a potential punishment in
20 this case. To be clear, the Supreme Courts of the United States, and Arizona, have
21 rejected the bulk of these arguments in the past. *The issues are raised to preserve*
22 *review, and avoid procedural default...and because they remain meritorious in any*
23 *humane society.* Any failure to dismiss the State's "Notice of Intent to Seek the Death
24 Penalty", based on any or all of the following grounds, will violate Justin Rector's
25 constitutional rights to due process, equal protection, counsel, a fair trial and appeal,
26 freedom from cruel and unusual punishment under the 5th, 6th, 8th, and 14th
27 Amendments to the United States Constitution, and corresponding provisions of the
28 Arizona Constitution. The motion is supported by the the Memorandum of Points and

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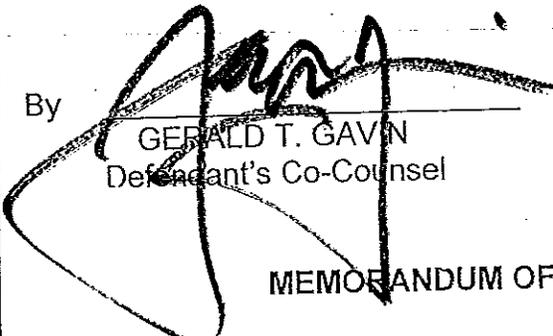


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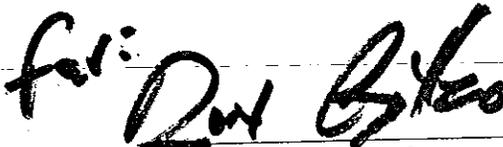
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1 Authorities attached hereto and incorporated herein, as well as the entirety of the Court
2 file and proceedings in this cause number. Mr. Rector asks this court eliminate death
3 as a potential punishment in this case now.

4
5 RESPECTFULLY SUBMITTED this 11th day of September, 2015.

6
7 By 

8 GERALD T. GAVIN
9 Defendant's Co-Counsel

for: 

10 RON GILLO
11 Defendant's Co-Counsel

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 The State is seeking to kill Mr. Rector; the defense maintains the death penalty is
14 a punishment of revenge and retribution, not rehabilitation, deterrence and justice. It
15 seeks to send a message that killing others is wrong, and then ironically permits the
16 State to do what the State is condemning. Its irony in the sickest sense; it has no place
17 in our society when dispensed in a justice system fraught with underfunding, mistakes
18 on all sides, emotional overload, racial disparities, questionable and ever-changing
19 science, witnesses with suspect memories and many times a questionable allegiance to
20 the truth. It leads to final solution that, if a mistake is made, the execution of the
21 accused leaves no possibility of that mistake being undone. It is inexact, expensive,
22 illogical and cruel. Its time to kill the death penalty.

23 The Death Penalty is *Per Se* Cruel and Unusual

24 The Eighth Amendment to the United States Constitution prohibits cruel and
25 unusual punishment. The States' ability to impose death and execute citizens is both
26 cruel and unusual, and as such this punishment is constitutionally barred in this cause.
27 The United States Supreme Court has held to the contrary. Gregg v. Georgia, 428 U.S.

1 153, 186-87 (1976); accord e.g. State v. Glassel, 211 Ariz. 33, 58, 116 P3d 1193, 1218
2 (2005).

4 Execution by Lethal Injection is Cruel and Unusual Punishment

5 The Cruel and Unusual Punishment clause of the Eighth Amendment, as applied
6 to the States by the Fourteenth Amendment, "draws its meaning from the evolving
7 standards of decency that mark the progress of a maturing society." Gregg v. Georgia,
8 428 U.S. 153, 173 (1976), quoting Trop v. Dulles, 356 U.S. 86, 101 (1958). In addition,
9 "deliberate indifference to serious medical needs of prisoners constitutes the
10 'unnecessary and wanton infliction of pain ' proscribed by the Eighth Amendment."
11 Estelle v. Gamble, 429 U.S. 97, 104 (1976).

12 Through Arizona's procedures for execution by lethal injection, especially given
13 the numerous recent problems in securing chemicals that are reliable, quick,
14 predictable, and available, the state is displaying deliberate indifference to Defendant's
15 "serious medical needs", and this indifference does result in the "unnecessary and
16 wanton infliction of pain" proscribed by the Eight Amendment. *Id.* Attached as Exhibit
17 "A" are newspaper accounts of several recent executions, and the shockingly long,
18 cruel, and torture induced painful deaths of recent inmates. Furthermore, the State's
19 indifference to this risk undeniably offends evolving standards of decency in violation of
20 the Eighth Amendment. *Id.* at 106; Tropp v. Dulles, 356 U.S. 86, 101 (1958). Arizona
21 has, to date, upheld the constitutionality of lethal injection. E.g., Glassel, 211 Ariz. at
22 59, 116 P.3d at 1219 (citing State v. Hinchey, 181 Ariz. 307, 315, 890 P.2d 602, 610
23 (1995)).
24
25

26 Given the ever-evolving, changing combinations of drugs administered to kill
27 people in our country, and this State, Mr. Rector lacks sufficient information to challenge
28 a particular procedure that Arizona follows in administering lethal injection. It is legally

of malice, deliberation, premeditation or that the defendant intended to kill the victim.

A.R.S. § 13-1105. Thus, unlike the first degree murder statute at issue in Lowenfield v. Phelps, 484 U.S. 231 (1988), Arizona's first degree murder statute does not perform any narrowing function at the guilt-innocence phase.

Second, the statutory aggravating factors that render a defendant "death eligible" do not "genuinely narrow the class of persons eligible for the death penalty" and do not "reasonably justify the imposition of a more severe sentence on the defendant" under the Supreme Court's jurisprudence, Zant v. Stephens 462 U.S. 862, 877 (1983)(footnote omitted), Arave v. Creech, 507 U.S. 463, 473-75 (1993); Stringer v. Black, 503 U.S. 222, 232-34 (1992).

A properly applied narrowing device provides not only a principled way to distinguish the capital homicide from many noncapital homicides, but also "differentiate[s] this [death penalty] case in an objective, evenhanded, and substantively rational way from the many....murder cases in which the death penalty may not be imposed." Zant, 462 U.S. at 879.

Arizona's aggravating circumstances are exceptionally broad. Any murder that has no apparent motive, State v. Wallace, 151 Ariz. 363, 368, 728 P.2d 232, 237 (1986), or that is motivated by a desire to eliminate a witness, State v. Smith, 141 Ariz. 510, 511-12, 687 P.2d 1265-67 (1984), or that is motivated by hatred or revenge (and is therefore "relished") is a death penalty crime. Any murder in which the killer used excessive force, State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983), or in which he uses insufficient force, State v. Chany, 141 Ariz. 295, 312, 686 P.2d 1265, 1282 (1984), is a death penalty crime. Any murder in which the victim experiences fear or uncertainty as to his fate, or in which he is conscious and able to feel pain during the killing is "cruel" and therefore a death penalty crime. State v. Correll, 148 Ariz. 468, 480-81, 715 P.2d 721, 733 (1986). Additionally, any homicide committed during a robbery or other "serious offense" is a death penalty crime. See A.R.S. § 13-703(F)(5). *In*

1 The defendant shot his victim with an automatic weapon) and
2 State v. Johnson, 147 Ariz. 395, 397, 400-01, 710 P.2d 1050,
3 1052, 1055-56 (1985) (court held that senseless murder was
4 Not especially heinous, cruel or depraved where the defendant
Killed his victim with a shotgun blast while the victim lay
Sleeping...)

5 ...One becomes death eligible if, hand trembling because of
6 Fear, mental illness, or drug use, one fails to aim accurately
7 or kill with the first blow and the victim found fortuitously
8 suffers and dies slowly. See Chaney, 141 Ariz. at 312, 686
9 P.2d at 1282 (affirming death penalty in case where
10 defendant's gunfire did not kill the victim instantaneously, but
11 instead, the victim suffered for thirty minutes before losing
12 consciousness and dying). The assassin who senselessly
13 shoots with steady hand and kills in cold blood or uses a
14 weapon with ruthless efficiency and dispatch and causes
15 immediate death does not kill cruelly and may not be death
16 eligible. See Johnson, 147 Ariz. at 397, 400-01, 710 P.2d
17 at 1052, 1055-56 (cruelty not even considered where the
18 defendant shot his sleeping victim, who 'rapidly bled to
19 death'). If this, too, is 'real science', its logic escapes me....

20 State v. Salazar, 173 Ariz. 399, 420-21, 844 P.2d 566, 587-88 (1992).

21 All in all, the Arizona statutory scheme has no threshold requirement that
22 separates the bulk of first degree murders from the minority in which a death sentence
23 may be imposed. As a result, Arizona's death penalty statute as a whole violates the
24 Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment
25 and denies defendant's due process.

26 **IV. A.R.S. §13-751(G) Unconstitutionally Places the Burden of Proof on the**
27 **Defendant in a Capital Case.**

28 A.R.S. §13-751(E) provides that:

[i]n determining whether to impose a sentence of death or life
imprisonment, the trier of fact shall take into account the
aggravating and mitigating circumstances that have been proven.
the trier of fact *shall impose a sentence of death* if the trier of fact
finds one or more aggravating circumstances enumerated in
subsection F of this section and then determines that there are no
mitigating circumstances sufficiently substantial to call for leniency.

1 (emphasis added). Although A.R.S. § 13-751(C) places the burden of establishing the
2 existence of aggravating circumstances on the State, the statute also expressly places
3 the burden of establishing the existence of mitigating circumstances on the defendant.

4 The statute does not require the State to prove (1) that the aggravating
5 circumstances as a whole, considered apart from any mitigating circumstances, warrant
6 the imposition of the death penalty or that they do so beyond a reasonable doubt, or (2)
7 that the circumstances justifies the imposition of death, or that it does so beyond a
8 reasonable doubt.

9 By requiring that the sentencing court impose the death penalty unless the
10 defendant proves that there are mitigating circumstances present sufficient to justify
11 leniency, A.R.S. §13-751 creates an unconstitutional mandatory presumption of death
12 whenever one aggravating circumstance is present. Consequently, A.R.S. §13-751
13 creates an unconstitutional mandatory presumption of death whenever one aggravating
14 circumstance is present. Consequently, A.R.S. §13-751 violates the Eighth and
15 Fourteenth Amendments proscription against mandatory death sentences, Roberts v.
16 Louisiana, 431 U.S. 633 (1977), and the Fourteenth Amendment's proscription against
17 mandatory, but potentially inaccurate, presumptions. Sanstrom v. Montana, 442 U.S.
18 510 (1979).

19
20 The Arizona Supreme Court has rejected the foregoing arguments. *E.g.* Glassel,
21 211 at 52-53, 58-59, 116 P.3d at 1212-1213, 1218-19.

22
23 **V. The Death Penalty Insufficiently Channels the Sentencer's Discretion**

24 Arizona's death penalty scheme defines certain aggravating and mitigating
25 circumstances. It fails, however, to adequately guide the sentencer's discretion, and
26 A.R.S. §13-751(E) only vaguely requires the sentence to "take into account" the
27 aggravation and mitigation. The statute also requires the court to impose death if it finds
28

1 aggravating circumstances exist. In essence, individual prosecutors have complete,
2 unbridled discretion as to whether the death penalty becomes available as a sentencing
3 option to be considered by the sentencing authority, in violation of the right to due
4 process and to be free from cruel and unusual punishment under the Fifth, Eighth, and
5 Fourteenth Amendments to the Constitution.

6 Such disparate treatment of similarly-situated, potential capital defendants
7 violates the equal protection clause of the Constitution. The State cannot advance even
8 a rational reason for such differing treatments, let alone the compelling state interest
9 required to uphold a violation of as fundamental a right as the right to life. Research
10 indicates that "[t]he more aggressively officials use the death penalty-the more often
11 they use it and the more frequently they apply it to homicides that are not highly-
12 aggravated- the greater the risk that any death verdict they impose will be seriously
13 flawed." James S. Liebman, et. al, *A Broken System, Part II: Why There Is So Much*
14 *Error in Capital Cases, And What Can Be Done About It*, at
15 <http://www.law.columbia.edu/brokensystem2/sectionVII.html>>. In other words, failure to
16 channel discretion in unconstitutional arbitrariness forbidden by the Eighth Amendment.
17 Being selected to face death under this scheme violated Defendant's rights and he is
18 entitled to a new sentencing where the death penalty is not an option.
19

20 The Arizona Supreme Court has rejected the forgoing arguments. *E.g. Glassel*,
21 211 Ariz. at 58, 116 P.3d at 1218.
22

23 **VIII. The Aggravating Circumstances Alleged By The State Are Not Supported**
24 **By Findings of Probable Cause At The Indictment Stage.**

25 The United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530
26 U.S. 466 (2000), *Ring II*, and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), require
27 that any fact serving to increase the punishment for a crime must be treated as an
28 element of the offense. In Arizona, the legislature defined first-degree murder in A.R.S.

1 § 13-1105, then provided for increasing the punishment for that crime upon a finding
2 that one or more statutory aggravating factors exist. A.R.S. § 13-751. Thus, the
3 legislature defined the "aggravated crime" of capital murder, separate and distinct from
4 first degree murder, as first degree murder plus the aggravating circumstances listed in
5 A.R.S. § 13-751(F). Accordingly, the aggravating circumstances are elements of the
6 only offense for which death is imposable.

7 Because they are elements of the offense, aggravating circumstances must be
8 included in the charging document. The Sixth Amendment requires that a criminal
9 defendant "be informed of the nature and cause of the accusation." State v. Sanders,
10 205 Ariz. 208, 68 P.3d 434, 439 (2003). This means that the "indictment or information
11 must describe the offense with sufficient specificity so as to enable the accused to
12 prepare a defense and to permit him to avail himself of the protection against double
13 jeopardy." *Id.* (citing United States v. Cruikshank, 92 U.S. 542, 558 (1875)).
14 Accordingly, Arizona Rule of Criminal Procedure 13.2(a) requires that "[t]he indictment
15 or information shall be a plain, concise statement of the facts sufficiently definite to
16 inform the defendant of the offense charged." A charging document is legally sufficient
17 if it "indicates the crime charged; *states the elements of the alleged crime*; and is
18 sufficiently definite to apprise the defendant that he can prepare his defense to the
19 charge." State v. Suarez, 106 Ariz. 62, 64, 470 P.2d 675, 677 (1970)(emphasis added).
20

21 To be included in the charging document, each and every element of the alleged
22 offense must be subjected to a probable cause determination, either by a grand jury in
23 the case of an indictment, A.R.S. §21-413, or by a magistrate at a preliminary
24 indictment Clause of the United States Constitution does not mandate that a state he
25 must nonetheless include "examination and commitment by a magistrate, certifying to
26 the probable guilt of the defendant, with the right on his part to aid counsel, and to the
27 cross examination of the witnesses produced for the prosecution." Hurtado v.
28

1 circumstances are elements, that they must be treated as elements, and that all
2 elements of an offense must be in the charging document and have been subjected to a
3 determination of probable cause.

4 To permit otherwise is tantamount to allowing the State to alter the nature of the
5 charge, which Arizona law has never permitted by "amendment". See State v. Van
6 Vliet, 108 Ariz. 162, 164, 494 P.2d 34, 36 (1972) (an amendment is permitted only if it
7 corrects a defect and does not change the nature of the offense); see also Apprendi,
8 530 U.S. at 476 (The Fourteenth Amendment "commands" that that any fact increasing
9 the maximum punishment for a crime must be "charged in the indictment".) In this case,
10 the automatic amendment transforms the nature of the charged offense from first
11 degree murder to capital murder, which exceeds the limits of the indictment. The
12 "amendment" does not correct a mistake of fact or remedy a formal or technical defect,
13 and defendant did not consent to "amendment."

14
15 The indictment in this case is not sufficient as a matter of law cannot be cured
16 short of remanding to the grand jury for further proceedings. Failure to dismiss State's
17 Notice of Intention to Seek the Death Penalty and related allegations of aggravating
18 circumstances violates Defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth
19 Amendments of the United States Constitution and Article II, §§ 4, 15, 24, and 30 of the
20 Arizona Constitution.

21 The Arizona Supreme Court rejected the forgoing argument in McKaney v.
22 Foreman, 209 Ariz. 268, 100 P.3d 18 (2004).

23
24 The Arizona death penalty statute is applied in a manner that discriminates
25 against the poor, young, male defendants and discriminates on the basis of the race of
26 the victim in violation of the due process and equal protection clauses of the State and
27 Federal Constitutions. See McClesky, 449 U.S. 891, 101, 253 (1980)(mem.)(Brennan,
28 J, dissenting).

1 [T]he discretion of judges and juries in imposing the death
2 penalty enables the penalty to be selectively applied, feeding
3 prejudices against the accused if he is poor and despised, and
4 unpopular minority, and saving those who, by social position,
5 may be in a more protected position.

6 Furman, 408 U.S. at 255 (Douglas, J. concurring).

7 The Supreme Court has recognized that distinctions based on wealth have a
8 measure of special constitutional significance. McDonald v. Board of Election Comm'rs
9 of Chicago, 394 U.S. 802, 807 (1969) (“[A] careful examination on our part is especially
10 warranted where lines are drawn on the basis of wealth.”); Harper v. Virginia Bd. Of
11 Elections, 393 U.S. 663, 668 (1966) (“Lines drawn on the basis of wealth or property”
12 are subjected to a ‘heightened scrutiny’ where to justify the different treatment of like
13 situated people the state must show advancement of a ‘substantial’ state interest)
14 (internal citations omitted). See Plyer v. Doe, 457 U.S. 202 (1982). There simply is no
15 legitimate reason why persons of wealth and influence do not face the death penalty
16 and the poor uniformly do face death for identical conduct. As such the death penalty is
17 unconstitutional.

18 The composition of Arizona’s death row is almost exclusively comprised of men.
19 Moreover, statistics state and nationwide evidence that less than 1.5% of all defendants
20 on death row are women and of those women charged with capital crimes, 2% ever
21 face even the possibility of a death sentence, while 1 out of every 8 arrests, or 13% of
22 all murder arrests are women. These statistics verify not only that the death penalty
23 rate for women is in gross disproportion to the rate of men, but that prosecutors
24 purposefully seek the death penalty discriminatory against men. See Victor Streib,
25 *“Capital Punishment of Female Offenders: Present Female Death Row Inmates and*
26 *Death Sentences and Executions of Female Offenders, January 1st 1973 to June 30th,*
27 *1996 (July 2, 1996); Victor Streib, “Death Penalty for Female Offenders”, Cinn.L.Rev.,*
28 *Vol 58, No. 1 (1990). No compelling or even important state interest can be advanced*

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1 to justify the discriminatory treatment of men facing capital crimes versus women facing
2 capital crimes. Because there is no justification at all for such disparate treatment this
3 court should hold Arizona's death penalty as applied to this defendant unconstitutional.

4 The Arizona Supreme Court has rejected this argument. *E.g. Glassel*, 211 Ariz.
5 at 58, 116 P.3d at 1218.

6
7 **X. The Death Penalty Is Not A Deterrent to Crime And As Such Violates Due**
8 **Process and the Prohibition Against Cruel and Unusual Punishment.**

9 Arizona's death penalty statute violates the Eighth and Fourteenth Amendment
10 prohibition on cruel and unusual punishment and fails to satisfy due process, as
11 construed by the Supreme Court in *Gregg*, 428 U.S. 153 (1976), *Profitt*, 428 U.S. 242
12 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), in that it does not serve a deterrent
13 purpose and it exceeds any legitimate retributive aim articulated by the legislature in
14 promulgating the criminal code.

15 Detailed research has produced no credible evidence that the death penalty
16 deters crime more effectively than any other punishment. See Death Penalty
17 Information Center, *Facts About the Deterrence and the Death Penalty* at
18 <http://www.deathpenaltyinfo.org/article.php?scid=12&did=167#studies>. Despite the most
19 exhaustive research my noted experts in the field, there is simply no convincing
20 evidence that the death penalty is a deterrent superior to lesser punishments, in fact,
21 the most convincing studies point in the opposite direction. *Id.*

22
23 Given the lack of any deterrent effect, Arizona's death penalty statute violates the
24 Eighth Amendment proscription against cruel and unusual punishment. Arizona law
25 provides for a sentence of imprisonment from twenty-five years to natural life without the
26 possibility of parole, as an alternative to the death penalty. A.R.S. §13-751(A). This
27 alternative punishment is a less drastic means of accomplishing the legislative goal of
28 deterring both the defendant and other from committing future homicides. Arizona's

1 Weekly, April 29th, 1999, citing Craig Haney, national expert on psychological effects of
2 long-term solitary prison incarceration. Defendant was not sentenced to this additional
3 punishment, and he constitutionally could not have been. The imposition of it by the
4 state renders his other sentences, including the sentence of death, defective. In re
5 Medley, 134 U.S. 160 (1890).

6 For any of the reasons cited above, previously rejected by the Arizona and/or the
7 United States Supreme Court, James Rector asks this court to take an admittedly bold
8 stance, have the Judge examine his conscience, and find that...for whatever argument
9 holds water, the death penalty....on these facts, in this county, and for the morally right
10 reason, be found an unconstitutional punishment for Mr. Rector to face at trial, and
11 reject it now. Precedent is a powerful indicator of direction in our legal system, but it is
12 not an absolute. If it were, African Americans could not be fully human, could not vote,
13 could not marry outside their race; Women could not vote or be treated equal; Gay
14 people could not marry. Long held laws...and their long term interpretations by our
15 highest courts, sometimes must change...because it is the morally right thing to do.
16 Many States are now eliminating the death penalty because of the inherent problems in
17 such a system of State imposed death.

18
19 If someone is found guilty of murder, it feels good to many that the murderer be
20 exterminated. It shouldn't. If murder is truly the repulsive act any normal human
21 believes it to be, setting up a government mechanism to exterminate a now helpless
22 man (for the most part), someone totally defenseless against the power of the State and
23 locked safely away, is a premeditated murder with no basis... with no logical
24 penological justification other than revenge. As a civilized society, we must review and
25 amend old ideas now out of touch with a more civilized, empathetic society. Killing our
26 own citizens is not a function of government we can continue to tolerate. It lowers all of
27 us to the killer's level. In every sense of the word, its not right.
28

11/11/99

1 It is in the interests of judicial economy, tangible economic benefits to the citizens of
2 Mohave County and the State, justice, and an increased likelihood of any sentence
3 surviving review, as well as sparing the victim's family and friends the pain of, not only a
4 trial, but possibly years of appellate review in State and Federal Courts.

5 James Rector has enclosed numerous exhibits following this motion. They
6 include Statements from Doctors, Pharmacists, and Nurses condemning the
7 participation of those professionals in the death penalty. Also included are statements
8 from major drug manufacturers who object to their medications being used to kill
9 people. Other exhibits include a recent New Yorker article on why the Death Penalty
10 should be given the death penalty; also accounts of the horrific, torturous and inhumane
11 executions in Arizona and Oklahoma. These supplemental materials are provided to
12 supply this court concrete factual concerns on multiple fronts regarding the efficacy of
13 the death penalty. While not binding on the court, of course, it is provided to illuminate
14 lingering concerns over how unpredictable, unethical, and cruel the current method of
15 execution in Arizona is.
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11/11/11

1 ORIGINAL of the 11^L day of September, 2015 with:
2

3 Clerk of the Court
4 401 E Spring Street
5 Kingman Arizona 86401

6 COPY 11^L of the forgoing delivered
7 This 11^L day of September
8 , 2015 to:

9 Honorable Lee Jantzen
10 Judge of the Superior Court
11 Mohave County Courthouse
12 401 E. Spring Street
13 Kingman Arizona 86401

14 Greg McPhillips
15 Assigned Deputy County Attorney
16 PO Box 7000
17 Kingman Arizona 86401

18 Ron Gilleo
19 Mohave County Legal Defender
20 Co-Counsel for Justin James Rector
21 313 Pine Street
22 PO Box 7000
23 Kingman Arizona 86401

24 Client Justin James Rector
25 Mohave County jail

26 File

27
28 By 

80811

EXHIBIT "A"

"THE DEATH PENALTY DESERVES THE DEATH PENALTY"

NEW YORKER / APRIL 2015 / BY LINCOLN CAPLAN

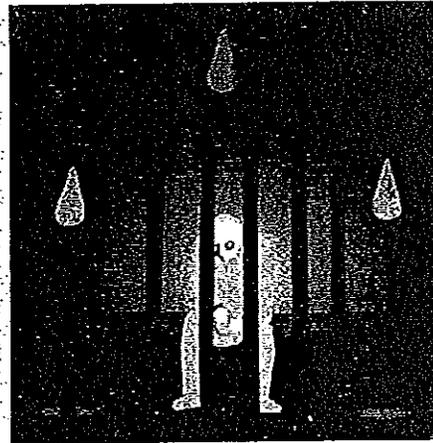
APRIL 15, 2015

THE DEATH PENALTY DESERVES THE DEATH PENALTY

BY LINCOLN CAPLAN

ILLUSTRATION BY DANIEL ZENDER

At the end of this month, the Supreme Court will reckon with execution by lethal injection in *Glossip v. Gross* (<http://www.scotusblog.com/case-files/cases/glossip-v-gross/>), the case of Oklahoma death-row inmates who are challenging the three-drug protocol that the state has chosen to carry out death sentences.



In the history of capital punishment in America, the 2010 case of Jeffrey Landrigan seems inconsequential, but it is worth revisiting now because it shows how hard the conservative majority has tried to avoid grappling with the grisly realities of this execution method and, really, with the death penalty in general. It also helps to explain why the national system for administering capital punishment is in such turmoil, with executions now halted because of concerns about lethal injection in fifteen of the thirty-two states (<http://www.deathpenaltyinfo.org/death-penalty-flux>) where the death sentence is still an option.

Arizona convicted Landrigan of murder and scheduled his execution, but a shortage in the United States of the barbiturate called sodium thiopental threw off (<http://www.nytimes.com/2010/10/28/us/28execute.html>) that plan. Almost all states with the death penalty were then using three drugs for executions—a short-acting anesthetic followed (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079826) by a paralyzing agent and then a heart-stopping drug. Sodium thiopental was meant to be the anesthetic. From a foreign wholesaler, later identified as Dream Pharma, a fly-by-night business run out of a driving school (http://news.bbc.co.uk/today/hi/today/newsid_9342000/9342976.stm) in London, the state of Arizona bought some made by a German company in Austria. It was allowed into the United States in violation of federal law, and it was neither checked nor approved by the Food and Drug Administration.

In federal court, Landrigan's lawyers asked the state to confirm its effectiveness, so he wouldn't suffer the agony that the other drugs were known to cause if the anesthetic didn't work. The state refused the request to provide that proof. The trial judge ordered (http://cdn.ca9.uscourts.gov/datastore/general/2010/10/26/10-99021_order.pdf) it to do

so, and Arizona defied the order. The judge stayed the execution. Without F.D.A. approval or proof from the state, she wrote, she couldn't determine whether the drug would actually anesthetize Landrigan.

The state's secretiveness especially "perplexed" her. She wrote that (<https://casetext.com/case/landrigan-v-brewer-2>) she had "never experienced a situation such as this where a defendant opposes a motion for emergency relief by claiming it has the evidence necessary for resolution of the matter but that evidence should not be produced." The U.S. Court of Appeals for the Ninth Circuit affirmed her ruling.

But then the Supreme Court's five conservatives, in an order written by Justice Anthony Kennedy over the dissenting votes of the four moderate liberals, quickly vacated the stay. "There is no evidence in the record to suggest that the drug obtained from a foreign source is unsafe," Kennedy wrote (<http://www.supremecourt.gov/orders/courtorders/102610zr.pdf>). Arizona executed Landrigan that night.

Kennedy disregarded what the trial and appeals courts had found about the increased risk from a drug provided by a source the F.D.A. didn't approve, which was evidence in the record. He also ignored the central reason for the stay of execution: that Arizona had defied an order from a federal judge to produce evidence that the sodium thiopental obtained for the execution would be effective as an anesthetic.

A few months later, the Justice Department told (<http://abcnews.go.com/Politics/doj-tells-arizona-illegally-obtained-death-penalty-drug/story?id=13679827>) Arizona that it could not use any more of the drug from the batch used to kill Landrigan because the state had obtained it illegally. In 2012, a federal district judge in Washington, D.C., confirmed that the drug was illegally imported and ordered the F.D.A. to immediately obtain whatever remained from Arizona and other states that bought the drug from Dream Pharma.

The debate over lethal injection dates back to 1976, when the Supreme Court reinstated capital punishment after a ten-year moratorium. The following year, as Jeffrey Toobin explained, Oklahoma chose it (<http://www.newyorker.com/magazine/2013/12/23/cruel-and-unusual>) as a supposedly humane alternative to the then-preferred, clearly excruciating methods of execution—strapping a convict to a chair and pulsing electricity through his body until he died of shock or choking him to death by making him breathe poisonous gas in a sealed chamber.

In making the choice, the Oklahoma legislature consulted no experts and did no studies on the procedure before adopting it as the state's primary method of execution. The legislature left to prison officials, not trained for this task, decisions about which drugs to

use, how much of each, and how to administer them.

None of the many other states that later adopted lethal injection as their method of execution made up for the slapdash way that Oklahoma developed the procedure by doing studies of their own. In 2008, Alison J. Nathan, who was then a law professor and is now a federal trial judge in New York City, wrote (<http://www.pennlawreview.com/debates/index.php?id=14>), "Historical accident (or what sociologists would call a 'cascade to mistaken consensus') explains far better than science or medicine the current ubiquity of the three-drug protocol."

There have been more than (<http://www.deathpenaltyinfo.org/executions-year>) fourteen hundred executions in the United States since the Supreme Court reinstated the death penalty, almost nine out of every ten by lethal injection (<http://www.deathpenaltyinfo.org/methods-execution>). There have been dozens of accounts of ghastly executions by lethal injection gone wrong, especially since 2011, when sodium thiopental became unobtainable. As states have experimented with new drug combinations, they have introduced new uncertainties about the effects (<https://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/Glossip/documents/2011-12-14%20Glossip%20v%20Griswold%20-%20Final%20Opinion.pdf>) lethal injection. Nine states have used or plan to use drugs from compounding pharmacies, whose products are not approved by the F.D.A.

One experiment the Court could not ignore was carried out a year ago on Clayton D. Lockett in Oklahoma (<http://www.newyorker.com/news/news-desk/witnesses-to-a-botched-execution>), a case that Paige Williams described in *The New Yorker*. The executioner tried and failed (<http://www.ca10.uscourts.gov/opinions/14/14-6244.pdf>) at least twelve times to find a usable vein for delivering the injections. After almost an hour, he found one in Lockett's groin. Seven minutes after he was given a sedative, Lockett was deemed ready and the lethal drugs were administered. Then, "after being declared unconscious," lawyers for the death-row inmates told the Court, "he began to speak, buck, raise his head, and writhe against the gurney." A federal appeals court reported, "In particular, witnesses heard Lockett say (<http://www.ca10.uscourts.gov/opinions/14/14-6244.pdf>): 'This shit is fucking with my mind,' 'Something is wrong,' and 'The drugs aren't working.'" About twenty minutes later, when the state's director of corrections thought that Lockett had not received enough of the execution drugs to kill him and that there was not enough of them left to complete the execution, he ordered the executioner to stop administering any drugs. Lockett died anyway soon after.

In executing Lockett, Oklahoma used for the first time as the anesthetic a sedative called midazolam, which is usually employed to treat serious seizures and severe insomnia. As lawyers for the inmates told the Court, it has no pain-relieving properties, hasn't been approved by the F.D.A. to maintain general anesthesia in surgical operations, and has a (<http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/2015.01.13-Cert-Petition.pdf>) "ceiling effect," meaning that even a large dose of it may not put someone

under. The lawyers noted that "there are actual scientific and medical data demonstrating that midazolam cannot reliably render a person unconscious and insensate for purposes of undergoing surgery."

Nevertheless, Arizona, Florida, and Ohio used midazolam in executions last year. In Arizona and Ohio, the deaths of the inmates were so protracted and painful that the states began looking for alternative drugs to use instead. In February, the Florida Supreme Court ordered

(http://www.floridasupremecourt.org/pub_info/summaries/briefs/15/15-147/Filed_02-17-2015_Order_Granteeing_Stay.pdf) the state government not to execute an inmate by the same combination of drugs used on Lockett until the U.S. Supreme Court resolves the issue. Roche and Akorn, which make midazolam, have declared (<http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision#statements>) their opposition to its use in executions.

In *Glossip v. Gross*, lawyers for the inmates want the Supreme Court to rule that Oklahoma's current sequence of drugs for lethal injections is unconstitutional because the use of midazolam creates

(http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/Brief_7955_pet.authcheckdam.pdf) an "objectively intolerable risk of harm."

In 2008, in *Baze v. Rees* (<https://www.law.cornell.edu/supct/html/07-5439.ZS.html>), the Supreme Court ruled that challenges to a state's lethal injection protocol must show that it "creates a demonstrated risk of severe pain" and that "feasible" and "readily implemented" alternatives would "significantly" reduce (http://www2.bloomberglaw.com/public/desktop/document/Baze_v_Rees_553_US_35_1) risk. Lawyers for the Oklahoma inmates also want the Court to reconsider this very hard-to-meet standard because the methods of lethal injections have changed in the past seven years and "new experiments have resulted in the types of unconstitutional executions that *Baze* was designed to prevent."

It would be unconstitutional, the lawyers for the inmates argue, to execute an inmate using only the paralyzing and heart-stopping drugs. That (<https://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/Glossip/documents/20150210%20Glossip%20v%20Gross%20Petition%20for%20Writ%20of%20Habeas%20Corpus.pdf>) cause intense and needless pain and suffering" and be cruel and unusual punishment under the Constitution's Eighth Amendment. It should be unconstitutional to use a sedative that carries a significant risk of causing unnecessary suffering, they also argue. They note that mounting evidence shows that midazolam is unreliable as an anesthetic.

Even if lethal injection is fatally flawed, of course, there are other means of execution available. Electrocution, asphyxiation by poisonous gas, shooting by a firing squad, and hanging are alternatives in states where lethal injection is currently the primary means of execution. The inmates' plea may also seem myopically focussed on one means of death

when it is the end—execution as a form of punishment—that should be judged. But any means inevitably connects to the end. It raises the fundamental question of whether any state is capable of administering capital punishment in a way that meets constitutional standards. If states can't do that, shouldn't the United States abolish the death penalty?

Since 1976, when it reinstated capital punishment, the Court has tried to improve the odds that states will carry it out fairly and justly by establishing a series of rules (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446950), or constitutional regulations, intended to limit the use of the death sentence to instances where the punishment fits both the crime and the criminal.

Since 2002, offenders with intellectual disabilities (mental retardation) cannot be put to death, because of, among other things, their “diminished capacities to understand and process information.” Since 2005, juvenile offenders cannot be executed because of their “underdeveloped sense of responsibility.” Since 2008, murder is the only crime for which a convicted offender can be put to death, and not just any murder. To warrant a death sentence, an offender must have displayed what the Court called “extreme culpability” with “a consciousness materially more depraved” than that of a typical murderer—for example, by brutally killing more than one victim.

But some of the rules have not solved the problems they were meant to. They increase the arbitrariness (http://www.ali.org/doc/Capital%20Punishment_web.pdf) and unfairness of who gets sentenced to death. In addressing the widespread problem of ineffective counsel for people charged with murder who might get a death sentence, for example, the Court set the bar so low that it has allowed courts to tolerate what one federal judge called “abysmal lawyering” in capital cases. In many instances, lawyers were drunk or fell asleep during trials in which their clients were convicted and sentenced to death.

The Court has also failed (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1568&context=lawreview>) to solve the most divisive problem that has entangled capital punishment throughout American history: racial discrimination. In 1987, with the moderate conservative Justice Lewis F. Powell, Jr., writing (https://www.law.cornell.edu/supremecourt/text/481/279#writing-USSC_CR_0481_0279_ZO) for the majority in a 5-4 decision, the Court rejected as proof of intentional discrimination in death-penalty cases overwhelming statistical evidence of disparities in outcomes explained (https://www.law.cornell.edu/supremecourt/text/481/279#writing-USSC_CR_0481_0279_ZO) only by differences in race: many studies have shown that an offender who killed a white victim is much more likely to be sentenced to death, especially when the offender is black. Instead, the Court held that a death-row inmate, to

have his sentence overturned, must prove that a judge, jury, or prosecutor in the case intended to discriminate against him on the basis of race. That is almost impossible to do.

It also helps to explain why, as Powell's biographer, John C. Jeffries, Jr., wrote, the Justice "came to believe that the system as a whole would always be plagued by doubt." In 1991, Powell, who was by then retired, told Jeffries that if he could change his vote in any case he would have voted in 1987 to abolish capital punishment, because it "serves no useful purpose" and "brings discredit on the whole legal system."

The discredit is profound when someone sentenced to death is later exonerated (<http://www.newyorker.com/magazine/2015/04/13/the-price-of-a-life>), as has happened a hundred and fifty-two times in the past forty-two years. But it is indelible when a state executes (<http://www.newyorker.com/magazine/2009/09/07/trial-by-fire>) someone who should never have been sentenced to death under the current rules. As Robert J. Smith, Sophie Cull, and Zoë Robinson documented in a report (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446950) published last year, eighty-seven of the hundred people executed in the United States between the middle of 2011 and the middle of 2013 had one or more traits that a court is supposed to regard as reducing blameworthiness. Fifty-four had been diagnosed with or showed symptoms of an acute mental illness that disrupted their thinking and diminished their ability to cope. Fifty had suffered a serious childhood trauma, like chronic homelessness or sexual molestation. Thirty-two had intellectual impairments, like a traumatic brain injury or a significant cognitive deficit. The authors of the report speculated that failures on the part of the defense lawyers kept juries from learning about mitigating traits and taking account of them, as the law required them to.

That is what happened, basically, in the case of Jeffrey Landrigan. The Arizona judge who presided over the trial—and, under the state's rules at the time, decided on his punishment—later submitted (<http://archive.azcentral.com/ic/pdf/1023hendricks.pdf>) an affidavit on his behalf to the Arizona Board of Executive Clemency. She said that, if she had known about mitigating factors that his lawyers never presented, like his organic brain damage and the impact of fetal alcohol syndrome on his behavior, she would not have sentenced him to death.

In 2009, the American Law Institute—the country's most prestigious legal organization involved in law reform and the architect of the Supreme Court's approach (<http://www.ali.org/doc/CapPunReport.pdf>) to reforming the use of the death sentence—"voted overwhelmingly" that (http://www.ali.org/_news/10232009.htm) the endless political controversy surrounding the penalty, as well as many other factors, make it impossible to ensure "a minimally adequate system for administering capital

punishment." In other words, as Adam Liptak wrote (<http://www.nytimes.com/2010/01/05/us/05bar.html>) in the *Times*, the organization believes that "the capital justice system in the United States is irretrievably broken."

In the Oklahoma case, the Supreme Court is unlikely to act on this wisdom by abolishing the death penalty. But the upcoming argument will require the justices to face some of its grisly realities. They will provide an ugly reminder that, while capital punishment has contributed negligible benefits to American criminal justice, it has imposed enormous, ever-increasing, and terrible costs.

Lincoln Caplan, a former New Yorker staff writer, is a senior research scholar at Yale Law School and the author of five books about the law.

EXHIBIT "B"

"ARIZONA EXECUTION LASTS NEARLY TWO HOURS; LAWYER SAYS JOSEPH WOODS WAS 'GASPING AND STRUGGLING TO BREATHE' "

THE WASHINGTON POST / JULY 23, 2014 / BY MARK BERMAN

Post Nation

Arizona execution lasts nearly two hours; lawyer says Joseph Wood was 'gasping and struggling to breathe'

by Mark Berman July 23, 2014

The execution of a convicted murderer in Arizona lasted for nearly two hours on Wednesday, as witnesses said he gasped and snorted for much of that time before eventually dying.

This drawn-out death of Joseph R. Wood III in Arizona prompted the governor to order a review and drew renewed criticism of lethal injection, the main method of execution in the United States, just months after a high-profile botched execution in Oklahoma.

"I've witnessed a number of executions before and I've never seen anything like this," Dale Baich, one of Wood's attorneys, told The Washington Post in a phone call. "Nor has an execution that I observed taken this long."

Wood was sentenced to death in 1991 for shooting and killing his ex-girlfriend Debra Dietz and her father, Eugene. In 1989, Wood went to a body shop where Debra and her father worked and shot Eugene Dietz in the chest; he then shot Debra twice, killing her.

He was killed at the Arizona State Prison Complex in an unusually prolonged process that immediately brought to mind lethal injections that have gone awry in recent months.

"I take comfort knowing today my pain stops, and I said a prayer that on this or any other day you may find peace in all of your hearts and may God forgive you all," Wood said as part of his final words, according to the Associated Press.

Related: [Everything you need to know about executions in the United States.](#)]

Wood was declared fully sedated at 1:57 p.m. and pronounced dead at 3:49 p.m., almost two full hours after the medical team was first directed to administer the drugs.

During the execution, Wood's attorneys filed a request to halt the lethal injection because he was still awake more than an hour after the process began. Baich, speaking via telephone from the parking lot of the state prison in Florence, Ariz., said Wood's lips started to move and he was "struggling to breathe" shortly after he was declared sedated.

Baich said he watched Wood "gasp and breathe heavily" for more than an hour and 140 minutes. But Baich said that he could not tell from his vantage point if Wood was in pain. During the botched execution of Clayton Lockett in Oklahoma earlier this year, witnesses reported seeing Lockett grimace, try to lift his head up and clench his jaw.

Reporters for the Associated Press and the Arizona Republic also reported seeing Wood gasp more than 600 times before dying. Michael Kiefer, a reporter for the Arizona Republic who witnessed the execution, told the Republic he counted 660 gasps.

"I just know it was not efficient," Kiefer said. "It took a long time."

Related: For two hours, she watched her family's killer die]

State officials disputed these accounts, contending that Wood was never in pain and that he was only snoring.

"I'm telling you he was snoring," Stephanie Grisham, spokeswoman for the Arizona attorney general's office, said in an e-mail to The Washington Post. "There was no gasping or snorting. Nothing. He looked like he was asleep. This was my first execution and I have no reason to minimize this."

Charles Ryan, the director of the Arizona Department of Corrections, said in a statement Wednesday night that Wood did not suffer during the execution.

"Throughout this execution, I conferred and collaborated with our IV team members and was assured unequivocally that the inmate was comatose and never in pain or distress," Ryan said.

He said that the medical team confirmed that Wood was sedated, checking eight different times in all. Ryan also said in his statement that Wood did not grimace or make any movements other than snoring.

"Physiologically, the time to complete an execution varies for each individual," Ryan said.

Arizona Gov. Jan Brewer (R) ordered the state's Department of Corrections to conduct a review of the execution, saying in a statement that she was "concerned by the length of time" it took.

"One thing is certain, however, inmate Wood died in a lawful manner and by eyewitness and medical accounts he did not suffer," she said. "This is in stark contrast to the gruesome, vicious suffering that he inflicted on his two victims — and the lifetime of suffering he has caused their family."

Ryan has said his department will conduct a full review and awaits the results of a toxicology study and an autopsy.

Family members of Wood's victims, who were angered that he looked at them, smiled while delivering his final words, told reporters that they did not object to the way the execution occurred.

This man conducted a horrific murder and you guys are going, let's worry about the drugs," Richard Brown told the Associated Press. "Why didn't they give him a bullet, why didn't we give him Drano?"



Chris Williams
@chriswnews

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Family of #JosephWood say killer "wasn't suffering". He got what he had coming to him. #AZnews

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Wood was the third inmate executed in Arizona since last October and the first put to death using a combination of the drugs midazolam and hydromorphone.

APR 11 2014

Attorneys for Wood had argued that reliable information was needed regarding the drugs that would be used in the execution. Arizona planned to use a two-drug combination that had been used only once before in an execution. That episode, a lethal injection in Ohio, lasted for nearly 25 minutes. Witnesses said the inmate was snorting and gasping during the process.)

A panel of judges from the U.S. Court of Appeals for the 9th Circuit had agreed with Wood over the weekend, staying the execution, and the full court upheld the decision on Monday. But the U.S. Supreme Court vacated the stay and denied a stay request on Tuesday evening. The Supreme Court also denied a stay of execution on Wednesday. Justice Anthony M. Kennedy referred the stay request to the entire court, and it was denied without explanation.

Shortly before the scheduled injection, the state Supreme Court said it had stayed the execution so it could consider Wood's petition. A short time later, the court announced that it had dissolved the earlier stay and was denying any notions asking for the execution to be stayed.

Death penalty opponents criticized the length of Wood's execution, saying that Arizona should have learned from the previous episodes in Oklahoma and Ohio.

"It's time for Arizona and the other states still using lethal injection to admit that this experiment with unreliable drugs is a failure," Cassandra Stubbs, director of the American Civil Liberties Union's Capital Punishment Project, said in a statement. "Instead of hiding lethal injection under layers of foolish secrecy, these states need to show us where the drugs are coming from. Until they can give assurances that the drugs will work as intended, they must stop future executions."

Wood was the first person executed this year in the state. Arizona's last two executions, both in October 2013, used two different types of lethal injections: Edward Schad was put to death with an injection of one drug (pentobarbital) on Oct. 9, while Robert Jones was executed with a three-drug mix (including midazolam hydrochloride) two weeks later.

The state changed its lethal injection protocols earlier this year. Horne's office announced that it would allow the use of midazolam and hydromorphone to carry out the executions, a change that occurred because the state is one of many scrambling to find the drugs needed for lethal injections. This shortage has caused states to effectively experiment with different combinations and drug protocols while also discussing turning to methods of execution such as the electric chair or firing squad.

When the appeals court upheld the stay of Wood's execution, Chief Judge Alex Kozinski wrote a stinging dissent arguing that attacks on lethal injection stemmed from fundamental problems with the concept:

Whatever happens to Wood, the attacks will not stop and for a simple reason: The enterprise is flawed. Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful — like something any one of us might experience in our final moments.... But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.

Cozinski went on to argue that a return to the firing squad made the most sense, rather than continuing to rely on drugs.

“Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding blood,” he wrote.

Last updated at 10:01 p.m. Earlier updates below.]

Update — 7:01 p.m.:

Joseph Wood died nearly two hours after the execution began, the Associated Press is reporting.

Update — 6:46 p.m.:

The execution is underway in Arizona, but lawyers for Wood have filed an emergency stay asking that the execution be halted.

According to the filing, he was declared sedated shortly before 2 p.m. (local time), but shortly after 2 p.m. began to breathe. His attorneys say Wood “has been gasping and snorting for more than an hour,” adding that he remains alive an hour after the execution began.

Here’s the entire filing:

[Emergency Motion for Stay of Execution](#)

Jon M. Sands
Federal Public Defender
District of Arizona
Dale A. Baich (OH Bar No. 002507)

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Earlier:

The Arizona Supreme Court announced Wednesday that it had stayed the execution of Joseph R. Wood shortly before he was set to die by lethal injection, but it dissolved the stay a short time later.

Wood was sentenced to death in 1991 for shooting and killing his ex-girlfriend Debra Dietz and her father, Eugene. His execution was set for Wednesday at 10 a.m. (local time) at the state prison in Florence, Ariz.

Attorneys for Wood had argued that he needed more information about his looming execution, including details about the drugs that would be used as well as the execution team. A panel of judges from the U.S. Court of Appeals for the 9th Circuit had agreed over the weekend and the full court upheld the decision on Monday, but the U.S. Supreme Court vacated the stay and denied a stay request on Tuesday evening.

The Supreme Court also denied a stay of execution on Wednesday. Justice Anthony M. Kennedy referred the stay request to the entire court, and it was denied without explanation.

Shortly before the scheduled execution, the state Supreme Court said it had stayed the execution so it could consider his petition. A short time later, the court announced that it had dissolved the earlier stay and was denying any motions asking for the execution to be stayed.

An attorney for Wood had said that he hoped the stay would give the court time to consider the issues Wood had raised, particularly the combination of drugs that will be utilized in the execution.

Issues involving the drugs that will be used and the medical personnel who will carry out the execution have come into play already in two different executions this year.

The two-drug combination that Arizona said it will now use for executions — utilizing medazolam and hydromorphone — was first used in a January execution in Ohio that saw an inmate choke, gasp and take nearly 25 minutes to die. Meanwhile, after an inmate grimaced and writhed during a botched lethal injection in Oklahoma, an independent autopsy found that the execution team failed to place the IV properly.

Arizona has argued that it has provided all of the necessary information regarding its execution protocols.

The execution warrant for Wood is good for 24 hours. If Wood is executed, he would be the first person put to death by the state since October 2013.

Here is the order dissolving the stay:

Arizona Supreme Court – Wood stay ended



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STATE OF ARIZONA,



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Mark Berman is a reporter on the National staff. He runs Post Nation, a destination for breaking news and developing stories from around the country.

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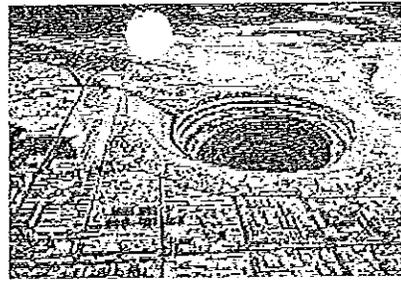
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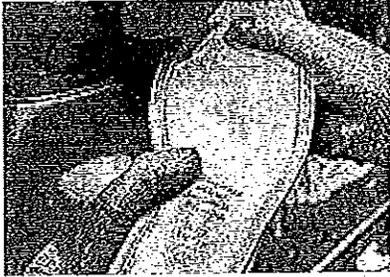
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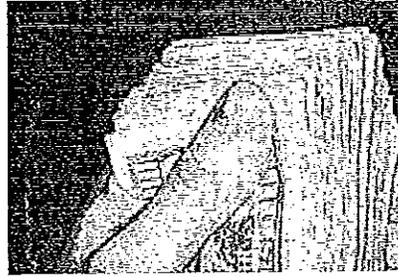
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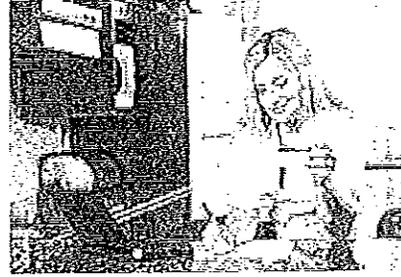
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EXHIBIT "C"

"BOTCHED LETHAL INJECTION EXECUTIONS REIGNITE DEATH
PENALTY DEBATE "

NATIONAL PUBLIC RADIO / JANUARY 6TH, 2015 / BY WADE GOODWYN



Botched Lethal Injection Executions Reignite Death Penalty Debate

JANUARY 06, 2015 5:45 PM ET



WADE GOODWYN

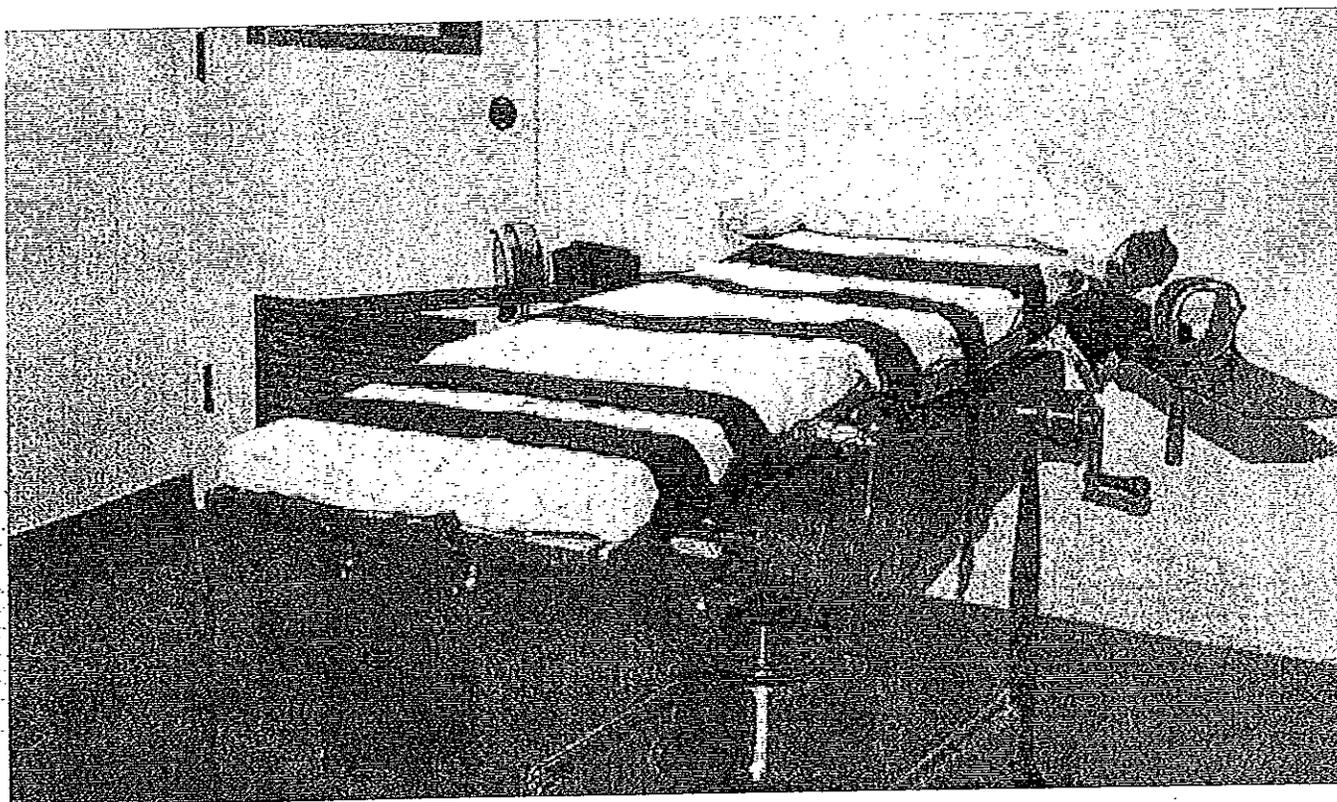
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In 2014, there were four botched executions, including one at the Oklahoma State Penitentiary in McAlester, Okla.

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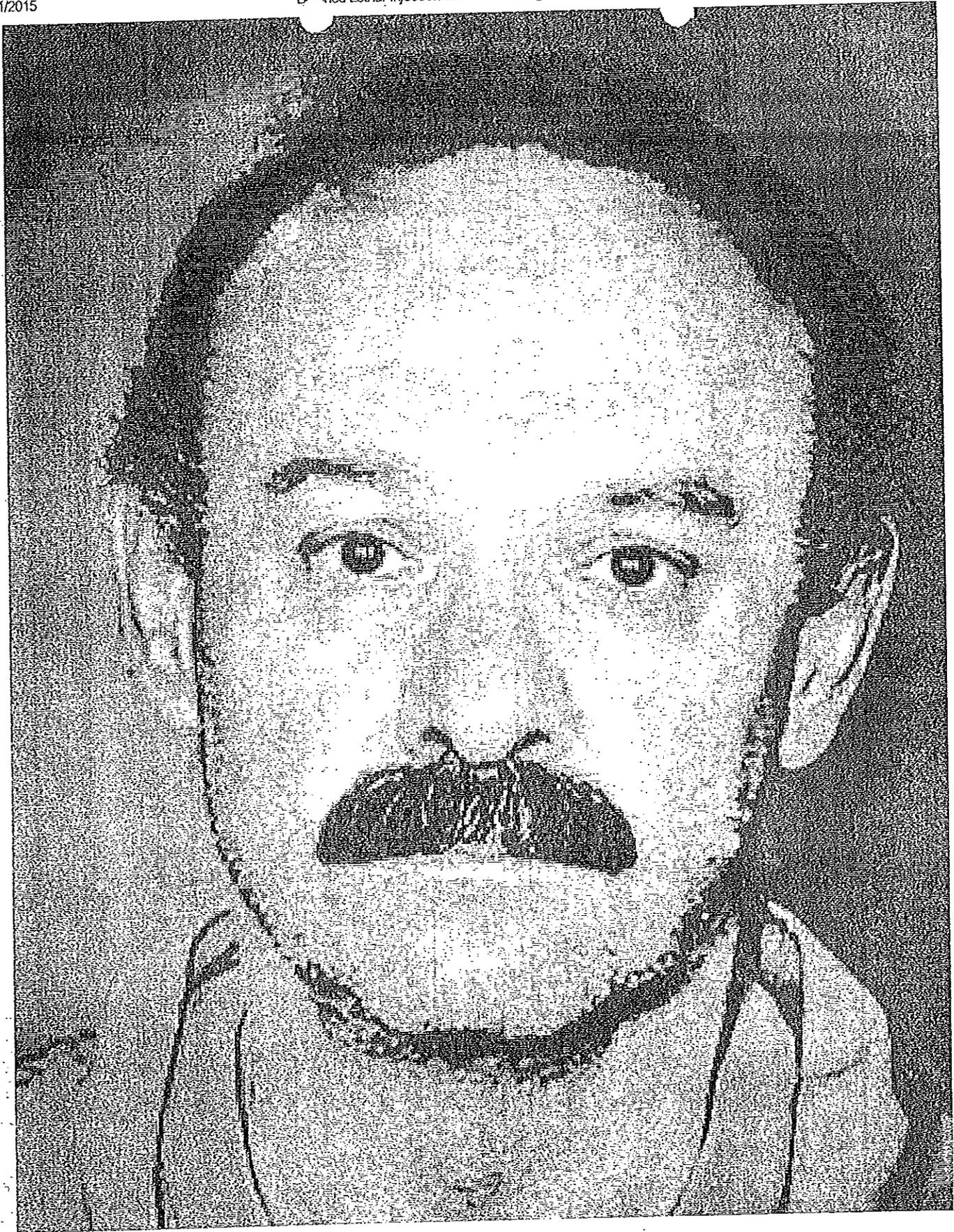
This past year, the number of inmates executed in America was the lowest in two decades at 35, according to the Death Penalty Information Center.

But death penalty states are having increasing difficulty obtaining the drugs they have used to execute inmates because pharmaceutical companies refuse to associate their drugs with killing people. This has forced states to seek new formulas using untested doses and find new compounding pharmacies to make their execution drugs. As a result, four executions in 2014 did not go well.

WORLD

Michael Kiefer, a veteran reporter for the *Arizona Republic*, has over the years been witness to five Arizona executions. Last July, Kiefer was observing the execution of double murderer Joseph Wood. For Wood's execution, the Arizona Department of Corrections was using a different drug formula for the first time.

"We were escorted in," Kiefer says. "Everything seemed to go smoothly. You watch the catheters being inserted. Joseph Wood closed his eyes, his head went back. It looked like executions I'd seen before using thiopental and pentobarbital."



Arizona Department of Corrections inmate Joseph Wood was executed by lethal injection in July. It took 15 doses and nearly two hours for him to die.

AP

With those drugs, Kiefer says it normally took five to 10 minutes for a condemned man

AP

Houston. They wrote them a letter, it was only discovered later, that said, 'We promise you that we will keep this on the down-low,' " Levin says.

"Down-low" was actually the phrase used. Just like the big pharmaceutical companies, compounding pharmacies don't want to be associated with executions either. So when the name of the pharmacy was disclosed in a court proceeding, the Houston compounding pharmacy was furious, embarrassed and quit.

"And the pharmacy asked for their drugs back, and the prison refused to give them back," Levin says.



THE TWO-WAY
2014 Saw Fewest Executions In 20 Years, Report Finds



U.S.
Are Opponents Of The Death Penalty Contributing To Its Problems?



THE TWO-WAY
Botched Oklahoma Execution Prompts Questions About Lethal Injection

This outing of compounding pharmacies has become a serious threat to death penalty states' drug supplies. Like several other death penalty states, Texas argues that the identity of the drug suppliers should be a state secret and not even judges should be able to find out.

"We've said before that disclosing the identity of the pharmacy would result in harassment of the business, and it's going to raise serious safety concerns for the business and its employees," says Jason Clark, a spokesman for the Texas Department of Criminal Justice.

But last month a Texas judge rejected the state's arguments, ruling the name of the compounding pharmacy is public information. Texas is appealing.

This is the new front in the legal war over the death penalty. A clean and painless death by injection has played a major role in preserving capital punishment in America. If that becomes a problem, it could complicate the institution's long-term survival.

lethal injection death penalty texas pharmaceuticals arizona

EXHIBIT "D"

"THREE EXECUTIONS GONE WRONG: DETAILS OF LETHAL INJECTIONS IN ARIZONA, OHIO, OKLAHOMA"

MERCURYNEWS.COM / JULY 24TH, 2014 / BY ASTRID GALVAN; SEAN MURPHY

Three executions gone wrong: Details of lethal injections in Arizona, Ohio, Oklahoma

Posted: Thu Jul 24 09:17:29 MDT 2014

MercuryNews.com

Since the start of the year, executions in Ohio, Oklahoma and Arizona have gone awry, with inmates gasping for breath as lethal drugs coursed through their bodies. The Associated Press had witnesses at the executions of the three inmates. A look at how each unfolded:

THE BACKSTORY:

ARIZONA: Joseph Rudolph Wood was convicted of fatally shooting Debbie Dietz, 29, and her father, Gene Dietz, 55, at their auto repair shop in Tucson in 1989. He was executed on Wednesday.

OKLAHOMA: Clayton Lockett was convicted of shooting Stephanie Nieman, 19, with a sawed-off shotgun and watching as two accomplices buried her alive in 1999. He was executed on April 29.

OHIO: Dennis McGuire was sentenced to die for raping and stabbing to death Joy Stewart, a pregnant newlywed, in 1989. He was executed on Jan. 16.

BENIGN BEGINNINGS

ARIZONA: Wood looked around the death chamber and glanced at the doctors as they made preparations for his execution Wednesday in Florence, Arizona. They located veins and inserted two lines into his arms.

OKLAHOMA: Lockett's execution was slightly delayed. Also, while the procedure typically calls for one IV to be inserted into each arm, the medical team had difficulty finding a suitable vein and instead opted for a single IV into Lockett's groin that was covered with a sheet.

OHIO: McGuire, strapped to the gurney as members of the execution medical team inserted intravenous needles into his arms, spoke several times. The prison's spokeswoman said he repeatedly thanked the leader of the execution team.

LAST WORDS

ARIZONA: Wood looked at the family members as he delivered his final words, saying he was thankful for Jesus Christ as his savior. At one point, he smiled at them, which angered the family. "I take comfort knowing today my pain stops, and I said a prayer that on this or any other day you may find peace in all of your hearts and may God forgive you all," Wood said.

OKLAHOMA: When asked if he had any final words, Lockett simply responded: "No."

OHIO: McGuire then thanked Stewart's family members, who witnessed the execution, for their "kind words" in a letter he apparently received from them. "I'm going to heaven. I'll see you there when you come," he said.

FIRST TROUBLE:

ARIZONA: About 10 minutes after the drugs were injected, the gasping began. Wood's jaw dropped, his chest expanded, and he let out a gasp. The gasps repeated every five to 12 seconds. They went on and on, hundreds of times. An administrator checked on him a half-dozen times. He could be heard snoring loudly when an administrator turned on a microphone to inform the gallery that Wood was still sedated, despite the audible sounds.

OKLAHOMA: After Lockett received the first drug, midazolam, and was determined to be unconscious, the second and third drugs were administered. A few minutes later, Lockett began writhing on the gurney, mumbling, breathing heavily and straining to lift his head from a pillow.

OHIO: McGuire appeared unconscious but gasped repeatedly as he lay on a gurney, his stomach rising and falling and his mouth opening and shutting. McGuire's execution lasted 26 minutes, the longest of any in Ohio to date. What was particularly unusual was the five minutes or so that McGuire lay motionless on the gurney after the drugs began flowing, followed by a sudden snort and then more than 10 minutes of irregular breathing and gasping. Normally, movement comes at the beginning and is followed by inactivity. It remains unclear what McGuire experienced, although it was clearly much different than any other execution where the needles were inserted properly.

REACTION:

ARIZONA: As the episode dragged on, Wood's lawyers frantically drew up an emergency legal appeal, asking federal and state courts to step in and stop the execution.

OKLAHOMA: As Lockett continued to struggle on the gurney, the prison warden ordered the blinds lowered that allowed witnesses to see inside the death chamber. After learning there was a problem with the IV and that some of the drugs had leaked into Lockett's tissue or out of his body, the state's prison director called a stop to the execution.

OHIO: McGuire's daughter, Amber McGuire, watched his final moments. "Oh, my God," she said as he gasped and breathed irregularly.

RESOLUTION:

ARIZONA: Wood's gasps lasted about an hour and a half. His breathing slowed and he took his final breath. Soon after, Arizona Department of Corrections Director Charles L. Ryan declared Wood dead.

OKLAHOMA: Lockett was pronounced dead of an apparent heart attack 43 minutes after his execution began. The results of a state autopsy are pending, and an official cause of death has not been released. Oklahoma Gov. Mary Fallin has ordered an independent investigation into Lockett's execution, and the results of that probe have not been released.

OHIO: McGuire was pronounced dead 26 minutes after the lethal drugs began flowing.

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Associated Press reporters Astrid Galvan in Florence, Arizona, and Sean Murphy in Oklahoma City contributed to this report.

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

The Constitution Project's Clearinghouse of New Voices for Criminal Justice Reform

STATEMENT FROM CORRECTIONS OFFICIALS REGARDING THE EXECUTION OF CLAYTON LOCKETT

As former correctional officials, we are deeply troubled by the botched execution of Clayton Lockett in Oklahoma last night. Our jobs as officers of the law involved carrying out and enforcing punishment within the confines of state and federal law. What appears to have been a horrific death last night certainly does not seem to have been legal or humane.

Some of the media who witnessed part of the execution appeared to be visibly shaken and disturbed. But the staff whose job it was to administer these drugs and to handle Mr. Lockett's body were surely put through an even more difficult experience. A career in corrections prepares one to see many things, but the terrible memories of witnessing executions remain in one's psyche forever. Correctional officers should not have to prepare to witness the horror of a botched execution such as that endured by Mr. Lockett and we can only imagine the emotional toll of this event on the professionals involved in the procedure.

No individual should be asked to carry out an execution using experimental drugs and dosages or without proper training and medical expertise. We cannot know how last night's events happened without a full independent inquiry, not by the Oklahoma Department of Corrections itself, but by a credible third party whose findings should be made public. And no further executions should be carried out in Oklahoma until Mr. Lockett's death is fully investigated and all the facts are known.

Signatories:

Dr. Allen Ault

Former Commissioner, Georgia, Mississippi, Colorado Departments of Corrections.

Robert Brown, Jr.

Director, Michigan Department of Corrections (1961-1991).

Jane Browning

Executive Director, Compassion Works for All; Former Executive Director, International Community Corrections Association

Paddy Burwell

Director (Public Member), State Bar of Texas (1997-2000); Member, Legal Services to the Poor and Criminal Matters Committee, State Bar of Texas (2002-2011), Committee Chair (2010); Member, State Bar of Texas Commission for Lawyer Discipline (2002-2005); Member, Texas Board of Pardons and Paroles (1999-2005); Life Member, Association of Former Texas Rangers.

Terry J. Collins

Director, Ohio Department of Rehabilitation and Correction (2006-2010); Assistant Director, Ohio Department of Rehabilitation and Correction (1977-2006). Correctional consultant utilizing 36 years of

Page 2
correctional experience.

Kathy Dennehy
Commissioner, Massachusetts Department of Corrections (2004-2007).

Steve J. Martin
Corrections Consultant and Attorney; Special Assistant Attorney General, Texas Attorney General (1985-1986); Executive Assistant to the Director (1984-1985), General Counsel (1983-1985), and Legal Counsel (1981-1983), Texas Department of Corrections, Huntsville, Texas; Federal court monitor, remedial decrees involving staff use of force in prisons and jails in the U.S., (1994-present); Expert, U.S. Department of Justice, Civil Rights Division (1993-2008); Expert, U.S. Department of Homeland Security, Office of Civil Rights and Civil Liberties (2010-present).

Dennis O'Neill
Retired Warden, Florida State Prison.

Rev. Dr. Carroll L. Pickett
Chaplain, Texas State Penitentiary at Huntsville, Texas Department of Corrections (1980-1995).

Chase Riveland
Director, Washington Departments of Corrections (12 years); Director, Colorado Department of Corrections (4 years).

Charles Terrell
Chairman, Texas Department of Criminal Justice (1987-1990); Chairman, Safer Dallas Better Dallas (2006-2012).

Dr. Reginald Wilkinson
Director (Ret.), Ohio Department of Rehabilitation and Correction (DRC), 1991-2006; DRC employee, 1973; President, American Correctional Association; Vice Chair for North America, International Corrections and Prison Association; President, Ohio Correctional and Court Services Association; Founder, Ohio chapter, National Association of Blacks in Criminal Justice.

Jeanne Woodford
Former Warden, San Quentin State Prison, California Department of Corrections and Rehabilitation.

EXHIBIT "F"

"AFFIDAVIT OF KENT DIVELY, M.D."

BOARD CERTIFIED ANESTHESIOLOGIST / SAN DIEGO CALIFORNIA

Kent Diveley, M.D.
Diveley Medical Corporation
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92101

August 4, 2014

MEDICAL REPORT

Otherwise other inmates in the future could suffer egregious inhumane deaths like Mr. McGuire.

Respectively submitted,

Kent Diveley, M.D.

EXHIBIT "G"

" ANESTHESIOLOGISTS AND CAPITAL PUNISHMENT"

.....ANESTHESIOLOGISTS MAY NOT PARTICIPATE IN CAPITAL PUNISHMENT...

DR MARK ROCKOFF, M.D. / SECRETARY/ AMERICAN BOARD OF ANESTHESIOLOGY



THE AMERICAN BOARD OF ANESTHESIOLOGY, INC.

A Member Board of the American Board of Medical Specialties

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Commentary (4/2/10)

Anesthesiologists and Capital Punishment

The majority of states in the United States authorize capital punishment, and nearly all states utilize lethal injection as the means of execution. However, this method of execution is not always straightforward (1), and, therefore, some states have sought the assistance of anesthesiologists (2).

This puts anesthesiologists in an untenable position. They can assuredly provide effective anesthesia, but doing so in order to cause a patient's death is a violation of their fundamental duty as physicians to do no harm.

For decades the American Medical Association (AMA) has been opposed to physician involvement in capital punishment on the grounds that physicians are members of a profession dedicated to preserving life when there is hope of doing so (3). Effective February 15, 2010, the American Board of Anesthesiology (ABA) has incorporated the AMA's position on capital punishment into its professional standing requirements for all anesthesiologists who are candidates for or diplomates of the ABA (4). Thus, anesthesiologists may not participate in capital punishment if they wish to be certified by the ABA. What constitutes participation is clearly defined by the AMA's policy.

The ABA has not taken this action because of any position regarding the appropriateness of the death penalty. Anesthesiologists, like all physicians, and all citizens, have different personal opinions about capital punishment. Nonetheless, the ABA, like the AMA, believes strongly that physicians should not be involved in capital punishment. The American Society of Anesthesiologists has also supported the AMA's position in this regard (5), as have others (6). Patients should never confuse the practice of anesthesiology with the injection of drugs to cause death. Physicians should not be expected to act in ways that violate the ethics of medical practice, even if these acts are legal.

In conclusion, the ABA's policy on capital punishment is intended to uphold the highest standards of medical practice and encourage anesthesiologists and other physicians to honor their professional obligations to patients and society.

Mark A. Rockoff, MD
Secretary, ABA

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EXHIBIT "H"

"THE AMERICAN NURSES ASSOCIATION IS STRONGLY OPPOSED TO NURSE PARTICIPATION IN CAPITAL PUNISHMENT. PARTICIPATION IN EXECUTIONS, EITHER DIRECTLY OR INDIRECTLY, IS VIEWED AS CONTRARY TO THE FUNDAMENTAL GOALS AND ETHICAL TRADITIONS OF THE NURSING PROFESSION"

A.N.A. COMMITTEE ON ETHICS / JANUARY 28TH, 2010

Position Statement

Nurses' Role in Capital Punishment

Effective Date: January 28, 2010

Status: Revised Position Statement

Originated By: ANA Committee on Ethics, 1983, rev. 1988 Revised by: ANA Center for Ethics and Human Rights

Adopted By: ANA Board of Directors

Related Past Action:

1. *Code of Ethics for Nurses with Interpretive Statements*, 2001
2. ANA Position Statements (1983,1984,1988): *Nurses' Participation in Capital Punishment*
3. House of Delegates Resolution on Acts of Torture and Abuse (2005)

Supersedes: ANA Position Statements (1983,1984,1988): *Nurses' Participation in Capital Punishment*

Purpose: This position statement addresses the nursing profession and the role of nurses in capital punishment. It provides a brief historical overview of the previous position statements as well as supportive background material related to capital punishment. Recommendations for nurses are presented with reference to ethical concepts, including, but not limited to, the ethic of care, justice, respect for persons, nonmaleficence, beneficence, and fidelity.

Statement of ANA position: The American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions, either directly or indirectly, is viewed as contrary to the fundamental goals and ethical traditions of the nursing profession.

Definitions of Capital Punishment:

Capital punishment "penalizes those convicted of certain classes of crimes by killing them" (US Supreme Court, 2009). Capital punishment is "The sentence of death for a serious crime." (Garner, 2004, p. 223).

History/previous position statements: The ANA's Committee on Ethics first adopted a position statement addressing capital punishment in 1983. This version was revised by the ANA Center for Ethics and Human Rights and approved by the ANA's Board of Directors in 1988 and again in 1994. These statements referred to the *Code of Ethics for Nurses* (ANA, 1985). There was also a House of Delegates Resolution on Acts of Torture and Abuse in 2005 that addressed the activities of nurses in correctional settings.

Supportive Material: Health care professionals, including nurses, continue to be called upon to participate in capital punishment including the use of lethal injection, among others. Currently, 35 states have legalized the death penalty. Fifteen states plus the District of Columbia do not support capital punishment (Death Penalty Information Center, 2010). Fifty nine countries retain the death penalty. In 2008 the United States was one of five countries with the highest rate of executions. "Together they carried out (93%) of all executions worldwide." (Amnesty International, 2008).

In 1972, the U. S. Supreme Court ruled in *Furman v. Georgia* that capital punishment violated the Constitution's Eighth and Fourteenth Amendments protecting individuals against "cruel and unusual punishments". The moratorium on the death penalty remained in place until 1976 when the Supreme Court upheld a death-sentence in *Gregg v. Georgia*, ruling that the death penalty does not, in all cases, violate the Eighth and Fourteenth Amendments. This ruling was supported in the *Baze v. Rees* Supreme Court case in 2008, which ruled that the lethal injection "cocktail" did not violate the Eighth or Fourteenth amendment, and was not deemed cruel and unusual punishment.

The United Nations General Assembly (2007) adopted a resolution, calling for "States that still maintain the death penalty: To establish a moratorium on executions with a view to abolishing the death penalty" (Item 2.d).

Professional and international organizations such as the American Medical Association (2000), American Psychiatric Association (2008), American Society of Anesthesiologists (2006), American Public Health Association (2001), American Correctional Health Services Association (1996), World Medical Association (2000), National Commission on Correctional Health Care (2008) and International Council of Nurses (2006a, 2006b) address the role of health care professionals in capital punishment. In summary, the health care professionals' participation in capital punishment is a breach of professional ethics.

Historically, the role of the nurse has been to promote, preserve, and protect human health. The *ANA Code of Ethics for Nurses with Interpretive Statements* states that ethics is "the foundation of nursing.... and has a history of concern for the welfare of the sick, injured, and vulnerable and for social justice" (ANA, 2001, p. 5). This array of concerns extends to the community and "encompasses the ...protection, promotion, and restoration of health" (p. 5). The Code of Ethics is grounded in the basic principles of respect for persons, nonmaleficence, beneficence, and justice, and stipulates that "nurses act to change those aspects of social structures that detract from health and well-being" (p. 5). Addressing end of life care, the Code states, nurses may not act [to alleviate pain] "with the sole intent of ending a patient's life" (p. 8). The obligation to refrain from causing death is longstanding and should not be breached even when legally sanctioned.

The ANA's Position Statement on Ethics and Human Rights (1991) addresses the intersection of ethics and human rights stating that "the principle of justice is one point at which issues of ethics and human rights intersect" (p. 1). This statement includes discussion of "first generation rights, such rights include: ...freedom from torture, and from cruel, inhuman or degrading treatment or punishment" (p. 1).

The ANA's *Social Policy Statement 3rd Edition* places the nurse in a position of public trust to ensure the patient is supported in goals of health and healing. "All registered nurses are educated in the art and science of nursing, with the goal of helping individuals, to attain, maintain, and restore health, or to experience a dignified death" (ANA, 2010, p.19). In those

cases where the corrections nurse has a relationship with a prisoner as a patient, the nurse will offer comfort care at the end of life, and if requested, help the prisoner prepare for the execution, but will not take part in it.

The ANA document *Corrections Nursing: Scope and Standards of Practice* (2007) states:

It is inappropriate for nurses to be involved in the security aspects of the facility and disciplinary decisions or committees. Correctional nurses must be vigilant in maintaining a healthcare role and not participate in non-therapeutic court-ordered procedures such as but not limited to body entry searches or executions by lethal injections, performed solely for correctional purposes and without informed consent. (p. 8)

The scope of practice indicates "the registered nurse in the corrections environment is bound by the profession's *Code of Ethics for Nurses with Interpretive Statements* (ANA, 2001)" (ANA, 2007, p. 14). It continues, stating "Nursing practice must be balanced with the goals of corrections and the incarcerated person's rights to appropriate health care" (ANA, 2007, p. 11).

The corrections nurse is expected to demonstrate integrity and highly ethical and moral practice, appreciating the legally mandated obligation to deliver nursing care regardless of the individual's circumstances or offenses. The basic concept of patient advocacy may be foreign to the corrections environment and may need to be regularly reaffirmed by the corrections nurse. (ANA, 2007, p. 12)

The ANA is opposed to all forms of participation by nurses in capital punishment, by whatever means, whether under civil or military legal authority. Participation in capital punishment is inconsistent with the ethical precepts of justice, nonmaleficence, and beneficence, and the values and goals of the nursing profession. The ethical principle of nonmaleficence requires that nurses act in such a way as to prevent harm, not to inflict it. The act of participating in capital punishment clearly inflicts harm; nurses are ethically bound to abstain from any activities in carrying out the death penalty process. Nurses must not participate in capital punishment, whether by chemical, electrical, or mechanical means. Consistent with this

directive is a standard of the National Commission on Correctional Health Care (NCCHC) prohibiting correctional health services staff from participation in inmate executions (2008).

Nurses, in their professional roles, including advanced practice, should not take part in assessing the prisoner or the equipment; supervising or monitoring the procedure or prisoner; procuring, prescribing or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; attending or witnessing the execution; or pronouncing the prisoner dead. Nurses should not train paraprofessionals in any of the activities listed above for the purpose of their use in capital punishment. The NCCHC specifies that health services staff do not assist, supervise or contribute to the ability of another to directly cause death of an inmate (2008).

The ANA recognizes that the endorsement of the death penalty remains a personal decision and that individual nurses may have views that are different from the official position of the profession. Regardless of the personal opinion of the nurse on the appropriateness of capital punishment, it is a breach of the ethical traditions of nursing, and the Code of Ethics to participate in taking the life of any person. The fact that capital punishment is currently supported in many segments of society does not override the obligation of nurses to uphold the ethical mandates of the profession.

Recommendations: In keeping with the nursing profession's commitment to caring, the preservation of human dignity and rights, the ethical principles of justice, nonmaleficence, beneficence, and fidelity, and the trust that the public has placed in registered nurses, the ANA recommends that:

1. Nurses abide by the Code of Ethics and the Scope and Standards of Professional Nursing Practice in correctional facilities prohibiting nurses from assuming any role in the capital punishment of a prisoner.
2. Nurses strive to preserve the human dignity of prisoners regardless of the nature of the crime they have committed.

3. Nurses act to protect, promote, and restore health of prisoners and provide comfort care at the end of life if requested, including pain control, anxiety relief or procuring services of a chaplain.
4. Nurses abide by the social contract to facilitate healing, and avoid participation in capital punishment — where the intent is to cause death.
5. Nurses who are invited to witness an execution must not represent themselves as a nurse nor assume any nursing role in that execution.
6. Nurse administrators provide a work environment that allows nurses to abide by the recommendations of the American Correctional Health Services Association and the ANA.
7. Nurses scrutinize policies and procedures guiding their practice to ensure there are no contradictions in performance expectations.
8. Nurses help colleagues balance moral burdens with professional ethics when specific death penalty cases cause moral turmoil.
9. Nurse researchers design studies to explore the meaning of participation, motivating factors, consequences of non-participation and fears of patient abandonment in the context of capital punishment.
10. Nurses continue to be involved in national and international dialogue on political, scientific, ethical, legal, social and economic perspectives leading to legislation that would abolish the death penalty.

11. Nurses as individuals and as a professional community maintain awareness that any nurse participation could contribute to the public's acceptance of the death penalty and their non-participation may, in fact, contribute to rejection of the death penalty.
12. Nurse educators should include and emphasize the knowledge and skills needed to act upon the above recommendations, especially the boundaries of direct and indirect participation.

Summary: The ANA is opposed to nurse participation in any phase of capital punishment. The *Code of Ethics for Nurses with Interpretive Statements* (ANA, 2001) addresses the fundamental values of the nursing profession. Participation of nurses in capital punishment is contrary to ethical precepts of the Code and *Nursing's Social Policy Statement: 3rd Edition* (ANA, 2010).

The document, *Corrections Nursing: Scope and Standards of Practice* (2007), specifically states that nurses' participation in executions by lethal injection is inappropriate. While many states still have a legalized death penalty, nurses should strive for social changes which recognize the human dignity of all individuals and uphold rights to be free from cruel and unusual punishment. Many professional and international organizations have addressed their concerns about the imposition of capital punishment and have issued codes, position statements, or policies stating opposition to the execution of prisoners.

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U.S. CONST. amend VIII.

U.S. CONST. amend XIV.

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EXHIBIT "I"

"INTERNATIONAL COMMITTEE OF COMPOUNDING PHARMACISTS"

**"IACP DISCOURAGES ITS MEMBERS FROM PARTICIPATING IN PREPARATION,
DISPENSING, OR DISTRIBUTION OF COMPOUNDED MEDICATIONS FOR USE IN LEGALLY
AUTHORIZED EXECUTIONS"**

IACP / MARCH 24TH, 2015 / DAVID BALL / GREG TURNER

EXHIBIT "J"

**" AMERICAN MEDICAL ASSOCIATION, EMERGENCY MEDICAL
TECHNICIAN ASSOCIATION SAY PARTICIPATION VIOLATES
MEDICAL ETHICS"**

**NAEMT POSITION STATEMENT ON EMT/ PARAMEDIC PARTICIPATION IN CAPITAL PUNISHMENT
JUNE 9TH , 2006**

EXHIBIT "K"

"PHYSICIANS AND EXECUTION"

"PHYSICIANS AND OTHER HEALTH CARE PROVIDERS SHOULD NOT BE INVOLVED IN CAPITAL PUNISHMENT, EVEN IN AN ADVISORY CAPACITY."

THE NEW ENGLAND JOURNAL OF MEDICINE / EDITORIAL / DR. CURFMAN / DR MORRISSEY

JANUARY 24TH, 2008



The NEW ENGLAND JOURNAL of MEDICINE

EDITORIAL

Physicians and Execution

Gregory D. Curfman, M.D., Stephen Morrissey, Ph.D., and Jeffrey M. Drazen, M.D.
N Engl J Med 2008; 358:403-404 | January 24, 2008 | DOI: 10.1056/NEJMe0800032

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Article

This spring the U.S. Supreme Court in *Baze v. Rees*¹ will rule on the constitutionality of the three-drug regimen currently used for lethal injection in most state executions. The Eighth Amendment to the U.S. Constitution prohibits punishment that is "cruel and unusual." The central question before the Court in *Baze* is whether the use of sodium thiopental, pancuronium bromide, and potassium chloride violates that constitutional prohibition.

The heinous nature of the crimes committed by Ralph Baze and his coplaintiff, Thomas Bowling, is not in doubt. What the Court will decide is whether the current lethal-injection protocol does or does not meet an acceptable constitutional standard of human decency.

Lethal injection was introduced in the United States in 1977 explicitly to sanitize executions, since the older methods — hanging, electrocution, and chemical gassing — were considered to be inhumane. The three-drug regimen that is commonly used was proposed by an Oklahoma forensic pathologist, Dr. A. Jay Chapman, and adopted by the state legislature without any scientific or medical testing. Injected drugs, now used in all but 1 of the 37 states in which capital punishment is legal, have been part of the increasing medicalization of executions and the enlistment of medical personnel to lend them apparent moral legitimacy.

Since 1977 the Oklahoma regimen has been used in approximately 900 executions, several dozen of which have been botched because of infiltration of intravenous lines, inadequate anesthesia, drug precipitation when solutions of sodium thiopental and pancuronium bromide are mixed, and other problems. In a vivid example, an inmate in Ohio in 2006 raised his head repeatedly during the execution and said, "It don't work."

The use of a neuromuscular blocker, pancuronium bromide, as part of the protocol has been especially controversial, since it has no anesthetic properties and only paralyzes the person, which can mask inadequate anesthesia if a sufficient dose of sodium thiopental has not been administered. The person may be alert and aware and may suffocate owing to paralysis of respiratory muscles, but there will be no way to know it. Also, the subsequent intravenous administration of potassium chloride would cause excruciating pain in a conscious person, but this too would be concealed by paralysis.

As a consequence of botched executions, the assistance of physicians and other health care professionals has increasingly been sought to provide consultation, place intravenous lines, mix and administer drugs, and monitor the results. This fact is not widely appreciated because such physicians often choose to remain anonymous. Still, many physicians and medical societies, including the American Medical Association and the American Society of Anesthesiology, have taken strong stands against the involvement of medical professionals in capital punishment. Although some states have forbidden medical boards to reprimand physicians who participate in executions, few medical professionals have agreed to assist in lethal injection. For example, in response to a federal court order in 2006, the State of California required the presence of qualified medical personnel at the execution of Michael Morales. Prison officials found two anesthesiologists who were willing to participate, but when informed in detail of the role they would play, they withdrew hours before the scheduled lethal injection, which was then halted.

Since the Morales case, there is evidence of a growing sentiment in the country against executions: only 42 executions took place in 2007 (as compared with 98 in 1999), New Jersey decided in December 2007 to abolish capital punishment, and the U.S. Supreme Court agreed to hear *Baze v. Rees*, marking the first time the Court has examined the constitutionality of lethal injection as a means of execution. But the people's unease over the death penalty is not new. In his 1972 concurring opinion in *Furman v. Georgia*² in which the Supreme Court ruled capital punishment to be cruel and unusual because of arbitrary and capricious application, Justice William Brennan wrote, "The progressive decline in, and the current rarity of, the infliction of

death demonstrate that our society seriously questions the appropriateness of this punishment today." Although *Furman* was reversed in 1976 in *Gregg v. Georgia*³ and executions resumed in the United States, the Court subsequently ruled unconstitutional the execution of the mentally retarded (in *Atkins v. Virginia*, 2002)⁴ and juveniles (in *Roper v. Simmons*, 2005).⁵ In both cases, Justice Anthony Kennedy, the current swing-vote justice, was in the majority, and he wrote the Court's opinion in *Roper*. If the Court's opinion in *Baze* is decided by a 5-to-4 majority, Justice Kennedy may again be at center stage, and his vote may prove decisive.

We are concerned that, regardless of its decision in *Baze v. Rees*, the Court may include language in its opinion that will turn again to the medical profession to legitimize a form of lethal injection that, meeting an appropriate constitutional standard, will not be considered "cruel and unusual punishment." On the surface, lethal injection is a deceptively simple procedure, but its practical application has been fraught with numerous technical difficulties. Without the involvement of physicians and other medical professionals with special training in the use of anesthetic drugs and related agents, it is unlikely that lethal injection will ever meet a constitutional standard of decency. But do we as a society want the nation's physicians to do this? We believe not.

Physicians and other health care providers should not be involved in capital punishment, even in an advisory capacity. A profession dedicated to healing the sick has no place in the process of execution. On January 7 in oral arguments in *Baze v. Rees*, the justices asked many important and thoughtful questions about a potential role for physicians and other health care professionals in executions. In their fuller examination of *Baze v. Rees*, the justices should not presume that the medical profession will be available to assist in the taking of human lives. We believe that, like the anesthesiologists in the Morales case, all responsible members of the medical profession, when asked to assist in a state-ordered execution, will remember the Hippocratic Oath and refuse to participate. The future of capital punishment in the United States will be up to the justices, but the involvement of physicians in executions will be up to the medical profession.

On January 7, 2008, the U.S. Supreme Court heard oral arguments in *Baze v. Rees*, which turns on the question of whether the three-drug protocol used to carry out the death penalty by lethal injection causes avoidable pain and suffering, in violation of the Constitutional ban on cruel and unusual punishment. On January 14, the *Journal* hosted a roundtable discussion of the case, the protocol, and the involvement of health care professionals in lethal injection. Moderator Atul Gawande, associate professor of surgery at Harvard Medical School, was joined by Deborah Denno, professor of law at Fordham University; Robert Truog, professor of medical ethics, anesthesiology, and pediatrics at Harvard Medical School; and David Waisel, associate professor of anesthesia at Harvard Medical School. Readers can watch the video of the roundtable discussion online at www.nejm.org. Readers can also vote online on whether they believe physicians and other health care professionals should be involved in executions and whether they themselves would choose to participate in executions (poll closes February 28, 2008).

This article (10.1056/NEJMe0800032) was published at www.nejm.org on January 7, 2008.

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Letters



Roche Statement

Statement on use of midazolam for death penalty

January 16, 2015

Roche is aware of the use of the benzodiazepine midazolam as part of a drug combination for executions under the death penalty in the U.S.

Roche did not supply midazolam for death penalty use and would not knowingly provide any of our medicines for this purpose. We support a worldwide ban on the death penalty.

Roche discovered midazolam in the 1970s as a treatment for acute seizures, moderate to severe insomnia, and for inducing sedation and amnesia before medical procedures. In 2004, Roche discontinued the manufacture and distribution of midazolam in the U.S. for business reasons during a re-evaluation of our product portfolio of medicines that are now available from generic manufacturers.

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Press Release

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Akorn Adopts Comprehensive Policy to Support the Use of Its Products to Promote Human Health

- Akorn Will Not Ship Directly to Prisons -

- Programs to Be Put In Place to Limit Potential Product Diversion for Executions -

LAKE FOREST, Ill., March 4, 2015 (GLOBE NEWSWIRE) -- Akorn, Inc. (Nasdaq:AKRX), today announced the company has adopted a comprehensive policy that endorses the use of its products to promote human health and wellness and condemns the use of its products - particularly midazolam and hydromorphone hydrochloride - in execution protocols.

Akorn's policy statement regarding the appropriate use of its products is as follows:

The employees of Akorn are committed to furthering human health and wellness through our vast portfolio of products. In the interest of promoting these values, Akorn strongly objects to the use of its products to conduct or support capital punishment through lethal injection or other means. To prevent the use of our products in capital punishment, Akorn will not sell any product directly to any prison or other correctional institution and we will restrict the sale of known components of lethal injection protocols to a select group of wholesalers who agree to use their best efforts to keep these products out of correctional institutions.

Direct Sales to Prisons Prohibited

Earlier this year, Akorn adopted a policy not to accept direct orders from prison systems. Departments of Correction in the United States who wish to purchase Akorn products for a legitimate medical need may purchase from our approved list of wholesalers. However, prison purchases of hydromorphone hydrochloride injection, USP, and midazolam injection, USP, through these wholesalers will not be allowed.

Wholesalers Engaged to Help Control Distribution of Midazolam and Hydromorphone

Building upon Akorn's prohibition of direct sales into prisons, the company is working to ensure that its distributors and wholesalers agree to not resell midazolam and hydromorphone to departments of correction and secondary wholesalers. In addition, Akorn plans to work with wholesalers and distributors to ensure that best efforts are used in other sales channels to prevent the sale of both products to prison systems.

Akorn Seeking the Return of Midazolam and Hydromorphone from Prison Systems

Akorn has dispatched a letter to the attorneys general and heads of departments of correction of the states that currently execute inmates or have prisoners on death row along with the United States Attorney General, the United States Secretary of Defense, the Director of the Federal Bureau of Prisons and the Chairman of the Department of Defense Corrections Council reiterating the company's policy on the appropriate use of its products. In addition, Akorn is seeking the return of any the company's products that may have been inappropriately purchased to aid in the execution process.

About Akorn

Akorn, Inc. is a specialty pharmaceutical company engaged in the development, manufacture and marketing of multisource and branded pharmaceuticals. Akorn has manufacturing facilities located in Decatur, Illinois; Somerset, New Jersey; Amityville, New York; Hettlingen, Switzerland and Paonta Sahib, India where the company manufactures ophthalmic, injectable and specialty non-sterile pharmaceuticals. Additional information is available on the company's website at www.akorn.com.

Forward Looking Statements

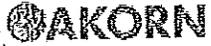
This press release includes statements that may constitute "forward-looking statements", including projections of certain measures of Akorn's results of operations, projections of sales, projections of certain charges and expenses, projections related to the number and potential market size of ANDAs, projections with respect to timing and impact of pending acquisitions, and other statements regarding Akorn's goals, regulatory approvals and strategy. Akorn cautions that these forward-looking statements are subject to risks and uncertainties that may cause actual results to differ materially from those indicated in the forward-looking statements. These statements are made pursuant to the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. Because such statements inherently involve risks and uncertainties, actual future results may differ materially from those expressed or implied by such forward-looking statements. You can identify these statements by the fact that they do not relate strictly to historical or current facts. They use words such as "anticipate," "estimate," "expect," "project," "intend," "plan," "believe," and other words and terms of similar meaning in connection with a discussion of future operating or financial performance. Factors that could cause or contribute to such differences include, but are not limited to: statements relating to future steps we may take, prospective products, prospective acquisitions, future performance or results of current and anticipated products and acquired assets, sales efforts, expenses, the outcome of contingencies such as legal proceedings, and financial results. These cautionary statements should be considered in connection with any subsequent written or oral forward-looking statements that may be made by the Company or by persons acting on its behalf and in conjunction with its periodic SEC filings. You are advised, however, to consult any further disclosures we make on related subjects in our reports filed with the SEC. In particular, you should read the

3/13/2015

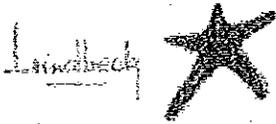
Akorn - Investor Relations | Press Release

discussion in the section entitled "Cautionary Statement Regarding Forward-Looking Statements" in our most recent Annual Report on Form 10-K, as it may be updated in subsequent reports filed with the SEC. That discussion covers certain risks, uncertainties and possibly inaccurate assumptions that could cause our actual results to differ materially from expected and historical results. Other factors besides those listed there could also adversely affect our results.

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Akorn, Inc.



Lundbeck overhauls pentobarbital distribution program to restrict misuse

Release date: 01-07-2011

Release time: 06:00

New specialty pharmacy drop ship program will deny distribution of pentobarbital to prisons in U.S. states currently carrying out the death penalty by lethal injection.

Lundbeck today announced that the company has moved to alter the distribution of its medicine Nembutal[®] (pentobarbital sodium injection, USP) in order to restrict its application as part of lethal injection in the U.S. Going forward, Nembutal will be supplied exclusively through a specialty pharmacy drop ship program that will deny distribution of the product to prisons in U.S. states currently active in carrying out the death penalty by lethal injection. The company notified its distributors of the plan in late June.

The new distribution program ensures that hospitals and treatment centers will continue to have access to Nembutal for therapeutic purposes. Under the program, Lundbeck will review all Nembutal orders before providing clearance for shipping the product and deny orders from prisons located in states currently active in carrying out death penalty sentences.

Prior to receiving Nembutal, the purchaser must sign a form stating that the purchase of Nembutal is for its own use and that it will not redistribute any purchased product without express written authorization from Lundbeck. By signing the form, the purchaser agrees that the product will not be made available for use in capital punishment.

"Lundbeck adamantly opposes the distressing misuse of our product in capital punishment. Since learning about the misuse we have vetted a broad range of remedies - many suggested during ongoing dialogue with external experts, government officials, and human rights advocates. After much consideration, we have determined that a restricted distribution system is the most meaningful means through which we can restrict the misuse of Nembutal," says Ulf Wiinberg, Chief Executive Officer of H. Lundbeck A/S and continues: "While the company has never sold the product directly to prisons and therefore can't make guarantees, we are confident that our new distribution program will play a substantial role in restricting prisons' access to Nembutal for misuse as part of lethal injection."

Lundbeck has initiated a thorough investigation of the distribution of Nembutal to assess ways of restricting prisons' access to the medicine. Based on the initial findings, the company believes its new distribution program is the best way to achieve this. The investigation will be completed, and any possible further options that may be discovered will be evaluated.

Prior to the implementation of the drop ship program, Nembutal was sold through a more standard process utilizing several distributors to fulfill orders based on whether customers held the appropriate federal and state licenses for ordering controlled substances.

Meets important medical need

Nembutal represents less than one percent of Lundbeck's global sales but the company chose not to withdraw the product from the market because the product continues to meet an important medical need in the U.S. Nembutal is used to treat serious conditions such as a severe and life threatening emergency epilepsy.

In a recent survey of more than 200 U.S. physicians and pharmacists conducted by independent third-party research companies, 90 percent of the respondents stated that options for treating patients requiring emergency control of certain acute convulsive episodes would be compromised if Nembutal were no longer available for use. Furthermore, 95 percent of respondents reported that it is very important for their institution to have access to Nembutal for potential use in the medical care of patients. All survey respondents were from academic institutions, large community hospitals or epilepsy centers in the U.S.

Contacts

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Country news

Hikma Pharmaceuticals strongly objects to the use of its products in capital punishment

London, 15 May 2013 – Hikma Pharmaceuticals PLC (LSE: HIK) (NASDAQ Dubai: HIK) notes the press release issued today by the legal action charity Reprieve, regarding the potential use of its injectable phenobarbital for the purpose of capital punishment by the Arkansas Department of Corrections.

Phenobarbital is the world's most widely used anti-convulsant. Hikma strongly objects to the use of any of its products in capital punishment. The Company is putting in place concrete steps to restrict the supply of its products for unintended uses. It has ceased the direct sale of injectable phenobarbital to US departments of corrections and will work directly with its distribution partners to add restrictions for unintended use to its distribution contracts.

Hikma aims to improve lives by providing patients with access to high quality, affordable medicines. Its medicines are used thousands of times a day to treat illness and save the lives of patients across its markets.

-- ENDS --

Enquiries

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About Hikma

Hikma Pharmaceuticals PLC is a fast growing multinational group focused on developing, manufacturing and marketing a broad range of both branded and non-branded generic and in-licensed products. Hikma operates through three businesses: "Branded", "Injectables" and "Generics", based principally in the Middle East and North Africa ("MENA"), where it is a market leader, the United States and Europe. In 2012, Hikma achieved revenues of \$1,108.7 million and profit attributable to shareholders of \$100.3 million.

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EXHIBIT "L"

**"STATEMENTS OF VARIOUS DRUG MANUFACTURE COMPANIES
OPPOSING USE OF THEIR DRUGS IN EXECUTIONS"**

COMPANIES: ROCHE / AKORN / LNDBECK / HIKMA

EXHIBIT "M"

"AMERICAN PHARMACISTS ASSOCIATION ADOPTS POLICY
DISCOURAGING PHARMACIST PARTICIPATION IN EXECUTION"

MARCH 30TH, 2015

APhA House of Delegates Adopts Policy Discouraging Pharmacist Participation in Execution

March 30, 2015

"The American Pharmacists Association discourages pharmacist participation in executions on the basis that such activities are fundamentally contrary to the role of pharmacists as providers of health care."

WASHINGTON, DC – The American Pharmacists Association (APhA) House of Delegates today voted to adopt a policy discouraging pharmacist participation in executions. The House of Delegates met as part of the 2015 APhA Annual Meeting & Exposition, APhA2015, in San Diego.

The policy states: "The American Pharmacists Association discourages pharmacist participation in executions on the basis that such activities are fundamentally contrary to the role of pharmacists as providers of health care."

APhA Executive Vice President and CEO, Thomas E. Menighan, BSPHarm, MBA, ScD (Hon), FAPhA, stated, "Pharmacists are health care providers and pharmacist participation in executions conflicts with the profession's role on the patient health care team. This new policy aligns APhA with the execution policies of other major health care associations including the American Medical Association, the American Nurses Association and the American Board of Anesthesiology.

This new policy statement joins two policies previously adopted by the APhA House of Delegates:

Pharmacist Involvement in Execution by Lethal Injection (2004, 1985)

1. APhA opposes the use of the term "drug" for chemicals when used in lethal injections.
2. APhA opposes laws and regulations which mandate or prohibit the participation of pharmacists in the process of execution by lethal injection.

M. Spinner

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