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BY: _____

2015 DEC 15 AM 10:45

VIRLYNN TINNELL
SUPERIOR COURT CLERK

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

STATE OF ARIZONA,

Plaintiff,

vs.

JUSTIN JAMES RECTOR

Defendant.

NO: CR 2014 - 01193

**DEFENDANT'S MOTION TO DISMISS
ALLEGATIONS OF DEATH BECAUSE
STATE CANNOT CONSTITUTIONALLY
IMPOSE DEATH PENALTY**

(ASSIGNED TO THE HON. LEE JANTZEN)

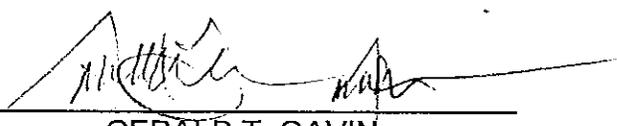
Defendant Justin James Rector, by and through undersigned counsel, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, and Article II, §§ 4, 24 and 30 of the Arizona Constitution, moves this Court dismiss the allegation of death noticed in this matter. The State is incapable of administering the death penalty in a matter that comports with the Constitution and basic human dignity, for the reasons and authority contained in the Memorandum of Point and Authorities attached hereto and incorporated herein.

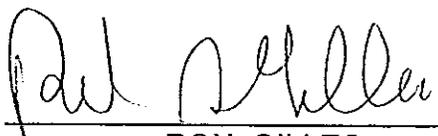


S8015CR201401193

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1
2 RESPECTFULLY SUBMITTED This 15th day of December, 2015.

3
4 
GERALD T. GAVIN
5 Co-Counsel for Mr. Rector

6 
RON GILIEO
7 Co-Counsel for Mr. Rector

8
9 MEMORANDUM OF POINTS AND AUTHORITES

10
11 Justin Rector asserts that allowing the State to impose a sentence of death
12 endangers his Eighth Amendment right to be free from being the subject of medical
13 experimentation, and from suffering a cruel, unusual, undignified or lingering painful and
14 labored death, and his Fourteenth Amendment rights to due process and equal
15 protection, as well as in violation of Article II, §§ 4, 24 and 30 of the Arizona
16 Constitution.

17
18 The Eighth Amendment of the Constitution, applicable to the State of Arizona
19 through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual
20 punishments." Punishments are "cruel when they involve torture or lingering death."
21 Baze v. Rees, 553 U.S. 35, 46 (2008) (quoting In re Kemmler, 136 U.S. 436, 447
22 (1890)). For more than a century, the States and the American public have sought to
23 ensure the "most humane and practical method" for carrying into effect the sentence of
24 death. See, e.g., Malloy v. South Carolina, 237 U.S. 180 (1915); S. BANNER, THE
25 DEATH PENALTY: AN AMERICAN HISTORY 192-93, 296-97 (2002) (describing the
26 evolution of executions from hanging; firing squad, to electrocution, to lethal gas to
27 injection). See generally AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED
28 EXECUTIONS AND AMERICA'S DEATH PENALTY (2014). A condemned prisoner is

1 Medical Association and the American Board of Anesthesiology also have concluded
2 that a physician's participation in capital punishment violates the ethical tenets of
3 medical practice.³ Likewise, many States, have recently encountered difficulty
4 obtaining drugs for lethal injection,⁴ in part because several pharmaceutical companies
5 responsible for making these drugs have refused to make their products available for
6 killing people.⁵

7 In the years since the Supreme Court decided Baze, at which time the majority of
8 States used the same combination of three drugs in their lethal injection protocols-
9 sodium thiopental, pancuronium bromide, and potassium chloride- states, including
10 Arizona, have been experimenting with different untested drug combinations to execute
11 prisoners, and are increasingly turning to untoward (and, in some cases, illegal)
12 methods to obtain the needed drugs required for these experimental combinations. ⁶

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17 3 SEE AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS, Opinion E-2.06 -
18 Capital Punishment (June 200) (accessed September 8th, 2014, at [http://www.ama-
21 asn.org/ama/pub/physician-resources/medical-ethics/code-medical-
22 ethics/opinion206.page](http://www.ama-
19 asn.org/ama/pub/physician-resources/medical-ethics/code-medical-
20 ethics/opinion206.page)); See also COMMENTARY, AMERICAN BOARD OF
23 ANESTHESIOLOGY, ANESTHESIOLOGISTS AND CAPITAL PUNISHMENT (May 2014);
24 "Statement from Drug Manufacturers and other Medical Professionals," Death
25 Penalty Information Center, [http://www.deathpenaltyinfo.org/lethal-injection-
moratorium-executions-ends-after-supreme-court-decision#statements\(listing
medical opposition\)](http://www.deathpenaltyinfo.org/lethal-injection-
26 moratorium-executions-ends-after-supreme-court-decision#statements(listing
medical opposition)).

21 4 See Arizona Again Tries to Illegally Import Execution Drug, Arizona
22 Republic,
23 [http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-
25 -corrections-import-thiopental-illegal-execution-drug/74406580/](http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-
24 -corrections-import-thiopental-illegal-execution-drug/74406580/) (last accessed
26 December 8, 2015).

21 5 See Deborah W. Denno, *Lethal Injection Chaos Post- Baze*, 102 GEO.L.J. 1331,
22 1360-66 (2014); see David Jolly, *Danish Company Blocks Sale of Drug for U.S.*
23 *Executions*, N.Y. Times, July 1, 2011,
24 <http://nytimes.com/2011/07/02/world/europe/02/execute.html>. ("The shortage of
25 sodium thiopental led prison officials to seek out questionable alternative
26 sources of the drug throughout the world, ranging from England to
Pakistan.").

21 6 Missouri and Texas, for instance, have turned to compounding pharmacies to
22 create analogues of branded drugs. Reliance on compounding pharmacies is
23 risky, however, because regulations governing such pharmacies are lax and
24 vary from state to state, and instances of contamination abound; American
25 Medical Association guidelines even warn doctors that prescribing compounded
26 medications can lead to malpractice liability. See Denno, 102 GEO.L.J at

1
2 The resort to compounding and/or clandestine means of obtaining drugs for
3 execution, along with other failures of states to protect the condemned from a painful
4 and undignified death, has resulted in a series of lethal-injection mishaps occurring with
5 disturbing frequency.

6 Sadly, Arizona has been one of the focal points of states engaging in clandestine
7 means to obtain drugs, experimentation, and disastrous results. On July 23, 2014,
8 Arizona executed Joseph Wood. This was only the second execution carried out in the
9 United States using a combination of midazolam and hydromorphone. The results were
10 disastrous and unconstitutional. Joseph Wood took almost two hours to die. During
11 their nearly two-hour medical experiment with new doses and chemicals, Arizona
12 departed radically from their execution protocol. As he gasped for air on the gurney,
13 executioners injected Wood over and over- fifteen times in excess of the amount called
14 for in the execution protocol. Arizona's unparalleled two-hour execution of Joseph
15 Wood has made clear that Arizona's attempts to implement its lethal injection statute
16 are fatally flawed. Arizona's improvised and unprecedented two-hour execution of
17 Joseph Wood has made clear that Arizona's attempts to implement its lethal injection
18 statute are fatally flawed. This improvised and unprecedented two-hour execution of
19 Joseph Wood has exposed fundamental flaws in Arizona's attempts to implement its
20 lethal injection statute. The State of Arizona has shown its willingness to abuse its
21 discretion, violate its own execution protocol and the Constitution, all with a substantial
22 risk of imposing more unpredictable, grotesque experiments in human execution with
23 similarly disturbing results.
24
25
26

27 _____
1366-68.

28 *7 Arizona Inmate Was Injected 15 Times With Execution Drugs*, The Guardian,
<http://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood> (last accessed Dec. 12, 2015).

1 Arizona's death-penalty statute and Arizona Department of Correction's ever
2 shifting regulations implementing that statute create a substantial risk that Mr. Rector's
3 execution would cause him to suffer an unacceptable, inhumane torturous death. The
4 disturbing events during Joseph Wood's execution were not isolated events. Rather,
5 Woods execution followed directly from the excessive discretion Arizona vests in its
6 prison officials for carrying out executions. The State of Arizona has now botched a
7 series of executions due to the ill-thought, flawed written procedures and the State's
8 refusal to follow even those flawed procedures. It is a Joseph Mengele inspired scheme
9 of ad-hoc death by any means available. It is beyond the pale, and wholly unacceptable
10 to a civilized society. See generally Lopez v. Brewer, 680 F.3d 1084, 1093-94 (9th Cir.
11 2012) (Pregerson, J., dissental) (discussing series of mishaps and mistakes in
12 Arizona's attempts to carry out death sentences).

13
14 Arizona and other jurisdictions have a long history of botched executions. See,
15 for general background on the issue, attached "Exhibit A" : *Botched Lethal Injection*
16 *Executions Reignite Death Penalty Debate*, National Public Radio, January 6th 2015;
17 "Exhibit B": *The botched executions behind the Supreme Court case on lethal injection*,
18 The Washington Post, January 23rd, 2015 ;
19 "Exhibit C": *A Gruesome Historical Argument Against the Death Penalty*, Time
20 Magazine, May 4th 2015; "Exhibit D": *Death Penalty Walking*, Time Magazine, January
21 3rd 2008. ("In a perfect world, perhaps, the government wouldn't wait 30 years and
22 several hundred executions to determine whether an execution method makes sense.
23 But the world of capital punishment has never been that sort of place. This weighty
24 moral issue, expressive of some of our society's deeply held values, involves alot of
25 winging it").
26

27 Given the state of capital punishment in Arizona, there is a substantial risk that if
28 the State is allowed to pursue a death sentence against Justin Rector, he will be subject

1 to macabre medical experimentation, and face substantial risk of suffering a cruel,
2 unusual, undignified, unpredictable or lingering death, in violation of his Eighth
3 Amendment rights against cruel and unusual punishment, and his Fourteenth
4 Amendment rights to due process and equal protection, as well as Article II, §§ 4,24,
5 and 30 of the Arizona Constitution.

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1 ORIGINAL of the foregoing filed
2 this 15th day of December, 2015 with:

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

6
7 COPY of the forgoing
8 Delivered this 15th day
9 Of December, 2015, to:

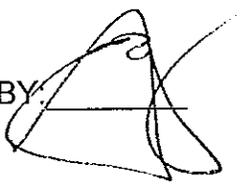
10 Honorable Lee Jantzen
11 Judge of the Superior Court
12 Mohave County Courthouse
13 2nd floor
14 Kingman Arizona 86401

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

19 Ron Gilleo
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21 Co-Counsel for Justin James Rector
22 313 Pine Street
23 PO Box 7000
24 Kingman Arizona 86401

25 Client Justin James Rector
26 Mohave County Jail

27 File

28
BY: 

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EXHIBIT "A"



LAW

Botched Lethal Injection Executions Reignite Death Penalty Debate

Updated January 6, 2015 · 6:36 PM ET



WADE GOODWYN

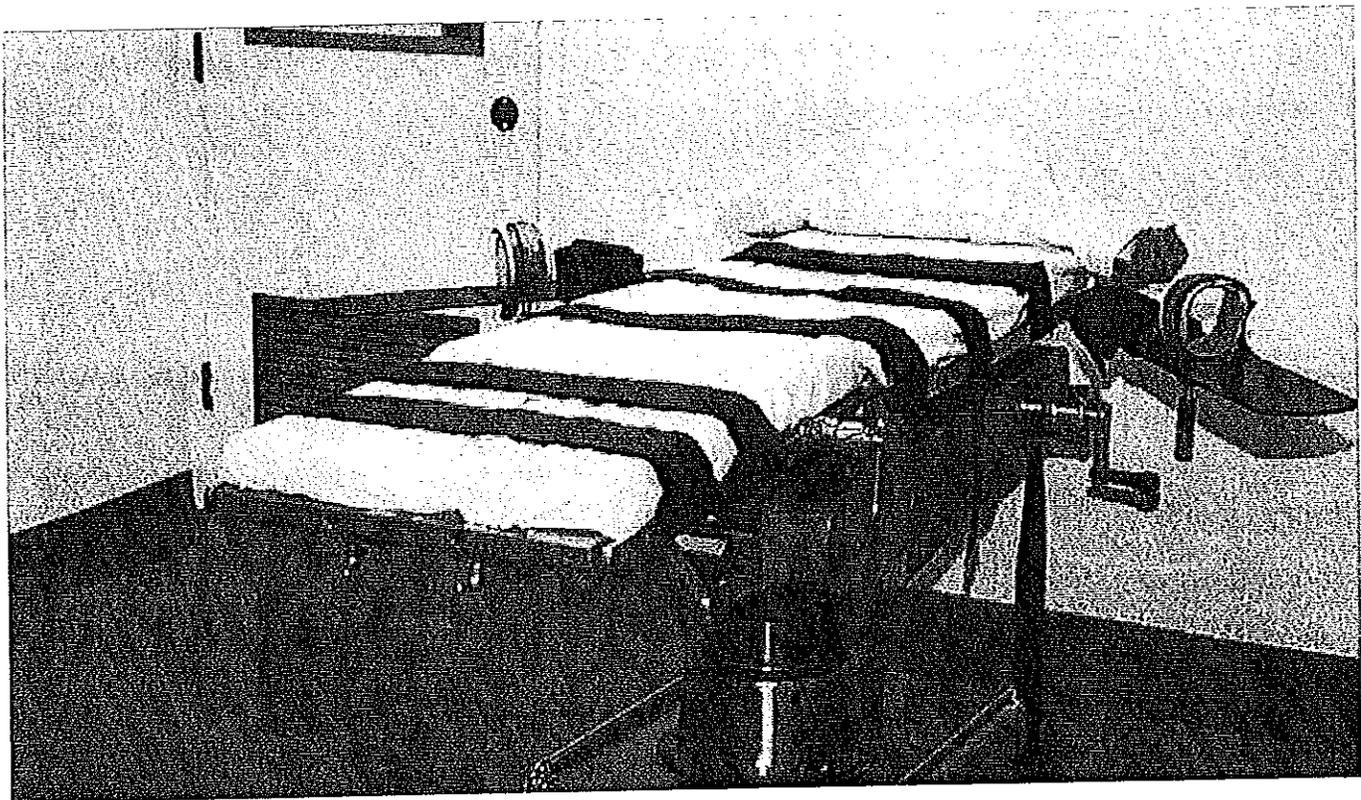
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All Things Considered

5:19

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

AP

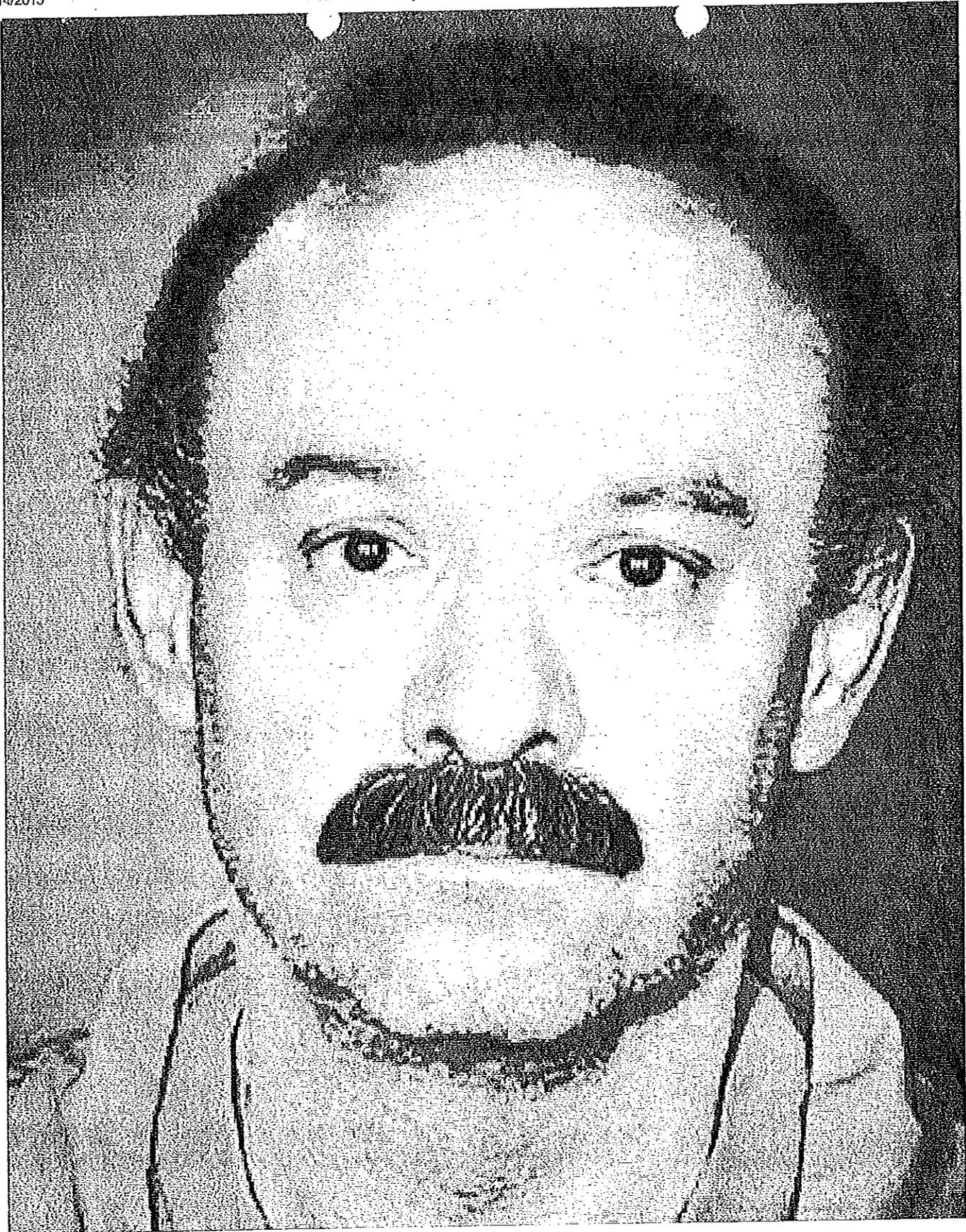
This past year, the number of inmates executed in America was the lowest in two decades at 35, according to the Death Penalty Information Center.

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.

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

to die. But at the six-minute mark something unusual happened.

"Suddenly he opened his mouth," Kiefer says. "His mouth sort of made this funny round shape, and you could see this expulsion of air, and we all jumped. This was something different."

Wood had begun fighting for his life, taking large intermittent breaths.

"And then there was another and then another, and then it just kept going," Kiefer says. "I started putting little hash marks on my pad, my notepad, to see how many times he did this — 640 times."

The executioner eventually came out, turned on the death chamber microphone, and tried to reassure everyone that Wood was asleep, and it was OK. But Kiefer says the sounds emanating from the condemned man that were suddenly brutally audible behind the executioner's voice only added another layer to everyone's distress. An hour passed.

"We looked at each other; you could see the alarm on the faces of the prison personnel," Kiefer says. "Nobody said anything. I turned to the reporter next to me and said, 'I don't think he's going to die.' I was wondering if Wood was going to open his eyes again."

Arizona's new drug formula — 50 milligrams of midazolam, a sedative, and 50 milligrams of hydromorphone, a narcotic — was supposed to be a lethal dose. Obviously it wasn't, so the executioner gave Wood a second dose. And then a third, a fourth, a fifth and so on, and then, mercifully, on the 15th dose, Wood died. It had taken nearly two hours.

¶¶

"I was wondering if Wood was going to open his eyes again."

Michael Kiefer, a reporter for the Arizona Republic

"A mess is a good way to put it," says Maurie Levin, a capital defense attorney in Texas who's been doing most of the lethal injection litigation in the state that is the runaway death penalty leader.

For both moral and public relations reasons, pharmaceutical companies no longer want any association with the death penalty process. Their drugs are to be used for healing only.

Levin says that pharmaceutical companies' new stance has forced death penalty states

to search for new drug combinations and new sources — compounding pharmacies.

"[The Texas Department of Criminal Justice], the prison, went to a pharmacy in 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.

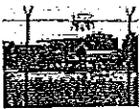
"Down-low" was actually the phrase used. Just like the big pharmaceutical companies, compounding pharmacies don't want to be associated with executions either. So when the name of the pharmacy was disclosed in a court proceeding, the Houston compounding pharmacy was furious, embarrassed and quit.

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



THE TWO-WAY

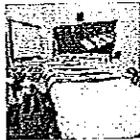
2014 Saw Fewest Executions In 20 Years, Report Finds



U.S.

Are Opponents Of The Death Penalty Contributing To Its Problems?

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.



THE TWO-WAY

Botched Oklahoma Execution Prompts Questions About Lethal Injection

"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

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EXHIBIT "B"

Wonkblog

The botched executions behind the Supreme Court case on lethal injection

By Jason Millman January 23

Late Friday afternoon, the Supreme Court announced it would review lethal injection procedures used for many death row inmates across the country after a few of botched executions raised concerns about whether the procedure is unconstitutional.

Those problematic executions include Clayton Lockett, an Oklahoma inmate in April who died of a heart attack 43 minutes after the lethal injection process was started. After the first of a three-drug cocktail was supposed to make him unconscious, Lockett began writhing on the gurney. Months earlier in Ohio, Dennis McGuire struggled and choked for several minutes and took nearly 25 minutes to die from the lethal injection. Arizona inmate Joseph R. Wood took nearly two hours to die, with witnesses saying he gasped and snorted for much of it. Other cases of problematic executions have been reported.

The question before the court now is whether the lethal injection protocol, which has undergone unexpected changes in the past few years, amounts to cruel and unusual punishment.

How lethal injection has changed

Until a few years ago, most lethal injections used a three-drug combination — an anesthetic, a paralytic drug and a drug stopping the heart. The most common anesthetic used was sodium thiopental, but in 2011, its sole manufacturer said it would no longer make it after Italian officials banned export of the drug for capital punishment. So states started using a different anesthetic, pentobarbital — until its manufacturer, a Danish company known as Lundbeck, protested its use in executions.

In turn, states started using new and untested combinations to carry out lethal injections, which is still the main method of executions in the United States. A Germany company said it would stop providing its anesthetic for lethal injections, and a compounding pharmacy last year refused to provide drugs to execute a Missouri inmate.

There's been a high level of secrecy

There's also been secrecy about where and how states are getting these new drugs. As my colleagues reported last April, following Lockett's execution:

In their scramble to carry out death sentences, prison officials from different states have made secret handoffs of lethal-injection drugs. State workers have carried stacks of cash into unregulated compounding pharmacies to purchase chemicals for executions. Some states, like Oklahoma, have relied on unproven drug cocktails, all while saying they must conceal the source of the drugs involved to protect suppliers from legal action and harassment.

"It looks like a street-level drug deal," said Dean Sanderford, a lawyer for Lockett. "And they're keeping all the information secret from us. . . . They don't need to be carrying out any more executions until they come clean, until we know exactly what happened with Clayton's execution and everything about these drugs, where they're getting them."

What's changed in Oklahoma

After a review of Lockett's death, Oklahoma a few months ago announced changes to its lethal injection procedure. The state says it will now use five times as much of the sedative midazolam, which it used for the first time in Lockett's execution last year. The state last week executed its first inmate since Lockett, and there were no apparent signs of distress.

What other states have done

The high-profile botched executions haven't changed much for states around the country. As the Boston Globe reported last month, some states are looking at other ways of executing death row inmates. Oklahoma is apparently looking at becoming the first state to use "forced deprivation of oxygen," while Tennessee may bring back the electric chair and Utah may reinstate the firing squad, according to the Globe.

Support for the death penalty is down

Nationwide support for the death penalty has been declining, but at least 60 percent of people still favor it. After series of botched executions, pollsters expressed doubt those incidents would change public attitudes in a significant way. Still, at least six states have abolished the death penalty since 2007, and 18 states in total ban it.

Jason Millman covers all things health policy, with a focus on Obamacare implementation. He previously covered health policy for Politico.

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What can babies teach students?



This isn't your daddy's gun club
3:31



Using Fitbit to help kids lose weight
5:05

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EXHIBIT "C"

HISTORY CRIME

A Gruesome Historical Argument Against the Death Penalty

Jennifer Latson @JennieLatson May 4, 2015

May 4, 1990: A death-row inmate in Florida dies in a botched execution by electric chair

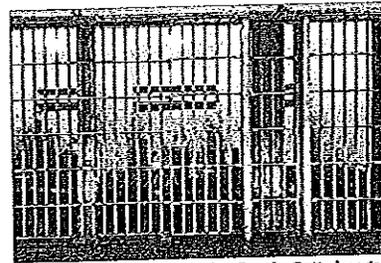
It's not easy being an executioner. Doing the job well earns no one's praise; doing it badly leads to accusations of cruel and unusual punishment. Such was the charge on this day, May 4, in 1990, when a Florida inmate's death by electric chair ended in torture for the inmate and trauma for horrified observers.

Jesse Tafero was convicted of fatally shooting two police officers during a 1976 traffic stop. By the time of his death, the electric chair was Florida's standard method of execution. But because of what critics have described as poor training for executioners and limited oversight for executions themselves, the process did not go smoothly.

The trouble began when a sponge used in the chair's headpiece wore out and had to be replaced. "There's no factory or parts catalog for execution devices, so the prison sent a guy to pick up a sponge at the store," TIME later reported. "Problem was, he bought a synthetic sponge instead of a genuine sea sponge"; the latter type was required to handle the electric current without catching fire.

Catch fire it did. Flames on Tafero's head were nearly a foot high, according to one witness, but initially failed to kill him. The current was reapplied three times, since he was still breathing after the first two times.

"It takes seven minutes before the



Frank van den Bergh—Getty Images



MORE

◀ **Kill Lethal Injection and Bring Back the Firing Squad**

The First Photograph of an

PHOTOGRAPH

prison doctor pronounced him dead, seven minutes of heaving, nodding, flame, and smoke," the witness, Ellen McGarrahan, wrote for *Slate*.

Executed by
Electric Chair

Tafero's death breathed new life into the national debate over the death penalty — particularly regarding the humaneness of execution methods and whether they are sufficiently regulated. Tafero's wasn't the first or the last to end in torture, after all: The 2014 book *Gruesome Spectacles: Botched Executions and America's Death Penalty* concludes that at least three percent of all American executions from 1890 to 2010 were botched, and lists 276 that are known to have gone wrong out of the roughly 9,000 over that time span.

The manner of Tafero's death didn't stop Florida lawmakers from continuing to embrace the electric chair. But a nearly identical malfunction occurred in 1997, during the execution of convicted murderer Pedro Medina, leaving one witness to remark, per *Gruesome Spectacles*, "[A] solid flame covered his whole head, from one side to the other. I had the impression of somebody being burned alive." The state finally switched to death by lethal injection in 2000.

And while lethal injection is now the primary execution method in all states that enforce the death penalty, it is not without its own detractors. In 2008, arguments against the three-drug cocktail used by Kentucky (and other states) reached the Supreme Court, which ruled that the method did not constitute cruel and unusual punishment. The court is now hearing a similar case, this time brought by death-row inmates in Oklahoma, over whether a sedative used in lethal injections is strong enough to prevent undue suffering. If the court rules against this method, according to the *New York Times*, some states will consider resurrecting the electric chair.

But Tafero's execution also became a talking point in another argument against the death penalty: the possibility of killing the wrong person. After Tafero's harrowing death, the key witness against him admitted that he himself had pulled the trigger in the traffic-stop gunfight. Although prosecutors continued to insist that they'd gotten the right man, many concluded that Tafero was, in fact, innocent.

Read more about the Supreme Court and the death penalty, here in the TIME archives: Death Penalty Walking



RIGHT ON YOUR MONEY

Death Penalty Walking

The Supreme Court prepares to hear a case on lethal injections that could cause us to rethink our haphazard system of capital punishment

By David Von Drehle | Thursday, Jan. 03, 2008

Like

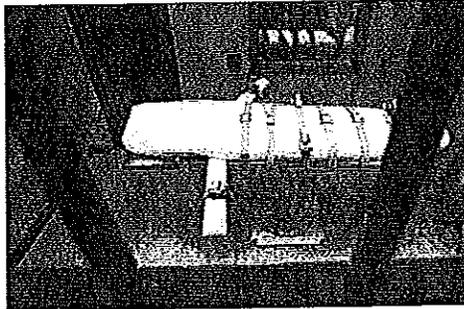
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On Jan. 7, the Supreme Court will hear oral arguments in a pair of Kentucky lawsuits challenging the lethal three-drug cocktail used in most U.S. executions. The gist of the cases is that the drug combination is unnecessarily complicated, using three chemicals when one would do, and that when this procedure is administered by undertrained prison officials, there's an unconstitutional risk that something will go wrong. Instead of going to a quiet death, an inmate could experience terrifying paralysis followed by excruciating pain.



David J. Phillip / AP

In a perfect world, perhaps, the government wouldn't wait 30 years and several hundred executions to determine whether an execution method makes sense. But the world of capital punishment has never been that sort of place. This weighty moral issue, expressive of some of our society's deeply held values, involves a lot of winging it. In 1990, for instance, a sponge used in the headpiece of Florida's electric chair wore out. There's no factory or parts catalog for execution devices, so the prison sent a guy to pick up a sponge at the store. Problem was, he bought a synthetic sponge instead of a genuine sea sponge, and when Jesse Tafero was strapped in, his head caught fire. Florida officials diagnosed the problem afterward by testing a similar sponge in a toaster.

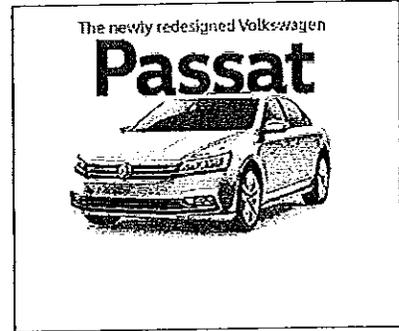
The "death bed" in the death chamber is separated by bars from the witness viewing room at the Walls Unit of the Texas Department of Corrections in Huntsville, Texas

In comparison, lethal injection sounds more scientific—almost therapeutic—but its history is as improvised as that supermarket sponge. In 1977 an Oklahoma lawmaker sketched the protocol on a notepad with the help of a medical examiner. More research has gone into the proper way to brush your teeth. But the idea caught on, and now, years later, more than half the states have adopted some version of the Oklahoma cocktail. Judges in courts across the country are scratching their head over the odd concoction, and the Supreme Court has effectively halted all executions to untangle a mess of belated questions: How much risk of torture is too much? How many safeguards are necessary? What makes a punishment cruel and unusual?

Decades of well-intentioned brainstorming like this one—legal, medical, procedural, political—have accumulated into one thoroughly screwed-up system. Any other government program that delivered 3% of what it promised—while costing millions of dollars more than the alternative—would be a scandal, but the death penalty is different. In its ambiguity, complexity and excess, the system expresses a lot about who we are as a nation. We're of mixed minds, and most of us would rather not spend a lot of time thinking about killing. A majority of Americans support the idea of capital punishment—although fewer are for it if given a choice of life without parole. At the same time, a substantial number in a recent poll said they could not serve on a death-penalty jury.

Our death penalty's continued existence, countering the trend of the rest of the developed world, expresses our revulsion to violent crime and our belief in personal accountability. The endless and expensive appeals reflect our scrupulous belief in consistency and individual justice. This is also a nation of widely dispersed power—many states, cities and jurisdictions. Out of this diversity has emerged the staggering intricacy of death-penalty law, as thousands of judges and legislators from coast to coast struggle to breathe real-life meaning into such abstract issues as what constitutes effective counsel, what is the proper balance of authority between judge and jury, what makes a murder "especially heinous," what qualities and defects in a prisoner compel mercy, and so on.

Such parsing has gone on for nearly 50 years, since the gestation of the model penal code after World War II. But it isn't getting us anywhere. Even supporters of capital punishment can't admire a process in which fewer than 3 in 100 death sentences imposed in the U.S. are carried out in any given year. California's death row houses more than 660 prisoners, but no one has been executed in the state in nearly two years. Pennsylvania, with 226 inmates on death row, hasn't carried out a sentence since the '90s. In Florida a spree killer named William Eledge, who confessed to



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his crimes and has openly discussed his guilt in interviews soon complete his 33rd year on death row with his appeals still unresolved. Thirty-three years! He's one of about 65 men in Florida alone with more than 25 years on death row.

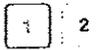
The more effort we invest in trying to make this work, the harder it seems to be to give up. The death penalty in the U.S. is a wreck, but it's our wreck—a collage of American attitudes, virtues and values.

The Rube Goldberg Death Machine

Less democratic nations have abolished the death penalty without regard for popular opinion. Less violent nations have forgotten the reasons for it. Less humane nations have no qualms about unfair executions. The kernel of the issue, it seems, is the signature American angst over how to balance individual rights with public order.

The debate almost always comes down to the question of whether to fix it or end it. But these alternatives largely miss the reality. Every attempt to fix the death penalty bogs down in the same ambivalence. We add safeguards one day, then shortcut them the next. One government budget contains millions of dollars for prosecutions, while another department spends more millions to defend against them. Indeed, the very essence of ambiguity is our vain search for a bloodless, odorless, motionless, painless, foolproof mode of killing healthy people. No amount of patching changes the nature of a Rube Goldberg machine. In 1996 Congress passed an extensive overhaul of capital punishment, but as in all previous overhauls, the changes quickly spawned new nuances to appeal. Ten years later, one of the most skillful anti-death-penalty lawyers in the country, Mark Olive, summed up the impact of the grandly titled Anti-terrorism and Effective Death Penalty Act, saying "It gave us 10 years of fresh issues to litigate."

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