

# BEHIND THE CURTAIN:

Secrecy and the Death Penalty  
in the United States



A report by the  
Death Penalty Information Center

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# EXECUTIVE SUMMARY

During the past seven years, states have begun conducting executions with drugs and drug combinations that have never been tried before. They have done so behind an expanding veil of secrecy laws that shield the execution process from public scrutiny.

As pharmaceutical companies have taken action to prevent states from using their medicines to execute prisoners, states have responded by procuring whatever drugs seem available and obtaining them secretly through questionable means.

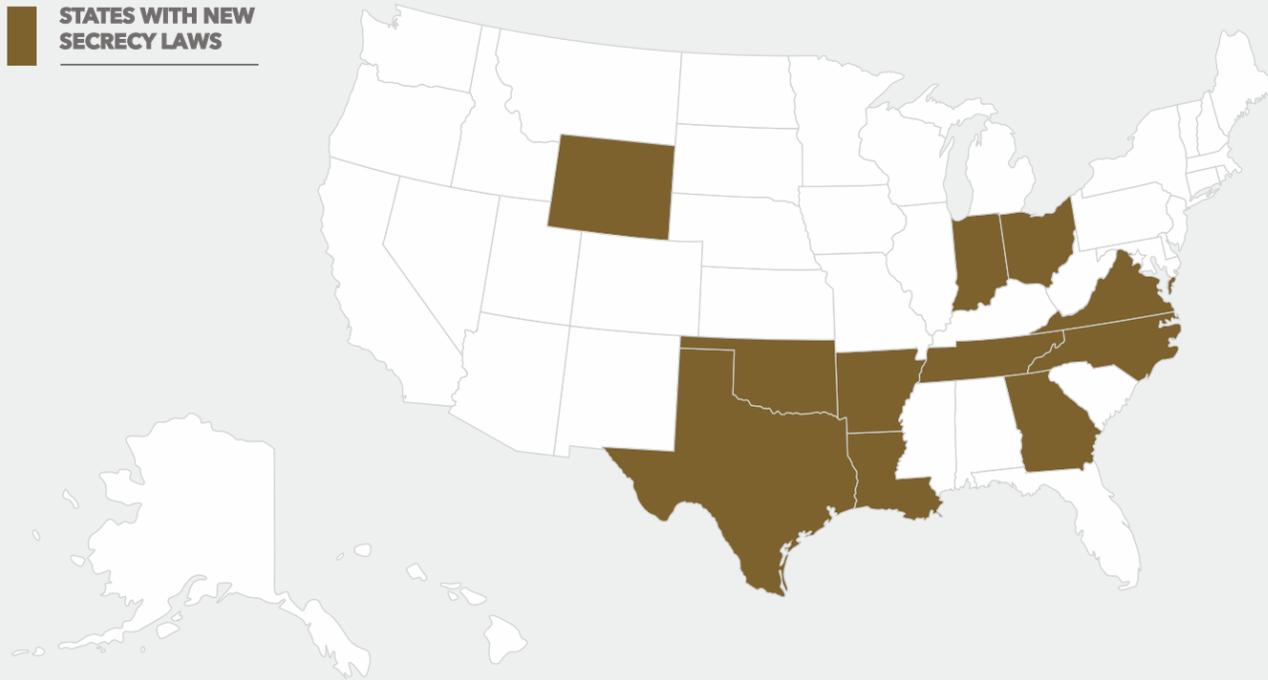
Since January 2011, legislatures in thirteen states have enacted new secrecy statutes that conceal vital information about the execution process. Of the seventeen states that have carried out 246 lethal-injection executions between January 1, 2011 and August 31, 2018, all withheld at least some information about the about the execution process. All but one withheld information about the source of their execution drugs. Fourteen states prevented witnesses from seeing at least some part of the execution. Fifteen prevented witnesses from hearing what was

happening inside the execution chamber. None of the seventeen allowed witnesses to know when each of the drugs was administered.

This retreat into secrecy has occurred at the same time that states have conducted some of the most problematic executions in American history. Lethal injection was supposed to be a more humane method of execution than hanging, the firing squad, or the electric chair, but there have been frequent reports of prisoners who were still awake and apparently experiencing suffocation and excruciating pain after they were supposed to be insensate. These problems have intensified with the use of new drug formulas, often including midazolam. In 2017, more than 60% of the executions carried out with midazolam produced eyewitness reports of an execution gone amiss, with problems ranging from labored breathing to gasping, heaving, writhing, and clenched fists. In several of these cases, state officials denied that the execution was problematic, asserting that all had proceeded according to protocol. But without access to information about drugs and the execution process, there is no way the public can judge for itself.

Disturbing stories of botched executions are just one sign of the need for public scrutiny of lethal injection. Investigators who have managed to uncover hidden information have found evidence of illegal actions, misrepresentations to the courts and the public, and incompetence in the conduct of executions. States have repeatedly tried to conceal controversial information about executions,

## STATES WITH NEW SECRECY LAWS



## EXAMPLES OF QUESTIONABLE STATE CONDUCT IN CARRYING OUT LETHAL INJECTION EXECUTIONS

- Hiring a physician-executioner who has been sued for malpractice at least 20 times, has been barred from practicing at two hospitals, and whose failure to use a written protocol, coupled with his dyslexia, resulted in him administering the wrong amounts of drugs;
- Illegally importing drugs from a sham pharmacy operating out of a London storefront labeled "driving academy"; and
- Buying drugs from a compounding pharmacy that committed more than 1800 violations of state health and safety guidelines and which the FDA found had "questionable potency, disinfecting and sterilization practices."

including the use of illegally imported drugs, less than reputable drug sources, and unqualified executioners. Without transparency, cases of incompetence or misconduct can continue unchecked.

Governmental transparency is fundamental to democracy. The public has a right to know how its government is carrying out its business and whether the government is working honestly and competently, by and for the People. The Eighth Amendment requires that punishments imposed by the government conform to public standards of decency, but this is impossible to determine if crucial information about a punishment is kept from the public.

Secrecy increases the risk of problems. It results in more botched and potentially problematic executions. Prisoners have a right to information about the execution process so that they can raise legitimate challenges to execution methods that may subject them to excruciating pain. Without this information, prisoners cannot meet the high burden of proof the courts have set out for challenging executions.

This report documents the laws and policies that states have adopted to make information about executions inaccessible to the public, to pharmaceutical companies, and to condemned prisoners. It describes the dubious methods states have used to obtain drugs, the inadequate qualifications of members of the execution team, and the significant restrictions on witnesses' ability to observe how executions are carried out. It summarizes the various drug combinations that have been used, with particular focus on the problems with the drug midazolam, and provides a state-by-state record of problems in recent executions. It explains how government policies that lack transparency and accountability permit states to violate the law and disregard fundamental principles of a democratic government while carrying out the harshest punishment the law allows.

# SECRECY AND DEMOCRACY

*"Secrecy and a free, democratic government don't mix."*

PRESIDENT HARRY S TRUMAN

The First Amendment protects the right of the People "to know that their government acts fairly, lawfully, and accurately."<sup>1</sup> For that right to have any meaning, the public must have access to information about how the government is actually carrying out its business. The public's need for openness, transparency, and accountability is especially crucial when the government exercises the power to end an individual's life. But the growing secrecy that shields current state efforts to carry out executions poses significant challenges to the rule of law and to the legitimacy of the democratic institutions administering capital punishment.

Secrecy in executions implicates a variety of policy and constitutional concerns. First and most obviously, the public has the right to oversee and to approve or disapprove of the execution process. Secrecy not only prevents the public from having robust, informed, and honest discussion about the death penalty, it also makes public oversight impossible. Any discussion about the government's ability and willingness to carry out capital punishment in a competent, principled, and constitutionally acceptable manner is thwarted when states selectively hide information.

Second, secrecy increases the risk of botched executions and has produced predictably problematic executions. To protect information from disclosure, state officials have circumvented normal procedures and attempted to modify protocols without oversight.<sup>2</sup> Hiding execution information from the public also fosters an environment of unaccountability that lacks essential checks and balances. When the veil of secrecy has been penetrated, courts and investigators have discovered that states have violated state and federal laws and regulations, deceived drug suppliers and manufacturers, encouraged breaches of contracts, and lied to the public.

Third, secrecy frustrates the judicial process by unfairly limiting prisoners' ability to prevent potentially unconstitutional executions. In order to challenge experimental or demonstrably inappropriate drug protocols or other dangerous execution practices, prisoners need all relevant information about their executions. The U.S. Supreme Court has imposed on prisoners an exceptionally high burden of proof in showing that a state's execution method will subject them to unconstitutional levels of pain and suffering. Under the Eighth Amendment, prisoners

must now show (1) that the state’s chosen method of execution will cause severe and substantial pain and suffering, and (2) that a less painful alternative—either using different drugs or a different method—is available to the state. States’ secrecy practices have denied prisoners meaningful access to the courts. State officials have suppressed information that could prove prisoners’ claims while simultaneously arguing those claims should be rejected because they are unproven.

Finally, transparency is critical to the Supreme Court’s determination of whether execution practices are constitutional. The Eighth Amendment looks to “evolving standards of decency that mark the progress of a maturing society”<sup>3</sup> in deciding which means of punishment the public will tolerate and which have become unconstitutionally cruel and unusual. If the courts are to do their job under a standard that purports to measure “the norms that ‘currently prevail,’”<sup>4</sup> they need accurate information on which to base that judgment. As Justice Thurgood Marshall argued more than forty years ago, “the constitutionality of the death penalty turns ... on the opinion of an informed citizenry.”<sup>5</sup>

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*“[T]his investigation revealed that the paranoia of identifying participants clouded the Department’s judgment and caused administrators to blatantly violate their own policies.”*

OKLAHOMA GRAND JURY REPORT REGARDING THE EXECUTION OF CHARLES FREDERICK WARNER AND ATTEMPTED EXECUTION OF RICHARD GLOSSIP<sup>6</sup>

# HISTORICAL TRANSPARENCY IN EXECUTIONS

Executions in the United States have historically been public, although society has tolerated some limited secrecy. For example, hangings would occur in the public square for citizens to witness, but the executioner’s identity would be shielded by a hood. In the nineteenth century, however, states began moving executions from the public square to behind prison walls.<sup>7</sup> These “private” execution laws were “originally enacted for paternalistic reasons and in response to a powerful movement in the 1830s to abolish capital punishment.”<sup>8</sup> Part of the purpose of moving executions out of public view was to avoid a spectacle and to afford a certain amount of dignity to the prisoner. But as a consequence, the need for transparency from inside the prison, including allowing public and media witnesses access to the entire execution, greatly increased. Believing that the “disgust produced by public executions would lead ‘to the entire abolition of capital punishment,’” legislators who opposed capital punishment also opposed removing executions from public view.<sup>9</sup>

Removing executions from the public arena was intended in part to “civilize society.” However, the private execution laws “had the perverse effect of degrading America’s democracy.... [T]hey often attempted to suppress public debate of the death penalty itself.”<sup>10</sup> The public’s inability to see for itself how executions were being carried out impaired society’s capacity for robust, fully informed discussion about state-sanctioned killing. Moving executions behind prison walls left information about how they were conducted solely in the government’s control. As a result, guaranteeing public access to that information became more essential.

# LETHAL INJECTION: THE CURRENT METHOD OF EXECUTION

Lethal injection has been the most common method of execution in the modern era of capital punishment in the United States. Between the resumption of executions in 1977<sup>11</sup> and August 31, 2018, 1,306 executions (nearly 90%) have used lethal injection.<sup>12</sup> Until 2009, most lethal-injection executions used the same three-drug combination:<sup>13</sup>

- (1) the first drug, a barbiturate called sodium thiopental, was intended to anesthetize the prisoner;
- (2) the second drug, a paralytic, was given to prevent any movement; and
- (3) the third drug, potassium chloride, was used to induce cardiac arrest and stop the prisoner's heart.

When states first turned to using drugs in executions, many did so in the belief that lethal injection would be more humane than the more visibly gruesome methods it replaced: hanging, electrocution, gas, and firing squad. Other states adopted lethal injection to avoid legal challenges to the constitutionality of their prior methods.<sup>14</sup> Despite states' purported goal of ensuring more humane executions, scholars have estimated that more than 7% of lethal-injection executions in the U.S. through 2010 were botched.<sup>15</sup> Beginning in 2011, as states have experimented with new execution drugs, reports of problematic executions have noticeably increased. Eight new drugs have been used in executions since that time: pentobarbital, midazolam, hydromorphone, etomidate, potassium acetate, diazepam, cisatracurium besylate, and fentanyl citrate.<sup>16</sup> In 2017, in seven of the eleven executions carried out using the recently introduced drug midazolam, eyewitnesses reported problems including wincing, gasping, labored breathing, heaving, convulsions, and clenched fists.

In 2017, the drug midazolam was used in 11 executions. In more than 60% of those executions, eyewitnesses reported problems ranging from labored breathing to gasping, heaving, convulsions, and clenched fists.

Lethal injection, especially when carried out with a paralytic that prevents the prisoner from moving or speaking, appears to be peaceful and painless. But if the paralytic is administered to a prisoner who is not properly anesthetized, then he will feel as though he is suffocating to death. Likewise, if the third drug in the sequence, potassium chloride, is administered to a sensate prisoner, he will feel as though he's being burned alive from the inside.<sup>17</sup>

The use of a paralytic in the three-drug protocol has been controversial, in part, because the serenity it appears to create is a result of the drug "mask[ing] any outward sign of distress."<sup>18</sup> The paralysis induced by the second drug acts as a chemical veil of secrecy that prevents anyone from knowing whether the other drugs worked properly and the extent to which the prisoner is experiencing pain. U.S. Supreme Court Justice John Paul Stevens asserted that any benefits gained by using a paralytic are "vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect."<sup>19</sup>

Lethal-injection practices have been greatly affected by drug availability. Pharmaceutical companies oppose the use of their medicines in executions. Every FDA-approved supplier of drugs historically used by prisons for executions has now imposed distribution controls on its medicines, blocking their use in lethal injections.<sup>20</sup> The universality of these distribution controls effectively ended the open market for execution drugs. States have responded by attempting to circumvent controls and by experimenting with new drug combinations.<sup>21</sup>

State officials have expanded their secrecy laws to undermine pharmaceutical companies' efforts to protect the integrity of their products. For example, Arkansas deliberately circumvented drug distribution contracts that prohibited the sale of medicines for use in executions. In response, McKesson Medical-Surgical, Inc., which distributed the paralytic drug Arkansas acquired for use in executions, sued the state. McKesson alleged that Arkansas had obtained the drugs through "false pretense, trickery and bad faith."<sup>22</sup> Fresenius Kabi and West-Ward Pharmaceuticals Corporation, the manufacturers of the other two drugs, submitted a brief in

support of McKesson's claims. In addition to arguing that the use of their drugs in Arkansas's executions violates existing "contractual supply-chain controls," the companies said that Arkansas's conduct "also creates a public-health risk because it could result in the denial of medicines from patients who need them most."<sup>23</sup> The Association for Accessible Medicines, a professional organization representing generic drug manufacturers, later filed a brief in the United States Supreme Court describing at length the public health risks of diverting "essential medicines" to non-therapeutic uses.<sup>24</sup>

As pharmaceutical companies have tightened restrictions on the sale of medicines previously used in executions, states have experimented with a variety of new drug formulas. Despite the popular conception that lethal injection is more humane than other methods, numerous lethal-injection executions have been problematic and some horribly botched over the decades. Indeed, the method has only become riskier and more troublesome in recent years. In April 2014, for example, Oklahoma's execution of Clayton Lockett was an appalling failure, and witnesses saw and heard Lockett writhing in agony before the state closed the curtains and halted the execution. Forty-three minutes after the attempted execution began, Lockett died of a heart attack.<sup>25</sup>

Numerous other problems have occurred during lethal-injection executions. State officials have chosen execution-drug formulas that do not work. Unqualified executioners have failed to properly insert the intravenous (IV) catheter. In some executions, the problems have been visible to witnesses who have reported prisoners gasping repeatedly for breath or straining and writhing in pain. In other executions, because states conceal execution information, the public learned about a state's mistakes only after the fact and generally only after a lawsuit had been filed. The public will never know about problems in other executions, because states have sole control of the information and are unwilling to divulge it.



***"Execution absent an adequate sedative ... produces a nightmarish death: The condemned prisoner is conscious but entirely paralyzed, unable to move or scream his agony, as he suffers what may well be the chemical equivalent of being burned at the stake."***

U.S. SUPREME COURT JUSTICE SONIA SOTOMAYOR<sup>26</sup>

***"States likely withhold crucial details because, almost invariably, the more data states reveal about their lethal injection procedures, the more those states demonstrate their ignorance and incompetence. The result is a perpetual effort by states to maintain secrecy about all aspects of the execution."***

FORDHAM UNIVERSITY SCHOOL OF LAW PROFESSOR DEBORAH DENNO<sup>27</sup>

The continuing problems with lethal injection underscore the need for information about lethal-injection drugs; yet this information has become increasingly difficult to obtain. This situation is all the more disturbing in light of what we do know about the process and secrecy. For example, we know that states have broken the law, deliberately induced contract breaches, lied to or misled drug suppliers, obtained drugs from questionable sources, and swapped drugs with each other. As these tactics have been challenged, states have responded by adopting stricter secrecy laws and departmental orders that prevent the public from obtaining information about executions, making their actions even less transparent.

In 2015, the American Bar Association passed a resolution urging "each jurisdiction that imposes capital punishment to ensure that it has execution protocols that are subject to public review and commentary, and include all major details regarding the procedures to be followed, the qualifications of the execution team members, and the drugs to be used."<sup>28</sup> Citing concerns about increased secrecy, botched executions, and protecting constitutional rights, the ABA concluded: "Society's interest in the fair administration of the death penalty is significant—and far outweighs any jurisdiction's asserted governmental interest in secrecy regarding their execution drugs and procedures."<sup>29</sup>

Laws that conceal the identity of executioners have existed for years. Although originally only the executioner's name was kept secret, states now withhold information about the qualifications of those participating in the execution process and the sources of their execution drugs. These expanded secrecy practices also conceal details of the execution. As problematic lethal injections have increased, so too have efforts to hide portions of the execution itself.

# THE SECRECY LANDSCAPE:

## NEW DRUG SECRECY LAWS

Since January 1, 2011, legislatures in thirteen states have enacted new secrecy statutes that prevent the public from obtaining important information about executions.<sup>30</sup> In addition, at least eight states—Alabama, Arizona, Florida, Idaho, Missouri, Nebraska, Pennsylvania, and South Carolina—have invoked existing laws, regulations, policies, or execution protocols to justify their refusal to disclose this information.<sup>31</sup> At least four states with secrecy laws also make individuals either civilly or criminally liable for disclosing such information.<sup>32</sup> Ohio—whose secrecy law imposes punitive civil sanctions on anyone who discloses protected information—has more than twenty executions scheduled between December 2018 and January 2023.<sup>33</sup>

### STATES THAT HAVE ENACTED NEW SECRECY LAWS SINCE JANUARY 1, 2011

STATE	STATUTE/ EFFECTIVE YEAR	INFORMATION CONCEALED FROM PUBLIC	Any exception for disclosure in statute?
ARKANSAS	Ark. Code Ann. §5-4-617 (2015)	"[I]dentities of the entities and persons who participate in the execution process or administer the lethal injection"; "entities and persons who compound, test, sell, or supply the drug or drugs ..., medical supplies, or medical equipment for the execution process"	May be disclosed in litigation under a protective order
GEORGIA	Ga. Code Ann. §42-5-36 (2013)	"[I]dentifying information" including "professional qualifications" "of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence"	NO

STATES THAT HAVE ENACTED NEW SECRECY LAWS SINCE JANUARY 1, 2011

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STATE	STATUTE/ EFFECTIVE YEAR	INFORMATION CONCEALED FROM PUBLIC	Any exception for disclosure in statute?
INDIANA	Ind. Code § 35-38-6-1 (2017)	"Information reasonably calculated to lead to the identity" of a "pharmacist, a pharmacy, a wholesale drug distributor, or an outsourcing facility that provides a lethal substance to the department of correction" or "an officer, an employee, or a contractor" of those persons	NO
LOUISIANA	La. Rev. Stat. §15:570 (2012)	"[I]dentity of any persons ... who participate or perform ancillary functions in an execution of the death sentence, either directly or indirectly ... and information about those persons which could lead to the determination of the identities of those persons"	NO
MISSISSIPPI	Miss. Code Ann. §99-19-51 (2016)	"[A]ll members of the execution team, a supplier of lethal injection chemicals, and the identities of those witnesses listed ... who attend as members of the victim's or the condemned person's immediate family"	NO
NORTH CAROLINA	N.C. Gen Stat. Ann. §15-190 (2015)	Any information that "[r]eveals name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prepares, prescribes, dispenses, supplies, or administers the drugs or supplies obtained for any purpose"	NO
OHIO	Ohio Rev. Code Ann. § 2949.221 (2015)	Any information "that identifies or reasonably leads to the identification of" an individual, corporation, or association who "manufactures, compounds, imports, transports, distributes, supplies, prescribes, prepares, administers, uses, or tests any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs, the medical supplies, or the medical equipment used in the application of a lethal injection of a drug or combination of drugs in the administration of a death sentence by lethal injection"	NO
OKLAHOMA	Okla. Stat. Ann. tit. 22, §1015 (2011)	"[A]ll persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution"	NO
SOUTH DAKOTA	S.D. Codified Law §23A-27A-31.2 (2013)	"The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances"	NO

STATE	STATUTE/ EFFECTIVE YEAR	INFORMATION CONCEALED FROM PUBLIC	Any exception for disclosure in statute?
TENNESSEE	Tenn. Code Ann. §10-7-504 (2013)	"[T]hose parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death," which includes "an employee of the state who has training related to direct involvement in the process of executing a sentence of death, a contractor or employee of a contractor, a volunteer who has direct involvement in the process of executing a sentence of death, or a person or entity involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death"	NO
TEXAS	Tex. Crim. Proc. Code Ann. art. 43-13 (2015)	"[A]ny person who participates in an execution ... including a person who uses, supplies, or administers a substance during the execution" and "any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution"	NO
VIRGINIA	Va. Code. §53.1-234 (2016)	"The identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such pharmacy or outsourcing facility, and any person or entity used by such pharmacy or outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs and any information reasonably calculated to lead to the identities of such persons or entities, including their names, residential and office addresses, residential and office telephone numbers, social security numbers, and tax identification numbers"	May be disclosed during civil lawsuit only if good cause is shown
WYOMING	Wyo. Code §7-13-916 (2015)	"The identities of all persons who participate in the execution of a death sentence as a member of the execution team or by supplying or manufacturing the equipment and substances used for the execution are confidential. Disclosure of the identities made confidential by this section may not be authorized or ordered."	NO

Between January 1, 2011, and August 31, 2018, seventeen states conducted a total of 246 lethal-injection executions. Of those states, all but Delaware (which no longer has an active death penalty) have laws or policies in place that restrict disclosure of information about execution drugs. States have taken extreme steps to hide the identities of any entity with even minimal involvement in executions, preventing the public from obtaining critical information even after troubling executions have occurred.

### LETHAL INJECTION EXECUTIONS BETWEEN JANUARY 1, 2011 AND AUGUST 31, 2018

STATE	NUMBER OF EXECUTIONS	% OF TOTAL	Year drug secrecy law (or policy) was enacted
TEXAS	89	36.17%	2015
FLORIDA	27	10.98%	2000
GEORGIA	24	9.76%	2013
MISSOURI	21	8.54%	In 2013, expanded protocol to include drug source under 2007 statute
OKLAHOMA	18	7.32%	2011
OHIO	15	6.09%	2015
ALABAMA	14	5.69%	None, but does not disclose information
ARIZONA	13	5.28%	In 2010, interpreted 1998 statute to include drug source
MISSISSIPPI	8	3.25%	2016
ARKANSAS	4	1.63%	2015
VIRGINIA	4	1.63%	2016
DELAWARE	2	0.81%	None, but no longer has active death penalty
IDAHO	2	0.81%	In 2011, changed regulations to include drug source
SOUTH DAKOTA	2	0.81%	2013
NEBRASKA	1	0.41%	2009
SOUTH CAROLINA	1	0.41%	In 2015, interpreted 2010 statute to include drug source
TENNESSEE	1	0.41%	2013

The states that conduct the most executions all have restrictive secrecy laws. As a result, the public is deprived of critical information about the qualifications of the executioners and the source of the drugs in the majority of executions that are carried out in the United States. Lacking this information, the general public cannot make informed decisions about the way states are administering capital punishment.

In the past several years, there have been visibly problematic executions, details of which remain obscured as a result of secrecy about the drugs and execution procedures. Two troubling examples occurred in Alabama and Arkansas.

Alabama has one of the most restrictive secrecy policies in the nation, consistently maintaining that all documents associated with an execution are confidential.<sup>34</sup> In December 2016, Alabama executed Ronald Smith. During the execution, witnesses reported that Smith clenched his fists and gasped repeatedly for nearly fifteen minutes. After the execution, a Department of Corrections spokesperson responded to criticisms of the execution by telling the public the state had “followed [its] protocol.”<sup>35</sup> The state later refused to provide any documentation about the execution.<sup>36</sup> As a result of intervention by several media outlets, a federal district court ordered the state to reveal documents filed under seal that outline its lethal injection protocol. The court held that the documents must be released “because the public has a common law right of access to the sealed records relating to Alabama’s lethal injection protocol.”<sup>37</sup> However, the order has been stayed while the state appeals to the U.S. Court of Appeals for the Eleventh Circuit.<sup>38</sup>

When Arkansas executed Kenneth Williams on April 27, 2017, media witnesses observed Williams “coughing, convulsing, jerking, and lurching, with sound that was audible even with the microphone turned off.”<sup>39</sup> A witness to ten executions reported that this was “the most [he had] seen an inmate move three or four minutes in.”<sup>40</sup> Though disturbing, the physical reaction was not unanticipated. It was the type of reaction that had become associated with the use of midazolam in executions. But Arkansas officials denied the obvious. A spokesperson for the Governor called the execution “flawless” and dismissed Williams’s convulsions as “an involuntary muscular reaction.”<sup>41</sup>

State responses to other problematic executions follow the same pattern. Even when eyewitnesses have seen and described classic symptoms of execution-drug failures, prison officials have asserted that the execution was carried out without complications or responded to concerns by claiming to have successfully followed the protocol when the protocol itself was the reason for the troubling execution.

## STATES’ RESPONSES TO PROBLEMATIC MIDAZOLAM EXECUTIONS

Prisoner, state, date of execution	WITNESS ACCOUNTS OF EXECUTION USING MIDAZOLAM	STATE’S RESPONSE TO EXECUTION
Dennis McGuire Ohio January 16, 2014	Approximately five minutes into the execution, “he began struggling. His body strained against the restraints around his body, and he repeatedly gasped for air, making snorting and choking sounds for about 10 minutes. His chest and stomach heaved; his left hand, which he had used minutes earlier to wave goodbye to his family, clenched in a fist.” <sup>42</sup>	“The process worked very well and the execution was carried out in compliance with [the execution policy].” –Warden Donald R. Morgan <sup>43</sup>
Clayton Lockett Oklahoma April 29, 2014	After being declared unconscious over 10 minutes into execution, Lockett began speaking and then grimaced and tensed his body several times over a three-minute period, his head rising from the gurney and his feet kicking several times. <sup>44</sup>	“The state lawfully carried out a sentence of death. Justice was served.... Execution officials said Lockett remained unconscious after the lethal injection drugs were administered.” –Oklahoma Governor Mary Fallin <sup>45</sup>
Ronald Smith Alabama December 8, 2016	“During 13 minutes of the execution, from about 10:34 to 10:47, Smith appeared to be struggling for breath and heaved and coughed and clenched his left fist after apparently being administered the first drug in the three-drug combination.” <sup>46</sup>	“We followed our protocol.” – Jeff Dunn, Commissioner for the Alabama Department of Corrections <sup>47</sup>
Ricky Gray Virginia January 18, 2017	“Prison officials closed a blue curtain at 8:54 p.m., shielding Gray from view. That is typically when officials insert the IV and place heart monitors before starting the injection. The curtain remained closed for more than 30 minutes before it was opened and the lethal injection began, which [Gray’s attorney] said was significantly longer than usual and concerning.” <sup>48</sup>	Lisa Kinney, Director of Communications for the Virginia Department of Corrections said she “could not explain why the curtain was closed that long.” <sup>49</sup>
Kenneth Williams Arkansas April 27, 2017	“[A]bout three minutes in, Williams’ body jerked 15 times in quick succession—lurching violently against the leather restraint across his chest—then the rate slowed for a final five movements.” <sup>50</sup>	J.R. Davis, a spokesman for Gov. Asa Hutchinson who did not witness the execution, called the execution “flawless” <sup>51</sup> and described the movements as “an involuntary muscular reaction.” <sup>52</sup> The following day, Governor Hutchinson rejected Williams’s attorney’s request for an independent investigation saying: “You don’t call for an independent investigation unless there’s some reason for it. Last night, one of the goals was there not be any indications of pain by the inmate, and that’s what I believe is the case.” <sup>53</sup>

Prisoner, state, date of execution	WITNESS ACCOUNTS OF EXECUTION USING MIDAZOLAM	STATE'S RESPONSE TO EXECUTION
William Morva Virginia July 6, 2017	A media witness to Morva's execution reported that approximately three minutes after Morva was silent, he began "gasping for air" several times, with his stomach contracting "pretty dramatically." <sup>54</sup>	"Execution was carried out without complications." —Lisa Kinney, Director of Communications for the Virginia Department of Corrections <sup>55</sup>
Gary Otte Ohio September 17, 2017	Within one minute after the drug administration began, Otte's "stomach was moving unnaturally up and down." Tears were "streaming down the left side of his face. His left fist was curled tightly." <sup>56</sup>	"The process worked very well and the execution was carried out in compliance with [the execution policy]." —Warden Ron Erdos <sup>57</sup>
Torrey McNabb Alabama October 19, 2017	At 9:12pm, more than fifteen minutes into the execution, a correctional officer leans down, saying McNabb's name. McNabb's "left hand twitches a few seconds later. The officer again lifts his eyelid and proceeds to pinch him at 9:13. McNabb's body briefly writhes, and his sister says, 'His whole body moving.' All four witnesses are audibly upset that he is still moving at this point. At 9:17, his right hand and arm abruptly shoot straight up from their resting place, staying aloft for several seconds. He visibly grimaces for a brief moment, twisting his head against the gurney." <sup>58</sup>	"I'm confident he was more than unconscious at that point. Involuntarily movement is not uncommon. That's how I would characterize it." —Jeff Dunn, Commissioner for the Alabama Department of Corrections <sup>59</sup>

# Secrecy in Viewing the Execution Itself

None of the states that have conducted executions in the past seven years ensured that witnesses could see and hear the entire execution process, and most of these states restricted witnesses from viewing the bulk of the process. Indeed, as concerns have grown about the experimental drug cocktails states have been using in executions and about the questionable—and sometimes illegal—methods they have employed to obtain these drugs, states have increasingly retreated into withholding information from the public.

**WITNESS LIMITATIONS FOR EXECUTIONS BETWEEN JANUARY 1, 2011 AND AUGUST 31, 2018**

State	Did not guarantee that witnesses could view prisoner during entire execution process	Did not guarantee that witnesses could hear what was happening in execution chamber	Did not guarantee that witnesses could know when a drug was administered
ALABAMA	◆	◆	◆
ARIZONA <sup>60</sup>	◆	◆	◆
ARKANSAS	◆	◆	◆
DELAWARE	◆	◆	◆
FLORIDA	◆	◆	◆
GEORGIA		◆	◆
IDAHO <sup>61</sup>	◆	◆	◆
MISSISSIPPI	◆		◆
MISSOURI	◆	◆	◆
NEBRASKA	◆	◆	◆
OHIO		◆	◆
OKLAHOMA	◆	◆	◆
SOUTH CAROLINA	◆	◆	◆
SOUTH DAKOTA	◆	◆	◆
TENNESSEE			◆
TEXAS	◆	◆	◆
VIRGINIA	◆	◆	◆

Most states have prevented witnesses from viewing the execution process until the prisoner has already been strapped to the gurney and the intravenous (IV) lines have been placed. This has left the public to speculate as to why it took prison personnel extended periods of time to set the IV lines in a number of recent executions. As of August 31, 2018, only five of the states with recent executions (Arizona, Georgia, Idaho, Ohio, and Tennessee) have procedures allowing witnesses to see the prisoner during the entire execution—beginning with the guards bringing the prisoner into the execution chamber and strapping him or her to the gurney, viewing the insertion of the IV line(s), watching the prisoner as the lethal drugs are administered, and concluding when death is pronounced.<sup>62</sup> Georgia limits the viewing of the prisoner being brought into the execution chamber and the IV being inserted to only a single media witness. The remaining witnesses are brought in only after that process is complete. Tennessee limits the non-state witnesses of IV insertion to the prisoner’s lawyer. Arizona changed its procedures in 2017 to permit witnesses to see the entire execution process but has yet to carry out an execution under these procedures.

States also have severely limited what witnesses see and hear after the prisoner is strapped to the gurney and the IV lines are established. In most states, witnesses reported that the prisoner is covered—at least in part—with a sheet. The sheet imposes a visual layer of secrecy, preventing witnesses from seeing the prisoner’s movements, which could indicate adverse reactions to the execution drugs. In all but Mississippi and Tennessee, there was no active microphone inside the execution chamber after the condemned prisoner made his last statement. This audio censorship masks the sounds witnesses can hear during the process, leaving the public to wonder whether a prisoner is gasping versus snoring, gurgling versus choking, or verbally expressing pain during the execution process.

Finally, most states have withheld critical information as to when each of the lethal drugs is being administered. As of August 2018, Arizona is the only state that has a written execution protocol that ensures that witnesses are informed

of the administration of each of the drugs. Arizona did not change its protocol voluntarily. Rather, the transparency was compelled by a December 2016 federal court order in a lawsuit filed after the nearly two-hour botched execution of Joseph Wood.<sup>63</sup> Arizona has not yet attempted to carry out an execution under this new protocol.

By preventing witnesses from observing and listening to the entire execution process, states are limiting meaningful discussion and oversight of executions. Witnesses who are not informed and cannot see when the drugs are being administered are missing critical information about the progress of the execution. Once the paralytic is administered, the prisoner is no longer able to move, and any reaction to painful stimuli will not be visible. As a result, states can assert that an execution was humane, and the public has no way of ascertaining whether that is true. There will be no evidence to the contrary, not necessarily because the execution was humane but because the paralyzed prisoner appears to be dying without incident.

One journalist who witnessed Arkansas’s execution of Marcel Williams in April 2017 reported that Williams’s back arched as he breathed deeply and “sucked in air.”<sup>64</sup> The reporter could not tell whether Williams was moaning because the witnesses heard no audio from the execution chamber.<sup>65</sup> He also did not know whether Williams was given another dose of the first drug nor did he know “when the second drug [the paralytic], which would mask all pain, was administered” because no announcement was made.<sup>66</sup> Because of state secrecy, the journalist lacked critical information as a witness to know and accurately report what happened during Williams’s death.<sup>67</sup>

The lack of transparency insulates the conduct of the execution itself from review and hinders open discussion about the death penalty. The need for witnesses to observe the entire execution process has become increasingly relevant as untested drug formulas are used and incidents of botched executions rise.

#### **OF THE 17 STATES THAT CARRIED OUT EXECUTIONS BETWEEN 2011-2018:**

- 14 (or 82%) did not guarantee that witnesses could view the prisoner during the beginning of the execution process, including watching the prisoner be strapped to the gurney or the setting of the IV lines
- 15 (or 88%) did not guarantee that witnesses could hear what was happening in the execution chamber throughout the execution.
- 17 (or 100%) did not guarantee that witnesses could see when each drug was being administered.

# WHAT IS THERE TO HIDE?

States have argued that if they are to carry out executions, they must keep secret the identities of the people involved in executions and the suppliers of lethal-injection drugs. Experience has shown, however, that states have used secrecy as a pretext for hiding improper conduct. Secrecy has enabled states to obtain drugs by any means necessary—sometimes illegally and sometimes in breach of contract—without checks and balances by legislatures, courts, or the public. States have used secrecy to avoid accountability for problematic executions, claiming that crucial information about the execution is confidential. State conduct that has been uncovered reveals troubling possibilities for what else secrecy laws could be hiding from public view. Ultimately, state secrecy laws have prevented the public from knowing the extremes to which its state governments are resorting to carry out the most severe and irreversible punishment.

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*“Democracies die behind closed doors. ... When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”*

JUDGE J. DAMON KEITH, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT<sup>68</sup>

# Purported Reasons for Secrecy

*“I think the drug maker, if that business is disclosed, they worry about all the demonstrators that will appear at their door. So what we’re trying to do is protect them.”*

NORTH CAROLINA STATE REPRESENTATIVE LEO DAUGHTRY

States have refused to provide information on a range of execution-related topics, including the identities of executioners. But in the guise of protecting employee confidentiality, states have also refused to provide information on the qualifications of the members of their execution teams. Officials in Oklahoma have justified withholding disclosure, claiming that revealing that information could subject execution team members to public pressure not to participate in executions.<sup>69</sup> Further, states have asserted that there is “no legitimate purpose for revealing that information beyond embarrassment, harassment, annoyance and intimidation.”<sup>70</sup> This argument, however, ignores the fact that states have been known to hire unqualified executioners, which, in turn, substantially increases the risk that an execution will be botched and that a prisoner will experience an unnecessarily torturous death.

States have provided various justifications for their insistence on secrecy regarding the acquisition of lethal-injection drugs. The predominant theme has been that if states provide information about a drug source to the public, then drug companies will choose not to supply drugs for use in executions. In fact, the secrecy is not intended to protect manufacturers but to prevent them from learning that their medicines are being diverted from therapeutic uses to use in executions.

Pfizer—ranked by Forbes in 2016 as the world’s second largest public drug and biotech company<sup>71</sup>—publicly banned the use of its products in executions in May 2016.<sup>72</sup> Other companies have expressed similar sentiments, emphasizing that they make medicines to save and improve the lives of patients and do not want to provide their products for use in executions.<sup>73</sup> As of August 2018, more than fifty manufacturers of drugs used in lethal injections have taken action to block their products from being used in executions.<sup>74</sup> As Professor Ty Alper has suggested, “It is difficult to imagine more negative public relations for a drug company than publicity about the fact that its products are used to kill people.”<sup>75</sup>

Far from supporting secrecy policies that purport to protect them, companies have actively opposed states' efforts to suppress information about the source of execution drugs. In July 2017, two pharmaceutical companies, Fresenius Kabi USA and Sandoz Inc., filed a brief in support of litigation seeking disclosure of records that Ohio sought to keep confidential under its secrecy statute. In the court filings, the companies wrote that they "have a keen and important interest in knowing whether any department of corrections have obtained their drugs despite and in contravention of their distribution controls and contracts."<sup>76</sup> Both companies stressed that they have not sought to conceal any records pertaining to them and further argued that Ohio's refusal to disclose the manufacturers of its execution drugs directly undermines their interests and "imped[es] their ability to preserve the integrity of their contracts."<sup>77</sup>

The European Union (EU) and some foreign governments have joined the companies' efforts, adopting human rights economic regulations that place restrictions on the exportation of medicines used in capital punishment.<sup>78</sup> In September 2017, 58 countries joined an initiative led by the European Union, Argentina, and Mongolia to create a global Alliance for Torture-Free Trade to halt the trade in goods—such as pharmaceuticals—used for capital punishment and torture.<sup>79</sup> After having problems with its manufacturing plant in North Carolina, Hospira—the sole domestic producer of sodium thiopental—decided to leave the market altogether rather than manufacture the drug in its plant in Italy. Italian authorities warned Hospira that it faced liability if it sold its products to the United States for use in executions. Hospira was not willing to take that risk.<sup>80</sup> If secrecy had shielded the information from public view, Hospira would not have been able to accurately assess its risk of liability.

In 2012, the German-based global healthcare company Fresenius Kabi objected to the use of its drug propofol in executions after Missouri announced plans to use that drug in lethal injections. Fresenius Kabi emphasized that the use of propofol in executions would prevent it from supplying the drug to the United States because the EU would add it to the list of lethal-injection drugs restricted from exportation. If Fresenius Kabi could not supply propofol to the U.S., then

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***"Pfizer makes its products to enhance and save the lives of the patients we serve. Consistent with these values, Pfizer strongly objects to the use of its products as lethal injections for capital punishment."***

STATEMENT OF PFIZER, INC.<sup>81</sup>

there would potentially be "millions of patients at risk," because propofol is the "most widely used anaesthesia drug."<sup>82</sup> When Missouri announced its intent to use propofol, the Business Secretary for the United Kingdom announced plans to impose export restrictions on the drug, saying: "This country opposes the death penalty. We are clear that the state should never be complicit in judiciary executions through the use of British drugs in lethal injections."<sup>83</sup> Stating concerns for protecting public health, Missouri's governor halted the scheduled propofol execution and ordered the Department of Corrections to find another drug.<sup>84</sup>

Fresenius Kabi has continued to challenge the use of its drugs in lethal injection. It filed suit in Nebraska federal court on August 8, 2018, alleging that Nebraska intended to execute Carey Dean Moore using drugs manufactured by the company that had been obtained "through improper or illegal means."<sup>85</sup> The lawsuit said the company's distribution contracts with authorized wholesalers and distributors prohibit sales to departments of corrections, and it alleges that Nebraska obtained the drugs "in contradiction and contravention of the distribution contracts," most likely from an unauthorized supplier. Nebraska Attorney General Doug Peterson said the state's execution drugs "were purchased lawfully and pursuant to the State of Nebraska's duty to carry out lawful capital sentences," an assertion that cannot be verified because of the state's secrecy practices. The state refused to identify the source of the drugs it used in Moore's execution, but two of the drugs—the paralytic, cisatracurium, and the drug used to stop the heart, potassium chloride—are manufactured by Fresenius Kabi, and only that company made vials of potassium chloride in the size obtained by the state.<sup>86</sup> Fresenius Kabi has been clear about its frustration with Nebraska's secrecy laws. Its spokesperson Steffen Rinas told In-PharmaTechnologist: "because of secrecy laws, we don't know with certainty if, or how, the state acquired our products, and the state has not confirmed it used our products in the execution" of Carey Dean Moore.<sup>87</sup>

Amicus briefs filed in the United States Supreme Court in the 2018 case of Missouri prisoner Russell Bucklew, further demonstrate the pharmaceutical industry's concerns about the diversion of medicines for use in executions. The Association for Accessible Medicines, a professional association representing generic and biosimilar drug manufacturers and distributors, wrote that its members "strongly oppose the use of their medicines ... to carry out executions."<sup>88</sup> The brief called such use "medically irresponsible," and raised concerns about the public health impacts. Specifically, some of the drugs used in executions are classified as "essential medicines" by the World Health Organization, and are in short supply, yet "four states had stockpiled enough of these drugs to treat 11,257 patients—if the drugs were used as intended for medical treatment rather than in executions." Eighteen public health experts warned in their own brief that state actions evading distribution restrictions and obtaining drugs from unlicensed sources "undermine[] federal laws that protect the public health, and ... circumvent[] pharmaceutical companies' ability to ensure the safety and effectiveness of drugs in the supply chain."<sup>89</sup>

As companies have publicly announced the measures they have taken to prevent their products from being used in executions, states have responded with secrecy laws, using the threat that death-penalty opponents will pressure companies to refuse to provide execution drugs as a pretext for passing these laws. When North Carolina adopted its secrecy law, State Representative Leo Daughtry, the bill's sponsor, explained: "I think the drug maker, if that business is disclosed, they worry about all the demonstrators that will appear at their door. So what we're trying to do is protect them."<sup>90</sup> The Arkansas Department of Corrections claimed that secrecy was necessary because "the sellers were concerned about adverse publicity and the loss of business if they were identified as suppliers of drugs used for executions."<sup>91</sup> Missouri argued that "revealing the information would prevent the Missouri Department of Corrections from obtaining and testing the execution chemical, and would expose persons who assist the state in carrying out executions to harassment, intimidation and harm."<sup>92</sup> The Arizona Attorney General's office defended its refusal to provide information about the drug source, arguing that disclosure would "deter drug manufacturers from providing lethal injection drugs."<sup>93</sup> The co-sponsor of Ohio's secrecy bill stressed the need for the law because "many manufacturers—from whom the state had purchased [drugs] for many years—have stopped selling drug compounds for this purpose."<sup>94</sup> He claimed the names of companies need to remain secret to protect companies that "fear ... public reprisal."<sup>95</sup> The Oklahoma Attorney General explained that the state passed its secrecy law "because [execution] participants have a privacy interest in not being subjected to public scrutiny based on their involvement in an event that engenders so much controversy."<sup>96</sup>

Some courts have accepted the states' arguments without supporting evidence. Other judges have criticized allowing states to hide information from the public

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***"The fact that some drug providers may be subject to harassment and/or public ridicule and the fact that authorities may find it more difficult to obtain drugs for use in executions are insufficient reasons to forgo constitutional processes in favor of secrecy, especially when the state is carrying out the ultimate punishment."***

JUSTICE ROBERT BENHAM, GEORGIA SUPREME COURT<sup>97</sup>

just because drug suppliers would face public scrutiny for their actions. Two justices on the Georgia Supreme Court flatly rejected the state's argument for secrecy, declaring: "The fact that some drug providers may be subject to harassment and/or public ridicule and the fact that authorities may find it more difficult to obtain drugs for use in executions are insufficient reasons to forgo constitutional processes in favor of secrecy, especially when the state is carrying out the ultimate punishment."<sup>98</sup> Though later reversed, a panel of the U.S. Court of Appeals for the Ninth Circuit rejected Arizona's argument for secrecy about the source of its lethal-injection drugs, noting that it "ignores the ongoing and intensifying debate over lethal injection in this country, and the importance of providing specific and detailed information about how safely and reliably the death penalty is administered."<sup>99</sup> The Arkansas Supreme Court found unpersuasive the state's argument that disclosure of the drug manufacturer would prevent it from being able to carry out death sentences, observing that "many manufacturers of lethal-injection drugs already prohibit the use of these drugs in executions."<sup>100</sup> The court ruled that the state must provide the public with information about the manufacturer of the lethal-injection drugs the state obtains for use in executions.<sup>101</sup>

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***"The Associated Press could find no evidence that any such investigations [of threats to pharmacies] are underway in Texas, and police in the community where one such pharmacy is located said they are not concerned."***<sup>102</sup>

States have also argued that secrecy is needed to protect their drug sources from harassment or even potential physical harm. A federal district court ordered the Arizona Department of Corrections to disclose the source of its execution drug after finding that the state presented no evidence that potential "calls and letters would prevent a corporation from operating or would be sufficiently disruptive to force them to refuse to sell its product" to the prison.<sup>103</sup> The court stressed that the manufacturer actually chose to stop providing the drug for executions "because it 'adamantly opposed the distressing misuse of [the] product in capital punishment'—not because it feared a public backlash."<sup>104</sup>

Some courts have refused to accept—without specific evidence—the state's argument that secrecy is needed to protect lethal-injection drug suppliers from physical harm. For example, Texas claimed that their drug sources would be subject to physical assaults if their identity were revealed to the public.<sup>105</sup> A Texas appeals court rejected the state's assertion that it had shown a substantial threat

of physical harm to the source if the execution drug were revealed and held that the state had to provide drug-source information to the public. Likewise, a news report contradicted Texas's allegations that drug sources were being threatened with violence. "The Associated Press could find no evidence that any such investigations [of threats to pharmacies] are underway in Texas, and police in the community where one such pharmacy is located said they are not concerned."<sup>106</sup>

In lethal-injection litigation in September 2018, attorneys for the State of Tennessee refused to provide information on their efforts to obtain execution drugs but conceded that there was no evidence death-penalty opponents had attempted to impede sales of drugs to the state.<sup>107</sup> A 2016 investigation into claims by Oklahoma officials that their supplier had been threatened also revealed that the state's allegations were highly exaggerated.<sup>108</sup> The alleged threat against a Tulsa pharmacy called the Apothecary Shoppe turned out to be nothing more than an email sent to the pharmacy by a retired college professor who used his own name and provided his telephone number. The professor characterized his email as simply advice to the pharmacy to be cautious. After this communication occurred, Ohio and Texas hired an expert who characterized this email as a "serious threat" against the pharmacy that justified the need for secrecy because it supposedly had caused the FBI to launch an investigation. Records from both the FBI and the Tulsa Police Department, however, showed that neither agency had been aware of any supposed threats against the pharmacy until a reporter called months later to ask about them. The pharmacy never filed any complaint about the email and did not come forward with copies of any threatening emails after investigators provided an opportunity to do so.<sup>109</sup>

In addition to exaggerating threats as justification for secrecy, states have also made misrepresentations to courts to prevent disclosure of information on their execution processes. For example, in *Glossip v. Gross* (2015), the U.S. Supreme Court case challenging the drug formula selected by Oklahoma for lethal injections, then-Oklahoma Attorney General Scott Pruitt told the Court that the state's drug supplier "came under intense pressure from death penalty opponents to cease compounding pentobarbital for use in executions, and subsequently declined to continue supplying the drug to Oklahoma."<sup>110</sup> Interpreting its state secrecy law broadly, Oklahoma submitted to the Court a heavily redacted copy of a letter with the names of both the pharmacy and the department of corrections blacked out.<sup>111</sup> Pruitt's statement, however, completely misrepresented the facts. The letter, which Arizona state attorneys submitted unredacted in another court<sup>112</sup>, was written from Woodlands Compounding Pharmacy to the Texas Department of Criminal Justice (TDCJ)—not Oklahoma. Because of this and other factual inaccuracies, Justice Sotomayor excoriated the state's attorney at argument, telling him "nothing you say or read to me am I going to believe, frankly, until I see it with my own eyes [in] context, okay?"<sup>113</sup>

#### LETTER SUBMITTED BY OKLAHOMA

Dear Sirs and Madam:

I am the owner and pharmacist-in-charge of the [REDACTED] the pharmacy that has provided [REDACTED] with vials of compounded pentobarbital.

Based on the phone calls I had with [REDACTED] of [REDACTED] regarding its request for these drugs, including statements that she made to me, it was my belief that this information would be kept on the "down low" and that it was unlikely that it would be discovered that my pharmacy provided these drugs. Based on [REDACTED] requests, I took steps to ensure it would be private. However, the State of [REDACTED] misrepresented this fact because my name and the name of my pharmacy are posted all over the internet. Now that the information has been made public, I find myself in the middle of a firestorm that I was not advised of and did not bargain for. Had I known that this information would be made public, which the State implied it would not, I never would have agreed to provide the drugs to the [REDACTED]

I, and my staff, are very busy operating our pharmacy, and do not have the time to deal with the constant inquiries from the press, the hate mail and messages, as well as getting dragged into the state's lawsuit with the prisoners, and possible future lawsuits. For these reasons, I must demand that [REDACTED] immediately return the vials of compounded pentobarbital in exchange for a refund.

Please contact me immediately to arrange for the return of the drugs. Otherwise I may have to ask the Court in the prisoners' lawsuit to consider my concerns.

[REDACTED]

#### UNREDACTED LETTER

Dear Sirs and Madam:

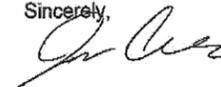
I am the owner and pharmacist-in-charge of the Woodlands Compounding Pharmacy, the pharmacy that has provided TDCJ with vials of compounded pentobarbital.

Based on the phone calls I had with Erica Minor of TDCJ regarding its request for these drugs, including statements that she made to me, it was my belief that this information would be kept on the "down low" and that it was unlikely that it would be discovered that my pharmacy provided these drugs. Based on Ms. Minor's requests, I took steps to ensure it would be private. However, the State of Texas misrepresented this fact because my name and the name of my pharmacy are posted all over the internet. Now that the information has been made public, I find myself in the middle of a firestorm that I was not advised of and did not bargain for. Had I known that this information would be made public, which the State implied it would not, I never would have agreed to provide the drugs to the TDCJ.

I, and my staff, are very busy operating our pharmacy, and do not have the time to deal with the constant inquiries from the press, the hate mail and messages, as well as getting dragged into the state's lawsuit with the prisoners, and possible future lawsuits. For these reasons, I must demand that TDCJ immediately return the vials of compounded pentobarbital in exchange for a refund.

Please contact me immediately to arrange for the return of the drugs. Otherwise I may have to ask the Court in the prisoners' lawsuit to consider my concerns.

Sincerely,



# Setting Aside the Veil:

## UNCOVERING INCOMPETENCE, ILLEGALITY, AND DECEPTION

In many cases, the public will never know the full extent of state officials' actions because they are shielded by secrecy laws. However, protracted litigation and extraordinary investigations have provided glimpses into disturbing conduct by state officials in procuring the drugs for, overseeing, and carrying out executions. This conduct has included:

- Hiring a physician-executioner who has been sued for malpractice at least 20 times, has been barred from practicing at two hospitals, and whose failure to use a written protocol, coupled with his dyslexia, resulted in him administering the wrong amounts of drugs;
- Illegally importing drugs from a sham pharmacy operating out of a London store-front labeled "driving academy";
- Purchasing drugs from a supplier in India who had obtained free samples of the medicine under the false pretense that he would use them for medical purposes in Zambia;
- Buying drugs from a compounding pharmacy that committed more than 1800 violations of state health and safety guidelines and which the FDA found had "questionable potency, disinfecting and sterilization practices";
- Obtaining execution drugs from a local hospital by misrepresenting that the medication was needed for a "medical patient."

Although litigation and state investigations have uncovered numerous examples of misconduct, they are no substitute for routinely making execution-related information available to the public. Other misconduct has surely gone undiscovered. Increasingly strict secrecy laws continue to thwart efforts to uncover the truth, suggesting that there is even more to hide.

# The Incompetent Physician-Executioner

In 2007, stung by disclosure of embarrassing information about its long-time physician-executioner, Missouri pioneered the use of secrecy to prevent public oversight. The "Show Me" state had employed a doctor with dubious credentials to conduct more than fifty lethal-injection executions. Alan Doerhoff had been sued for malpractice more than twenty times, barred from practicing at two hospitals, publicly reprimanded by the state Board of Healing Arts, and had been caught making false statements in two court cases. Suffering from dyslexia, he sometimes confused drug names when conducting executions and would improvise drug dosage. He followed no written protocol and kept no records.<sup>114</sup> After these facts came to light in a lawsuit brought by Missouri's death-row prisoners, a federal judge ordered that Doerhoff no longer "participate in any manner, at any level in the State of Missouri's lethal injection process."<sup>115</sup>



Missouri legislators responded to media attention and public criticism concerning the state's use of a clearly unqualified execution doctor not by enacting reforms, but by prohibiting disclosure of the identities of the execution team. Missouri's law even created a civil cause of action subjecting anyone who disclosed execution team members' identities to damages. At least two other states (Ohio and South Carolina) have included civil liability provisions in their secrecy laws.

South Dakota's secrecy law goes even further, making disclosure of execution-related information a crime punishable by up to one year of imprisonment and a \$2,000 fine.

Since Missouri initially adopted its secrecy law in 2007, it has expanded the scope of the law by redefining what constitutes membership on the execution team. In 2013, attempting to shield the identity of its drug supplier, Missouri expanded the definition of "execution team" in its execution protocol to include suppliers of lethal chemicals.<sup>116</sup> As a result, in Missouri, the public cannot know who has been awarded public contracts to supply execution drugs to the state.

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*"When jurisdictions are permitted to operate in secrecy, the courts, legislatures, and the public cannot provide critical oversight to guard against the use of risky and experimental drug protocols and untrained and unqualified execution team members."*

REPORT TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION ON LETHAL INJECTION SECRECY RESOLUTION<sup>117</sup>

## Illegal Importation of Drugs

In 2009, the pharmaceutical company Hospira—the only U.S. drug company that manufactured sodium thiopental—experienced manufacturing problems at one of its plants, causing a shortage of the first drug used in states' three-drug lethal injection protocols. The public first learned of the shortage when, only days before a scheduled May 2010 execution, an attorney representing Ohio informed a federal district court that the state was unsure if it would be able to secure the drug.<sup>118</sup> Hospira's production problems triggered a series of events that culminated in a company decision to stop manufacturing the drug. With their source of sodium thiopental unavailable, states had to look elsewhere for lethal-injection drugs. As they did so, states began to hide these efforts from the public.

With no domestic source of sodium thiopental available, states looked for sources abroad.<sup>119</sup> In attempting to import lethal-injection drugs, states clandestinely turned to sources with questionable facilities and dubious reputations, violating federal laws in the process. Attempts to conceal these actions from the public failed when two federal agencies—the Food & Drug Administration (FDA) and the Drug Enforcement Agency (DEA)—began investigating the importation of controlled substances for unapproved non-medical purposes in potential violation of federal law.

In September 2010, the Arizona Department of Corrections received a tip from the Arkansas Department of Corrections about a London-based drug wholesaler that was willing to supply execution drugs. Arkansas had, in turn, learned of the wholesaler through a referral from Georgia.<sup>120</sup> The wholesaler, Dream Pharma, Ltd. (pictured right), was no normal pharmaceutical distributor. As press reports disclosed, it "operat[ed] out of a storefront driving school in west London."<sup>121</sup> Arizona officials knew Dream Pharma was a potentially problematic source. Before the state purchased the drugs from the company, a senior pharmacist consultant told state officials that Dream Pharma's website "leaves something



to be desired” and she questioned whether the company was a “reputable” drug source. She also informed Arizona officials of a “gray” market in the pharmaceutical industry” and said that it was “pretty likely” that Dream Pharma’s drug was not approved by the FDA. Ignoring these warnings, Arizona ordered execution drugs from Dream Pharma.<sup>122</sup>

In October 2010, just days before Arizona was scheduled to execute Jeff Landrigan, his attorneys learned that the state would be using imported drugs in his execution. But Arizona refused to provide Landrigan with any information about the drugs, so he knew only that the drug had not been manufactured in the United States and, therefore, had not been approved by the FDA. Based on this limited information, Landrigan filed a challenge in federal court raising concerns about the legality of executing him with gray-market drugs imported from a non-FDA approved supplier. The court ordered Arizona to provide information about the source of the drug, but the state refused. The federal judge was perplexed, saying 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.”<sup>123</sup> The state appealed the district court’s order, but because Landrigan had no information about the drugs, the U.S. Supreme Court allowed his execution to go forward.<sup>124</sup> Landrigan’s attorneys later discovered that he had been executed with drugs illegally imported from Dream Pharma.

Between 2010 and early 2011, at least eight other states illegally imported sodium thiopental from overseas, and the DEA intervened to halt the practice.

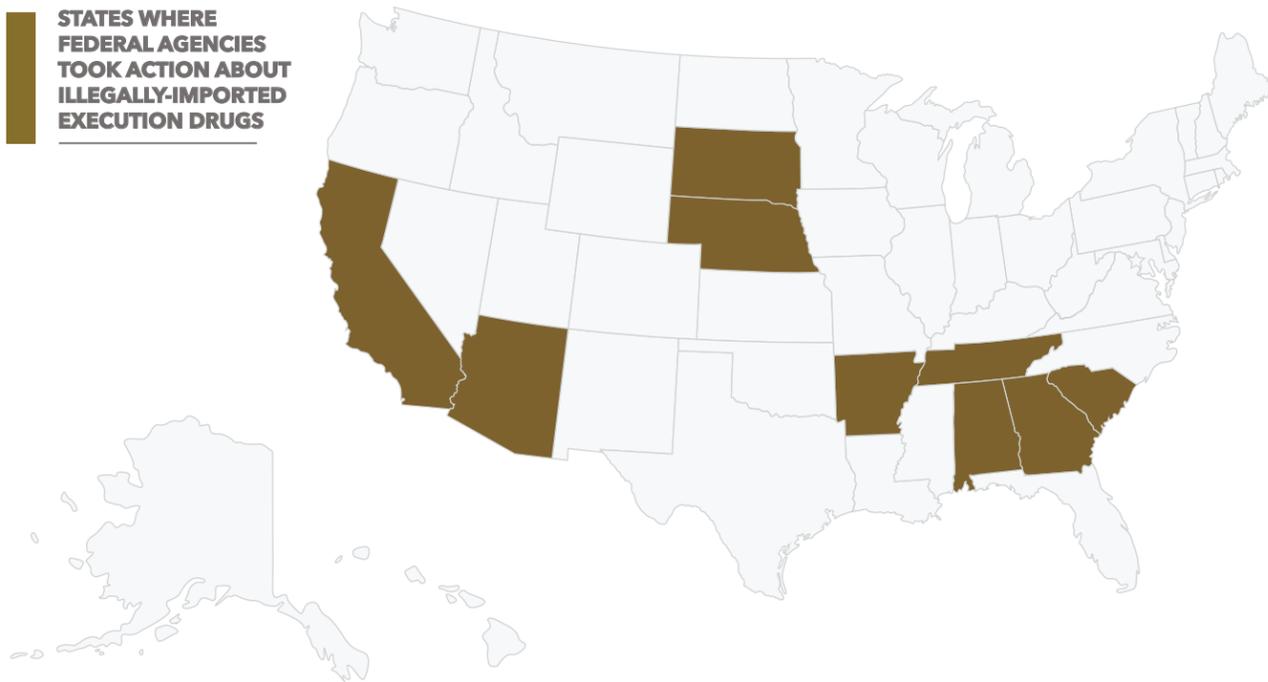
In 2011, the DEA seized thiopental from Alabama, Georgia, Kentucky, South Carolina, and Tennessee. Following a court decision, the FDA sent letters to Arizona, Arkansas, California, Georgia, Nebraska, South Carolina, South Dakota, and Tennessee requesting that the states relinquish the illegally-obtained drugs.<sup>125</sup> Subsequently, a federal appeals court ruled that the drugs had been imported into the United States in violation of federal law but, due to a procedural issue, allowed states to keep the drugs already in their possession.<sup>126</sup> Because there was no way importation of these drugs could have complied with federal regulations, the court determined that the FDA should have taken action preventing the drugs from entering the country. Despite this express federal court determination, states continued to order sodium thiopental from overseas.

Dream Pharma has not been the only overseas supplier of execution drugs. In 2010, before most states implemented drug-source secrecy laws, a public-records request yielded information that Kayem Pharmaceuticals, based in India, had supplied sodium thiopental to Louisiana and Nebraska for only \$2 per vial. The owner of Kayem, however, said he did not “want to be an accessory to state sponsored killing” and accused the state officials of having concealed the intended use of the drugs.<sup>127</sup> So when South Dakota corrections officials approached Kayem for execution drugs, the owner raised his price to \$20 per vial, hoping the increased cost would dissuade the state from buying the drugs. The price hike did not work, and Kayem shipped 500 vials of sodium thiopental to South Dakota. Because of federal regulations, however, South Dakota never used the drugs.<sup>128</sup>

One of Kayem’s employees, Chris Harris, left the company and became an execution-drug supplier to several states. Harris had no pharmaceutical background and listed as his business address an apartment that he had abandoned years prior, having failed to pay months of rent and electricity bills.<sup>129</sup> Harris had obtained free samples of sodium thiopental from a Swiss company, Naari, under the pretext of registering the anesthetic in Zambia. Instead, he sold the free samples of the drug to Nebraska for \$5,400.<sup>130</sup> Naari CEO Prithi Kochhar was shocked when he learned the medicine had been sold for use in executions. In a letter to the Chief Justice of the Nebraska Supreme Court, Kochhar said: “Mr. Harris misappropriated our medicines and diverted them from their intended purpose and use.”<sup>131</sup> Kochhar told the court that Naari is “deeply opposed to the use of medicines in executions.”<sup>132</sup>

In later execution-drug transactions, Harris required states to place a minimum purchase order of 1,000 vials and charged a rate that was seven times the market price for the drug. As a result, state taxpayers paid Harris tens of thousands of dollars for drugs that, it turns out, would never be used. In 2015, Nebraska paid Harris \$54,000 for 1,000 vials of sodium thiopental and 1,000 vials of pancuronium bromide (a paralytic). Nebraska was not alone in purchasing from Harris. Arizona paid Harris nearly \$27,000 for 1,000 vials of sodium thiopental. Texas also imported sodium thiopental at the same time as Arizona, and while it is

**STATES WHERE  
FEDERAL AGENCIES  
TOOK ACTION ABOUT  
ILLEGALLY-IMPORTED  
EXECUTION DRUGS**



widely believed that those drugs were purchased from Harris, the source of Texas's 1,000 vials of drugs has not been confirmed.<sup>133</sup>

Nebraska never received its execution drugs. Harris shipped them via FedEx, but citing the absence of paperwork permitting their importation to the United States, the carrier refused to deliver them and returned the drugs to their sender. The drugs never left India, and Nebraska unsuccessfully tried to recoup its payment.<sup>134</sup> When Nebraska executed Carey Dean Moore on August 14, 2018, after a 20-year execution hiatus, it still had not received the drugs ordered from Harris and used an experimental drug combination instead. The state did not reveal the supplier of the drugs used in Moore's execution, but Fresenius Kabi, which manufactures two of the drugs, sued Nebraska, alleging that the state had purchased its products "through improper or illegal means."<sup>135</sup>

Arizona's and Texas's shipments of sodium thiopental arrived in the United States, but the FDA seized the shipments at airports in Phoenix and Houston.<sup>136</sup> Texas and Arizona informally attempted to persuade the FDA to release the drugs from detention.<sup>137</sup> When those efforts failed, Texas sued the FDA in hopes of obtaining the drugs. Instead, the FDA issued a final order in April 2017 notifying prison officials that the shipments had been imported in violation of federal law and would not be released.<sup>138</sup>

# Compounding Pharmacies with Questionable Practices

States also have turned to compounding pharmacies when the execution drugs they sought were unavailable from major pharmaceutical manufacturers. Compounding pharmacies service patients who need drugs that cannot be supplied by a mass-manufactured product; the pharmacist, acting per a prescription, creates medication specifically tailored for a particular patient. A patient may need the assistance of a compounding pharmacist if, for example, she cannot swallow a mass-produced medicine in pill form and needs the medicine specially produced as a liquid, or if she has drug allergies or suffers from a rare illness for which mass production of a drug is cost prohibitive. Compounding pharmacies usually mix small amounts of drugs when filling an individual's prescription. Because the drugs produced by these pharmacies are customized, the FDA "does not verify the safety or effectiveness of compounded drugs."<sup>139</sup>

The use of compounding pharmacies for lethal-injection drugs has raised many concerns, including the health and safety record of the compounder, the quality and efficacy of the drugs, the companies' (and states') refrigeration, storage, and transport practices, and the legality of a compounding pharmacist producing drugs without a valid medical prescription for the treatment of an individual patient.<sup>140</sup> Three key examples—one from Georgia and two from Missouri—highlight the problems that arise when states use compounding pharmacies behind the veil of secrecy laws.

On March 2, 2015, Georgia was scheduled to execute Kelly Gissendaner. Hours after the execution was set to begin, however, the state called it off because the lethal-injection drugs manufactured and supplied by an anonymous compounding pharmacy were "cloudy."<sup>141</sup> Georgia law classifies information about the manufacturer, compounder, or supplier of lethal-injection drugs as a "confidential state secret."<sup>142</sup> Because of this strict secrecy law, the public knew virtually nothing about the drug, including where and how it was compounded, transported, and stored. Georgia officials maintained that nothing was wrong with either the drugs or their supplier but suggested they may have been stored at too cold a temperature. The state said it was in the process of conducting a study of the problem and would make the results public. It did not. After Gissendaner

sued, the state disclosed a video of the drugs showing particles that looked like “clumps of cottage cheese floating in the solution,” and the state’s own expert said that the drug could have been prepared improperly by the pharmacy.<sup>143</sup> No known corrective measures were undertaken to ensure that future execution drugs were not contaminated.

The aborted Gissendaner execution illustrates the need for public oversight and the importance of an independent review of the execution process when something goes wrong. Missouri provides insight into a range of other problems that can—and do—occur behind the scenes. Missouri amended its lethal-injection policy in 2013 to prevent disclosure of the identity of its drug supplier. It was only through diligent investigations by reporters who pieced together information from a variety of sources that the public learned of the reckless practices of two different compounding pharmacies that provided lethal drugs to Missouri.



The Apothecary Shoppe sold Missouri more than \$30,000 worth of drugs that were used in three executions.<sup>144</sup> The Oklahoma-based company was not licensed to do business in Missouri, and its interstate sale of controlled substances without a valid prescription may have violated both Missouri and federal law. To hide the state’s dealings with the Apothecary Shoppe, an official of the Missouri Department of Corrections drove to Oklahoma with an envelope containing \$11,000 in cash, gave the money to a contact from the Apothecary Shoppe, and returned to Missouri with

the drugs in hand.<sup>145</sup> The failure to report cash payments may have also violated federal law: cash payments of \$10,000 or more require notification to the Treasury Department’s Financial Crimes Enforcement Network. To evade disclosure, Missouri also failed to file the required 1099 tax form with the Internal Revenue Service (IRS). The Apothecary Shoppe has not disclosed whether it paid taxes on the cash income it received.<sup>146</sup>

After the Apothecary Shoppe provided drugs to Missouri, the FDA and Oklahoma Board of Pharmacy conducted routine inspections of the compounding pharmacy. The investigation revealed 1,892 violations of state guidelines, and the FDA found “questionable potency, disinfecting and sterilization practices.” In addition, inspectors noted that the employees would arbitrarily extend expiration dates on drugs without proper testing or documentation and would store drugs in a blue Igloo cooler rather than putting them in the proper refrigeration unit simply because the refrigerator was located in a different room.<sup>147</sup>

After journalists discovered and reported Missouri’s use of the Apothecary Shoppe, the state switched to another compounding pharmacy to obtain execution drugs. That pharmacy, Foundation Care, also had repeated health violations so serious that the FDA labeled the company as “high risk” and cited it as an example of the need for greater federal oversight of compounders.<sup>148</sup>

Foundation Care first came to the attention of FDA investigators in 2007 when a doctor complained to the agency that a patient he was treating had developed “a ‘life threatening’ illness” after taking a drug prepared by the pharmacy. At that time, the FDA investigators found that the pharmacy had shipped drugs to patients without conducting tests for sterility and bacteria, and a lab sample revealed drugs that had been contaminated with bacteria. A 2013 inspection found “multiple examples” of practices that could lead to contamination and that Foundation Care had failed to “assure that drug products conform to appropriate standards of identity, strength, quality and purity.” In a February 2014 letter to the Missouri Board of Pharmacy, the FDA warned that the pharmacy’s practices “could lead to contamination of drugs, potentially putting patients at risk.”<sup>149</sup>

The possibility of drug contamination has been one of the centerpieces of challenges to Missouri’s execution process, and experts have indicated that contamination could create an unconstitutional risk of pain and suffering. However, in a deposition in the Missouri prisoners’ legal challenge, state officials refused to say whether they were aware of any problems with their drug supplier. At the same time that Missouri’s drug supplier was violating health and safety regulations related to contamination, state attorneys were affirmatively using Missouri’s secrecy provisions to deny prisoners access to information about the state’s drug supplier and the supplier’s safety record. This allowed state prosecutors to argue to the court that the prisoners had not met their burden of proving that Missouri executions may be unconstitutionally cruel. Only after an in-depth exposé by investigative journalist Chris McDaniel did the public learn that Missouri used drugs from Foundation Care to conduct seventeen executions between 2014 and 2017.<sup>150</sup>

# Misrepresenting Facts to Obtain Drugs

Under false pretenses, states have obtained drugs for lethal injections from drug manufacturers, medical-care providers, and drug distributors that have made clear that they do not want to be involved in executions. Through secrecy and dishonesty, states have acted in bad faith to circumvent the non-distribution policies of pharmaceutical manufacturers, inducing or misleading drug resellers into breaching drug-distribution contracts.

A lawsuit filed by Texas death-row prisoners in 2013 alleged that the Texas Department of Criminal Justice (TDCJ) had obtained execution drugs under false pretenses. The lawsuit claimed that TDCJ purchased the drugs propofol, midazolam, and hydromorphone from an out-of-state pharmacy instructing that the drugs be delivered to the “Huntsville Unit Hospital,” a medical facility that had been closed thirty years earlier.<sup>151</sup> The state also attempted to purchase compounded pentobarbital from the pharmacy with a prescription written in the name of Huntsville’s warden. The pharmacy reportedly cancelled that order—which also was to be delivered to the defunct “Huntsville Unit Hospital”—after discovering that the TDCJ ordered the drugs intending to use them to execute prisoners.<sup>152</sup>

Similarly, in 2013, the Ohio Department of Rehabilitation and Correction (ODRC) misled its supplier about the ultimate destination of the drugs it intended to use in executions. Rather than risk the McKesson Corporation—one of the nation’s largest pharmaceutical distributors—refusing to sell medicines to Ohio prisons, the state arranged for the purchase to be made by the Ohio Pharmacy Service Center—part of the state’s mental-health agency. In turn,

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*“When you call them to see if they will sell [pentobarbital] to us make sure you say we are the Department of Mental Health do not mention anything about corrections in the phone call or what we use the drug for.”*

EXCERPT FROM JULY 2011 E-MAIL FROM OHIO OFFICIAL<sup>153</sup>

the Pharmacy Service Center diverted the medicines to ODRC to be used for lethal injection.<sup>154</sup>

In Louisiana, one week in advance of a scheduled execution in January 2014, the Department of Corrections needed hydrocodone—one of the drugs in its lethal-injection protocol. Falsely claiming that the medication was needed for a “medical patient,” the Department obtained hydrocodone from a pharmacy at Lake Charles Memorial Hospital.<sup>155</sup> The hospital had provided the state prison system with medicines for patient care in the past and believed that was what it was doing again. A hospital board member reacted with dismay when he learned of the state’s deceit: “At no time was Memorial told the drug would be used for an execution,”<sup>156</sup> he said. If the hospital had “known of the real use, we never would have done it.”<sup>157</sup>

In January 2017, a filing error exposed the contents of a sealed transcript in a Missouri lethal-injection case. As a result, the media learned that Missouri had been using lethal-injection drugs manufactured by the pharmaceutical company Akorn Pharmaceuticals. But in 2015, Akorn had publicly announced its opposition to the use of its products in executions and had implemented distribution restrictions to prevent departments of corrections from obtaining its products.<sup>158</sup> Through secrecy, Missouri evaded Akorn’s distribution controls and purchased pentobarbital for use in executions.

In late February 2017, Arkansas Governor Asa Hutchinson scheduled eight lethal-injection executions to occur over a span of eleven days that April. State officials attempted to justify the unprecedented schedule by saying that one of its drugs would expire on April 30.<sup>159</sup> Those executions raised objections from drug-distributor McKesson Corporation, which had sold vecuronium bromide manufactured by Pfizer to Arkansas “under the auspices that it would be used for medical purposes.”<sup>160</sup> Within days of shipping the drug, however, McKesson learned that the vecuronium bromide was sold to a facility carrying out executions.<sup>161</sup> Arkansas refused McKesson’s repeated requests that the state return the drug shipment.<sup>162</sup> Days before the scheduled executions, left with no other alternative, McKesson sued the state alleging that Arkansas was fully aware that Pfizer did not permit the use of its products in executions and deliberately withheld from McKesson that it intended to use the drug for lethal injection.<sup>163</sup> The drugs were not returned, and Arkansas carried out four executions using products manufactured by Pfizer and distributed by McKesson in breach of its distribution contract.<sup>164</sup>

Later in the year, on October 6, 2017, Arkansas openly claimed that its secrecy law had been designed to prevent pharmaceutical manufacturers and distributors from identifying breaches in their controls and taking legal action to recover their medicines. In a court filing, the state wrote that secrecy was necessary to prevent companies from “interject[ing] themselves into litigation in an effort to halt the State’s use of their drugs for capital punishment” and “implement[ing] even more distribution controls.”<sup>165</sup>

In 2018, the drug company, Alvogen, sued Nevada after learning that the state had obtained midazolam from one of its distributors. Alvogen alleged that Nevada had used “subterfuge” and “intentionally defrauded Alvogen’s distributor” to obtain the drug. To further the ruse that the drugs were being purchased for therapeutic purposes, Alvogen said, the state had the drug shipped to a state office several hundred miles from the prison.<sup>166</sup> Based on these allegations, Clark County District Judge Elizabeth Gonzalez stayed the execution of Scott Dozier and later issued a preliminary injunction barring the state from using its supply of that drug in carrying out any execution.<sup>167</sup> After hearing testimony on the issues, Judge Gonzalez found that the Nevada Department of Corrections had acted in “bad faith” to obtain the drug through “subterfuge.”<sup>168</sup> The judge determined that both Nevada’s prison director, James Dzurenda, and its prison pharmacy director, Linda Fox, knew when they bought Alvogen’s drugs that the company “objected to their use in lethal injection and that they had controls in place to prevent sales for such use.... Indeed,” Judge Gonzalez wrote, “when purchasing the Alvogen Midazolam Product, Fox’s response to Alvogen’s objections was ‘Oh shit.’ She then asked Mr. Dzurenda if he would like her to order more [midazolam] because she was ‘certain once it’s in the press that we got it [she] will be cut off.’”

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*“States have circumvented this carefully and extensively regulated supply chain to acquire drugs for use in lethal injection. They use overseas sellers, unlicensed middlemen, and secret compounding pharmacies. The result is twofold: it undermines federal laws that protect the public health, and it circumvents pharmaceutical companies’ ability to ensure the safety and effectiveness of drugs in the supply chain.”*

AMICUS BRIEF OF PHARMACY, MEDICINE, AND HEALTH POLICY EXPERTS IN *BUCKLEW V. PRECYTHE*<sup>169</sup>

# Swapping Drugs and Paying Cash for Drugs

In further efforts to conceal their execution-related activity, some states have paid for lethal-injection-related services in non-traditional ways to avoid creating purchase orders and to hide payment transactions. Cumulatively, Missouri has paid its executioners more than \$200,000 in cash, placing hundred-dollar bills in envelopes with instructions not to open until services are completed.<sup>170</sup> As with its payments to pharmacies for lethal-injection drugs, Missouri did not file 1099 forms with the IRS for its payments to executioners. Arizona also paid its physician-executioner in cash—an amount totaling more than \$100,000 for five executions.<sup>171</sup> Oklahoma hid its acquisition of lethal drugs by taking money from a petty cash account it used for purchasing bus tickets for released prisoners.<sup>172</sup>

States also have swapped drugs with each other, surreptitiously transporting controlled substances across state lines. Arkansas has served as a lethal-injection drug supplier to multiple states—including Oklahoma, Mississippi, and Tennessee—without payment and apparently as a gesture of good will.<sup>173</sup> In turn, Arkansas has received drugs from both Texas and Tennessee.<sup>174</sup> Arkansas Department of Corrections Director Wendy Kelley admitted to receiving drugs in a parking lot from an anonymous supplier. According to Kelley, the anonymous supplier “donated” the products after she informed them that payment would have to be processed through another department.<sup>175</sup>

In another instance, California corrections officers drove to Arizona to pick up twelve grams of sodium thiopental. In an unintentional excursion into irony, a thank-you email sent from a California correctional official to his Arizona counterpart said, “You guys in AZ are life savers. By [sic] you a beer next time I get that way.”<sup>176</sup> In 2015, Texas provided Virginia the necessary drugs to carry out the execution of Alfredo Prieto. Texas was repaying a favor to Virginia, which had provided Texas with the lethal-injection drug pentobarbital in 2013.<sup>177</sup>

From: CHARLES FLANAGAN [REDACTED]  
Sent: Wednesday, September 29, 2010 5:35:03 PM  
To: Kernan, Scott@CDCR  
Subject: RE: FW: Execution Protocol Drugs  
Auto forwarded by a Rule

no need...happy to help...

>>> "Kernan, Scott@CDCR" <Scott.Kernan@cdcr.ca.gov> 9/29/2010 4:57 PM >>>  
Charles,

Just confirming I received this email. Staff will be contacting Warden first thing in the morning. You guys in AZ are life savers. By you a beer next time I get that way.

Scott

-----Original Message-----  
From: CHARLES FLANAGAN [REDACTED]  
Sent: Wednesday, September 29, 2010 4:40 PM  
To: Kernan, Scott@CDCR  
Cc: CARSON McWILLIAMS; ROBERT PATTON  
Subject: Re: FW: Execution Protocol Drugs

Scott:

To confirm our verbal conversation, Director Ryan has authorized the Arizona Department of Corrections (ADC) to provide you with 12 grams of the Thiopental Sodium we have just acquired. You also have our thanks for the Pancuronium Bromide your agency has provided to ADC. Please let us know when your employees would like to arrive at the Arizona State Prison Complex-Florence, located at Florence, Arizona, in order to pick up the drugs, as you indicated this is your preferred method of delivery and transportation.

# THE COST OF SECRECY:

## AN ACCOUNT FROM OKLAHOMA

In 2015, the year after the 43-minute botched execution of Clayton Lockett, the U.S. Supreme Court agreed to review a case challenging Oklahoma's lethal-injection protocol. In *Glossip v. Gross*, the Supreme Court considered whether the condemned prisoners had presented sufficient evidence to establish that the manner by which Oklahoma intended to execute them constituted cruel and unusual punishment. Oklahoma's execution protocol used the drug midazolam—a drug that has now been implicated in problematic executions in at least five states. The prisoners argued that using midazolam in a three-drug formula would not anesthetize the prisoner sufficiently to prevent him from experiencing the suffocation or searing pain known to be caused by the second and third drugs. The prisoners lost in both the Oklahoma federal district court and the federal appeals court. Over a strongly written four-justice dissent, a bare majority of five justices ruled in favor of the State, giving deference to the lower court's findings.<sup>178</sup> But execution-related problems continued to

plague Oklahoma even after its win in the Supreme Court.

While the *Glossip* case was pending in the Supreme Court, Oklahoma executed Charles Warner in January 2015—using the wrong drug.<sup>179</sup> As Warner was being executed, he said, "My body is on fire."<sup>180</sup> Had the state provided copies of the drug labels or purchase orders to the public prior to the execution, this mistake likely would have been prevented. Certainly, Warner's lawyers would have noticed the error. Later that same year, in September 2015, Oklahoma was minutes away from executing Richard Glossip when corrections personnel discovered they had, once again, obtained the wrong drug. Even so, legal counsel for the Oklahoma Governor Mary Fallin pushed for the execution to go forward. Glossip's execution was eventually stayed, the Oklahoma Attorney General ordered a grand-jury investigation into the circumstances of both Warner's execution and Glossip's attempted execution, and all executions were put on hold.<sup>181</sup>

After spending eight months investigating, the grand jury issued a scathing report in May 2016 finding serious problems at every stage of Oklahoma's execution process. The grand jury reported that Department of Corrections staff and others participating in the execution process "failed to perform their duties with the precision and attention to detail the exercise of state authority in such cases demands."<sup>182</sup> The report called the state actors negligent, careless, and in some instances, even reckless.<sup>183</sup> The grand jury recognized the toxic consequences of Oklahoma's obsession with secrecy. Its investigation, the report said, "revealed that the paranoia of identifying participants clouded the Department's judgment and caused administrators to blatantly violate their own policies."<sup>184</sup>

Among the disturbing facts uncovered by the grand jury were that corrections officials failed to obtain the correct drug licenses and failed to order the drug specified in the protocol not once, but twice. Even though it knew that both federal and state law imposed registration requirements as a precondition to legally possessing and/or storing execution-related drugs in advance of an execution, the Department of Corrections nonetheless failed to register with either the DEA or the Oklahoma Bureau of Narcotics and Dangerous Drugs.<sup>185</sup> Moreover, according to the report, the pharmacist who ordered the drugs for the state was unaware until only thirty minutes before Glossip's scheduled execution that he

had ordered the wrong drug.<sup>186</sup> In fact, the same wrong drug had been used in Warner's execution, and as the grand-jury investigation found, the execution team member responsible for ensuring that the proper drugs are administered was clueless as to how that happened. His only explanation was that this had been his "first foray into this very unusual world of executions," and because his "anxiety level was significant," he "totally dropped the ball."<sup>187</sup>

The Oklahoma grand jury made a number of specific findings on how the Department's "paranoia" about secrecy had "clouded the Department's judgment."<sup>188</sup> It wrote:

Due to these [confidentiality] concerns, there was no written order for the drugs, and the Pharmacist did not receive a hardcopy of the Protocol until after ordering the drugs. Large cash payments were made to the physician and EMT who assisted in the process. Cash was used to pay for the drugs. No formal invoice was obtained for the drugs. The Inspector General did not include the drug names on the chain of custody form. The drugs bypassed security in an unmarked box with no inventory included when entering the prison. The individual conducting the Quality Assurance Review did not have access to participants' names to verify their credentials.<sup>189</sup>

As the governor's deputy general counsel testified, "[W]hen you say completely hidden and state government in the same sentence, you've got a problem."<sup>190</sup>

Worse yet, the public may never have known of the state's ineptitude in properly carrying out executions if it had been up to the governor. When, immediately before Richard Glossip's execution, the prison discovered it had once again received a drug that was not authorized under its execution protocol, Steve Mullins, the governor's general counsel, "argued heavily against publically disclosing that the wrong drug was used."<sup>191</sup> Instead, Mullins urged that the state move forward with an execution that clearly violated the Department's own procedures. The grand jury found that Mullins "flippantly and recklessly disregard[ed] the written Protocol and the rights of Richard Glossip."<sup>192</sup> Left to counsel's devices, Glossip would have been illegally executed, and the public would have been left in the dark, never knowing that the wrong drug had been used in his and Warner's executions.

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**"[W]hen you say completely hidden and state government in the same sentence, you've got a problem."**

DEPUTY GENERAL COUNSEL TO THE GOVERNOR OF OKLAHOMA<sup>193</sup>

# EVOLVING STANDARDS OF DECENCY

*"The constitutionality of the death penalty turns, as I have urged, on the opinion of an informed citizenry."*

U.S. SUPREME COURT JUSTICE THURGOOD MARSHALL

In determining the constitutionality of death-penalty practices under the Eighth Amendment, the courts look to "evolving standards of decency."<sup>194</sup> These standards are designed to measure what American society will tolerate when it comes to punishments. When drug companies choose not to supply their products for executions, what does that say about society's tolerance for capital punishment? When the drugs necessary to ensure the most humane executions are unavailable to prisons, what does that mean for the constitutionality of the death penalty? When prisoners are unable to prove that alternative execution methods or drug formulas are available because states have concealed this execution information from the public, what should be the result? The U.S. Supreme Court faced each of these questions in 2015 in *Glossip v. Gross*.

In *Glossip*, the Court was called upon to decide whether a condemned prisoner had to present a readily available, alternative way for the state to execute him as a precondition to proving that a state's intended lethal-injection formula is unconstitutionally cruel and unusual. During oral argument, the justices grappled with the degree to which it should consider pharmaceutical companies' unwillingness to supply their products for use in executions. Justice Samuel Alito rhetorically wondered whether it was "appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty which consists of efforts to make it impossible for the States to obtain drugs that could be used to carry out capital punishment with little, if any, pain?"<sup>195</sup> Justice Antonin Scalia said that he "would be more inclined to find that it was intolerable if there was even some doubt about this drug [that prisoners challenged] when there was a perfectly safe other drug available."<sup>196</sup> These statements suggested that whether an execution is cruel and unusual is a matter of equity: the prisoners, the justices asserted, were responsible for the drug unavailability and, as a result, they were in no position to complain about experiencing more pain when "better" drugs were no longer available to the state.

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*“Petitioners here had no part in creating the shortage of execution drugs; it is odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty—actions which are, of course, wholly lawful.”*

U.S. SUPREME COURT JUSTICE SONIA SOTOMAYOR<sup>197</sup>

In stark contrast, Justice Stephen Breyer, addressing prisoners’ counsel, said: “Perhaps there is that larger question, that if, in fact, for whatever set of reasons, it’s not you, you didn’t purposely hide these other kinds of drugs, if there is no method of executing a person that does not cause unacceptable pain, that, in addition to other things, might show that the death penalty is not consistent with the Eighth Amendment.”<sup>198</sup> Justice Breyer’s comment foreshadowed his lengthy dissent, in which he wrote that, for various reasons, it is now “highly likely that the death penalty violates the Eighth Amendment.”<sup>199</sup>

When the Court issued its decision in *Glossip*, five of the nine justices agreed that, as a precondition to successfully challenging a state’s method of execution, a prisoner must plead and prove a known and available alternative.<sup>200</sup> Missing from this analysis was any discussion of the fact that states’ secrecy laws make it nearly impossible for prisoners to find out what drugs are or are not actually available to the states. The decision, instead, grew out of the majority’s factually unsupported belief that “anti-death-penalty advocates [had] pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.”<sup>201</sup> The majority feared that if a prisoner could successfully challenge a method of execution without providing an alternate method, then the “logical conclusion” would be that a state could not carry out death sentences.<sup>202</sup> Justifying its tolerance for a potentially painful execution method, the majority noted that “while most humans wish to die a painless death, many do not have that good fortune.”<sup>203</sup>

In a dissent joined by three other justices, Justice Sotomayor sharply contested this rationale, writing that the Court’s new requirement that a prisoner provide the state with an alternative means to end his or her own life would lead to “patently absurd consequences.”<sup>204</sup> “If a State wishes to carry out an execution,” she explained, “it must do so subject to the constraints that our Constitution

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*“[I]f there is no method of executing a person that does not cause unacceptable pain, that, in addition to other things, might show that the death penalty is not consistent with the Eighth Amendment.”*

U.S. SUPREME COURT JUSTICE STEPHEN BREYER<sup>205</sup>

imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.”<sup>206</sup> At an earlier stage in the case, Justice Sotomayor remarked that “it would be odd if the constitutionality of being burned alive, for example, turned on a challenger’s ability to point to an available guillotine.”<sup>207</sup> Justice Sotomayor also rejected the notion that the independent choices made by drug companies should be imputed to prisoners. The condemned prisoners “had no part in creating the shortage of execution drugs,” she stressed, and it seemed “odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty—actions which are, of course, wholly lawful.”<sup>208</sup>

Almost two years after *Glossip*, another lethal-injection case made its way before the United States Supreme Court, as Alabama prisoner Thomas Arthur challenged the use of midazolam in a three-drug formula. Arthur proposed the firing squad as an alternative to lethal injection.<sup>209</sup> The lower courts rejected his proposal, holding that the firing squad was not “available” to the Department of Corrections because the state legislature had not chosen to authorize it under Alabama’s death-penalty statute.<sup>210</sup> Justice Sotomayor, once again, dissented from the Supreme Court’s denial of review, writing: “even if a prisoner can prove that the State plans to kill him in an intolerably cruel manner, and even if he can prove that there is a feasible alternative, all a State has to do to execute him through an unconstitutional method is to pass a statute declining to authorize any alternative method. This cannot be right.”<sup>211</sup>

State secrecy is inherently at odds with the evolving standards doctrine. As Justice Sotomayor observed in her dissent in *Arthur v. Dunn*: “Evolving standards have yielded a familiar cycle: States develop a method of execution, which is generally accepted for a time. Science then reveals that—unknown to the previous generation—the States’ chosen method of execution causes unconstitutional levels of suffering. A new method of execution is devised, and the dialogue continues.

The Eighth Amendment requires this conversation.”<sup>212</sup> But state laws that insulate information about executions from public review stifle that conversation, prevent the public input and oversight that changes state laws and practices that have become unacceptable, and ultimately interfere with the Court’s task of assessing contemporary values.

This issue has recently been litigated in Tennessee. When the state adopted a three-drug protocol with midazolam as the first drug administered, death-row prisoners challenged the protocol as likely to result in torturous executions. As required by *Glossip*, the prisoners suggested execution with pentobarbital as one of the alternatives to execution with the three-drug protocol. The state asserted without evidence that it was unable to procure that drug, but state secrecy laws prevented the prisoners from effectively responding to this claim. Instead, the prisoners challenged the state’s contention indirectly by pointing to other states that had successfully procured pentobarbital. This was not enough for the Tennessee courts. When Billy Ray Irick asked for his August execution warrant to be vacated based on this evidence, the trial court held that he had not demonstrated that pentobarbital was available and had not adequately pleaded an alternative two-drug method.<sup>213</sup> The Tennessee Supreme Court refused to vacate the death warrant, and the U.S. Supreme Court denied Irick’s motion for a stay of execution.

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***“Not only is Glossip’s available alternative requirement perverse, it is also unworkable. In Tennessee, executions are cloaked in secrecy, which makes it difficult—if not impossible—for the Petitioners to establish an available alternative to the State’s method of execution.... The trial court here prohibited identification of the Department’s agents who were involved in procuring execution drugs, such as pentobarbital, and of its potential suppliers.”***

JUSTICE SHARON G. LEE, TENNESSEE SUPREME COURT<sup>214</sup>

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***“[O]ur national conversation simply may have resulted in an evolution in the standard of decency upon which the Eighth Amendment relies.”***

JUDGE JANE B. STRANCH, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT<sup>215</sup>

As a result, Irick was executed on August 9, 2018, and medical experts have opined that he was aware while experiencing excruciating pain and suffocation.<sup>216</sup>

Tennessee prisoners continued to challenge the lethal-injection protocol after Irick’s execution. Shortly before Edmund Zagorski’s October 11, 2018, scheduled execution date, the Tennessee Supreme Court removed the lethal-injection challenge from the appellate court’s jurisdiction and affirmed the trial court’s dismissal of the prisoners’ complaint. In dissent, Justice Sharon G. Lee recognized how severely state secrecy and evasiveness had hindered the prisoners’ ability to challenge the protocol: “As the trial court accurately observed, the availability of pentobarbital was essential to the case, and without the State answering the question as to the availability of pentobarbital, the trial court proceedings were meaningless. For the State to provide the answer on the eve of trial while effectively evading the question for months was patently unfair to the Petitioners.”<sup>217</sup> The state’s concealment was successful. After failing to obtain relief in state or federal court on his challenge of the lethal-injection protocol, Zagorski chose to be executed by electrocution.<sup>218</sup>

The drug companies’ refusal to supply lethal-injection drugs has been used against prisoners raising constitutional challenges. However, the actions of the drug companies are themselves relevant to determining the evolution of our social values. As Judge Jane B. Stranch of the U.S. Court of Appeals for the Sixth Circuit wrote in April 2017 concerning a challenge to Ohio’s lethal-injection protocol, “The refusal of drug companies to sell execution drugs may evidence a recognition of changing societal attitudes toward the death penalty.”<sup>219</sup>

Courts have long considered the views of professional communities “with germane expertise” in giving substance to the country’s evolving standards of decency.<sup>220</sup> The uniform view of the medical community—as expressed in resolutions by more than twenty state, national, and international medical associations<sup>221</sup> and the non-distribution policies of more than fifty pharmaceutical companies<sup>222</sup>—is evidence to be considered in the evolving standards analysis. However, when states are permitted to conceal how and from whom they have procured lethal-injection drugs, they impede pharmaceutical companies from fully engaging in this dialogue.

# PROBLEMATIC EXECUTIONS USING NEW DRUG FORMULAS

As manufacturers have chosen to deny death-penalty states access to commonly used execution drugs, states have begun experimenting with new drugs. With these new drug combinations, new problems have arisen in executions. Although secrecy laws and policies have concealed information about drug sourcing and execution practices, visually and audibly problematic executions have graphically revealed serious problems with new drug formulas.

Several states have substituted midazolam for a barbiturate as the first drug in a three-drug execution protocol. The first drug is supposed to place the prisoner in a deep comalike state, unable to feel the torturous effects of the second and third drugs. If the first drug does not work properly, then the prisoner will be paralyzed by the second drug, unable to express outward reaction, as he suffocates while fluid builds up in his lungs and his veins are chemically burned by the third drug.



Midazolam is not in the same class of drugs as barbiturates (such as sodium thiopental or pentobarbital) and therefore does not act in the same manner as those drugs. Midazolam is a benzodiazepine—a sedative like Xanax or Valium. Pharmacologists have explained that the chemical structure of benzodiazepines makes them incapable of producing a deep level of unconsciousness.<sup>223</sup>

Despite this known fact, eight states (Alabama, Arizona, Arkansas, Florida, Ohio, Oklahoma, Tennessee, and Virginia) have used midazolam in executions. Execution witnesses in each of those states have reported similar troubling observations of a phenomenon medical experts call “air hunger,” in which the prisoners are left gasping for breath. In more than 60% (7 of 11) of the midazolam executions in 2017, eyewitnesses reported problems ranging from labored breathing to gasping, heaving, writhing, and clenching fists.

Lethal injections using other new drug formulas have also raised concerns about torturous executions. Witnesses have described visible or audible signs of extreme pain in executions using etomidate, diazepam, and fentanyl. Although

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*“[O]ur lived experience belies any suggestion that midazolam reliably renders prisoners entirely unconscious to the searing pain of the latter two drugs. These accounts are especially terrifying considering that each of these men received doses of powerful paralytic agents, which likely masked the full extent of their pain.”*

U.S. SUPREME COURT JUSTICE SONIA SOTOMAYOR<sup>224</sup>

secrecy laws conceal portions of these executions from public view, what has been seen raises questions about whether states are routinely inflicting cruel and unusual punishment in the execution process.

## Florida

Florida—the first state to use midazolam in executions—conceals from the public much of the execution process. During the execution of William Happ in 2013—the state’s first midazolam execution—the media reported that Happ’s body moved more than usual, including his head moving back and forth, after he was declared to be unconscious.<sup>225</sup> Florida also taped Happ’s hands, repeating this practice in subsequent executions. Prison officials justified this measure in a later midazolam execution by claiming it was necessary to prevent condemned prisoners from flashing gang signs or making obscene gestures before death.<sup>226</sup> Moreover, prior to Happ’s execution, Florida had laid a sheet flat over the prisoner’s body. After his execution, the state began tenting the sheet over the condemned prisoner, preventing witnesses from observing any body movements.<sup>227</sup>

During the 2014 midazolam execution of Eddie Wayne Davis, execution personnel failed to assess whether Davis was unconscious before administering the paralytic and the third drug, which causes severe burning. A witness reported seeing Davis’s “head tilt back and his mouth opening and closing in a tortured grimace.”<sup>228</sup>

Florida conducted thirteen executions with a three-drug midazolam protocol before it replaced midazolam with the barbiturate etomidate in January 2017.<sup>229</sup> As of August 31, 2018, Florida has carried out four executions using etomidate. A reporter who witnessed the etomidate execution of Patrick Hannon in November 2017 noted that Hannon moved during the execution. “His lips twitched, his chest heaved and his arms, legs and body appeared to convulse a bit.”<sup>230</sup> In February 2018, Eric Branch uttered a “bloodcurdling” scream and thrashed against restraints after the administration of the drugs.<sup>231</sup>

## Ohio



DENNIS MCGUIRE

In January 2014, Ohio administered midazolam as one of two drugs in a never-before-used formula: midazolam and hydromorphone. The prisoner it planned to execute, Dennis McGuire, challenged the formula with the support of medical testimony from an anesthesiologist who said this method would cause McGuire to experience pain and suffering and likely “air hunger.”<sup>232</sup> Although the federal judge acknowledged that the execution amounted to “an experiment in lethal injection processes,” he allowed it to go forward.<sup>233</sup> Eyewitnesses reported that McGuire clenched his fists and strained against the gurney, heaving and gasping for breath, and they heard snorting and choking sounds—the same reaction that medical experts had warned about.<sup>234</sup> A lawsuit filed by McGuire’s family after the execution alleged that he had experienced “repeated cycles of snorting, gurgling and arching his back, appearing to writhe in pain.... It looked and sounded as though he was suffocating.”<sup>235</sup> Witnesses to the execution publicly expressed concern about what they had seen; some went further and called upon the governor to end capital punishment.<sup>236</sup> Afterwards, Ohio halted all executions while the state worked to revise its protocol.

One year later, in January 2015, Ohio announced it would abandon the use of midazolam and hydromorphone and return to its previous one-drug protocol using a mass dose of a single barbiturate.<sup>237</sup> But in October 2016, the state changed its protocol again to include a three-drug formula beginning with midazolam.<sup>238</sup> Condemned prisoners with looming execution dates challenged the use of midazolam, and after a five-day hearing in which the prisoners presented expert testimony supporting their position, a federal magistrate judge stayed the executions.<sup>239</sup> The state appealed, and eventually a divided U.S. Court of Appeals for the Sixth Circuit reversed the decision in an 8–6 vote and vacated the stays.<sup>240</sup> As of August 31, 2018, Ohio has carried out three executions using midazolam as part of a three-drug formula.<sup>241</sup> During the second execution in September 2017, one minute after the drug administration began, prisoner Gary Otte’s “stomach was moving unnaturally up and down.” Tears were “streaming down the left side of his face. His left fist was curled tightly.”<sup>242</sup>

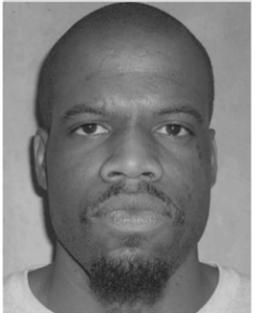
## Oklahoma

Oklahoma was the second state in which a midazolam execution generated intense adverse national attention. The state had scheduled two executions for the evening of April 29, 2014: one at 6:00 p.m. (Clayton Lockett) and one at 8:00 p.m. (Charles Warner). It was the first time Oklahoma had attempted two lethal injections in a single night, and the first time the state would be using midazolam. But Oklahoma dramatically botched the first attempted execution, and the second execution had to be postponed.

Before the scheduled executions, a state trial court ordered the state to provide defense attorneys information about the lethal-injection drugs Oklahoma intended to use. But state prosecutors appealed, and the Oklahoma Supreme Court stayed the executions to review the issue. This led to a state political and constitutional crisis. Legislators called for impeachment of the justices who voted to stay the executions, and Governor Mary Fallin threatened that she would not enforce the stay. Two days after issuing the stay, the Oklahoma Supreme Court reversed course and allowed the execution to proceed without the disclosure of drug information.<sup>243</sup> This veil of secrecy would remain in place until Lockett’s visibly gruesome execution led to a state investigation.

Anxiety was in the air leading up to the double-scheduled executions. State officials claimed they could no longer acquire the drug Oklahoma had previously used in lethal injections, and the attorney general’s office was under political pressure to quickly find a replacement so executions could continue without delay.<sup>244</sup> Conducting online research, the corrections department’s general counsel scrambled to find a new drug using what he described as “Wiki leaks or whatever it is.”<sup>245</sup> He chose midazolam. Although the state’s protocol vested the prison warden with sole responsibility for selecting the execution drugs, Warden Anita Trammell played no role in this change to the state’s protocol. Instead, she was told after the fact that there was a new protocol. In an interview after the execution, Warden Trammell admitted, “I didn’t write the policy. I don’t know anything about the drugs.”<sup>246</sup> She was not alone. When the warden discussed midazolam with the lethal-injection team shortly before the execution was scheduled to begin, she learned that “the executioners didn’t know anything about [midazolam]. No one did.”<sup>247</sup> Even the physician-executioner—a last-minute replacement—said that he did not know what the second and third drugs were and that he “didn’t really care to know what they were.”<sup>248</sup>

Compounding the risks that something would go wrong, Oklahoma had scheduled two executions in one evening. According to the report published after the state investigation was completed, “It was apparent the stress level at [Oklahoma State Penitentiary] was raised because two executions had been scheduled on the same day.”<sup>249</sup> One of the execution team members described the situation



CLAYTON LOCKETT

as “an atmosphere of apprehension”<sup>250</sup> and explained that there was an “air of urgency”<sup>251</sup> that evening. The general counsel for the Department of Corrections felt that the department “was under a lot of pressure” to “get it done” and “hurry up about it.”<sup>252</sup>

On the night of the double execution, problems were apparent from the start. The execution chamber lacked the proper medical equipment, including the correct size tubing and needles. The paramedic supplied tubing from her own personal supply because the prison’s supply was the wrong size.<sup>253</sup> Raising questions about his qualifications and judgment, the physician-executioner placed an IV using a needle that was also the wrong size.

Both the paramedic and physician-executioner demonstrated medical ineptitude. The paramedic charged with establishing IV access was unable to set the IV in Lockett’s arms. Questioned later about her difficulty in setting the IV line, she replied “that people who are very fair complected [sic], their veins are deep because—I don’t know why. And black people have small veins.”<sup>254</sup> That, of course, was simply not true, and Oklahoma’s use of a paramedic who was not only ignorant of human anatomy but also harbored race-based misconceptions about physiology raised serious questions about the state’s process for selecting the execution team and the qualifications of its execution personnel.

Because of the paramedic’s incompetence, the physician-executioner had to assist in setting Lockett’s IV line. Together, they punctured Lockett at least sixteen times in his arms, feet, neck region, and groin area before finally setting the IV. Witnesses were not permitted to observe this process, but after the execution, Warden Trammell described the execution team’s efforts as “jabbing” and “poking” Lockett. “[T]here was blood everywhere,” she said.<sup>255</sup> The IV line eventually established in Lockett’s groin used a needle the physician-executioner described as “marginal.”<sup>256</sup> The needle was 1.25 inches—the only size available—but it was the wrong size. A standard 2-2.25-inch needle would have been appropriate.<sup>257</sup> The physician-executioner who set the line explained, “[w]e had stuck this individual so many times, I didn’t want to try and do another line.”<sup>258</sup>

After the IV line was established the curtains opened—nearly thirty minutes past the scheduled start time—giving witnesses their first view of the execution process.<sup>259</sup> Within ten minutes after the midazolam was injected, the physician-

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***Clayton Lockett was “squeezing his eyes tight and tightening his muscles and his mouth as if he were grimacing in pain.”***

LISBETH EXON, REPORTER AND EXECUTION WITNESS<sup>260</sup>

executioner assessed Lockett, and the warden declared him unconscious.<sup>261</sup> Minutes later, however, Lockett started moving, jerking around, and straining against the gurney. Witnesses heard him say, “the drugs aren’t working.”<sup>262</sup> For several minutes, Lockett was seen grunting and writhing.<sup>263</sup> From his vantage point in the room with Lockett, the physician-executioner “thought he was seizing.”<sup>264</sup> The Corrections Director Robert Patton described Lockett as “trying to pull up and his head was pulling up off the table... and kind of bearing [sic] his teeth.”<sup>265</sup> One media witness reported that Lockett was “squeezing his eyes tight and tightening his muscles and his mouth as if he were grimacing in pain.”<sup>266</sup> A victim-advocate witness described the scene as reminiscent of a horror movie.<sup>267</sup>

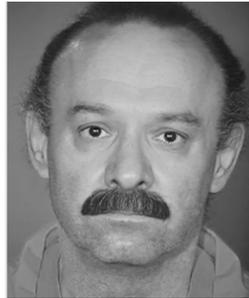
Shortly after Lockett’s writhing became unmistakably noticeable, execution personnel closed the curtains, concealing the remainder of the execution from the public. Approximately fourteen minutes later, the Director informed the witnesses that the execution had been called off.<sup>268</sup> Ten minutes after the execution was stopped, Lockett was pronounced dead, not from the execution but from a heart attack.<sup>269</sup> Witnesses had been prevented from seeing what happened during the last 24 minutes of Lockett’s life.<sup>270</sup>

Warden Trammell would later describe the scene behind the curtain as “a bloody mess.”<sup>271</sup> At some point during the execution, the mis-sized IV line had failed and some of the drugs began to enter the tissue surrounding the vein. This produced a sack of fluid under Lockett’s skin that was larger than a golf ball.<sup>272</sup> Behind the curtain, the physician-executioner attempted to set another IV line in Lockett’s groin but hit an artery instead, spraying blood all over his coat. Although the physician-executioner wanted to establish a second line in the artery, the paramedic reminded him that he could not do that because “it doesn’t work that way.”<sup>273</sup> Nor would a second line have mattered: Oklahoma did not have additional drugs to administer to Lockett.<sup>274</sup> After this disaster, Governor Mary Fallin stayed the evening’s second scheduled execution of Charles Warner.

The botched Lockett execution produced a swift and widespread outcry. President Barack Obama found the execution “deeply disturbing” and called for an investigation by the Justice Department.<sup>275</sup> Attorney General Eric Holder was “greatly troubled” by the events and ordered the Justice Department’s Civil Rights and Criminal Divisions to look into execution protocols.<sup>276</sup> Oklahoma’s staunchly conservative Senator Tom Coburn, a doctor, said the execution was “not done appropriately” and that he would prefer that people like Clayton Lockett be given life sentences.<sup>277</sup>

Oklahoma’s problem executions did not end with Lockett’s. Its last execution occurred on January 15, 2015, when its secrecy laws and policies contributed to executing Charles Warner with the wrong drugs. That mistake came to light when only hours before the scheduled execution of Richard Glossip, the same drug mix-up occurred, and Glossip’s execution was stayed only because an assistant attorney general resisted the entreaties of the governor’s counsel to ignore and conceal this violation of the execution protocol.<sup>278</sup>

# Arizona



JOSEPH WOOD

States concerned about the execution debacles in Oklahoma and Ohio—particularly those using midazolam—might reasonably have put their executions on hold until the problems in those states had been fully investigated and corrected. But that did not happen. Using the same problematic drug formula as Ohio (midazolam and hydromorphone), Arizona scheduled the execution of Joseph Wood for July 23, 2014.

Weeks before his scheduled execution, Wood sued the state, arguing that he had a First Amendment right to information about the drug formula and source of drugs that Arizona intended to use in his execution. A panel of the U.S. Court of Appeals for the Ninth Circuit agreed and directed Arizona to reveal the source of its two execution drugs. The court stayed Wood's execution, finding he raised serious questions on the merits of his First Amendment claim.<sup>279</sup> Arizona prosecutors asked the U.S. Supreme Court to vacate the stay, arguing that its protocol was available on its website and that the public, therefore, already had “access to all of the provisions of the protocol which include: the names of the drugs to be used, the amounts of the drugs to be delivered in the execution, the manner in which the drugs will be administered, and the qualifications of persons tasked with placing intravenous lines for the administration of the drugs.”<sup>280</sup> In a one-paragraph order, the Supreme Court lifted the stay.<sup>281</sup>

Joseph Wood was executed the following day, with problems of a magnitude never seen before in any lethal injection. For nearly two hours, Wood “gulped like a fish on land,” gasping for breath more than 640 times.<sup>282</sup> A media witness described Wood's movement as piston-like: “The mouth opened, the chest rose, the stomach convulsed.”<sup>283</sup>

The execution took so long that Wood's lawyers left the witness room to file emergency motions to stop it from continuing.<sup>284</sup> The federal district court held a telephonic hearing while the execution was still under way. More than one hour after the state began its attempt to kill Wood, his lawyer implored the court to

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*Joseph Wood “gulped like a fish on land. The movement was like a piston: The mouth opened, the chest rose, the stomach convulsed ... more than 640 [times].”*

MICHAEL KIEFER, ARIZONA REPUBLIC, REPORTER AND EXECUTION WITNESS<sup>285</sup>

order Arizona to halt the execution and perform life-saving measures.<sup>286</sup> An hour-and-a-half into the execution, the state's attorney told the court that the prison had administered “[a] second dose of drugs” and assured the court that Wood was already “brain dead.”<sup>287</sup> Although the judge expressed skepticism that the state could render such a clinical judgment without any measure of brain activity, he concluded that stopping the execution risked subjecting Wood to even more pain. Towards the end of the hearing, the state's attorney informed the court that Wood had died.<sup>288</sup>

The state made two material misrepresentations to the court during the hearing—falsehoods that came to light only after the execution. First, records released one week after the execution showed that the state had to use fifteen doses of the lethal-injection drugs over the almost two-hour execution.<sup>289</sup> When the state's attorney told the court that a “second” dose had been administered, in actuality thirteen doses of drugs had already been administered. Moreover, Arizona's execution protocol prescribed administration of “50mg Midazolam and 50mg Hydromorphone,” and that is the amount the state told the courts—including the U.S. Supreme Court—would be administered. Instead, Wood received 750mg of each of the two drugs. Arizona's undisclosed change in protocol in Wood's execution was not an isolated occurrence. The U.S. Court of Appeals for the Ninth Circuit had previously criticized the state for “amending its execution protocol on an ad hoc basis,” creating a “rolling protocol” that forced the court “to engage with serious constitutional questions and complicated factual issues in the waning hours before executions.”<sup>290</sup>

Arizona's second misrepresentation during the telephonic hearing was its mischaracterization of Wood's medical condition. The state's attorney said that Wood was “brain dead,” a statement that was not and could not have been accurate. As Dr. Chitra Venkat, a professor of neurology and neurological sciences at Stanford University, said: “If you are taking breaths, you are not brain dead. Period. That is not compatible with brain death, at all. In fact, it is not compatible with any form of death.”<sup>291</sup> Harvard Medical School anesthesiology professor, David Waisel, M.D.—the same expert who accurately predicted what would happen in Ohio when it used midazolam—said: “There is no way anyone could ever look at

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*“If you are taking breaths, you are not brain dead. Period. That is not compatible with brain death, at all. In fact, it is not compatible with any form of death.”*

DR. CHITRA VENKAT, STANFORD UNIVERSITY<sup>292</sup>

someone and make that kind of diagnosis. [Wood] was still breathing, so he was not brain dead. This is an example where they threw out a term that has a precise medical definition, but they didn't know what it means."<sup>293</sup>

Arizona has not attempted any executions since it executed Wood. After being sued by death-row prisoners, the state agreed to abandon the use of midazolam in any future executions.<sup>294</sup> In another lawsuit brought by the media, a federal district court judge ordered Arizona to allow witnesses at executions to see the drugs as they are being administered to the prisoner and prohibited the state from closing the curtains during an execution—as occurred in Oklahoma—absent a legitimate penological objective.<sup>295</sup>

## Alabama



RONALD SMITH

Alabama used midazolam to execute Ronald Smith in December 2016. The state conceals most of its information surrounding executions—including hiding its protocol from the public—and as a result, Smith's request for information about the drug had been denied. Without that information, his constitutional challenges to the state's use of midazolam also were rejected by the courts. During his execution, Smith—like others before him who were given midazolam—gasped for breath for nearly fifteen minutes of the 34-minute-long execution.<sup>296</sup> A media witness observed Smith heaving and clenching a fist and noticed that one of his eyes appeared to be open.<sup>297</sup>

A lawyer who witnessed Smith's execution, Spencer Hahn, reported that approximately two minutes after a dose of midazolam was administered, Smith "began having difficulty breathing, including regular asthmatic-sounding barking coughs every ten seconds or so. He also lifted his head and looked around, moved his arms, clenched his left hand, and moved his lips in what appeared to be an attempt to say something."<sup>298</sup> An Alabama corrections officer conducted a "consciousness" check, and Smith moved when he was pinched.<sup>299</sup> The state then administered another dose of midazolam and conducted a second "consciousness" check.<sup>300</sup> Smith continued to move after the second check, but Hahn noticed shortly afterwards that Smith's breathing had become shallow, and Smith stopped moving. At that point, Hahn assumed that the paralytic had been administered.<sup>301</sup> Despite this objectively verifiable evidence of problems, Alabama said in a statement it released to the media that the state followed its protocol and claimed there had been no indication that Smith had suffered.<sup>302</sup> Alabama has refused to release any documents related to Smith's execution.<sup>303</sup>

Alabama continued to use midazolam in a three-drug formula after Smith's execution, with continuing evidence of problematic executions. When Torrey McNabb was executed in October 2017, media witnesses reported that McNabb

*Ronald Smith "began having difficulty breathing, including regular asthmatic-sounding barking coughs every ten seconds or so. He also lifted his head and looked around, moved his arms, clenched his left hand, and moved his lips in what appeared to be an attempt to say something."*

SPENCER HAHN, ATTORNEY<sup>304</sup>

was still moving more than fifteen minutes after the execution began. His hands twitched, his fists clenched, and his body writhed.<sup>305</sup> Approximately "twenty minutes after the first in a succession of drugs entered his bloodstream, McNabb raised his right arm and hand and his face briefly twisted into an intense grimace."<sup>306</sup> Almost fifteen minutes later, he was pronounced dead. Alabama Department of Corrections Commissioner Jeff Dunn said that he was "confident" that McNabb had been unconscious while he moved. While asserting that the state "follow[s] the protocol as it is written," Dunn refused to "talk specifically about the protocol."<sup>307</sup>

## Virginia

In January 2017, Virginia executed Ricky Gray. Witnesses to the execution watched as Gray was brought into the execution chamber and strapped to the gurney. Then, as is Virginia's practice, the curtains were closed while the execution team attempted to place the IV lines. This process typically took only a few minutes—usually not more than ten.<sup>308</sup> But during Gray's execution, the witnesses waited for more than half an hour before the curtains were re-opened.<sup>309</sup> On the evening of the execution, prison officials offered no explanation for the delay. But the following day, they admitted it was because they had had difficulty finding a vein.<sup>310</sup>

Gray was executed with compounded midazolam and compounded potassium chloride as part of a three-drug protocol.<sup>311</sup> This was the first time that compounded versions of either drug were used in an execution.<sup>312</sup> Witnesses to the execution reported that Gray made what appeared to be gasping noises and showed



RICKY GRAY

signs of labored breathing.<sup>313</sup> Dr. Mark Edgar, an independent pathologist who later reviewed the autopsy report, opined that Gray had experienced suffocation during his execution.<sup>314</sup> He said, “The anatomic changes described in Ricky Gray’s lungs are more often seen in the aftermath of a sarin gas attack than in a routine hospital autopsy.”<sup>315</sup> Witnesses saw Gray move his head from side to side after the consciousness check—movements, his lawyer said, “could be further evidence of his body’s desperate reaction to suffocation.”<sup>316</sup> Defense attorneys for condemned prisoner William Morva sought a reprieve from Morva’s July 2017 execution based on Dr. Edgar’s conclusions about Gray’s death but were unsuccessful.<sup>317</sup>

After the execution, Gray’s attorneys voiced additional concerns about the process, including the length of time it had taken execution personnel to set an IV line. They said that the prison had checked Gray’s veins before the execution and found nothing to suggest that Gray—an otherwise healthy 39-year-old man—had any problems with his veins.<sup>318</sup> Gray’s lawyers and the American Civil Liberties Union called for an independent inquiry into the execution, but the Commonwealth claimed all had gone well, adding the assurance that “attorneys from the Office of the Attorney General observed the entire process along with Department of Corrections officials and senior staff.”<sup>319</sup> But the public did not witness the entire process, nor did any neutral observer, and Virginia refused to release any additional information to the public after Gray’s execution.

Gray’s problematic execution generated calls for more openness and transparency, and less than three weeks later the Virginia Department of Corrections changed its execution protocol.<sup>320</sup> That change, however, did not make the procedures more transparent or public officials more accountable. Instead, Virginia retreated further into secrecy by literally closing the curtain on even more of the execution process. The state’s new protocol now delays opening the curtains to the witness room until after the IV lines have been established.<sup>321</sup> Witnesses will no longer see the prisoner brought into the execution chamber and strapped to the gurney. The public will no longer know when the IV-insertion process begins and ends. These changes do nothing to ensure more competent setting of IV lines or to facilitate improved public oversight of the process. They simply deny the public important information about how long it takes prison personnel to set the IV, and they make it more difficult to assess whether execution complications have occurred.

Virginia executed William Morva on July 6, 2017, using its new protocol. The curtain was opened only after Morva had been strapped to the gurney and the IV lines had been established.<sup>322</sup> In a press conference immediately following the execution, a media witness reported that, approximately three minutes after Morva had been silent, he began “gasping for air” several times, with his stomach contracting “pretty dramatically.”<sup>323</sup> Disregarding this evidence of air hunger, the spokesperson for the state reported that the execution “was carried out without complications.”<sup>324</sup>

# Arkansas

In February 2017, Arkansas Governor Asa Hutchinson scheduled eight executions to take place over an eleven-day period in April 2017. It was the most executions scheduled in the shortest period of time in the modern history of the death penalty in the United States.<sup>325</sup> There was one reason, and one reason only, for the rush: the state’s supply of the execution drug midazolam was set to expire on April 30, 2017.<sup>326</sup>

Shortly before the executions, the condemned prisoners challenged the state’s use of midazolam, arguing that it risked subjecting them to an unconstitutionally torturous death. A federal district court conducted a four-day evidentiary hearing, after which the judge stayed the executions based on her conclusion that the prisoners were likely to prevail in a trial on the merits.<sup>327</sup> The 100-page order was reversed on appeal in part because the court of appeals determined that the prisoners could have brought their lawsuit sooner.<sup>328</sup>

Four of the eight scheduled executions were ultimately stayed for reasons unrelated to the lethal-injection protocol. The state limited public access to information about the four executions that went forward.<sup>329</sup> During the executions, no announcements were made as to when each of the drugs were administered, nor could the witnesses determine the timing from the viewing room. During the execution of Marcel Williams, a media witness speculated that the executioner administered a second dose of midazolam “since the official began a second round of consciousness checks that were less thorough than before.”<sup>330</sup> In three of the four executions, witnesses reported that the prisoners opened their mouths and gasped for air, and in two instances, witnesses saw prisoners lurching against the gurney.<sup>331</sup> The time logs Arkansas released after the executions were cursory and uninformative; the only information recorded about any of the drugs was the time at which the first chemical was injected.<sup>332</sup>

The final of the four executions was the most visibly problematic. Media witnesses reported seeing Kenneth Williams “coughing, convulsing, lurching, jerking, with sound that was audible even with the microphone turned off.” Associated Press reporter Kelly Kissel, who has witnessed ten executions, said “Williams’ body jerked 15 times in quick succession—lurching violently against the leather restraint across his chest.”<sup>333</sup>

Because of these clearly observable problems and the witnesses’ consistent descriptions of Williams gasping and lurching during the execution, Williams’ lawyers called for an investigation.<sup>334</sup> Governor Hutchinson refused, saying he was “satisfied” with the information he had received about Williams’s execution from the Department of Correction.<sup>335</sup> But neither the Governor nor the Department ever disclosed that information—whatever it was—to the public. The state’s



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internal execution log, which was released, contains nothing that helps to explain what transpired during Williams’s execution:

18. **Warden advises the officials are ready to proceed with the execution at: 10:52pm**
19. Chemicals administered at: 10:52pm
20. Absence of respiration and pulse assessed at: 11:02pm
21. Warden summons the coroner at: 11:04pm
22. **Coroner enters the Chamber at: 11:04pm**
23. **Coroner pronounces death at: 11:05pm**
24. **The Director reads essential portion of Court’s Order at: 11:05pm**
25. Curtains of Viewing Room are closed at: 11:05pm
26. Witnesses exit the Viewing Room at: 11:10pm

Although Arkansas has not carried out an execution since Williams’s, it has indicated that it intends to keep using midazolam in a three-drug formula.<sup>336</sup> In November 2017, the Arkansas Supreme Court ruled that the state’s Freedom of Information Act requires the Department of Correction to release copies of the pharmaceutical drug and packaging labels for the supply of the drugs that it intends to use in upcoming executions. However, the court permitted the department to redact the batch and lot numbers that appear on the labels.<sup>337</sup> In July 2018, state officials announced that they would not carry out any executions in 2018 because of difficulties procuring execution drugs. State officials blamed those difficulties on their inability to keep drug information secret and have said they will not attempt to procure new drugs unless the state legislature expands the state secrecy law to include drug manufacturers.<sup>338</sup>

## Tennessee

After eight years without executions, Tennessee adopted a three-drug protocol in January 2018 using midazolam, vecuronium bromide, and potassium chloride. Thirty-three death-sentenced prisoners challenged the protocol based on expert opinion and other states’ experiences with midazolam. A Tennessee trial court conducted an expedited evidentiary hearing about the new protocol, finding that the prisoners “established that midazolam does not elicit strong analgesic [i.e., pain-inhibiting] effects” and that a prisoner “may be able to feel pain from the administration of the second and third drugs.” However, the trial court denied

relief based on its conclusion that the prisoners had not effectively pleaded or proven the availability of a less painful alternative.<sup>339</sup>

Billy Ray Irick, who was scheduled to be executed in August 2018, requested that his death warrant be vacated because of the risk of cruel and unusual punishment inherent in Tennessee’s protocol. His efforts to delay his execution were unsuccessful in state and federal courts. In dissenting from the U.S. Supreme Court’s denial of Irick’s stay motion, Justice Sonia Sotomayor wrote:

In refusing to grant Irick a stay, the Court today turns a blind eye to a proven likelihood that the State of Tennessee is on the verge of inflicting several minutes of torturous pain on an inmate in its custody, while shrouding his suffering behind a veneer of paralysis.... If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism.<sup>340</sup>

On August 9, 2018, Irick’s execution went forward, taking more than 20 minutes. During the prolonged process, Irick choked, gasped, coughed, moved his head, and strained his forearms against restraints. Witnesses reported that Irick continued to move after the consciousness check, meaning that he could have felt the effects of the second and third drugs “and would have experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride.”<sup>341</sup> Records from Irick’s execution indicate that the state violated its own execution protocol by failing to prepare an additional dose of midazolam, the drug used to sedate him. Questions about the protocol continue to be litigated by other death-row prisoners.

## Nebraska

After more than 20 years with no executions, Nebraska performed its first lethal injection on August 14, 2018. The state executed Carey Dean Moore with a never-before-used formula of diazepam (Valium), fentanyl citrate (an opioid painkiller), cisatracurium besylate (a paralytic), and potassium chloride to stop the heart. The execution took 23 minutes. Media witnesses noted that “Moore coughed, his diaphragm and abdomen heaved, he went still, then his face and fingers gradually turned red and then purple, and his eyes cracked open slightly. One witness described his breathing as shallow, then deeper, then labored.”<sup>342</sup> Moore’s face turned reddish, then purple. A curtain was lowered after the final drug was administered, blocking witnesses’ view of Moore’s reactions. The curtain remained closed for 14 minutes, during which Moore was declared dead.<sup>343</sup>

Many of these troubling executions created a public outcry and received extensive media coverage, yet states continue their experimentation with midazolam and other lethal-injection drugs. Given the well-documented risks of using these new drugs, it is hard to describe the resulting execution problems as unanticipated. As Justice Sotomayor has written in several cases involving midazolam executions, “[s]cience and experience are now revealing that, at least with respect to midazolam-centered protocols, prisoners executed by lethal injection are suffering horrifying deaths beneath a ‘medically sterile aura of peace.’”<sup>344</sup>

At a time in which the United States has seen bipartisan movement toward criminal-justice reform, state experimentation with questionable drug formulas—the details of which are hidden behind secrecy statutes—expose execution practices as noticeably out of step. The continuing use of demonstrably inappropriate drugs, improperly obtained and administered behind a veil of secrecy, is a recipe for even more problematic executions.

## CONCLUSION

*“[S]ecrecy has no place in a democracy, especially not for actions as irreversible as executions.”*

FORMER TEXAS GOVERNOR MARK WHITE & FORMER FLORIDA SUPREME COURT JUSTICE GERALD KOGAN<sup>345</sup>

Our democracy was founded on principles of open and transparent government of the people, by the people, and for the people. The government operates with the electoral consent of the people and its legitimacy depends on being accountable to the people for its decisions. When a state hides critical information from the public regarding the most serious criminal sanction it permits, it violates these core democratic values. Acting in secret, the government lacks accountability to its citizens. Ruling in secret, it lacks legitimacy.

Enabled by their secrecy laws, many states have violated state and federal laws, breached contracts, obtained drugs from unfit suppliers, and hired incompetent executioners. Because much of that information remains hidden, the people may never know how often and pervasively this misconduct occurs. When pharmaceutical companies oppose the misuse of their medicines to carry out executions, states respond with more secrecy, concealing information that would permit companies to learn when a state has acquired their drugs through subterfuge. When execution witnesses raise concerns about problematic executions, reporting that prisoners have gasped, jerked, and writhed before they died, states deny the obvious and claim the executions went off as planned, and then change their execution protocols to further restrict public access.

States have claimed that heightened secrecy is needed to protect their anonymous drug suppliers from public reprisals and legal action by pharmaceutical manufacturers for contract breaches. But if states cannot in the light of day obtain the drugs used to lawfully carry out executions, is that not evidence that society’s standards have evolved to the point that lethal injections are no longer tolerable? And if states can only obtain drugs that produce torturous executions, are those executions a civilized society should tolerate at all?

Instead of hiding execution information from the public, states should act openly and transparently so that citizens, legislators, and judges can have a fully informed discussion about the death penalty. It is impossible to know whether current methods of execution are consistent with evolving standards of decency if methods are kept secret. When states hide information in a deliberate effort to keep the people ignorant, America looks less and less like the democratic society it was founded to be.

<sup>1</sup> Prior to joining the DPIC staff, Ms. Konrad provided legal representation to the following prisoners who are discussed in this report: Richard Glossip, Jeffrey Landrigan, Charles Warner, and Joseph Wood.

<sup>1</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

<sup>2</sup> See, e.g., DPIC, *Oklahoma Grand Jury Issues Report Detailing "Blatant Violations" of the State's Execution Protocol*, at <https://deathpenaltyinfo.org/node/6463>.

<sup>3</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>4</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

<sup>5</sup> *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

<sup>6</sup> *Interim Report Number 14, In the Matter of the Multicounty Grand Jury, State of Oklahoma*, Case No. SCAD-2014-70 at 103 (Okla. May 19, 2016).

<sup>7</sup> John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Comm. Law Journal 355, 360 (Aug. 1993).

<sup>8</sup> *Id.* at 358.

<sup>9</sup> *Id.* at 361.

<sup>10</sup> John D. Bessler, *Death in the Dark: Midnight Executions in America*, 207 (Northeastern 1997).

<sup>11</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>12</sup> DPIC, *Searchable Execution Database*, at <https://deathpenaltyinfo.org/views-executions>.

<sup>13</sup> This formula was developed by then-Oklahoma medical examiner, A. Jay Chapman, M.D., who admitted he was an expert in dead bodies, but not in "getting them that way." Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *Fordham Law Review* 49, 66 (2007) (hereinafter "*The Lethal Injection Quandry*").

<sup>14</sup> *Id.* at 62-65.

<sup>15</sup> Austin Sarat, *Grotesque Spectacles: Botched Executions and America's Death Penalty*, Appendix A (Stanford Univ. Press 2014). Sarat's definition:

"Botched executions occur when there is a breakdown in, or departure from, the 'protocol' for a particular method of execution. The protocol can be established by the norms, expectations, and advertised virtues of each method or by the government's officially adopted execution guidelines. Botched executions are 'those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.' Examples of such problems include, among other things, inmates catching fire while being electrocuted, being strangled during hangings (instead of having their necks broken), and being administered the wrong dosages of specific drugs for lethal injections."

*Id.* at 5.

<sup>16</sup> The first state to carry out an execution using pentobarbital was Oklahoma, on December 16, 2010. See DPIC, *State-by-State Lethal Injection*, at <https://deathpenaltyinfo.org/state-lethal-injection>.

<sup>17</sup> *Baze v. Rees*, 553 U.S. 35, 53 (2008) (stating that if the prisoner is not properly anesthetized, there would be a "substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride"); *Glossip v. Gross*, No. 14-7955, 576 U.S. \_\_\_ (2015) (Sotomayor, J., dissenting) ("The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain.").

<sup>18</sup> *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring).

<sup>19</sup> *Id.* at 73.

<sup>20</sup> Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, *New York Times*, May 13, 2016.

<sup>21</sup> Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, *New Yorker*, May 21, 2016.

<sup>22</sup> *State v. Hon. Alice Gray & McKesson Medical-Surgical, Inc.*, No. CV-17-317, *McKesson Medical-Surgical, Inc.'s Response to Emergency Petition for Immediate Writ of Mandamus, Writ of Certiorari, or Superintending Writ* (Ark. Filed Apr. 20, 2017).

<sup>23</sup> *McGehee v. Hutchinson*, Case No. 4:17-cv-179-KGB, *Amicus Brief of Fresenius Kabi USA, LLC, and West-Ward Pharmaceuticals Corp.* (E.D. Ark. Apr. 13, 2017).

<sup>24</sup> *Bucklew v. Precythe*, No. 17-8151, *Brief for the Association for Accessible Medicines as Amicus Curiae in support of neither party*, July 23, 2018.

<sup>25</sup> DPIC, *Oklahoma Botches Execution of Clayton Lockett*, Apr. 30, 2014, at <https://deathpenaltyinfo.org/node/5760>.

<sup>26</sup> *Arthur v. Dunn*, No. 16-602, slip op. at 2, 580 U.S. (2017) (Sotomayor, J., dissenting from the denial of certiorari).

<sup>27</sup> Denno, *The Lethal Injection Quandary* at 95.

<sup>28</sup> American Bar Association, *Execution Transparency Resolution* at 12 (2015).

<sup>29</sup> *Id.*

<sup>30</sup> Arkansas, Georgia, Indiana, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, and Wyoming.

<sup>31</sup> See, e.g., **Alabama**: In re Ohio Execution Protocol, 2:16-mc-3770- WKW, *Order at 3* (M.D. Ala. Jan. 25, 2017) ("The [Alabama Department of Corrections] has in place a policy that provides that all documents associated with the execution of death-row inmates are to remain confidential, and the policy covers the documents requested in the subpoenas. Indeed, the confidentiality of the State of Alabama's *execution protocol* and practices has been protected in litigation brought by the state's own death-row inmates."). **Arizona**: Ariz. Rev. Stat. § 13-757 (2009) ("The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.") In March 2014, Arizona Department of Corrections revised its execution protocol to specify, "The anonymity of any person ... who participates in or performs any ancillary function(s) in the execution, including the source of the execution chemicals, and any information contained in records that would identify those persons are, as required by statute, to remain confidential and are not subject to disclosure." **Florida**: Fla. Stat. Ann. § 945.10 (2000) ("(1) Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions [of public records act]... (g) Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.".) **Idaho**: Idaho Admin. Code 06.01.01.135 (2011) ("The Department will not disclose (under any circumstance) the identity of the on-site physician; or staff, contractors, consultants, or volunteers serving on escort or medical teams; nor will the Department disclose any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution.".) **Missouri**: Mo. Rev. Stat. §546.720 (2007) ("The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential.") In October 2013, Missouri Department of Corrections amended its *protocol* to expand the definition of execution team: "The execution team consists of department employees and contracted medical personnel including a physician, nurse, and pharmacist. The execution team also consists of anyone selected by the department director who provides direct support for the administration of lethal chemicals, including individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure." **Nebraska**: Neb. Rev. Stat. Ann. § 83-967 (2009) ("The identity of all members of the execution team, and any information reasonably calculated to lead to the identity of such members, shall be confidential and exempt from disclosure pursuant to sections 84-712 to 84-712.09 and shall not be subject to discovery or introduction as evidence in any civil proceeding unless extraordinary good cause is shown and a protective order is issued by a district court limiting dissemination of such information."). In 2017, the state refused to disclose information regarding the source of its lethal drugs, arguing that such information would lead to the identity of execution team members. The ACLU (and local media outlets) sued the state to obtain this information. On June 18, 2018, the court ordered

the disclosure of information regarding the source of the drugs. See *State of Nebraska ex. rel. Amy Miller, ACLU of Nebraska Foundation v. Scott Frakes, Director of Nebraska Dept. of Corr.*, No. CI-17-4283, [Order](#) (Dist. Ct. Lancaster Cty, Neb. June 18, 2018). **Pennsylvania:** 61 Pa. C.S. § 4305(c) (2009) (“The identity of department employees, department contractors or victims who participate in the administration of an execution pursuant to this section shall be confidential.”). When an execution was scheduled in 2014, the state refused to disclose information about its drug source. Media outlets sought to intervene in the pending lawsuit, urging disclosure, but the issue was not resolved because the execution was stayed, and all executions in Pennsylvania have been on hold. See *Chester v. Wetzel*, No. 1:08-cv-1261 (M.D. Pa.). **South Carolina:** S.C. Code § 24-3-580 (2010) (“A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team.”). In July 2015, the state Attorney General issued an [opinion](#) finding that the statutory phrase “member of an execution team” must be “broadly construed” to include “the identities of individuals and companies involved in the process of preparing chemical compounds for use in an execution via lethal injection.”

<sup>32</sup> See, e.g., Mo. Rev. Stat. § 546.720 (“Any person whose identity [related to executions] is disclosed in violation of this section shall: (1) Have a civil cause of action against a person who violates this section; (2) Be entitled to recover from any such person: (a) Actual damages; and (b) Punitive damages on a showing of a willful violation of this section.”); Ohio Rev. Code Ann. § 2949.221(F) (“Any person, employee, former employee, or individual whose identity and participation in a specified activity is disclosed in violation of this division has a civil cause of action against any person who discloses the identity and participation in the activity in violation of this division. In a civil action brought under this division, the plaintiff is entitled to recover from the defendant actual damages, punitive or exemplary damages upon a showing of a willful violation of this division, and reasonable attorney’s fees and court costs.”); S.C. Code § 24-3-580 (“Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a willful violation of this section, punitive damages.”); S.D. Codified Law § 23A-27A-31.2 (“Disclosure of confidential information pursuant to this section concerning the execution of an inmate under chapter 23A-27A is a Class 1 misdemeanor,” which carries up to \$2000 fine and/or up to one year imprisonment).

<sup>33</sup> Although Ohio’s secrecy law was only applicable for 24-months, it provided any drug company that supplied drugs during that time period protection for 20 years. Ohio Rev. Code Ann. § 2949.221(D)(2) (2015). Because Ohio purchased its current drug supply—which is enough for almost 20 executions—before the statute expired, the supplier(s) of those drugs will likely remain unknown, and the civil liability for disclosure applies. See Andrew Welsh-Huggins, [Records show Ohio has plenty of execution drugs](#), Associated Press, Oct. 5, 2017.

<sup>34</sup> *In re Ohio Execution Protocol*, 2:16-mc-3770-WKW, [Order at 3](#) (M.D. Ala. Jan. 25, 2017). On May 30, 2018, a federal district court judge ordered the Alabama Department of Corrections to make its lethal-injection protocol available to the public. See DPIC, [Federal Judge Orders Alabama to Disclose Execution Records](#), at <https://deathpenaltyinfo.org/node/7114>. The state has appealed the order, and as of October 2018, no documents have been provided to the public.

<sup>35</sup> Kent Faulk, [Alabama Death Row inmate Ronald Bert Smith heaved, coughed for 13 minutes during execution](#), AL.com, Dec. 8, 2016.

<sup>36</sup> [Letter](#) from Janice B. Hughes, Alabama Department of Corrections, to Suhana S. Han, Sullivan & Cromwell, LLP, Re: Public Records Request, Feb. 2, 2017.

<sup>37</sup> *Hamm v. Dunn*, 2:17-cv-02083 (N.D. Ala. May 30, 2018).

<sup>38</sup> Ivana Hrynkiw, [Judge delays release of Alabama’s lethal injection documents](#), AL.com, June 7, 2018.

<sup>39</sup> [Executed Arkansas man ‘convulsed and groaned’](#), BBC News, Apr. 28, 2017.

<sup>40</sup> Phil McCausland, [Arkansas Execution of Kenneth Williams ‘Horrifying’: Lawyer](#), NBC News, Apr. 28, 2017.

<sup>41</sup> Kelly P. Kissel & Andrew DeMillo, [Arkansas inmate convulses during deadline-beating execution](#), Associated Press, Apr. 28, 2017.

<sup>42</sup> Alan Johnson, [Inmate’s death called ‘horrific’ under new, 2-drug execution](#), Columbus Dispatch, Jan. 17, 2014.

<sup>43</sup> [Letter from Warden Donald R. Morgan to Director Gary C. Mohr, Ohio Department of Rehabilitation and Correction](#), Re: After-Action Review, Dennis McGuire, Jan. 16, 2014.

<sup>44</sup> Graham Lee Brewer, [Execution failure in Oklahoma: Clayton Lockett dies of heart attack after vein explodes](#), The Oklahoman, Apr. 29, 2014.

<sup>45</sup> *Id.*

<sup>46</sup> Kent Faulk, [Alabama Death Row inmate Ronald Bert Smith heaved, coughed for 13 minutes during execution](#), AL.com, Dec. 8, 2016.

<sup>47</sup> *Id.*

<sup>48</sup> Alanna Durkin Richer, [Virginia man convicted of 2006 slaying of family is executed](#), Associated Press, Jan. 19, 2017.

<sup>49</sup> *Id.*

<sup>50</sup> Kelly P. Kissel & Andrew DeMillo, [Arkansas inmate convulses during deadline-beating execution](#), Associated Press, Apr. 28, 2017.

<sup>51</sup> [Tweet of David Lippman](#), TVH11, Apr. 27, 2017 (reporting on comments made by Governor Hutchinson’s spokesperson).

<sup>52</sup> Kelly P. Kissel & Andrew DeMillo, [Arkansas inmate convulses during deadline-beating execution](#), Associated Press, Apr. 28, 2017.

<sup>53</sup> Kelly P. Kissel and Andrew DeMillo, [Arkansas governor dismisses calls for full execution probe](#), Associated Press, Apr. 28, 2017.

<sup>54</sup> Sebastian Murdock & Chris D’Angelo, [Virginia Executes Man With Drug That Activists Warn Could Simulate Drowning](#), Huffington Post, July 5, 2017.

<sup>55</sup> *Id.*

<sup>56</sup> *In re: Ohio Execution Protocol Litigation*, 2:11-cv-01016, [Declaration of Carol Wright](#) (S.D. Ohio Sept. 26, 2017).

<sup>57</sup> [Letter from Warden Ron Erdos to Director Gary C. Mohr, Ohio Department of Rehabilitation and Correction](#), Re: After-Action Review, Gary W. Otte, Sept. 13, 2017.

<sup>58</sup> Connor Sheets, [‘I hate you’: Inside the execution chamber as Alabama cop-killer put to death](#), AL.com, Oct. 20, 2017.

<sup>59</sup> Kim Chandler, [Alabama Inmate Defiant Before Execution for Killing Officer](#), Associated Press, Oct. 20, 2017.

<sup>60</sup> *Guardian News & Media LLC v. Ryan*, No. 2:14-cv-02363, [Order](#) (D. Ariz. Dec. 21, 2016), requires future executions to allow viewing of the entire process and a “contemporaneous awareness” of the administration of each drug.

<sup>61</sup> Although viewing was restricted in the 2011 execution of Paul Rhoades, *Associated Press v. Otter*, 682 F.3d 821 (9th Cir. 2012), required Idaho to allow media witnesses to view the entire execution process in the 2012 execution of Richard Leavitt.

<sup>62</sup> Arizona and Idaho have these procedures in place only because they were directed to do so by court order.

<sup>63</sup> *Guardian News & Media LLC v. Ryan*, No. 2:14-cv-02363, [Order](#) (D. Ariz. Dec. 21, 2016).

<sup>64</sup> Jacob Rosenberg, [Arkansas executions: ‘I was watching him breathe heavily and arch his back’](#), The Guardian, Apr. 25, 2017.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

<sup>69</sup> *Warner v. Gross*, No. 14-cv-665-F, [Supplemental Brief in Support of Defendants’ Motion for Protective Order and Brief in Support](#) at 16 (W.D. Okla. Oct. 29, 2014).

<sup>70</sup> *Id.*

<sup>71</sup> Corinne Jurney, [2016 Global 2000: The World’s Largest Drug And Biotech Companies](#), Forbes, May 27, 2016.

<sup>72</sup> Pfizer, [Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment](#), Feb. 2017.

<sup>73</sup> See, e.g., DPIC, [Pharmaceutical Company Restricts Access to Drug Used in U.S. Executions](#), July 6, 2011, at <https://deathpenaltyinfo.org/pharmaceutical-company-restricts-access-drug-used-us-executions>; Lethal Injection Information Center, [Industry Statements](#), at <http://lethalinjectioninfo.org/industry-statements/>.

<sup>74</sup> DPIC, [Lethal Injection: Statements from drug manufacturers and medical professionals](#), at <https://deathpenaltyinfo.org/lethal-injection#statements>; Lethal Injection Information Center, [Industry Statements](#), at <http://lethalinjectioninfo.org/industry-statements/>; see also Erik Eckholm, [Pfizer Blocks the Use of Its Drugs in Executions](#), New York Times, May 13, 2016.

<sup>75</sup> Ty Alper, [The United States Execution Drug Shortage: A Consequence of Our Values](#), Brown Journal of World Affairs, 2014.

<sup>76</sup> *State of Ohio, ex rel. Hogan Lovells US LLP and Elizabeth A. Och v. Ohio Department of Rehabilitation and Correction*, Case No. 2016-1776, [Amici Curiae Brief in Support of Relator on Behalf of Fresenius Kabi USA, LLC and Sandoz, Inc.](#) (Ohio July 10, 2017).

<sup>77</sup> *Id.*

<sup>78</sup> See [Commission Implementing Regulation \(EU\) No 1352/2011](#), amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (imposing trade restrictions on certain drugs); Peter Walker, [Vince Cable restricts export of drug used in US executions](#), The Guardian, Nov. 29, 2010 (reporting that United Kingdom Business Secretary is imposing import restrictions on sodium thiopental); DPIC, [United Kingdom Acts to Ban Export of Lethal Injection Drug](#), at <https://deathpenaltyinfo.org/united-kingdom-acts-ban-export-lethal-injection-drug>.

<sup>79</sup> DPIC, [Senior U.N. Official Assails Death-Penalty Secrecy As Obstruction of Human Rights](#), Nov. 28, 2017, at <https://deathpenaltyinfo.org/node/6934>; see [www.torturefreetrade.org](http://www.torturefreetrade.org).

<sup>80</sup> [Statement from Hospira Regarding its halt of production of Pentothal](#), Jan. 21, 2011.

<sup>81</sup> Pfizer, [Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment](#), Feb. 2017.

<sup>82</sup> Fresenius Kabi, [Propofol as a lethal injection could lead to EU sanctions, potentially putting millions of U.S. patients at risk](#), Sept. 2017.

<sup>83</sup> DPIC, [United Kingdom Acts to Ban Export of Lethal Injection Drug](#), July 12, 2012, at <https://deathpenaltyinfo.org/united-kingdom-acts-ban-export-lethal-injection-drug>.

<sup>84</sup> Jim Salter, [Missouri gov. halts first US execution by propofol](#), Washington Post, Oct. 11, 2013.

<sup>85</sup> DPIC, [Drugmaker Sues Nebraska, as 15 Death-Penalty States Oppose Ruling Blocking Use of Drugs in Nevada](#), Aug. 9, 2018, at <https://deathpenaltyinfo.org/node/7168>.

<sup>86</sup> *Id.*

<sup>87</sup> Flora Southey, [Nebraska obtained lethal injection from unauthorized source says Fresenius Group](#), in-PharmaTechnologist, Aug. 22, 2018.

<sup>88</sup> *Bucklew v. Precythe*, No. 17-8151, [Brief for the Association for Accessible Medicines as Amicus Curiae in support of neither party](#), July 23, 2018.

<sup>89</sup> *Bucklew v. Precythe*, No. 17-8151, [Brief of Amici Curiae Pharmacy, Medicine, and Health Policy Experts in Support of Petitioner](#), July 23, 2018.

<sup>90</sup> Jon Camp, [North Carolina Legislature Passes Bill Limiting Execution Transparency](#), ABC11 News, July 29, 2015.

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State organizations that have issued statements against the use of medicine for purposes of executions include: California Medical Association; Nevada State Medical Association; New Hampshire Medical Society; North Carolina Medical Board.

International organizations that have issued statements against the use of medicine for purposes of executions include: International Academy of Compounding Pharmacists; International Council of Nurses; World Medical Association; World Psychiatric Association. See [Professional Association Policies](#), Lethal Injection Information Center.

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