

**IN THE SUPREME COURT OF ARIZONA**

STATE OF ARIZONA,	) Supreme Court No. CR-13-0282-
	) AP
	)
Appellee,	) Maricopa County Superior Court
vs.	) No. CR-2003-038541-001
	)
AARON BRIAN GUNCHES,	)
	)
Appellant.	)
	)

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**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION  
AND AMERICAN CIVIL LIBERTIES UNION OF ARIZONA**

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## **INTEREST OF THE *AMICI***

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has long been committed to due process and fundamentally fair procedures for defendants in all criminal cases, and, as relevant here, protection against cruel and unusual punishment in executions. The ACLU's Capital Punishment Project defends persons facing the death penalty and their constitutional rights. The ACLU of Arizona is one of the ACLU's statewide affiliates, with over 20,000 members throughout Arizona.

Amici have extensive familiarity with the procedures states have used and the obstacles they have encountered in their efforts at humane administration of lethal injection. Amici submit this brief to highlight the good reasons for suspending executions for a thorough review of Arizona's protocols and their implementation.

## **PROCEDURAL BACKGROUND**

The Office of the Attorney General ("OAG") has joined Mr. Gunches's motion to withdraw his request for a death warrant, and has moved to withdraw its own earlier motion seeking the warrant's issuance.

As the OAG has explained, it “does not intend to seek a warrant of execution in any case at least until a thorough examination of the administration of capital punishment in Arizona has been conducted.” OAG’s Motion at 2-3. The OAG has instead determined that a “review of the administration of capital punishment in Arizona is now warranted” based on concerns expressed by courts and the Governor, the decisions of other states using lethal injection to review their own execution procedures, and a determination that the public interest is best served by greater transparency. *Id.* at 7–11. It is particularly noteworthy that the Governor, who oversees the Department that would be responsible for carrying out this execution, has determined that a review is necessary. Additionally, the OAG’s decision to seek a warrant was based in part on Mr. Gunches’s request for a warrant, but as Mr. Gunches’s position has changed, so has the OAG’s. *Id.* at 3.

This Court has questioned whether, now that the OAG has once moved for a warrant, it has any jurisdiction under state law to do anything but issue the warrant. *See Order, State v. Gunches*, No. CR-13-0282-AP (Jan. 31, 2023) (citing A.R.S. § 13-759(A) and Ariz. R. Crim P. 31.23(a)). Amici American Civil Liberties Union and American Civil Liberties Union of Arizona support the arguments by Mr. Gunches and amicus curiae, the Federal Public Defender for the District of Arizona, that any undertaking by

this Court to order the execution to proceed, in the face of the Executive's determination that it will not proceed, would constitute a violation of the separation of powers. Ariz. Const. art. 3 (separation of powers).

Furthermore, strong reasons support the Governor's determination to conduct a thorough review of Arizona's lethal injection protocol, through an Independent Review Commissioner, before seeking any executions. Finally, the Governor has not acted in isolation in commencing a review of Arizona's chronic inability to conduct humane executions. The Governor follows the sensible lead of other state executives and courts who have taken similar steps.

## **ARGUMENT**

### **I. The Executive Branch Has Good Reason to Pause Executions.**

#### **A. Introduction**

The executive branch is in the best position to determine whether a review of the execution protocol is needed because it has the most access to the relevant information. And indeed, the Governor's executive order identified multiple reasons for calling a temporary halt to executions and establishing an Independent Review Commission, including contemplated improvements to the policies and procedures of the Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR"), which is now under

new leadership. *See* Governor Katie Hobbs, Executive Order 2023-05, “Establishing a Death Penalty Independent Review Commissioner” (Jan. 20, 2023). Informed by the OAG’s expertise in this area, the Governor also cites the state’s history of executions that “have resulted in serious questions about ADCRR’s execution protocols and lack of transparency.” *Id.* As discussed below, the chronic problems that require a pause and review include maladministration, failure to insert intravenous lines professionally, compounding failures, and the prevalence of pulmonary edema among those executed with the one-drug pentobarbital protocol that Arizona now uses. Arizona’s struggle to conduct its lethal injections humanely is not unique. Other states have recently botched their executions, leading state after to state to reexamine execution protocols, adopt alternative methods, or abandon execution as state policy.

Before this Court sets any execution date for Mr. Gunches, it should assure itself that the process the State will use to kill him does not amount to unconstitutional torture. *See, e.g., Baze v. Reese*, 553 U.S. 35, 50 (2008). The history of lethal injection in Arizona and across the nation suggests a substantial likelihood of extreme pain that the State could avoid by adopting a different and constitutional mode of execution.

## **B. Maladministration and Failed Intravenous Access**

### **1. Arizona: Joe Wood**

Arizona's 2014 execution of Joseph Wood lasted nearly two hours, as the state administered 15 doses of the drug midazolam in an attempt to execute him.<sup>1</sup> Reporters counted Wood gasping more than 640 times over the course of one hour and fifty-seven minutes before finally succumbing to the drugs. Witnesses reported that he remained conscious and sensate for minutes and even hours after state officials administered the lethal injection. His lips quivered, he gasped for air, and he struggled against the restraints on the execution gurney. Fighting to breathe as the drugs took effect, Mr. Wood suffered for nearly two hours in a state of air hunger.<sup>2</sup>

As Mr. Wood continued struggling and fighting to breathe, his attorneys filed emergency motions to stop the drug infusion and end their client's excruciating pain. However, Mr. Wood died before state and federal courts had a chance to rule on his attorneys' request for a resuscitation order.

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<sup>1</sup> Mark Berman, *Arizona execution lasts nearly two hours; lawyer says Joseph Wood was "gasping and struggling to breathe,"* Washington Post (July 23, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/>.

<sup>2</sup> Bob Ortega, Michael Kiefer and Mariana Dale, *Execution of Arizona Murderer Takes Nearly Two Hours*, Arizona Republic (July 23, 2014), <https://eu.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/>.

State officials subsequently denied that anything went wrong during the procedure or that Mr. Wood experienced significant pain.<sup>3</sup>

## **2. Arizona: Clarence Dixon, Frank Atwood, and Murray Hooper**

Arizona did not carry out a single execution for the next eight years. In an abrupt shift, however, the State executed three persons in 2022, using a single-drug pentobarbital protocol. In each of these executions, prison officials struggled to find a vein and inflicted extreme pain.

On May 11, 2022, Arizona executed Clarence Dixon. It took prison officials 40 minutes to locate a vein, and witnesses reported that the executioners' hands were "shaking" during the procedure. After stabbing Mr. Dixon's arms repeatedly, officials ultimately resorted to inserting a femoral line into Mr. Dixon's groin area, a technique witnesses described as "unnecessarily invasive and painful." Mr. Dixon grimaced as the executioners forcibly held him down on the gurney. Following the execution, staff "wiped up a fair amount of blood."<sup>4</sup>

Less than a month later, Arizona executed Frank Atwood, an elderly

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<sup>3</sup> Berman, *supra*, Washington Post (July 23, 2014).

<sup>4</sup> Jimmy Jenkins, *After Acquiring Lethal Injection Drugs, Arizona Struggles to Administer Them*, Arizona Republic (May 18, 2022) <https://eu.azcentral.com/story/news/local/arizona/2022/05/18/after-acquiring-lethal-injection-drugs-az-struggles-administer-them/9817921002/>.

man who lived with degenerative spondylosis, a condition of the spine that left him in near-constant pain.<sup>5</sup> There is no evidence that ADCRR officials made any effort to review the problems leading to IV insertion difficulties in the month between the Dixon and Atwood executions. When carrying out Mr. Atwood's execution, Arizona officials again struggled to locate a vein. After making multiple failed attempts to establish a peripheral vein in Mr. Atwood's arms, executioners signaled their intent to begin an intrusive, painful femoral procedure as they had done at great cost to Mr. Dixon. Grimacing in pain, Mr. Atwood advised prison officials to try again in his right arm, emphasizing that medical professionals had never experienced difficulty setting an IV line there in the past. After making several failed attempts, the executioners again moved to establish a femoral line. Mr. Atwood suggested they instead try accessing his right hand. After 30 minutes of failed attempts, this ultimately proved effective. One media witness to the execution exclaimed in astonishment, "My God, the execution team is taking direction from the man they are attempting to execute."<sup>6</sup>

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<sup>5</sup> Amended Complaint, *Atwood v. Shinn*, Case No. 2:22-cv-00860 (D. Ariz. filed May 27, 2022).

<sup>6</sup> Jimmy Jenkins, *Behind the Black Curtain: Republic Reporter Describes 'Surreal' Frank Atwood Execution*, Arizona Republic (June 8, 2022), <https://eu.azcentral.com/story/news/local/arizona/2022/06/08/republic-reporter-describes-witnessing-frank-atwood-arizona-execution/7561081001/>.

On November 16, 2022, Arizona executed Murray Hooper. As before, the State made no known efforts to examine the qualifications of its execution team or to assess the problems with IV insertion in the months between the Atwood and Hooper executions. Unable to establish a peripheral vein, prison officials resorted to an invasive procedure similar to a cut-down, inserting an intravenous (“IV”) line into Mr. Hooper’s femoral artery. The execution team made multiple failed attempts before a line was established.<sup>7</sup>

Arizona has refused to provide the public with any information about the qualifications of its execution team. *See First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1074 (9th Cir. 2019). There remains no public evidence that the State has provided further training or adopted any safeguards against the maladministration episodes in 2022.

### **3. Difficulties with Intravenous Access: A Widespread Issue**

Intravenous access difficulties are not unique to Arizona but pervade lethal injection procedures in all executing states. The risks associated with

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<sup>7</sup> Jimmy Jenkins, *Murray Hooper Execution in Arizona*, Arizona Republic (November 16, 2022), <https://eu.azcentral.com/story/news/local/arizona/2022/11/16/arizona-death-row-murray-hooper-execution/10702863002/>.



difficult IV access are compounded by executioner incompetence,<sup>8</sup> the high-stress environment of the execution chamber, and individual and medical factors (*e.g.*, age, physical disability, history of IV drug use, melanated skin, obesity).<sup>9</sup>

In 2022, difficulties with IV access contributed to visibly botched executions across the country. In fact, the Death Penalty Information Center (“DPIC”), a non-partisan research organization, referred to 2022 as the “year of the botched execution” in its annual report. DPIC’s analysis attributes the high rate of torturous executions in 2022 chiefly to a lack of accountability or critical evaluation by states that—like Arizona—experience problems with their lethal injection protocols.<sup>10</sup>

Three of the four executions that Alabama carried out last year resulted in visible torture, due to prison officials’ failure to establish IV lines. In the first of these procedures, Alabama executed Joe Nathan James,

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<sup>8</sup> Mark D. Franscisco, et al., *Competitive Real-Time Near Infrared (NIR) Vein Finder Imaging Device to Improve Peripheral Subcutaneous Vein Selection in Venipuncture for Clinical Laboratory Testing*, 12 *Micromachines* 373 (2021).

<sup>9</sup> V.N. O'Reilly-Shah et al., *Training the Trainers in Ultrasound-guided Access to Improve Peripheral Intravenous Catheter Placement among Children Presenting for Anesthesia*, 6 *Pediatr. Qual. Saf.* 406 (2021).

<sup>10</sup> *Year-End Report*, Death Penalty Info. Ctr. (Dec. 16, 2022), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

Jr., on July 28, 2022. Officials spent over three hours stabbing Mr. James with needles under the cover of secrecy. When witnesses were finally granted access to the execution chamber, Mr. James no longer appeared to be conscious, despite the fact that he had apparently not yet been injected with lethal injection drugs. Two separate autopsy examinations each revealed numerous lacerations on Mr. James's body.<sup>11</sup>

On September 22, 2022, Alabama officials attempted to execute Alan Miller. Executioners repeatedly stabbed Mr. Miller with needles – in his right arm, right hand, left arm, left hand, right foot, and left foot – for two hours in an effort to set an IV line. Unsuccessful, prison staff raised the gurney from a horizontal to a vertical orientation and left Mr. Miller hanging from the gurney in an upright, crucifixion-style position for 20 minutes before returning him to his death watch cell, traumatized, after the State's execution warrant expired.<sup>12</sup>

On November 17, Alabama attempted to execute Kenneth Smith by lethal injection. Officials stabbed Mr. Smith with needles in his right and left arms and hands for 90 minutes, as Mr. Smith writhed in pain. Unsuccessful at establishing a peripheral line, execution members inserted a needle

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<sup>11</sup> Second Amended Complaint at 16-22, *Smith v. Hamm*, No. 2:22-cv-00497 (M.D. Ala. October 6, 2022), ECF No. 71.

<sup>12</sup> *Id.* at 16-22.

containing what appeared to be an intramuscular sedative, a procedure not permitted by the execution protocol, into Mr. Smith's neck, over his strenuous objections. They then tried and failed to establish a central line, repeatedly stabbing Mr. Smith in his collarbone region. Unable to carry out the execution before the warrant expired, Alabama officials returned Mr. Smith to his death watch cell.<sup>13</sup>

Alan Miller and Kenneth Smith are currently the only two living execution survivors in the United States. Each man suffered severe physical pain and psychological trauma, including symptoms consistent with post-traumatic stress disorder, following the State's prolonged, failed attempts to execute them.<sup>14</sup>

Yet Alan Miller and Kenneth Smith are not the only men to survive an execution in Alabama. On February 22, 2018, the State of Alabama attempted to execute Doyle Lee Hamm by lethal injection. Over the course of two and one-half hours, corrections staff pierced Hamm's body at least a dozen times. The executioners initially attempted to establish access in Mr. Hamm's lower extremities, beginning with his ankles and moving up through his calves. With each attempt, the executioners sliced deep into his

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<sup>13</sup> *Id.* at 29-43.

<sup>14</sup> *Id.* at 29-43.

skin and made multiple painful, probe-and-withdrawal movements with the needle. After these attempts failed, the execution team initiated a painful, intrusive femoral insertion procedure in Mr. Hamm's groin area, without first administering anesthesia. The procedure ultimately failed. Instead, prison officials punctured Mr. Hamm's bladder, resulting in severe hemorrhaging and excruciating pain. Mr. Hamm experienced persistent symptoms of PTSD following the torturous procedure.<sup>15</sup>

For decades, difficulties with IV access have contributed to visibly torturous executions nationwide, increasing the risk that executions will go wrong and prisoners will die in excruciating pain. For example, in 2009, Ohio spent over two hours repeatedly stabbing Romell Broom with needles, before ultimately calling the execution to a halt. By the time the State abandoned its attempts to execute him, Mr. Broom was in tears.<sup>16</sup> After surviving this execution attempt, he later died on Ohio's death row of suspected COVID-19 complications.

Ohio was forced yet again to call off another execution in 2017 after

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<sup>15</sup> Preliminary report of Doyle Hamm Examination by Mark Heath, *Hamm v. Hamm*, No. 2:17-cv-02083 (N.D. Ala. filed February 22, 2018), ECF No. 103, App. A.

<sup>16</sup> Stephen Majors, *Governor delays execution after problems with convict's veins*, CantonRep.com (Sept. 16, 2009), <https://www.cantonrep.com/story/news/state/2009/09/16/governor-delays-execution-after-problems/42679476007/>.

spending eighty minutes attempting without success to establish IV access for terminally ill 69-year-old Alva Campbell. Prison personnel used an ultraviolet light to probe Campbell's arm for a vein, repeatedly sticking his arms and legs. One media witness reported that when he was stuck in the leg, "Campbell threw his head back and appeared to cry out in pain."<sup>17</sup> He later died in prison from serious preexisting health problems.<sup>18</sup>

In 2014, Oklahoma executed Clayton Lockett via lethal injection. Executioners stabbed him with needles for an hour in an attempt to find a vein, before finally setting a line in his groin area using an intrusive procedure. Minutes after the first drug, the sedative Midazolam, was administered, Mr. Lockett remained conscious and sensate, suggesting an issue with the IV site. He then started "breathing heavily, writhing on the gurney, clenching his teeth and straining to lift his head off the pillow".<sup>19</sup> It

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<sup>17</sup> *Ohio Halts Execution of Physically Debilitated Prisoner After It Cannot Find Vein for Intravenous Line*, Death Penalty Info. Ctr. (March 6, 2018), <https://deathpenaltyinfo.org/news/alva-campbell-terminally-ill-prisoner-who-survived-botched-execution-attempt-dies-on-ohio-death-row>.

<sup>18</sup> Tracy Connor, *Alva Campbell, Inmate Who Survived Execution Try, Dies in Prison*, NBC News (March 4, 2018), <https://www.nbcnews.com/news/us-news/alva-campbell-inmate-who-survived-execution-try-dies-ohio-prison-n852961>.

<sup>19</sup> Associated Press, *Oklahoma Nixes 2nd Execution of the Night after Botching 1st*, New York Post (April 29, 2014), <https://nypost.com/2014/04/29/oklahoma-nixes-2nd-execution-of-the-night-after-botching-1st/> (visited Feb. 9, 2023).

was only then that the execution team lifted the sheet covering Mr. Lockett's groin and discovered that they had missed the vein. The drugs had bubbled under his skin, resulting in a swelling "larger than a golf ball."<sup>20</sup> Ultimately, forty-three minutes after the execution began, Mr Lockett died of a heart attack. Following the execution, the head of Oklahoma's prison system called the procedure a "bloody mess."<sup>21</sup>

#### **4. Compounded Pentobarbital Presents an Elevated Risk of Excruciating Pain.**

As the above examples illustrate, the risks associated with lethal injection, particularly those presented by IV access difficulties, arise irrespective of a State's choice of drug protocol. Arizona's procedure, which relies on compounded pentobarbital, presents additional risks. In recent years, witnesses have documented a number of visibly botched procedures in states that, like Arizona, rely on compounded pentobarbital to carry out executions. These risks are exacerbated in states that, again like Arizona, procure lethal injection drugs under the cover of secrecy and refuse to

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<sup>20</sup> Josh Sanburn, *IV Problems Led to Botched Execution in Oklahoma, Report Says*, Time (September 4, 2014), <https://time.com/3268932/clayton-lockett-botched-execution-state-report-iv/>.

<sup>21</sup> Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett was "A Bloody Mess,"* The Guardian (December 13, 2014), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

provide even basic details about the source, identity, and quality of the State's supply of lethal drugs.<sup>22</sup>

Over the last 10 years, every FDA-approved manufacturer of drugs used in executions in the USA has publicly opposed the use of its medicines in executions and has put distribution controls in place to prevent prisons from buying drugs for this purpose.<sup>23</sup> A number of jurisdictions have responded by turning to a compounded version of the drug.

Compounding is the creation of a pharmaceutical preparation by a pharmacist in lieu of a commercially available manufactured drug. Outside the lethal injection context, physicians and patients may turn to compounded drugs to customize strength or dosage, flavor a medication to make it more palatable to a child, reformulate a drug to exclude a nonessential ingredient such as a dye to which the patient is allergic, or change the form of the

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<sup>22</sup> See, e.g., Jimmy Jenkins, *Legal Challenge Prompts State to Create New Batch of Drugs for Clarence Dixon Execution*, Arizona Republic (May 10, 2022) (documenting ADCRR's lack of transparency concerning the quality of lethal injection drugs); Amended Complaint, ECF No. 21 at 20-25, *Atwood v. Shinn*, Case No. 2:22-cv-00860 (D. Ariz. May 27, 2022) (similarly describing secrecy surrounding ADCRR's procurement, handling, and testing of compounded pentobarbital).

<sup>23</sup> Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. Times (May 13, 2016), at A1, <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html>.

medication from a pill to a liquid for a patient who has trouble swallowing.<sup>24</sup>

Using compounded drugs carries certain risks. Compounding pharmacies, unlike drug manufacturers, are not regulated by the FDA, and accreditation is not required. The products they make have a significantly higher failure rate and shorter shelf life than manufactured drugs. *Id.* Unaccredited pharmacies have been known to distribute contaminated preparations that can cause illness or death.<sup>25</sup>

Over and over, in multiple jurisdictions, persons who received compounded pentobarbital have complained of or nonverbally manifested extreme pain, although a properly prepared compound should be painless. In 2020-21, the federal government used compounded pentobarbital to execute Corey Johnson, Lisa Montgomery, Alfred Bourgeois, and William LeCroy, among others.

- On January 14, 2021, shortly after officials administered the drug to Mr. Johnson, he exclaimed that his “hands and mouth

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<sup>24</sup> *Frequently Asked Questions About Pharmaceutical Compounding*, Amer. Pharmacists Ass’n, <https://www.pharmacist.com/Practice/Patient-Care-Services/Compounding/Compounding-FAQs> (last visited Feb. 7, 2023).

<sup>25</sup> Chris McDaniel, *Inmates Said the Drug Burned As They Died*, BuzzFeed News (Nov. 28, 2018) (describing expert affidavit of David Waisel warning that improper compounding may leave particles in solution capable of causing irritation to the vein and “extraordinary pain” to the recipient), <https://www.buzzfeednews.com/article/chrisgcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas> .



were burning.”<sup>26</sup>

- On January 13, 2021, immediately after the drug entered Lisa Montgomery’s veins, she began gasping for air, and her stomach began to throb.<sup>27</sup>
- On December 11, 2020, after Alfred Bourgeois received compounded pentobarbital, his stomach quivered uncontrollably, and he grimaced in pain. Nearly 30 minutes passed between the administration of pentobarbital and the pronouncement of death.<sup>28</sup>
- On September 22, 2020, after officials administered the drug to William LeCroy, his stomach began to heave uncontrollably. Color drained from Mr. LeCroy’s limbs, his face became ashen, and his lips turned blue.<sup>29</sup>

On August 21, 2019, the State of Texas executed Larry Swearingen

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<sup>26</sup> Michael Tarm, *Executioners Sanitized Accounts of Death in Federal Cases*, Associated Press (February 17, 2021).

<sup>27</sup> Tom Wood, *Witness Reveals Final Moments of Lisa Montgomery Before Her Execution*, LAD Bible (January 13, 2021), <https://www.ladbible.com/news/news-witness-reveals-final-moments-of-lisa-montgomery-before-her-execution-20210113>.

<sup>28</sup> Michael Tarm, *U.S. Executes Truck Driver Who Killed Daughter*, Associated Press (December 11, 2020).

<sup>29</sup> Michael Tarm, *Executioners Sanitized Accounts of Death in Federal Cases*, Associated Press (February 17, 2021); Michael Tarm, *U.S. Executes Killer Obsessed with Witchcraft*, Associated Press (September 21, 2020).

using compounded pentobarbital. After prison officials administered the drug, Mr. Swearingen declared that he could “taste” the effects of the lethal dose, and complained that it “burned.”<sup>30</sup>

On September 26, 2018, the State of Texas executed Troy Clark using compounded pentobarbital. Mr. Clark cried out that the pentobarbital “burned going in.” He grunted and gasped for 21 minutes before death was pronounced.<sup>31</sup>

On July 17, 2018, the State of Texas executed Christopher Young using compounded pentobarbital. For 25 minutes, Mr. Young cried out in intense pain and described a “burning” sensation in his body.<sup>32</sup>

On June 27, 2018, the State of Texas executed Danny Bible using compounded pentobarbital. After the pentobarbital was administered, Mr. Bible cried out “burning” and “it hurts.”<sup>33</sup>

On May 4, 2018, the State of Georgia executed Robert Earl Butts, Jr. using compounded pentobarbital. Immediately after prison officials

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<sup>30</sup> Keri Blakinger, *Larry Swearingen Executed Despite Claims of Innocence*, Houston Chronicle (August 21, 2019).

<sup>31</sup> Juan A. Lozano & Michael Graczyk, *Texas Executes Man in the Torture, Drowning of Ex-Roommate*, Associated Press (September 26, 2018).

<sup>32</sup> Christopher Young, *Death Row Inmate From San Antonio, Executed for Deadly 2004 Robbery*, Associated Press (July 17, 2018).

<sup>33</sup> Jolie McCullough, *Danny Bible Executed for a 1979 Rape and Murder, Despite Claims That He was Too Sick for Lethal Injection*, The Texas Tribune (June 27, 2018).

administered the drug, Mr. Butts cried out, “It burns, man.”<sup>34</sup>

On January 18, 2018, Texas executed Anthony Shore using compounded pentobarbital. At the end of Mr. Shore’s final statement, he began to tremble, crying out, “I can feel that it does burn. Burning!”<sup>35</sup>

## **5. Flash Pulmonary Edema**

Recent experience has also demonstrated that patients executed with pentobarbital (and midazolam) often suffer the torture caused by flash or sudden pulmonary edema, a condition in which the air sacs (alveoli) in the lungs fill with fluid that often appears bloody and/or frothy.<sup>36</sup>

In 2016, a group of anesthesiologists reviewed autopsy reports for 43 executed persons from eight states. They found pulmonary edema in 66.66% of pentobarbital executions. Their opinion was that injecting the highly alkaline solution containing pentobarbital directly into the bloodstream could damage the capillaries serving the lung sacs, causing them to rupture and fill with fluid. The lungs of the persons with edema were so filled with fluid that they weighed far more than average. As the authors

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<sup>34</sup> *It Burns Man, ’ Georgia Man Says During Execution for Killing Prison Guard*, CBS News, May 4, 2018.

<sup>35</sup> *“Tourniquet Killer” Anthony Allen Shore Executed in Texas for 1992 Strangling*, CBS News, January 19, 2018.

<sup>36</sup> *Pulmonary Edema*, Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/24218-pulmonary-edema> (last visited Feb. 8, 2023).

described, the finding was “an alarming one for the question of cruelty in this method of execution,” because sufferers experience pulmonary edema as a “sensation of suffocating or drowning that worsens when lying down.”<sup>37</sup>

Prompted by this research, National Public Radio sponsored a 2020 review of over 200 autopsy reports of persons executed by lethal injection, and found that 84% of those executed had evidence of pulmonary edema. The findings remained consistent regardless of the state or drug protocol. The cases included executions under protocols that employed one drug, including pentobarbital. The average lung weights were double the ordinary average. The authors reported that flash pulmonary edema had been found on autopsy of Wesley Purkey, whom the federal government executed with pentobarbital in August 2020.<sup>38</sup>

## **6. The Attorney General Had Good Reason to Withdraw the Motion for a Warrant.**

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<sup>37</sup> Joel B. Zivot et al., *Execution by lethal injection: Autopsy findings of pulmonary edema* at 1, 6, 7, medRxiv Preprint Server for Health Sciences, available at <https://www.medrxiv.org/content/10.1101/2022.08.24.22279183v1> (visited Feb. 9, 2023).

<sup>38</sup> See National Public Radio, *NPR Investigation of Lethal-Injection Autopsies Finds Executed Prisoners Experience Sensations of Suffocation and Drowning*, at 1 (posted Sept. 25, 2020), <https://deathpenaltyinfo.org/news/npr-investigation-of-lethal-injection-autopsies-finds-executed-prisoners-experience-sensations-of-suffocation-and-drowning>.

All this evidence supports the OAG’s decision to withdraw its motion. The OAG’s pleading mentions the botched execution of Joe Wood, the many stops and starts in executions, the chronic problems with compounded pentobarbital supplies, and concerns over the “shroud of secrecy” that has until now obscured Arizona’s execution practices. The evidence reviewed above demonstrates that the problems run deeper and are even more alarming even than the OAG describes.

**II. The OAG Has Properly Deferred to the Governor’s Decision to Review the Execution Protocol, and the Governor, In Turn, Follows the Sensible Lead of Other Governors and Courts, in Arizona and Elsewhere, Pausing Problematic Executions to Review Lethal Injection Practices.**

The OAG is correct not to seek an execution while the Governor engages in a good-faith review of execution protocols. Governor Hobbs is not the first governor to call a halt to executions in Arizona over concerns about execution methods that amounted to torture. For example, after Joseph Wood’s 2014 execution garnered national attention for its brutality, then-Governor Jan Brewer ordered a review of Arizona’s lethal injection procedures, stating that she was “concerned about the length of time it took”

for the State to execute Mr. Wood.<sup>39</sup> Executions did not resume until recently.

Nor would an order that denied or dismissed as moot the AG's now-abandoned motion represent a new departure for this Court, which has repeatedly denied or continued the AG's motions for warrants in light of ongoing lethal injection concerns or pending litigation.<sup>40</sup>

In view of the difficulties with IV access and the wider problems inherent to lethal injection as a whole, many states have paused or stopped using lethal injection entirely in recent years. Most recently, Oklahoma Attorney General Gentner Drummond, after witnessing the execution of Scott Eizember on January 12, moved the Court of Criminal Appeals to

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<sup>39</sup> Josh Sanburn, *Inside the Efforts to Halt Arizona's Two-Hour Execution of Joseph Wood*, Time (July 24, 2014), <https://time.com/3026985/joseph-wood-arizona-lethal-injection-botched/>.

<sup>40</sup> See Order, *State v. Dixon*, No. CR-08-0025-AP (July 21, 2021); Order, *State v. Atwood*, No. CR-87-0135-AP, Order (July 12, 2021); Order, *State v. Robert Charles Towery*, No. CR-92-0493-AP (Nov. 29, 2011); Order, *State v. Robert Henry Moormann*, No. CR-85-0115-AP (Nov. 29, 2011); Order, *State v. Richard Lynn Bible*, No. CR-90-0167-AP (Sept. 22, 2010); Order, *State v. Richard Lynn Bible*, No. CR-90-0167-AP (May 20, 2010); Order, *State v. Donald Edward Beaty*, No. CR-85-0211-AP/PC (Feb. 4, 2010); Order, *State v. Eric John King*, No. CR-91-00050 (May 6, 2009); Order, *State v. Eric John King*, No. CR-91-0084-AP (Apr. 20, 2009); Order, *State v. Daniel Cook*, No. CR-88-0301-AP (Apr. 1, 2009).

modify its lengthy schedule of upcoming executions. Drummond told the court that “a reassessment of the current execution schedule is necessary to maintain confidence in the system.” The court granted the motion, rescheduling seven executions and postponing thirteen others.<sup>41</sup>

Similarly, after three failed executions marred by IV-line access issues, Alabama Governor Kay Ivey paused executions in November 2022 and ordered a “top-to-bottom” review of the state’s capital punishment system.<sup>42</sup> In Tennessee, Governor Bill Lee halted all executions in the state last year and commissioned an investigation into the state’s execution practices after the execution of Oscar Smith was called off due to an “oversight” in the preparation for lethal injection.”<sup>43</sup> The independent investigation subsequently found that the state had repeatedly failed to

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<sup>41</sup> See Liliana Segura, *Oklahoma Slows Down Frenzied Execution Spree and Launches Probe Into Richard Glossip Case*, at 1, 2, *The Intercept* (Jan. 28, 2023), <https://theintercept.com/2023/01/28/oklahoma-execution-spreerichard-glossip/>.

<sup>42</sup> The Associated Press, *Alabama is pausing executions after a 3<sup>rd</sup> failed lethal injection*, *NPR* (November 1, 2022), <https://www.npr.org/2022/11/21/1138357929/alabama-executions-pause-lethal-injection#:~:text=Alabama%20is%20pausing%20executions%20after%203%20failed%20lethal%20injections%20Alabama,unprecedented%20third%20failed%20lethal%20injection.>

<sup>43</sup> Jonathan Mattise & Kimberlee Kruesi, *Report: Tenn has broken its lethal injection rules since '18*, *Associated Press* (December 28, 2022), <https://apnews.com/article/crime-legal-proceedings-bill-lee-tennessee-0c78c5a2a44d4bbf9ed5ec7bb9ae96a8>

follow its own protocols in performing seven executions and preparing for an eighth between 2018 and 2022. Louisiana and Ohio have stopped using lethal injection for the foreseeable future due to concerns with sourcing the drugs safely and responsibly.<sup>44</sup>

As discussed in the submissions of Mr. Gunches and amicus curiae, the Federal Public Defender for the District of Arizona, this Court has well-established jurisdiction to forbear issuing an execution warrant that neither the OAG nor Mr. Gunches wants. The evidence discussed above provides overwhelming reasons for forbearance.

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<sup>44</sup> Julie Carr Smyth, Farnoush Amiri, & Andrew-Welsh-Huggins, *Ohio governor: Lethal injection no longer execution option*, at 8 (December 2020), <https://apnews.com/article/legislature-ohio-coronavirus-pandemic-mike-dewine-executions-f7f1542613ae6922444d77341d4d3b40>; Associated Press, *Execution suit tossed because Louisiana can't get drugs* (April 3, 2022), <https://apnews.com/article/louisiana-crime-lawsuits-executions-0e2ebdd7ab6358f7f1a85eb245d95303>.



### **III. Before Setting Any Execution Date, the Court and the State Should Be Sure that Arizona’s Lethal Injection Process Will Not Cause Unconstitutional Extreme Pain.**

The Eighth and Fourteenth Amendments forbid the State to carry out a death sentence by means that inflict pain beyond that necessary to end the condemned prisoner’s life. *In re Kemmler*, 136 U.S. 436, 447 (1890).

“Punishments are cruel when they involve torture or a lingering death . . . [,] something more than the mere extinguishment of life.” *Id.* A method that “superadd[s] pain, terror, or disgrace” qualifies as cruel and unusual. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1114 (2019).

A jurisdiction’s execution method must present a “substantial risk of serious harm” for an Eighth Amendment claim to succeed. *See Baze*, 553 U.S. at 50; *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). A condemned person can establish an Eighth Amendment violation if they identify a “feasible, readily implemented” alternative procedure that would “significantly reduce a substantial risk of severe pain.” *Baze*, 533 U.S. at 52. To determine whether the risk of pain associated with the State’s method is “substantial[.]” it must be “compared to a known and available alternative[.]” that the state failed to adopt without a legitimate penological reason. *Glossip v. Gross*, 576 U.S. 863, 878 (2015); *Bucklew*, 139 S. Ct. at 1114.

The evidence collected above demonstrates that Arizona's lethal injection experiment has not merely risked, but actually caused, severe pain to persons it has put to death. But this Court need not find a constitutional violation to respect the Executive's prerogative. It is the Governor's role in the first instance to ensure that she and her team have done all that is necessary to carry out executions professionally, with dignity, and in accord with Arizona and federal law.

The OAG and the Governor plan to conduct a thorough exploration of the reasons for Arizona's longstanding systematic failures and the available alternatives. This Court should pause until that review is complete before issuing any new warrants, including for Mr. Gunches. The Court, no less than the prosecution, Mr. Gunches, and the People of this State, should guard against any repetition of the torturous Arizona executions that have shocked the public conscience.

## CONCLUSION

For the foregoing reasons, Amici urge the Court to assure itself of the lawfulness of any execution the State will undertake and allow time for the State to do the same. The Court should grant the State's motion to withdraw its request for a death warrant, and the warrant should not issue.

**RESPECTFULLY SUBMITTED** this 16th day of February, 2023.

American Civil Liberties Union  
Foundation of Arizona

By /s/ Jared G. Keenan  
Jared G. Keenan  
Joshua M. Spears

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