

IN THE SUPREME COURT OF ARIZONA

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

**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 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. Amici have extensive familiarity with the issues and practical problems surrounding lethal injection. They 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 for the warrant’s issuance. OAG motion at 2-3, 7–11. This Court has questioned whether, now that the OAG has once moved for a warrant, it has jurisdiction to do anything but issue it. *See Order, State v. Gunches*, No. CR-13-0282-AP (Jan. 31, 2023). Amici ACLU and ACLU of Arizona submit this brief in support of the Court’s jurisdiction. Amici describe below the strong

reasons for a thorough review of Arizona’s lethal injection protocol, through an Independent Review Commissioner, before scheduling any executions. Furthermore, the Governor has not acted in isolation; she 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 best positioned to decide whether Arizona’s execution protocol requires review because it has the most access to relevant information. The Governor’s executive order identified multiple reasons for the review, including contemplated improvements to the policies and procedures of the Arizona Department of Corrections, Rehabilitation and Reentry (“ADCRR”), 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, the Governor also cited the state’s history of questionable executions. *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 does not amount to unconstitutional torture. *See, e.g., Baze v. Reese*, 553 U.S. 35, 50 (2008). The relevant history in Arizona and elsewhere suggests a substantial likelihood of extreme pain that the State could avoid.

B. Maladministration and Failed Intravenous Access

1. Arizona: Joe Wood

In 2014, as officials administered 15 doses of midazolam to Joseph Wood, reporters observed him gasping more than 640 times and struggling against his restraints over the course of one hour and fifty-seven minutes before finally succumbing. Witnesses reported that he remained conscious and sensate for minutes and even hours. Mr. Wood's attorneys filed emergency motions to stop the infusion, but he died before the courts could rule. State officials subsequently denied that anything went wrong or that Mr. Wood experienced significant pain.¹

¹ 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/>; 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->

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

After an eight-year pause, the State resumed executions in 2022 with a single-drug pentobarbital protocol. In each execution, officials struggled to find a vein and inflicted extreme pain. First, at Clarence Dixon's May 11, 2022 execution, prison officials took 40 minutes to locate a vein, stabbing his arms repeatedly and ultimately conducting a painful insertion of a femoral line into his groin area. Mr. Dixon grimaced as the executioners forcibly held him down on the gurney. Afterwards staff wiped up blood.² Less than a month later at the execution of Frank Atwood, after multiple failed attempts to establish a peripheral line, executioners prepared for the painful femoral procedure. Grimacing in pain, Mr. Atwood advised them to try again on his right arm, and, after more failed attempts, his right hand. After 30 more minutes of failed attempts, this ultimately proved effective.³ Similarly, at the November 16, 2022, execution of Murray Hooper, officials again could not establish a line in a

execution-botched/13070677/; Berman, *supra*, Washington Post (July 23, 2014).

² 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/>.

³ Amended Complaint, *Atwood v. Shinn*, Case No. 2:22-cv-00860 (D. Ariz. filed May 27, 2022); Jimmy Jenkins, *Behind the Black Curtain: Republic Reporter Describes 'Surreal' Frank Atwood Execution*, Arizona Republic (June 8, 2022),

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peripheral vein. After multiple attempts, they again used the invasive cut-down-like procedure to insert a line in his femoral artery.⁴

Arizona has refused to provide public information on its execution team's qualifications, and has given no public evidence of improved training. *See First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1074 (9th Cir. 2019).

3. Difficulties with Intravenous Access: A Widespread Issue

Intravenous access difficulties are not unique to Arizona. All executing states face risks compounded by executioner incompetence, the high-stress environment, and individual factors (age, physical disability, history of IV drug use, melanated skin, obesity).⁵ In 2022, difficulties with IV access contributed to visibly botched executions across the country. In its 2022 year-end report, the Death Penalty Information Center (“DPIC”), attributed the high rate of torturous executions chiefly to a lack of accountability or critical evaluation.⁶

⁴ 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/>.

⁵ 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); 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).

⁶ *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>.

Three of four Alabama executions last year resulted in visible torture related to IV lines. On July 28, 2022, officials spent over three hours stabbing Joe James with needles out of view, and he appeared unconscious when witnesses were finally admitted, although administration of the drugs had apparently not begun. Two separate autopsies revealed numerous lacerations on his body.⁷ On September 22, officials repeatedly stabbed Alan Miller in his right arm, right hand, left arm, left hand, right foot, and left foot for two hours. Unsuccessful, the staff raised the gurney to a vertical orientation and left Mr. Miller hanging in an upright, crucifixion-style position for 20 minutes before returning him to his cell after the warrant expired. On November 17, officials stabbed Kenneth Smith with needles in his arms and hands for 90 minutes. They then inserted a needle that appeared to contain a sedative, an unauthorized procedure under the protocol, and tried but failed to establish a central line near his collarbone. When the warrant expired, they returned him to his cell. Both Miller and Smith developed symptoms typical of post-traumatic stress disorder.⁸

The failed 2022 Alabama executions reprised the aborted February 22, 2018, execution of Doyle Lee Hamm, who endured two and one-half hours of unsuccessful probe-and-withdrawal needle movements and a femoral insertion

⁷ Second Amended Complaint at 16-22, *Smith v. Hamm*, No. 2:22-cv-00497 (M.D. Ala. October 6, 2022), ECF No. 71.

⁸ *Id.* at 16-22, 29-43.

procedure that punctured his bladder and caused severe hemorrhaging.⁹

For decades, difficulties with IV access have contributed to visibly torturous executions nationwide:

- 2009, Ohio: the execution of Ronnell Broome was called off after over two hours of stabbing with needles;¹⁰
- 2017, Ohio: the execution of terminally ill Alva Campbell was called off after 80 minutes of probing with needles for a vein;¹¹
- 2014, Oklahoma: officials improperly set a line in Clayton Lockett's groin. He remained sensate, dying of a heart attack after 43 minutes of suffering.¹²

⁹ 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.

¹⁰ 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/>.

¹¹ *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>; 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>.

¹² 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); 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/>; Katie Fretland, *Scene at Botched Oklahoma*

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

Over the last 10 years, as every FDA-approved manufacturer has publicly opposed the use of its products in executions, many states have turned to compounded versions of execution drugs.¹³ Compounding is the creation of a pharmaceutical by a pharmacist, in lieu of an FDA-regulated and accredited manufacturer.¹⁴ Compounded drugs have significantly higher failure rates and shorter shelf lives. Unaccredited pharmacies have distributed contaminated preparations that caused illness or death.¹⁵ In recent years, witnesses have documented a number of visibly botched procedures in states that, like Arizona, rely on compounded pentobarbital for executions and, again like Arizona, refuse

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>.

¹³ 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>.

¹⁴ *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).

¹⁵ 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/chrismcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas>.

to provide even basic details about the the State’s supply of lethal drugs.¹⁶ In multiple jurisdictions, persons who received compounded pentobarbital have described or manifested pain and burning, although a properly prepared compound should be painless. In 2020-21, the federal government used compounded pentobarbital to execute multiple prisoners.

- On January 14, 2021, shortly after officials administered the drug to Corey Johnson, he exclaimed that his “hands and mouth were burning.”¹⁷
- On January 13, 2021, immediately after the drug entered Lisa Montgomery’s veins, she gasped for air, and her stomach throbbed.¹⁸
- On December 11, 2020, after Alfred Bourgeois received compounded pentobarbital, his stomach quivered, and he grimaced in pain.¹⁹
- On September 22, 2020, after officials administered the drug to William

¹⁶ 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).

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

¹⁸ 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>.

¹⁹ Michael Tarm, *U.S. Executes Truck Driver Who Killed Daughter*, Associated Press (December 11, 2020).

LeCroy, his stomach began to heave. Color drained from his limbs, his face became ashen, and his lips turned blue.²⁰

Witnesses made similar reports about the executions with compounded pentobarbital of Larry Swearingen (Texas, August 21, 2019),²¹ Troy Clark (Texas, September 26, 2018),²² Christopher Young (Texas, July 17, 2018),²³ Danny Bible (Texas, June 27, 2018),²⁴ Robert Earl Butts (Georgia, May 4, 2018),²⁵ and Anthony Shore (Texas, January 18, 2018).²⁶

²⁰ 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).

²¹ Keri Blakinger, *Larry Swearingen Executed Despite Claims of Innocence*, Houston Chronicle (August 21, 2019).

²² Juan A. Lozano & Michael Graczyk, *Texas Executes Man in the Torture, Drowning of Ex-Roommate*, Associated Press (September 26, 2018).

²³ Christopher Young, *Death Row Inmate From San Antonio, Executed for Deadly 2004 Robbery*, Associated Press (July 17, 2018).

²⁴ 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).

²⁵ *It Burns Man, Georgia Man Says During Execution for Killing Prison Guard*, CBS News, May 4, 2018.

²⁶ *“Tourniquet Killer” Anthony Allen Shore Executed in Texas for 1992 Strangling*, CBS News, January 19, 2018.

5. Flash Pulmonary Edema

Recent experience has also demonstrated that patients executed with pentobarbital often suffer the torture caused by flash or sudden pulmonary edema, in which the lung's air sacs (alveoli) fill with fluid.²⁷ In a 2016 review of autopsy reports for 43 executions from eight states, a group of anesthesiologists found pulmonary edema in 66.66% of pentobarbital executions. The lungs were filled with fluid and weighed far more than average. The finding was “alarming” because sufferers experience pulmonary edema as a “sensation of suffocating or drowning[.]”²⁸ 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% had evidence of pulmonary edema, with average lung weights over double the ordinary average. The findings remained consistent regardless of the state or drug protocol, including pentobarbital protocols like the one the federal government used to execute Wesley Purkey in August 2020.²⁹

²⁷ *Pulmonary Edema*, Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/24218-pulmonary-edema> (last visited Feb. 8, 2023).

²⁸ Joel B. Zivot et al., *Execution by lethal injection: Autopsy findings of pulmonary edema* at 1, 6, 7, medRxiv Preprint Server for Health Sciences, <https://www.medrxiv.org/content/10.1101/2022.08.24.22279183v1>.

²⁹ 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>.

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

This evidence, some of it mentioned in the OAG's pending motion, supports its decision. The discussion above demonstrates that the problems are even more alarming 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.

Governor Hobbs is not the first Arizona governor to call a halt to executions over concerns about methods. After Joseph Wood's 2014 execution garnered national attention for its brutality, then-Governor Jan Brewer ordered a review of lethal injection procedures.³⁰ Nor would this Court break new ground by denying or dismissing as moot the AG's now-abandoned motion for a warrant.³¹

³⁰ 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/>.

³¹ 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).

Many states have paused or stopped using lethal injection in recent years. Most recently, Oklahoma Attorney General Gentner Drummond, after witnessing an execution, moved the Court of Criminal Appeals to modify its lengthy execution schedule for a review that was “necessary to maintain confidence in the system.” The court granted that motion.³² Similarly, after three failed executions, Alabama Governor Kay Ivey paused executions in November 2022 and ordered a “top-to-bottom” review of the capital punishment system.³³ Last year, after the aborted execution of Oscar Smith, Tennessee Governor Bill Lee halted executions and commissioned an investigation, which found that the state had repeatedly failed to follow its own protocols.³⁴ Louisiana and Ohio have stopped using lethal injection indefinitely over drug sourcing concerns.³⁵

³² 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-spree-richard-glossip/>.

³³ The Associated Press, *Alabama is pausing executions after a 3rd 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.>

³⁴ 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>

³⁵ Julie Carr Smyth, Farnoush Amiri, & Andrew-Welsh-Huggins, *Ohio governor: Lethal injection no longer execution option*, at 8 (December 2020),

As discussed in the submissions of other amici, this Court has well-established jurisdiction to forbear issuing an execution warrant that neither the OAG nor Mr. Gunches wants. The evidence demands forbearance.

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 death sentencing by means that inflict pain beyond that necessary to end life. *In re Kemmler*, 136 U.S. 436, 447 (1890). A method that “superadd[s] pain, terror, or disgrace” or presents a “substantial risk of serious harm” violates the Eighth Amendment. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1114 (2019); *Baze*, 553 U.S. at 50; *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). A court measures “substantial” risk by comparing an execution method “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; *Baze*, 533 U.S. at 52.

The evidence collected above demonstrates that Arizona’s lethal injection experiment has not merely risked, but actually caused, severe pain. But this Court need not find a constitutional violation to respect the Executive’s role. Because

<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>.

OAG and the Governor plan a thorough exploration of Arizona’s longstanding systematic failures and available alternatives, this Court should not issue any new warrants until that review concludes. The Court, no less than the prosecution, Mr. Gunches, and the People, should guard against any repetition of the torturous Arizona executions that have shocked the public conscience.

CONCLUSION

For the foregoing reasons, 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 21st day of February, 2023.

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