



**The Advocates for Human Rights,
a non-governmental organization in special consultative status with ECOSOC
submits this**

Shadow Report on the Death Penalty in the United States of America

for consideration during the

**53rd Session of the United Nations Committee against Torture
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The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty.

Endorsed by:

World Coalition against the Death Penalty
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Together against the Death Penalty (Ensemble contre la peine de mort - ECPM), France

Executive Summary

The administration of the death penalty in the United States raises serious concerns that condemned prisoners are experiencing severe pain and suffering when being executed, in violation of U.S. obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Shortages of lethal injection drugs and of qualified medical personnel willing to participate in executions have prompted states to experiment with drugs obtained from unregulated sources, new drugs not previously used in lethal injections, and execution teams without sufficient medical training. States have attempted to shield these decisions from public examination by passing secrecy laws that, among other consequences, prevent condemned prisoners from challenging their executions on grounds that they will experience severe pain and suffering. As a result of these changes, condemned prisoners in several recent executions apparently suffered severe pain. The U.S. report was submitted before these executions took place and so includes no information on the substantial evidence that severe pain and suffering occurs under these new protocols.

Part I of this report (paragraphs 1–7) provides background about traditional lethal injection procedures in the United States. Part II (paragraphs 8–14) explains how drug sourcing difficulties have prompted states to adopt new execution strategies that increase the likelihood that executions will constitute torture or cruel, inhuman or degrading treatment. It further demonstrates that states are erecting barriers to prevent prisoners from raising legal challenges to execution methods. Part III (paragraph 15) highlights state efforts to revive execution methods that have already been determined to be cruel, inhuman or degrading punishment. Part IV (paragraph 16) sets forth details of several executions in 2013 and 2014 that demonstrate that the changes in execution protocols are resulting in executions that are torture or cruel, inhuman or degrading punishment. Suggested questions and recommendations appear on page 11.

I. Background

1. The Advocates submits the following report in response to the Committee’s request for “information on steps taken to address the continuous concern that executions by lethal injection can cause severe pain and suffering.”¹ Many of the cases cited in part IV occurred after the U.S. government submitted its report in August 2013 and so present new and compelling evidence of serious problems with the death penalty not addressed by the government.

2. All 32 U.S. states that still retain the death penalty and the U.S. federal government have adopted lethal injection as the exclusive or primary means of implementing capital punishment.²

a. Traditional Lethal Injection Protocols Have Raised Human Rights Concerns.

3. Lethal injection was traditionally administered by injecting a prisoner with three consecutive drugs: (1) sodium thiopental, a “barbiturate sedative that induces a deep, coma-like unconsciousness”; (2) pancuronium bromide, “a paralytic agent that inhibits muscular-skeletal

¹ Committee Against Torture, “List of Issues prior to the submission of the fifth periodic report on United States of America,” (Jan. 20, 2009) CAT/C/USA/Q/5, ¶ 31(b).

² *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/methods-execution> (last visited Aug. 25, 2014).

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movements and . . . stops respiration”; and (3) potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.”³ Proper administration of the first drug should prevent pain caused by the second and third drugs.⁴ When inexperienced technicians administer these drugs, however, severe pain and suffering can result.

4. The three-drug injection procedure is intended to be a more humane alternative to older execution methods such as hanging, the firing squad, the electric chair, or the gas chamber. A number of recent executions, however, have cast the “humanity” of the procedure into doubt. In 2006, Ohio’s execution of Joseph L. Clark lasted nearly 90 minutes because prison officials had difficulties locating a suitable vein for the lethal injection.⁵ In 2007, Ohio’s execution of Christopher Newton lasted nearly two hours, long enough that Newton was permitted to take a bathroom break.⁶ And in 2009, the execution of Romell Broom failed altogether, as Ohio technicians unsuccessfully searched for a suitable vein to inject for over two hours before finally abandoning the execution and sending Broom back to death row (where he still sits).⁷

5. Ohio is not the only state to have conducted prolonged and problematic executions using the traditional lethal injection protocol. For example, the state of Florida’s 2006 execution of Angel Diaz lasted 34 minutes and required two rounds of injections to complete. It resulted in chemical burns on Diaz’ arms where administrators had pushed needles through his veins into soft tissue.⁸

b. The U.S. Supreme Court Allows Lethal Injection to Continue.

6. The Committee recommended that the United States “carefully review its execution methods,”⁹ in particular lethal injection, in order to prevent severe pain and suffering. Instead, the opposite has occurred. Despite a spate of horrific executions, the U.S. Supreme Court held in 2008 that Kentucky’s three-drug method of lethal injection does not constitute “cruel and unusual punishment” in violation of the Eighth Amendment of the U.S. Constitution.¹⁰ In *Baze v. Rees*, two inmates on Kentucky’s death row challenged the use of the three-drug injection procedure, claiming that there is a “significant risk” that the procedure would not be properly followed, which would result in severe pain in violation of the Eighth Amendment.¹¹ The Supreme Court ruled otherwise, holding that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual [punishment]” under

³ *Baze v. Rees*, 553 U.S. 35, 44 (2008).

⁴ Such pain would otherwise occur as a result of the paralysis and cardiac arrest.

⁵ Jim Provance & Christina Hall, *Clark Execution Raises Lethal-Injection Issues*, TOLEDO BLADE (May 4, 2006) available at <http://www.toledoblade.com/local/2006/05/04/Clark-execution-raises-lethal-injection-issues.html> (last visited June 25, 2014).

⁶ Julie Carr Smyth, *Newton Execution Took Two Hours; Vein Couldn’t Be Located*, THE PLAIN-DEALER (May 25, 2007) available at http://blog.cleveland.com/pdextra/2008/11/newton_execution_took_two_hour.html (last visited June 25, 2014).

⁷ Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, N.Y. TIMES (Sept. 16, 2009) available at www.nytimes.com/2009/09/17/us/17ohio.html (last visited June 25, 2014).

⁸ Victoria Gill, *The Search For a Humane Way to Kill*, BBC NEWS MAGAZINE (Aug. 7, 2012) available at www.bbc.co.uk/news/magazine-19060961 (last visited June 25, 2014).

⁹ Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States*,” (July 25, 2006), CAT/C/USA/CO/2, ¶ 31.

¹⁰ *Baze v. Rees*, 553 U.S. 35 (2008).

¹¹ *Id.* at 49.

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the Eighth Amendment.¹² There has been no further Supreme Court review of whether lethal injection procedures create an intolerable risk of harm, despite states' making considerable changes to execution protocols and despite evidence of increasing numbers of botched executions.

7. Although the *Baze* decision did not require a change to the traditional three-drug protocol, the U.S. lethal injection process has nonetheless faced upheaval over the last several years. Challenges to other U.S. states' lethal injection procedures have since been brought in other state and federal courts and, in some cases, have halted executions pending litigation.¹³

II. Drug Sourcing Difficulties Prompt States to Adopt New Execution Strategies That Increase the Likelihood That Executions Will Constitute Torture or Cruel, Inhuman or Degrading Punishment and to Erect Barriers to Prevent Prisoners from Raising Legal Challenges to Execution Methods.

a. States Face Increasing Difficulty Obtaining Lethal Injection Drugs

8. Policies adopted by other governments and regional authorities have hindered U.S. states' ability to procure the drugs necessary to administer lethal injections. In 2010, the United Kingdom issued export restrictions on sodium thiopental after learning the drug was used for executions in the United States.¹⁴ In early 2011, the Italian government requested that Hospira Inc., the world's largest manufacturer of sodium thiopental, guarantee that any drugs it produced would not be used for executions.¹⁵ Hospira responded it was unable to guarantee compliance and halted production of sodium thiopental altogether.¹⁶ In December 2011, the European Commission (EC) of the EU tightened restrictions on exporting products that can be used for capital punishment.¹⁷ The EC's so-called "Torture Goods Regulation" imposes export controls on eight barbiturates, including sodium thiopental and pentobarbital,¹⁸ and reiterates the moral opposition of European governments to capital punishment and their resistance to furthering the practice in any way.

9. In addition to the policies adopted by foreign governments and the EU, the international business community has also begun taking steps to curtail its role in lethal injections. In February 2011, multinational pharmaceutical company Novartis and its subsidiary Sandoz announced that they had instructed distributors to stop selling sodium thiopental to customers that had been

¹² Id. at 50.

¹³ See *State-by-State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Aug. 25, 2014).

¹⁴ Dominic Casciana, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS, Nov. 29, 2010, <http://www.bbc.co.uk/news/uk-11865881?print=true> (last visited Aug. 25, 2014).

¹⁵ Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons*, BLOOMBERG BUSINESSWEEK, Feb. 7, 2013, <http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (last visited Aug. 25, 2014).

¹⁶ *Ibid.*

¹⁷ Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN (Dec. 20, 2011) available at <http://www.guardian.co.uk/world/2011/dec/20/death-penalty-drugs-european-commission> (last visited Aug. 25, 2014).

¹⁸ Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons*, BLOOMBERG BUSINESSWEEK (Feb. 7, 2013) available at <http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (last visited Aug. 25, 2014).

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importing it into the U.S.¹⁹ Kayem Pharmaceuticals also stopped selling sodium thiopental,²⁰ and a host of other pharmaceutical manufacturers have openly opposed the use of their drugs in executions as well.²¹

b. State Lethal Injection Practices Are Evolving.

10. As U.S. states face growing barriers to obtaining execution drugs, they have begun to turn to unregulated and non-transparent sourcing for lethal injection drugs. As they do so, concerns about whether lethal injection constitutes cruel and unusual punishment have escalated.

i. States Increasingly Rely on Unregulated Compounded Drugs to Conduct Executions.

11. Some states are obtaining drugs, or the components to manufacture drugs, from compounding pharmacies, which produce drugs that are not verified by the U.S. Food and Drug Administration (FDA) for their “quality, safety and effectiveness.”²² Compounding pharmacies are not regulated by the FDA, and the FDA does not verify the safety or effectiveness of compounded drugs.²³ Mississippi allegedly went one step further and bought the raw ingredients for lethal injection drugs from a compounding pharmacy, intending to have the drugs compounded later, though the state would offer no details about how it intended to prepare the lethal injection drugs, the people involved, or their qualifications.²⁴

ii. States Turn to Dubious Sources to Obtain Execution Drugs.

12. Other states are reportedly obtaining manufactured drugs from dubious sources. When supplies of sodium thiopental were scarce in 2010, Arizona executed Jeffrey Landrigan with drugs purchased from a pharmaceutical company operating in the back of a London driving school.²⁵ Nebraska and South Dakota have turned to questionable Indian drug manufacturers to source their lethal injection ingredients.²⁶ When drugs originate from sources outside of federal

¹⁹ Ibid.

²⁰ Mandakini Gahlot, *Indian Entrepreneur Refuses to Sell U.S. Lethal Injection Drugs*, NBC NEWS (July 30, 2014), <http://www.nbcnews.com/news/asian-america/indian-entrepreneur-refuses-sell-u-s-lethal-injection-drugs-n168571>.

²¹ Reprieve, *Ethical Statements from Pharmaceutical Firms*, (May 29, 2014)

http://www.reprieve.org.uk/publiceducation/2012_03_26_ethical_statements/

²² The Special Risks of Pharmacy Compounding, U.S. Food and Drug Administration, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm107836.htm> (last visited Aug. 25, 2014).

²³ U.S. Food and Drug Administration, “*Compounding and the FDA: Questions and Answers*,” <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm> (last visited Aug. 28, 2014).

²⁴ Tracy Connor, *Mississippi Death Row Inmate Michelle Byrom Challenges Drugs*, NBC NEWS (March 28th 2014), <http://www.nbcnews.com/storyline/lethal-injection/mississippi-death-row-inmate-michelle-byrom-challenges-drugs-n66301> (last visited Oct. 8, 2014).

²⁵ Andrew Hosken, *Lethal Injection Drug Sold from UK Driving School*, BBC NEWS (Jan. 6, 2011) available at <http://news.bbc.co.uk/1/hi/today/9342000/9342976.stm> (last visited Aug. 25, 2014).

²⁶ *Kayem Pharma under fire over supply of lethal injection drug; Lundbeck Company of Denmark also caught up in legal tussle* (June 2, 2011) available at <http://deathpenaltynews.blogspot.co.uk/2011/06/kayem-pharma-under-fire-over-supply-of.html> (last visited Aug. 25, 2014). The Indian manufacturer, Kayem Pharma, subsequently pledged to stop providing drugs for use in lethal injections (Kevin O’Hanlon, *Company says it no longer will sell drug for lethal injection*, LINCOLN JOURNAL STAR (April 07, 2011), http://journalstar.com/news/state-and-regional/nebraska/article_4ec6475d-e308-5647-85e0-78769e6f4c0f.html).

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oversight and regulation, there is a greater likelihood of tampering, improper labeling, and diminished potency, quality, and efficacy of those drugs²⁷—factors that elevate the risk that an execution will constitute torture or cruel, inhuman or degrading punishment.

iii. Medical Professionals Are Entangled in Executions and Drug Procurement, in Violation of Professional Ethics.

13. Medical ethics bar physicians and anesthesiologists from participating in executions;²⁸ however, many state laws either require or recommend that a physician be present at executions.²⁹ This condition places medical personnel in the untenable position of being required to violate professional ethics to perform their job. After discovering that medical staff under his supervision had assisted in procuring lethal injection drugs, Dr. Marc Stern, former assistant secretary of healthcare for the Washington Department of Corrections, felt obligated to resign, remarking, “Procurement of the drugs was a direct violation of ethics by the personnel involved.”³⁰ The ethical bar to physician participation in executions also means that execution teams often lack sufficient medical training to properly administer the drugs, resulting in botched executions such as Clayton Lockett’s.

c. States Use Secrecy Laws to Create Barriers for Prisoners Seeking to Raise Legal Challenges to Execution Methods.

14. As U.S. states increasingly turn to questionable sources, several states have adopted secrecy laws to conceal the identity of drug suppliers and the identities and qualifications of the execution team.³¹ The Georgia State Assembly recently passed a law that classifies the identity of any person or company providing drugs for use in lethal injections as a “state secret.”³² Other states, including Arkansas, Colorado, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, and Texas have also adopted secrecy laws or protocols protecting the

²⁷ *Unapproved Prescription Drugs: Drugs Marketed in the United States That Do Not Have Required FDA Approval*, FEDERAL DRUG ADMINISTRATION, <http://www.fda.gov/drugs/guidancecomplianceregulatoryinformation/enforcementactivitiesbyfda/selectedenforcementactionsonunapproveddrugs/default.htm> (last visited Oct. 6, 2014).

²⁸ American Medical Association, *Opinion 2.06 Capital Punishment*, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?> (last visited Oct. 1, 2014); American Board of Anesthesiologists, *Commentary (May 2014): Anesthesiologists and Capital Punishment*, <http://www.theaba.org/pdf/CapitalPunishmentCommentary.pdf> (last visited Oct. 1, 2014).

²⁹ Lee Black, JD, LLM and Robert M. Sade, MD, *Lethal Injection and Physicians: State Law vs Medical Ethics*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (December 19, 2007), <http://www.deathpenaltyinfo.org/node/2264> (last visited Oct. 1, 2014).

³⁰ M. Stern, *I was told to approve a lethal injection, but it violates my basic medical ethics*, THE GUARDIAN (August 6, 2014), <http://www.theguardian.com/commentisfree/2014/aug/06/lethal-injection-medical-ethics-botched-executions> (last visited Oct. 1, 2014).

³¹ Kathy Lohr, *Where Do Drugs For Lethal Injections Come From? Few Know*, NPR (July 30, 2013) available at <http://www.npr.org/2013/07/30/207026540/where-do-drugs-for-lethal-injections-come-from-nobody-knows> (last visited Aug. 25, 2014); Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE (Aug. 1, 2013) available at <http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/> (last visited Aug. 25, 2014).

³² Ed Pilkington, *Georgia Scrambles For Fresh Supply of Drugs to Execute Death Row Inmate*, THE GUARDIAN, (July 12, 2013) available at <http://www.guardian.co.uk/world/2013/jul/12/georgia-drugs-execute-death-row-inmate> (last visited Aug. 25, 2014).

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identity of their drug sources.³³ Still more states, including Ohio, are considering enacting secrecy laws.³⁴ Legal objections are being raised that suppressing these suppliers' identities allows the state to withhold critical information about the drugs' effectiveness in executing a person without suffering, infringing on the due process rights of condemned prisoners, and violating prisoners' right to a remedy for violations of the Convention.³⁵

III. States Are Exploring Alternative Execution Methods That Are Cruel and Inhuman.

15. The lack of available lethal injection drugs also has led some U.S. states to revive execution methods that previously have been determined to constitute cruel and inhuman punishment. The Committee in its List of Issues expressed its concern over the use of the electric chair by some states.³⁶ Despite concerns that it constitutes cruel and inhuman punishment, Tennessee enacted a law in May 2014 that will allow the state to execute death row inmates using the electric chair in the event lethal injection drugs are unavailable.³⁷ Several states allow inmates to choose the electric chair instead of lethal injection, but Tennessee is the first to mandate use of this method since the Nebraska Supreme Court ended that state's sole use of electrocution as its execution method in 2008 by ruling it constituted cruel and unusual punishment under the state's constitution.³⁸ In the neighboring state of Missouri, the attorney general has suggested that resurrecting the use of the gas chamber may be an option following the state supreme court's refusal to set execution dates while a legal challenge to the state's lethal injection protocol is pending.³⁹ The Human Rights Committee in *Ng v. Canada* recognized that the International Covenant on Civil and Political Rights, which the United States has ratified, prohibits execution by gas asphyxiation because it "constitutes cruel and inhuman treatment."⁴⁰

³³ Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE (Aug. 1, 2013) available at <http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/> (last visited Aug. 25, 2014). *Tennessee Plans Executions in Secret*, THE TENNESSEAN (Mar. 23, 2013), available at <http://www.tennessean.com/story/news/crime/2014/03/23/tennessee-plans-executions-secret/6765403/> (last visited Aug. 25, 2014); *Secrecy Surrounds Execution Drugs in Most States*, THE ASSOCIATED PRESS (Apr. 5, 2014) available at <http://bigstory.ap.org/article/secrecy-surrounds-execution-drugs-most-states> (last visited Aug. 25, 2014).

³⁴ Josh Sanburn, *States Try Secrecy to Protect Lethal Injection Drugmakers*, TIME (Oct. 1, 2014), <http://time.com/3450777/ohio-lethal-injection-secrecy-law-drugs/> (last visited Oct. 1, 2014).

³⁵ *Ibid.*

³⁶ Committee Against Torture, "List of Issues prior to the submission of the fifth periodic report on United States of America," (Jan. 20, 2009) CAT/C/USA/Q/5, ¶ 31(c).

³⁷ *Tennessee Brings Back Electric Chair During Lethal Injection Drug Scarcity*, FOX NEWS (May 23, 2014) available at <http://www.foxnews.com/politics/2014/05/23/tenn-brings-back-electric-chair/> (last visited Aug. 25, 2014). Several states allow inmates to choose the electric chair instead of lethal injection, but Tennessee is the first to mandate electrocution when drugs are unavailable. Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES (Feb. 9, 2008) available at http://www.nytimes.com/2008/02/09/us/09penalty.html?_r=0 (last visited Aug. 25, 2014).

³⁸ Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES (Feb. 9, 2008) available at http://www.nytimes.com/2008/02/09/us/09penalty.html?_r=0 (last visited June 25, 2014).

³⁹ Tony Rizzo, *Missouri's Attorney General Hints at Gas Chamber's Return*, KANSAS CITY STAR (July 3, 2013) available at <http://www.kansascity.com/2013/07/03/4327272/missouri-attorney-general-koster.html> (last visited June 25, 2014).

⁴⁰ Human Rights Comm. Commc'n No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), para. 16.4.

IV. Recent Executions Demonstrate That These Changes Are Resulting in Torture or Cruel, Inhuman or Degrading Punishment.

16. As described in Part III above, in response to the scarcity of traditionally used lethal injection drugs, retentionist states have adopted two approaches in their search for new execution methods: (1) some states have adopted new, experimental execution protocols using manufactured drugs; (2) other states have turned to unregulated compounded versions of drugs used in traditional protocols. Under both approaches, the use of such uncharted means of execution has demonstrably increased the risks of executions constituting torture or cruel, inhuman or degrading punishment.⁴¹ The following is a synopsis of recent executions using these new methods. The U.S. report was submitted before these executions took place and so includes no information on the substantial evidence that severe pain and suffering occur under these new protocols.

- a. On October 15, 2013, the state of Florida executed William Happ, the first condemned prisoner to be executed using an untested three-drug method using midazolam hydrochloride in place of pentobarbital, which prisons could no longer purchase commercially. It was reported the execution took twice as long as under the previous protocol and that Happ continued moving even after the administration of the drug meant to render him unconscious.⁴² The state executed Darius Kimbrough and Askari Muhammad on November 11, 2013 and January 7, 2014 using the same drug protocol.⁴³
- b. The states of Arizona, Louisiana, and Ohio adopted a new, two-drug execution protocol, composed of an untested combination of midazolam and hydromorphone. This is also the back-up protocol in Kentucky. Ohio used these drugs to execute Dennis McGuire on January 16, 2014. In a clearly botched execution lasting roughly 25 minutes, McGuire proceeded to violently gasp for breath and otherwise struggle—a condition known as “air hunger.”⁴⁴ Ohio had received warnings from several doctors that the new protocol could inflict severe pain but nevertheless proceeded with McGuire’s execution.⁴⁵ A

⁴¹ Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES (Nov. 8, 2013) available at <http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html> [hereinafter Fernandez].

⁴² *Florida Murderer Who Raped and Killed Woman is Left Writhing in Agony and Takes Twice as Long to Die as He is Executed Using New Untried Lethal Injection Drug*, DAILY MAIL (Oct. 16, 2013), <http://www.dailymail.co.uk/news/article-2462115/William-Happ-executed-Florida-executes-murderer-using-untried-lethal-injection-drug.html> (last visited Aug. 25, 2014).

⁴³ Bill Cotterell, *Florida Executes Man with New Lethal Injection Drug*, Reuters (Oct. 15, 2013), <http://www.reuters.com/article/2013/10/16/us-usa-florida-execution-idUSBRE99F00020131016>; *Fla. Executes Man for Illinois Woman’s 1986 Murder*, Associated Press (Oct. 15, 2013), <http://tbo.com/news/crime/happ-to-be-executed-today-for-1986-citrus-county-murder-20131015/>; Death Penalty Information Center, “Execution List 2013,” accessed Feb. 2, 2014, <http://www.deathpenaltyinfo.org/execution-list-2013>; Death Penalty Information Center, “Execution List 2014,” accessed Feb. 2, 2014, <http://www.deathpenaltyinfo.org/execution-list-2014>.

⁴⁴ *Ohio Execution Took 25 Minutes with New Drugs*, SKY (Jan. 16, 2014) available at <http://news.sky.com/story/1196057/ohio-execution-took-25-minutes-with-new-drugs> (last visited Aug. 25, 2014).

⁴⁵ B. Crair, *Exclusive Emails Show Ohio’s Doubts About Lethal Injection*, NEW REPUBLIC (Aug. 17, 2014), <http://www.newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution> (last visited October 1, 2014).

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federal judge has imposed a moratorium on executions in Ohio until January 2015 over concerns with the state's lethal injection protocol.⁴⁶

- c. On July 23, 2014, Arizona executed Joseph Rudolph Wood III using the same midazolam and hydromorphone protocol.⁴⁷ Wood's attorneys filed court motions over concerns about the drugs and the Arizona Department of Corrections' refusal to provide information about the origins of the drugs to be used for Wood's execution.⁴⁸ The execution was allowed to proceed without disclosure of the drug sourcing or the qualifications of the executioners.⁴⁹ Wood was pronounced dead nearly two hours after the drugs' initial administration,⁵⁰ although the lethal injection process normally lasts only 10 or 11 minutes.⁵¹ Even though Arizona's protocol calls only for one dose, Wood was injected with 14 additional doses of the lethal injection drugs.⁵² During the execution, a reporter noted Wood "gulped like a fish on land. The movement was like a piston: The mouth opened, the chest rose, the stomach convulsed."⁵³ At times when the speaker from the execution chamber to the observation room was activated, the reporter could tell that during these convulsions, Wood made "a snoring, sucking [sound], similar to when a swimming-pool filter starts taking in air, a louder noise than [the reporter] can imitate It was death by apnea. And it went on for an hour and a half. I made a pencil stroke on a pad of paper, each time his mouth opened, and ticked off more than 640, which was not all of them, because the doctor came in at least four times and blocked my view."⁵⁴
- d. In late 2013, Missouri, North Carolina, and Tennessee announced plans to use a one-drug protocol, with Missouri and Tennessee stating their intent to obtain the drug through a compounding pharmacy.⁵⁵ It was later revealed that Missouri had been administering the

⁴⁶ A. Johnson, *Moratorium on Ohio's executions extended until January*, COLUMBUS DISPATCH (August 11, 2014), <http://www.dispatch.com/content/stories/local/2014/08/11/Moratorium-on-lethal-injections-in-Ohio-extended.html> (last visited October 1, 2014).

⁴⁷ Matt Pearce et al., *Arizona Killer Takes 2 Hours to Die, Fueling Lethal-Injection Debate*, L.A. TIMES, July 23, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-arizona-execution-20140723-story.html>.

⁴⁸ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

⁴⁹ The Arizona Supreme Court lifted its stay of execution, and the U.S. Supreme Court lifted a stay issued by the U.S. Court of Appeals for the Ninth Circuit. *Ibid.*

⁵⁰ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

⁵¹ *Ibid.*

⁵² F. Santos and J. Schwarz, *Arizona Loose With Its Rules in Executions, Records Show*, NEW YORK TIMES (August 17, 2014), <http://www.nytimes.com/2014/08/18/us/arizona-loose-with-its-rules-in-executions-records-show.html> (last visited Oct. 1, 2014).

⁵³ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

⁵⁴ *Ibid.*

⁵⁵ Lucas L. Johnson II, *Tennessee Revises Protocol for Executions*, ASSOCIATED PRESS (Sept. 30, 2013) available at <http://www.memphisdailynews.com/news/2013/sep/30/tennessee-revises-protocol-for-executions>; Anne Blythe, *NC Public Safety Secretary Changes Death Row Execution Protocol*, NEWS AND OBSERVER, (Nov. 5, 2013) available at <http://www.newsobserver.com/2013/11/05/3344126/north-carolina-public-safety-secretary.html>; *Missouri Switches*

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drug midazolam in advance of executions and out of sight of witnesses since November 2013, despite saying that it did not use the drug in executions. Though the state claimed that it administered the drug only as a sedative, medical experts claim that the amount administered was far over a regular dose and would make the condemned prisoner “difficult to arouse.”⁵⁶

- e. On January 9, 2014, Oklahoma carried out its first execution using compounded pentobarbital. Concerns were raised that the execution had miscarried after the final words of the inmate, Michael Lee Wilson, were “I feel my whole body burning.”⁵⁷ Despite the apparent pain caused during the first execution, on January 24, Kenneth Eugene Hogan was executed using the same protocol.⁵⁸
- f. On April 29, 2014, Oklahoma inmate Clayton Lockett died approximately 40 minutes after the state began his execution by administering the first drug in a three-drug protocol the state had not previously used or tested.⁵⁹ Lockett was declared unconscious ten minutes after the administration of the drug; then, according to witnesses, he began to nod, mumble, and writhe on the gurney and appeared to some witnesses to be having a seizure.⁶⁰ Thirty-three minutes later, Lockett died while Oklahoma was considering stopping the execution. An investigation found that the poorly trained execution team had incorrectly inserted the IV that delivered the lethal injection drugs and then had not monitored the site so that they did not notice when the IV stopped delivering the lethal injection drugs correctly.⁶¹ Lockett’s family is suing the state of Oklahoma alleging that the drug combination had never been tested and accusing state officials of deliberate indifference to the risk of torture being inflicted on Lockett.⁶² A federal judge recently allowed a lawsuit by inmates challenging Oklahoma’s lethal injection protocol to proceed and urged state officials to delay executions scheduled for November 13, November 20,

to *New Execution Drug*, ASSOCIATED PRESS (Oct. 22, 2013) available at

<http://deathpenaltynews.blogspot.com/2013/10/missouri-switches-to-new-execution-drug.html>.

⁵⁶C. McDaniel, *Missouri Swore It Wouldn’t Use A Controversial Execution Drug. It Did*, ST. LOUIS PUBLIC RADIO, (September 2, 2014), <http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did> (last visited Oct. 1, 2014).

⁵⁷ “*I Feel My Whole Body Burning: Last Words of a Man Executed by Lethal Injection in Oklahoma*,” DAILY MAIL (Jan. 10, 2014) available at <http://www.dailymail.co.uk/news/article-2536976/I-feel-body-burning-Man-executed-lethal-injection-Oklahoma-beating-convenience-store-worker-death-1995.html> (last visited Aug. 25, 2014).

⁵⁸ *Profile of Kenneth Eugene Hogan’s Execution*, Clark County Prosecutor Database, available at <http://www.clarkprosecutor.org/html/death/US/hogan1364.htm> (last visited Aug. 25, 2014).

⁵⁹ *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Aug. 25, 2014).

⁶⁰ *Oklahoma Botches Execution of Clayton Lockett*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/node/5760> (last visited Aug. 25, 2014).

⁶¹ M. Berman, *Oklahoma investigation into botched execution finds problems with IV insertion, training of execution team*, WASHINGTON POST (September 4, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/04/oklahoma-investigation-into-botched-execution-finds-problems-with-iv-insertion-training-of-execution-team/> (last visited Oct. 1, 2014).

⁶² E. Pilkington, *Oklahoma delays executions again despite unveiling new death chamber*, THE GUARDIAN (Oct. 13, 2014) <http://www.theguardian.com/us-news/2014/oct/13/oklahoma-delays-executions-again-days-after-unveiling-new-death-chamber> (last visited Oct. 17, 2014).

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and December 4, 2014.⁶³ The attorney general of Oklahoma has filed an application for court permission to extend those execution dates by 60 days.⁶⁴

V. Suggested Questions and Recommendations

Suggested questions

- What assurances can the United States provide that new lethal injection protocols will not result in torture or cruel, inhuman or degrading punishment?
- Given the strong evidence that current lethal injection protocols in some states inflict severe pain and suffering on condemned prisoners, what steps is the United States taking to prevent further inhuman executions from taking place?
- What steps is the United States taking to ensure appropriate transparency and information about the sources of lethal injection drugs and the protocols used in executions with a view to ensuring these drugs do not result in torture or cruel, inhuman or degrading punishment?
- How is the United States ensuring due process and access to a remedy for detainees seeking to challenge their imminent execution as violating the Convention, in light of the secrecy surrounding lethal injection protocols?
- Will the federal government assist and cooperate with people sentenced to death in their efforts to determine the origins of the drugs that will be used for their lethal injections?
- What measures is the United States taking to ensure that state prison authorities do not unlawfully import or transfer drugs for use in lethal injection procedures?
- What steps is the United States taking to ensure the medical competence of the personnel carrying out an execution?

Suggested Recommendations

- The U.S. federal government and U.S. states should impose a moratorium on the death penalty in light of the risk of imposing torture or cruel, inhuman or degrading punishment by lethal injection.
- The U.S. federal government should enact legislation to ensure that lethal injections are carried out: (1) via well-tested procedures that do not subject prisoners to unnecessary pain; (2) with full oversight and transparency of the sourcing and administration of the

⁶³Z. Branstetter, *Federal judge urges state to delay executions*, TULSA WORLD (September 19, 2014) http://www.tulsaworld.com/corrections/federal-judge-urges-state-to-delay-executions/article_21cccee6-e4ed-5120-9158-be950bde6e5e.html (last visited Oct. 1, 2014).

⁶⁴E. Pilkington, *Oklahoma delays executions again despite unveiling new death chamber*, THE GUARDIAN (Oct. 13, 2014) <http://www.theguardian.com/us-news/2014/oct/13/oklahoma-delays-executions-again-days-after-unveiling-new-death-chamber> (last visited Oct. 17, 2014).

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drugs; and (3) using drugs regulated and approved by the U.S. Food and Drug Administration.

- In full compliance with the decision of the U.S. Court of Appeals for the D.C. Circuit's decision in *Cook et al. v FDA et al.*,⁶⁵ the U.S. Food and Drug Administration should bar importation of any drug which is found to be in violation of § 21 U.S.C. 381(a) and should seize drugs imported in violation of that statute.⁶⁶

⁶⁵ See *Cook et al., v. Food and Drug Administration et al.*, case number 12-5176, U.S. Court of Appeals for the D.C. Circuit.

⁶⁶ 21 U.S.C. § 381(a)(1)-(4) states:

(1) such article has been manufactured, processed, or packed under insanitary conditions or, in the case of a device, the methods used in, or the facilities or controls used for, the manufacture, packing, storage, or installation of the device do not conform to the requirements of section 360j (f) of this title, or

(2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or

(3) such article is adulterated, misbranded, or in violation of section 355 of this title or the importer (as defined in section 384a of this title) is in violation of such section 384a of this title, or prohibited from introduction or delivery for introduction into interstate commerce under section 331 (l) of this title, or

(4) the recordkeeping requirements under section 2223 of this title (other than the requirements under subsection (f) of such section) have not been complied with regarding such article, then such article shall be refused admission, except as provided in subsection (b) of this section. With respect to an article of food, if importation of such food is subject to, but not compliant with, the requirement under subsection (q) that such food be accompanied by a certification or other assurance that the food meets applicable requirements of this chapter, then such article shall be refused admission. If such article is subject to a requirement under section 379aa or 379aa-1 of this title and if the Secretary has credible evidence or information indicating that the responsible person (as defined in such section 379aa or 379aa-1 of this title) has not complied with a requirement of such section 379aa or 379aa-1 of this title with respect to any such article, or has not allowed access to records described in such section 379aa or 379aa-1 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations, except that the Secretary of Health and Human Services may destroy, without the opportunity for export, any drug refused admission under this section, if such drug is valued at an amount that is \$2,500 or less (or such higher amount as the Secretary of the Treasury may set by regulation pursuant to section 1498 (a)(1) of title 19) and was not brought into compliance as described under subsection (b).. [1] The Secretary of Health and Human Services shall issue regulations providing for notice and an opportunity to appear before the Secretary of Health and Human Services and introduce testimony, as described in the first sentence of this subsection, on destruction of a drug under the sixth sentence of this subsection. The regulations shall provide that prior to destruction, appropriate due process is available to the owner or consignee seeking to challenge the decision to destroy the drug. Where the Secretary of Health and Human Services provides notice and an opportunity to appear and introduce testimony on the destruction of a drug, the Secretary of Health and Human Services shall store and, as applicable, dispose of the drug after the issuance of the notice, except that the owner and consignee shall remain liable for costs pursuant to subsection (c). Such process may be combined with the notice and opportunity to appear before the Secretary and introduce testimony, as described in the first sentence of this subsection, as long as appropriate notice is provided to the owner or consignee. Clause (2) of the third sentence of this paragraph [2] shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under the Controlled Substances Import and Export Act [21 U.S.C. 951 et seq.].