

Reality v. Illusion: What I Saw When I Witnessed 16 Executions

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“WITNESSING means both being present at an event and taking it in. It means having a responsibility to it, the obligation of telling the tale.”¹

INTRODUCTION

I witnessed sixteen executions.²

John Joubert
Michael Beuke
Jeffrey Landrigan
Donald Beaty
Richard Bible
Robert Moormann
Robert Towery
Samuel Lopez
Daniel Cook
Richard Stokley
Edward Schad
Robert Jones
Joseph Wood
Joseph Garcia
Keith Nelson
Aaron Gunches

I watched these men die.

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¹ ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 167 (2000).

² At the time of my presentation at the symposium on February 7, 2025, I had witnessed fifteen executions.

I remember each of their names and faces. Some I knew very well as I represented them for years in litigation challenging their convictions and death sentences, or the constitutionality of the protocols that state or federal governments planned to use to carry out their executions. Others I met in the months leading up to their scheduled executions as they knew their court proceedings were coming to an end. A few I never met, seeing them for the first time when they were splayed on the execution gurney and tightly strapped down. In each instance, I was there to bear witness to what the government was about to do to one of its citizens.

Each of the witness rooms were somewhat generic. A drab, institutional color of paint hung on the walls. Some witness rooms had benches or chairs where witnesses would sit and fidget, waiting for the event to begin. Others were standing room only. The rooms where the condemned persons would take their last breath were brightly lit. All had a window separating the witnesses from the person about to die, giving the illusion that one was just watching an episode of a series on a big screen television. There are rituals associated with executions, and each jurisdiction has its own.

Of the sixteen executions I witnessed, one was by electrocution and the rest were by lethal injection. Witnesses to an electrocution see the brutality and the gruesomeness of the act. It is right before your eyes. There is little the government can do to hide what is happening. Lethal injection executions are just as brutal, but the government goes out of its way to sanitize and medicalize the process. It creates an illusion and false impression that the condemned person is simply lying on a bed, being attended to by people dressed in medical garb and, after a quick shot, the person is simply drifting off to sleep. That is not reality.

First, I will briefly describe the long-standing practice of allowing people to witness executions and the reasons some choose to do so. Next, I will describe what I saw and heard during the sixteen executions I witnessed. The accounts vary, depending on the vagaries of the execution processes and protocols in place at the different prisons and what the witnesses were allowed to see and hear. Then, I will discuss the degrees of transparency the prisons allowed over the nearly thirty years that I witnessed executions, and observe that more accountability and transparency are needed, not only during the execution process, but beyond. Finally, I will conclude by offering my reflections to contribute to the ongoing discussions and debates about the death penalty in deciding whether it is still sound public policy.

I. THE RIGHT AND THE NEED TO WITNESS EXECUTIONS

“Historically, executions were open to all comers.”³ Even as the methods of executions have changed, a long-standing tradition of public access has remained the baseline.⁴ Moreover, even after executions moved from the public square to behind prison walls, the public was still permitted access to this stage of the criminal

³ Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 875 (9th Cir. 2002).

⁴ *Id.* at 876 (noting that the public viewed executions by hanging and by lethal gas).

proceedings.⁵ Because executions have been “fully open events in the United States,” the “historical tradition strongly supports the public’s First Amendment right” of access to information regarding the entire execution process.⁶

Public access to executions is functionally important for several reasons. “Independent public scrutiny” is critical in ensuring “the proper functioning of capital punishment.”⁷ Where the public is permitted to scrutinize a governmental process, it “enhances the quality and safeguards the integrity” of the process.⁸ Moreover, “an informed public debate is critical in determining whether execution[s] . . . comport[] with ‘the evolving standards of decency which mark the progress of a maturing society.’” “[C]itizens must have reliable information” in order to determine whether “executions are fairly and humanely administered[.]”¹⁰ “And if you want the public to have confidence in the administration of justice, it seems to me like you would want transparency to be at its highest when (government) is taking its most draconian action.”¹¹

Permitting selected witnesses to attend and view executions contributes to the overall transparency of the death penalty process. Public oversight, in the form of impartial witnesses, can help ensure that the execution is carried out in a manner where the condemned is not purposely tortured or abused during the entire process. This right serves as a check against potential misconduct or procedural errors during an execution.

Allowing a person sentenced to death to choose witnesses to attend and view the execution ensures additional transparency. It can also provide psychological and emotional support to the condemned person in their final moments.

This is why there are witnesses to executions, but the question remains: why do people witness executions? There are a variety of reasons. A condemned person’s lawyer “may be present as a comfort to their client or to provide any last-minute legal representation. Still others witness out of a sense of duty or because it is their job to do so.”¹² Victim family members may “seek closure and consolation.”¹³

⁵ *Id.* at 875–76.

⁶ *Id.* at 875.

⁷ *Id.* at 876.

⁸ *Id.* at 876 (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982)).

⁹ *Id.* at 876 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁰ *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

¹¹ Leslie Bonilla Muñoz, *Media Unlikely to Witness Indiana’s First Execution in 15 Years*, IND. CAP. CHRON. (Nov. 11, 2024, at 7:00 AM), <https://indianacapitalchronicle.com/2024/11/11/media-unlikely-to-witness-indianas-first-execution-in-15-years/> [<https://perma.cc/MP34-5GNR>].

¹² Austin Sarat, *Witnessing an Execution Is Always Problematic, Even When There’s Nothing Much to See*, HILL, (Sep. 2, 2022, at 2:45 PM ET), <https://thehill.com/opinion/criminal-justice/3625722-witnessing-an-execution-is-always-problematic-even-when-theres-nothing-much-to-see/> [<https://perma.cc/4WSU-LXCV>].

¹³ *Id.*

Broadcast journalist Ted Koppel, who decided to witness an execution, said, “If we are going to live with capital punishment we have to see it and know what it is about.”¹⁴ Former Arizona Attorney General Terry Goddard was asked why he witnessed an execution. He responded, “If I’m supposed to support this I should know what it looks like.”¹⁵ Death penalty scholar Austin Sarat, commenting on people who watch executions, wrote “I am convinced, as the cultural critic Wendy Lesser says, that doing so can be ‘nothing short of ghoulish.’”¹⁶ Elizabeth Bruenig, a staff writer at *The Atlantic*, recently wrote about her observations about viewing executions. “What I witnessed . . . has not changed my conviction that capital punishment must end. But in sometimes-unexpected ways, it has changed my understanding of why.”¹⁷

“Unless you have actually witnessed an execution, it is impossible to fully understand what it is like to be one of those spectators.”¹⁸ Why was I present when sixteen men became lifeless corpses? To bear witness.

II. A VIEW THROUGH THE LOOKING GLASS: DUALITY OF EXPERIENCES AND SURREAL SITUATIONS

“[T]he death chamber contains images and truths that are unmanageable, and unpredictable, in their human impact.”¹⁹ The first execution I witnessed was on July 17, 1996. The last one was on March 19, 2025. I watched sixteen men take their last breaths in Lincoln, Nebraska; Lucasville, Ohio; Florence, Arizona; Huntsville, Texas; and Terre Haute, Indiana. This is what I saw and heard.

A. *Call This Number*

John Joubert’s execution was the first one I witnessed. The state of Nebraska executed him by electrocution on July 17, 1996.²⁰

In the early 1990s, I was an assistant state public defender assigned to the Death Penalty Department of the Office of the Ohio Public Defender. One afternoon, I was flipping through a weekly news magazine and read a short account about a prisoner

¹⁴ *Id.*

¹⁵ Michael Kiefer & Dale Baich, *Poorly Executed: How Arizona Has Failed at Carrying Out the Death Penalty Part 1: Witness to an Execution*, ARIZ. MIRROR. (Apr. 24, 2023, at 7:10 AM), <https://azmirror.com/2023/04/24/poorly-executed-how-arizona-has-failed-at-carrying-out-the-death-penalty/> [<https://perma.cc/T448-C3KG>].

¹⁶ Sarat, *supra* note 12.

¹⁷ Elizabeth Bruenig, *Witness: Inside America’s Death Chambers*, ATL., July 2025, at 28, 28, <https://www.theatlantic.com/magazine/archive/2025/07/death-row-executions-witness/682891/> [<https://perma.cc/7R2Z-X742>].

¹⁸ LIFTON & MITCHELL, *supra* note 1, at 170.

¹⁹ LIFTON & MITCHELL, *supra* note 1, at 196.

²⁰ Joy Powell, *Joubert Dies for Boys’ Murders: Last of Appeals Rejected Hours Before Execution*, OMAHA WORLD-HERALD, July 17, 1996, at 1.

in Maine whose appeal had come to an end. John Joubert was his name. What struck me about the blurb was that John's appeal in his Maine murder case was final, and the state of Nebraska was seeking John's return so that a previously imposed death sentence could be carried out. The state of Maine did not have the death penalty as a sentencing option in murder cases.²¹

At the time, I was one of the attorneys representing Alton Coleman, who had four death sentences in three states.²² Alton had a prior federal non-capital conviction and was serving it when, at Ohio's request, the federal government secretly returned him to that state so that his subsequently imposed death sentences could be carried out.²³

John, unlike Alton Coleman, could try to prevent his transfer from Maine back to Nebraska. I drafted a letter, put together copies of the research we did in Alton's case, and mailed them to John's lawyers in Maine. I wrote that if they were going to try to prevent John's transfer from Maine to Nebraska, they needed to act before the move took place.

One day, a month or so later, my office phone rang, and it was a collect call from John Joubert. John told me that his lawyers in Maine passed my correspondence on to him as their representation ended. John asked me about the transfer issue, told me a little bit about his cases, and said that he would likely be transferred to Nebraska soon. He was.

²¹ John Joubert was convicted and sentenced to death by the electric chair for abducting and murdering two young boys outside Omaha, Nebraska. *State v. Joubert*, 399 N.W.2d 237, 241 (Neb. 1986). In a state district court in Nebraska, John entered a guilty plea to two counts of first-degree murder. *Id.* As part of the plea agreement, the State agreed not to introduce evidence that Joubert previously murdered a young boy in Maine. *Joubert v. Hopkins*, 75 F.3d 1232, 1239 (8th Cir. 1996).. After the death sentence was imposed in Nebraska, John was transferred to Maine for a trial on the murder charges. Joubert was convicted of murder in Maine. *See State v. Joubert*, 603 A.2d 861, 863 (Me. 1992).

²² *State v. Coleman*, 525 N.E.2d 792, 792 (Ohio 1988); *State v. Coleman*, 544 N.E.2d 622, 624–25 (Ohio 1989); *Coleman v. State*, 558 N.E.2d 1059, 1059 (Ind. 1990); *People v. Coleman*, 544 N.E.2d 330, 332 (Ill. 1989).

²³ After Alton was twice sentenced to death in Ohio, the state court “ordered that [Coleman] be returned to federal custody, where [he] had been serving a twenty-year federal sentence for a 1984 conviction under 18 U.S.C. § 1201(a), the federal kidnaping statute. However, the court reserved the right of the State of Ohio to request custody of Petitioner in order to carry out the Ohio sentence.” *Coleman v. Mitchell*, 268 F.3d 417, 425 (6th Cir. 2001). Subsequently, Alton “was transferred from federal to state custody for execution of the Ohio sentences while his direct appeals from his state court convictions were pending.” *Id.* at n.3. As a result, Alton filed a lawsuit challenging his transfer from federal custody to state custody prior to the completion of his federal kidnaping sentence. *See Complaint, Coleman v. Thornburgh*, No. 1:88-cv-03654-RCL (D.D.C. Dec. 28, 1988), ECF No. 1. That litigation was stayed at Alton's request during his federal habeas challenges to his convictions and death sentences. Order by Judge Royce C. Lamberth, *Coleman v. Thornburgh*, No. 1:88-cv-03654-RCL (D.D.C. Aug. 25, 1994), ECF No. 104 (“granting motion to stay proceedings and to hold case in abeyance until proceedings under 28 USC 2254 have been fully resolved[.]”) Alton Coleman was executed by the state of Ohio on April 26, 2002. Death Warrant Executed, *Ohio v. Coleman*, 525 N.E.2d 792 (Ohio 1988) (No. 1987-0192), Dkt. at Apr. 26, 2002.

John was represented by capable lawyers in Nebraska. Procedurally, his case was at the Habeas Corpus stage in federal court.²⁴ Over the next few years, John and I communicated by mail and through phone calls. We talked mostly about non-legal matters like baseball and current events. At some point in the spring of 1996, sensing what was ahead as his federal Habeas Corpus case had come to an end, John said to me that if I ever wanted to meet him before he was executed, he would be happy to see me. I traveled to Lincoln, Nebraska, and we met.

Eventually, an execution date was set for June 28, 1996. John sought numerous stays of the execution date.²⁵ On the eve of his execution, two Petitions for a Writ of Certiorari and an original Petition for Writ of Habeas Corpus, each with stay applications, were pending before the United States Supreme Court. I was in Washington, D.C. that evening and arranged to have a telephone call with John to say goodbye. We spoke.

As the time got closer to midnight, the Supreme Court denied one Petition for Writ of Certiorari,²⁶ took no action on the Habeas Corpus petition, and granted a stay of execution on the other Petition for Writ of Certiorari.²⁷ Four days later, the Supreme Court dismissed the Certiorari petition for want of Jurisdiction,²⁸ as well as the original Habeas petition.²⁹ A few days after the Supreme Court lifted the stay of execution, the Nebraska Supreme Court on July 9, 1996 issued a warrant of execution that set July 17, 1996 as the day for the execution to be carried out in the electric chair.³⁰

John and I spoke a few days after the new execution date was set. He asked if I would be able to visit him again in Lincoln before July 17. I told John I would be back to see him, and in mid-July, I returned to Nebraska to meet with John and spend

²⁴ In 1995, the federal district court granted a writ of habeas corpus, finding that John's death sentences were based on an unconstitutionally vague statutory aggravating factor. *Joubert v. Hopkins (Joubert I)*, 1994 U.S. Dist. LEXIS 21560, at *211 (D. Neb. Oct. 11, 1994). In January 1996, the Eight Circuit reversed. *Joubert v. Hopkins (Joubert II)*, 75 F.3d 1232, 1248 (8th Cir. 1996). John's death sentence was reinstated.

²⁵ See, e.g., *Joubert v. Neb. Bd. of Pardons*, 87 F.3d 966, 968 (8th Cir. 1996).

²⁶ *Joubert v. Hopkins (Joubert III)*, 518 U.S. 1029, 1029 (1996).

²⁷ *Joubert v. Hopkins (Joubert IV)*, 518 U.S. 1029, 1029 (1996). The stay was likely granted as the petition raised challenges to the application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §§ 2241–66 (1996). The following day, the Supreme Court dismissed for want of jurisdiction a successor habeas petition and original habeas petition in *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (holding that "[t]he added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9."). This doomed John's chances for the Supreme Court to review his case.

²⁸ *Joubert v. Hopkins (Joubert V)*, 518 U.S. 1031 (1996).

²⁹ *In re Joubert*, 518 U.S. 1032, 1032 (1996).

³⁰ External Release, Amnesty International, Further Information (2) on EXTRA 87/96 (AMR 51/47/96, 10 June 1996) and Follow-up AMR 51/53/96, 2 July 1996 - Death Penalty (July 9, 1996), <https://www.amnesty.org/ar/wp-content/uploads/2021/06/amr510571996en.pdf> [<https://perma.cc/Q6F5-4PLH>].

time with his legal team and supporters. Two days before the scheduled execution, John asked me if I would be one of his witnesses.

In 1994, Nebraska executed Harold LaMont Otey in the electric chair. Before that, the last person electrocuted in the state was Charles Starkweather in 1959.³¹ One of the lawyers who consulted with John's legal team had been a witness to Mr. Otey's execution two years earlier.

Early in the evening of July 16, John's legal team and I arrived at the Nebraska State Penitentiary. We met with John and then gathered on the prison grounds, waiting for the appointed hour.

Before I walked into the prison for the scheduled post-midnight execution, the lawyer who witnessed Mr. Otey's execution told me to roll up my sleeve. As I did, she pulled out a black marker, wrote seven numbers on my arm, and gave me a quarter. She told me that there was a payphone³² outside of the witness room, and that if something went wrong with the execution, I should step out of the room and call the phone number written on my left arm. The Chief Justice of the Nebraska Supreme Court would be at home, and he would take my call. In that moment, it was hard to comprehend what she was telling me.

Ten minutes before midnight, I was escorted to the death chamber viewing room. Before I walked into the room, I looked to the right and saw the payphone mounted on the wall.

The lighting in the death chamber viewing room was soft. The room had twelve chairs in three rows of four. I was seated in the front row. It was approximately four feet from the window that separated the viewing room from the death chamber. A curtain on the death chamber side covered the window. Nine other witnesses were in the viewing room. A minute or so later, a prison official entered the room and offered the witnesses paper bags. He set the bags on a chair in the viewing room as no one took him up on his offer.

At six minutes past midnight, the curtains covering the window to the execution chamber opened. The electric chair was big. It had a high back and arms, the wood was dark-colored, and it was about ten feet from the window that separated the viewing room from the execution chamber. The electric chair was in the center of the room, and it rested on a slightly raised platform. The lighting in the execution chamber was bright.

John was already strapped in, secured in the chair by two tan leather restraints with buckles across his chest and two tan leather restraints across his torso. The same kind of belts secured John's arms and legs to the arms and legs of the electric chair.

³¹ Assoc. Press, *35-Year Hiatus Ends as Nebraska Puts a Killer to Death*, N.Y. TIMES, Sep. 3, 1994, at 8, <https://www.nytimes.com/1994/09/03/us/35-year-hiatus-ends-as-nebraska-puts-a-killer-to-death.html> [<https://perma.cc/XT44-S36M>].

³² See Kristopher Hooks, *History of Payphones... You Know, That Thing You Don't Use Anymore*, ABC 10 SACRAMENTO (May 18, 2017, at 5:31 PM PDT), <https://www.abc10.com/article/news/local/history-of-payphones-you-know-that-thing-you-dont-use-anymore/103-440924470> [<https://perma.cc/88N2-LST9>].

John had ginger-red hair along with a matching beard and moustache when I saw him a few hours earlier. Now, his head was completely shaved, and his beard and mustache were gone as well. He was wearing an oversized khaki jumpsuit. Long sleeves covered his arms, and the outseam of the left pant leg was slit. John wore white socks. His feet did not touch the floor of the platform on which the chair was secured. After a minute of the witnesses looking at John, the curtains closed.

Six minutes later, the curtains opened. John's face was covered with a tan leather mask from just above his eyebrows to the bottom of his chin. John's nose peeked out of a triangle cut in the mask.³³ A dark leather strap secured an electrode to the top of John's head on the right side. A wet sponge, which was dripping, rested between the electrode and John's scalp. The front of John's jumpsuit was wet and as time passed more moisture appeared.

A dark leather strap secured an electrode to John's left calf. It was located about halfway between the knee and ankle on the outside of the calf. A wet sponge rested between the electrode and John's skin.

As John was sitting and waiting, he repeatedly tapped his right index finger on the arm of the electric chair.

Then, I heard a "clunk," and at the same time saw John immediately puff up. For the next ten to fifteen seconds, it looked like he was being ejected from the electric chair, and the jumpsuit John was wearing suddenly seemed like it was filled with a blast of air. The tapping index finger stopped, and John's hands curled into tight fists. His nose and the top of his head swelled, and his head snapped to the back of the electric chair. John's feet curved inward, making him look grossly pigeon-toed. The color of his skin color changed from pale white to blue.

When the jolt ended, John's jumpsuit deflated as his body sucked back to the seat back, arms and legs of the electric chair. John's fisted hands loosened. A few seconds later, I heard a second "clunk," and for the next thirty seconds, John was again ejected, his jump suit puffed up, his fists curled and tightened, his nose and the top of his head remained swollen, his head snapped back, his feet curved inward, and his skin color changed from blue to red.

John then slumped in the electric chair. His skin became redder, and his fingers remained curled in tight fists. Then, the third "clunk," and for the next thirty seconds, the same things happened to John again. This time, I heard a hissing sound and saw a puff of white smoke come out of the electrode attached to John's left calf. His left knee was blanched, and the area below the kneecap turned redder and redder. Water began to drip from the electrode. I smelled burnt flesh. John's skin color changed from red to purple.

³³ Former warden Ron McAndrew, who oversaw executions by electrocution in Florida, explained, "There's a thick leather mask that has a belt that runs through it, that fits across the face and buckles the condemned's head to the two little prongs you see at the top of the electric chair. When they tighten the belt of the head, you automatically break his nose . . . And the reason for that thing is he can't scream. He can't holler . . . The witnesses . . . they're watching somebody die, but they have no idea it's impossible for him to scream." GIANNA TABONI, *THE VOLUNTEER: THE FAILURE OF THE DEATH PENALTY IN AMERICA AND ONE INMATE'S QUEST TO DIE WITH DIGNITY* 126–27 (2025).

Again, John sank in the electric chair for about ten seconds. His skin remained purple, and his fingers stayed curled in tight fists until I heard a fourth “clunk.” Again, I saw what I saw the first three times. John’s knee remained white and the area below the electrode remained red. Water continued to drip from the electrode, and John’s skin color changed from purple to charcoal. The charcoal color of his hands were darker than the color of his head. This lasted for twenty to thirty seconds. Then, John collapsed back to the chair. His head was bent forward, slightly to the right, and the color of his skin began to change to an even darker charcoal color than before.

For the next four or five minutes, the witnesses sat and looked. Then, an officer entered the execution chamber, went to the right side of the electric chair, and unbuttoned the top button of the jumpsuit. The officer placed his fingers on the right side of John’s neck, looked at the assembled witnesses, and shook his head, which I took to mean John was dead.³⁴ The curtain closed.

³⁴ The only person reported to survive an execution by electrocution was Willie Francis, whose first attempted execution failed to kill him. “Willie reported that it felt like ‘being cut and pricked by . . . thousands . . . of razor-sharp needles and pins.’ At one point, while the current was still flowing, Willie yelled for removal of the hood that covered the upper part of his face. ‘Let me breathe,’ he hollered.” Gerald Caplan, Book Review, 57 GEO. WASH. L. REV. 1643, 1644 (1989) (reviewing ARTHUR S. MILLER & JEFFREY H. BOWMAN, DEATH BY INSTALLMENTS (1988)); see also Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459, 479-80 (1947) (Burton, J., dissenting) (citing affidavits by execution witnesses: “Then the electrocutioner turned on the switch and when he did Willie Francis’ lips puffed out and he groaned and jumped so that the chair came off the floor . . . then the condemned man yelled: ‘Take it off. Let me breath[.]’”; “I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched . . . Then Willie Francis cried out ‘Take it off. Let me breath.’”)

Following John’s execution, “[c]oroner reports show John Joubert suffered a 4-inch blistering burn on the top of his head and blistering on both sides of his head above his ears.” *Judge Details Why He Thinks Electric Chair Is a Cruel Penalty*, LINCOLN STAR J. (Mar. 5, 2004), https://journalstar.com/news/state-and-regional/article_adb36116-7270-5eba-be30-0a6dc654f14b.html [<https://perma.cc/J847-CX9K>]. Subsequently, the Nebraska Supreme Court declared that electrocution under the state’s execution protocol was unconstitutional. “Examined under modern scientific knowledge, ‘[electrocution] has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber’ of state prisons And the evidence clearly proves that unconsciousness and death are not instantaneous for many condemned prisoners. These prisoners will, when electrocuted, consciously suffer the torture that high voltage electric current inflicts on the human body. The evidence shows that electrocution inflicts intense pain and agonizing suffering. Therefore, electrocution as a method of execution is cruel and unusual punishment in violation of the Nebraska Constitution, article I, § 9.” *State v. Mata*, 745 N.W.2d 229, 278–79 (Neb. 2008).

B. Last Words

Michael Beuke³⁵ was executed by the state of Ohio on May 13, 2010, in Lucasville, Ohio. He was executed by lethal injection with a three-drug formula of sodium thiopental,³⁶ a paralytic, and potassium chloride.

Michael was remorseful. His Catholic faith was important to him and while he was on death row, his faith deepened. The morning of his 10:00 a.m. execution, Michael “took communion, participated in a cell-front Mass and played a keyboard[.]”³⁷ He was permitted to take his rosary into the execution chamber and hold it in his hand.

In Ohio, the witnesses were able to observe the IV lines being inserted. I was sitting in one of the witness viewing rooms with the two Catholic Bishops who just celebrated the last Mass Michael would attend. A video monitor flicked on, and Michael was laying on a cot with two men sitting on rolling stools on either side of him. Michael’s eyes were red as the executioners went to work to set the lines in his left arm first, then the right arm. Both of his arms were bleeding. It looked like the executioners were having some difficulty with the right arm, but eventually, they got it. Once the catheters were set, Michael’s arms were stretched straight out to his sides with each one secured to a board. It appeared that Michael talked to the two men, but we could not hear what they said. The executioner on the right side patted Michael’s shoulder twice. Michael smiled.

³⁵ The Office of the Federal Public Defender for the District of Arizona was appointed to represent Michael. I was an Assistant Federal Public Defender and would remain so until April 2022. I met Michael on numerous occasions during the course of our representation. A few weeks before Michael’s scheduled execution, lead counsel had an accident and was not able to travel to Ohio during the end stage of the case.

³⁶ On March 17, 2010, Michael moved to intervene in the pending litigation challenging the Ohio lethal injection protocol. Motion to Intervene as Plaintiff-Intervenor, *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Mar. 23, 2010), ECF No. 699. The motion was granted, and his complaint was filed. Order, *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Mar. 23, 2010), ECF No. 702; Complaint for Injunctive and Declaratory Relief, Attorney Fees, and Costs of Suit Pursuant to 42 U.S.C. § 1983, *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Mar. 23, 2010), ECF No. 705. He also moved for a temporary restraining order. Beuke’s Motion for a Temporary Restraining Order or a Preliminary Injunction and Request for a Hearing, *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio May 6, 2010), ECF No. 752.. During a hearing on the motion, state acknowledged “there has been a shortage of thiopental sodium. And when the normal sources are resorted to to (sic) obtain the drug, there has been some indications that those sources are unable to provide the drug due to the shortage.” Transcript of Motion Hearing at4-5, *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio May 10, 2010), ECF No. 768. Eventually, Ohio was able to obtain sodium thiopental for Michael’s execution. *See also*, Kevin Sack, *Shortage of Widely Used Anesthetics Is Delaying Executions in Some States*, N.Y. TIMES (Sep. 29, 2020), <https://www.nytimes.com/2010/09/30/us/30drug.html> [<https://perma.cc/BZY5-6UR7>] (“Hospira Inc., the only domestic manufacturer of thiopental sodium, suspended production of the drug almost a year ago because of problems obtaining its active ingredient The company informed states [in the spring of 2010] that it did not support the use of its products for capital punishment.”).

³⁷ Alan Johnson, *Killer Didn’t Go Quietly, Quickly*, COLUMBUS DISPATCH (May 14, 2010, at 2:11 PM ET), <https://www.dispatch.com/story/news/2010/05/14/killer-didn-t-go-quietly/23873854007/> [<https://perma.cc/VK5E-2HQF>].

The executioners then helped Michael sit up and stand. His arms were sticking straight out, parallel to the floor, as he took steps into the execution chamber—a walking crucifix.

Once in the chamber, there was a stool for Michael to step on to help him climb onto the execution gurney. As he was being restrained, the catheters were hooked up to the long tubing that would carry the lethal chemicals to his body. Michael laid still with his eyes closed. It was time.

The warden, holding a microphone close to Michael, asked if he had any last words. Michael said, “I’m sorry” to the victim’s family members who were present. Then, he said, “In the Name of the Father, Son, and Holy Spirit, I believe in God” After the “Apostles Creed,” an “Our Father,” three “Hail Marys,” and a “Glory Be,” Michael prayed the five decades announcing the five Glorious Mysteries, each beginning with an “Our Father,” ten “Hail Marys,” and a “Glory Be,” as he fingered each of the rosary beads.³⁸ The two Bishops sitting in the witness room with me ran their fingers over their rosary beads and prayed along with Michael. I watched. The warden holding the microphone had a look on his face like he was not sure what to do. Prison officials later said they were not inclined to stop Michael from praying his last words.³⁹

When Michael weepingly said his final “Amen,” the warden gave the signal, and the drugs began to flow. Michael’s eyes fluttered, he blinked and swallowed hard. His fingers curled; his breathing slowed as the color left his face. His breathing stopped, and his mouth opened. A man with a stethoscope walked into the room and listened to Michael’s heart. Nine minutes after Michael said, “Amen,” he was dead. It was the longest set of “last words” after executions resumed in Ohio⁴⁰ following *Furman v. Georgia*.⁴¹

C. Boomer Sooner

When I saw Jeff Landrigan⁴² lying on the execution gurney in Housing Unit 9, known as the death house at the Arizona State Prison in Florence, Arizona, he looked exhausted. I observed him as I was standing in the room reserved for witnesses to executions in Arizona. The room was square-ish with a three-tiered carpeted riser where the witnesses stood. There were three dividers that separated the four witness

³⁸ See generally *How to Pray the Rosary*, U.S. CONF. OF CATHOLIC BISHOPS, <https://www.usccb.org/how-to-pray-the-rosary> [<https://perma.cc/SdT3-GALQ>] (last visited May 26, 2025) (describing the Prayers of the Rosary and the Joyful, Sorrowful, Glorious, and Luminous Mysteries of the Rosary.) .

³⁹ Johnson, *supra* note 37.

⁴⁰ *Id.*

⁴¹ *Furman v. Georgia*, 408 U.S. 238, 238 (1972).

⁴² I was one of the attorneys in the Federal Defender’s Office who represented Jeff in his federal habeas corpus proceedings and other collateral matters challenging the Arizona lethal injection protocol. Memorandum of Decision and Order, *Landrigan v. Stewart*, No. CV-96-02367-PHX-ROS (D. Ariz. Dec. 15, 1999), ECF No. 130.

groups—the condemned’s witnesses, the media, official witnesses, and the witnesses present for the victim. At the back of the room was an odd-shaped protrusion. It was the back of the gas chamber, last used when Arizona executed Walter LaGrand in 1999.⁴³

The day before his October 26, 2010, scheduled execution, a federal judge enjoined the state from moving forward with the execution.⁴⁴ In the early morning hours before his scheduled 10:00 a.m. execution, the U.S. Court of Appeals for the Ninth Circuit affirmed, and the injunction remained in place.⁴⁵ Later that day, the injunction was vacated on the state’s motion by the U.S. Supreme Court in a 5-4 one-paragraph decision around 6:00 p.m.⁴⁶ It would take the execution team about four hours to gear back up. The executioners would prepare syringes containing sodium thiopental,⁴⁷ which was imported⁴⁸ from the United Kingdom in violation of the Food, Drug, and Cosmetic Act (FDCA).⁴⁹ The two drugs that would follow the injection of sodium thiopental were a paralytic and potassium chloride.

Jeff was covered up to his chin with a bright white sheet. A tent was in place over his torso, which meant the two executioners, the Team Leader⁵⁰ and Team

⁴³ *Execution List 1999*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/1999> [<https://perma.cc/Q9VG-ZVQJ>] (last visited Aug. 30, 2025).

⁴⁴ *Landrigan v. Brewer*, No. CV-10-02246-PHX-ROS, 2010 WL 4269559, at *12 (D. Ariz. Oct. 25, 2010).

⁴⁵ *Landrigan v. Brewer*, 625 F.3d 1144, 1148 (9th Cir. 2010); *reh’g en banc denied*, 625 F.3d 1132, 1132–33 (9th Cir. 2010) (mem.).

⁴⁶ *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010). For a detailed account of what occurred in real-time and in the aftermath, see TABONI, *supra* note 33, at 74–85.

⁴⁷ Kiefer & Baich, *supra* note 15 (“Thiopental was an old drug that had mostly been replaced in clinical settings by the drug propofol. The only American provider of thiopental had stopped making the drug because of what it said were manufacturing issues, though diminishing profitability is just as likely. Why would any company keep it on the market for a few thousand dollars of sales to corrections departments to kill people?”).

⁴⁸ Prior to the execution we learned that the thiopental was imported after we received an anonymous phone call. See Kiefer & Baich, *supra* note 15; see also Voice Message from Anonymous Caller (recorded Oct. 16, 2010) (providing information that on October 8, a neighbor bragged that his company imported the drugs and identifying the company and importer; and hoping the information was helpful and useful.) (on file with author and the Ohio State Journal of Criminal Law). The source of those drugs was later revealed to be Dream Pharma, a small pharmaceutical wholesaler operating out of the back of a London driving school. Owen Bowcott, *London Firm Supplied Drugs for U.S. Executions*, GUARDIAN (Jan. 6, 2011, at 12:45 PM EST), <https://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions> [<https://perma.cc/BD9W-PKLS>].

⁴⁹ Kiefer & Baich, *supra* note 15.

⁵⁰ The executioners were called the “Medical Team.” The Medical Team Leader (“MTL”)

[R]ecently has been a physician at a clinic where he sees adult patients with medical problems such as diabetes, heart disease, and high blood pressure. His primary duties as a clinic physician do not include placing femoral central lines, administering IVs, or preparing sodium thiopental. For many years, MTL served as an emergency room physician and regularly placed central lines. ADC maintained no documentation concerning MTL’s qualifications and did not conduct a professional license or criminal

Member,⁵¹ set a central line in Jeff’s femoral vein⁵²—a minor surgical procedure in the groin area.⁵³ The long, uncertain wait must have slowly drained Jeff. His last words were “Boomer Sooner.” Jeff was from Oklahoma.

All we could see was Jeff’s face. He lifted his head, the white sheet covering his chest heaved upward three times, his eyes closed halfway and stayed that way. As the color left Jeff’s face, his mouth opened. The execution was complete. It took ten minutes for Jeff to die.

D. *Switching Up the Drugs*

Donald Beaty was trembling and crying.⁵⁴ He, too, was under a torso tent, which meant another central line insertion into the femoral vein of the catheters that would carry the lethal drug.⁵⁵ Just eighteen hours before the May 25, 2011, scheduled execution, the Arizona Department of Corrections⁵⁶ abruptly changed the

history check before selecting him to participate on the Medical Team or before each execution.

West v. Brewer, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *7 (D. Ariz. Dec. 21, 2011).

⁵¹ The Medical Team Member “MTM-IV” was

[E]mployed with ADC and has been a correctional officer since 1996. His primary duties do not include administering IVs or preparing drugs as part of his regular employment. MTM-IV served as a corpsman from 1988 until 1996 and was also an EMT while in the military. MTM-IV has no specific recollection of his corpsman or EMT training but does recall learning how to set an IV line. ADC maintained no documentation concerning MTM-IV’s qualifications and did not conduct a professional license or criminal history check before selecting him to participate on the Medical Team or before each execution. MTM-IV was charged with [a] DUI in 2008 and paid a fine for reckless driving. He was also arrested for consuming liquor in public in 2000 and for writing a bad check in 1984 or 1985.

Id. at *6.

⁵² “When setting the femoral central lines in Landrigan and [Eric] King, MTL punctured the skin at least twice and did not administer additional lidocaine after the first attempt at setting the line was unsuccessful.” *Id.* at *8.

⁵³ CORINNA BARRETT LAIN, SECRETS OF THE KILLING STATE: THE UNTOLD STORY OF LETHAL INJECTION 111 n.53 (2025) (parenthetical and citation omitted) (“The procedure starts the same as the normal catheterization process—a catheter is inserted into the vein by a needle, which is then removed, leaving the catheter in place. Then a long guide wire is threaded through the catheter, where the needle once was, and deep into the vein. Then the original catheter is removed and a second, longer catheter is fitted over the wire; then the wire is removed, leaving the longer catheter in place.”).

⁵⁴ While at the Federal Defender’s Office, I was part of the legal team representing Donald in successor collateral proceedings in the state and federal courts.

⁵⁵ “The drugs administered during the execution of . . . Beaty . . . were administered through the femoral central line.” *West*, 2011 WL 6724628, at *8.

⁵⁶ The Arizona Department of Corrections is now known as the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR). It will be referred to as the ADCRR going forward, except when “ADC” appears in quoted material. Dave Biscobing, *Name Change for Arizona Dept. of Corrections Met with Mixed Reaction*, ABC15 ARIZ. (Jan. 15, 2020, at 7:12 AM),

execution protocol⁵⁷ to require pentobarbital⁵⁸ rather than thiopental as the first chemical in the three-drug protocol. This change was in response to the Federal Drug Enforcement Administration's (FDA) notice that the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) was prohibited from using the foreign thiopental.⁵⁹ This was the same drug the ADCRR used to execute Jeff Landrigan.

Donald apologized to the victim's family members who were present, and as he continued to shake and shudder, he mouthed words to his brother, who was also present. Donald yawned and closed his eyes. His mouth was moving, and his breaths got heavier. His mouth opened as his chest under the white sheet rose a few times. After a few more minutes, Donald was dead.

E. Two Weeks After Appointment

Two weeks before Richard Bible's scheduled execution, we were appointed to represent him.⁶⁰ Ricky was scheduled to be executed by lethal injection by the state

<https://www.abc15.com/news/state/name-change-for-arizona-dept-of-corrections-met-with-mixed-reaction> [<https://perma.cc/TVA5-ESUU>].

⁵⁷ See Notice of Substitution of Drug at 1, *State v. Beaty*, No. CR-85-0211-AP/PC (Ariz. May 24, 2011); see also Notice of Errata and Supplemental Notice of Substitution of Drug at 1, *State v. Beaty*, No. CR-85-0211-AP/PC (Ariz. May 24, 2011).

⁵⁸ First Amend. *Coal. of Ariz., Inc. v. Ryan*, 188 F. Supp. 3d 940, 947 (D. Ariz. 2016), *aff'd in part, rev'd in part and remanded*, 938 F.3d 1069, 1081 (9th Cir. 2019) ("Eighteen hours before it was to begin, the Department notified Beaty that it would substitute sodium thiopental with pentobarbital. The Arizona Supreme Court permitted the execution to proceed, based on the State's avowal that the only change was the drug substitution. [Arizona Supreme Court] Justice Hurwitz dissented, observing that Beaty's application was occasioned by the State's last-minute decision to substitute one barbiturate for another, and we have been compelled to address this issue literally overnight.") (internal citations and quotations omitted); see also *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (Reinhardt, J., joined by Schroeder, Pregerson, Fletcher, Fisher, Paez, & Berzon, JJ., dissenting from *denial of reh'g en banc*) ("Rushing to execute Donald Beaty under the circumstances before us is unconscionable. At 4:00 p.m. yesterday, a mere *eighteen hours* before the State was scheduled to execute him, Arizona announced that, due to concerns about the legality of its importation of the drug constitutionally approved for use in its three-drug protocol, it would switch to a new drug that it had never tested and that its executioners had not been trained to use.").

⁵⁹ Donald Beaty was a plaintiff in a challenge brought by individuals on death row under the FDCA against the FDA for improperly allowing sodium thiopental to be imported for their executions. *Beaty v. FDA*, 853 F. Supp. 2d 30, 32 (D.D.C. 2012), *aff'd in part, vacated in part sub nom. Cook v. FDA*, 733 F.3d 1, 12 (D.C. Cir. 2013). Beaty was executed while the case was pending in federal court. See also TABONI, *supra* note 33, at 82–84.

⁶⁰ The Federal Defender's Office entered an appearance in court to represent Ricky eight days before his scheduled execution date. Counsel previously assigned in federal court in habeas corpus proceedings under 28 U.S.C. §2254, was appointed under 18 U.S.C. § 3599(a)(2). CJA 30: Appointment of Attorney Daniel D Maynard for Richard Lynn Bible in Death Penalty Proceedings, Bible v. Stewart, No. 2:98-CV-01859-PGR (D. Ariz. Nov. 23, 2005), ECF No. 104. Counsel pursued an appeal in the Ninth Circuit, and after the denial of a writ of habeas corpus was affirmed. *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009), *cert. den.* 559 U.S. 995 (2010). Counsel moved to withdraw from representation during the end stages of the case and asked for substitute counsel to be appointed.

of Arizona with a three-drug formula of pentobarbital, a paralytic, and potassium chloride on June 30, 2011.

When the curtain opened, Ricky was pale. He looked up toward the ceiling. He did not turn his head to look at those on the other side of the glass that separates the condemned person from those there to witness. Ricky was also covered with a sheet up to his neck.⁶¹ With his last words, he thanked his family and lawyers. “Everything is okay. That’s it.”

Ricky’s eyes were blinking as the chemicals began to flow. Then, they closed. Ricky gulped, his mouth opened, and he took sixteen rapid breaths. The color began to leave his face, and nine minutes after the execution began, Ricky was dead.

F. Someone Should Have Checked the Label

I was asked by Robert Moorman’s legal team to serve as a witness.⁶² I never met Robert, who went by Bobby. Two days before Bobby’s scheduled execution, the ADCRR discovered that one of the execution drugs in the three-drug protocol had expired over a month earlier.⁶³ A second forced change to the drug regime in nine months. This time, it was not the result of flouting the law that caught up with the ADCRR just prior to Donald Beaty’s execution.⁶⁴ Here, it was the result of inattention and failure to follow the written execution protocol.

Arizona improvised again. Rather than a three-chemical regime, the second and third drugs—the paralytic and potassium chloride—were abandoned, and the ADCRR planned to move forward with a one-drug protocol using pentobarbital.

Appellant Richard Lynn Bible Motion to Substitute Counsel, *Bible v. Schriro*, No. 07-99017 (9th Cir. Mar. 25, 2010), ECF No. 63. The motion was denied without prejudice as the mandate already issued. Order, *Bible v. Schriro*, No. 07-99017 (9th Cir. Mar. 30, 2010), ECF No. 64. Counsel then refiled a motion to substitute counsel in the district court. Motion to Substitute Attorney, *Bible v. Schriro*, No. 2:98-CV-01859-PGR (D. Ariz. Mar. 30, 2010), ECF No. 122. That motion was denied. Order Denying 122 Motion to Substitute Attorney, *Bible v. Schriro*, No. 2:98-CV-01859-PGR (D. Ariz. Mar. 31, 2010), ECF No. 123. For reasons unknown, counsel waited over one year to refile the motion in the district court, this time asking for association or substitution of counsel, which was also denied. Motion for the Association or Substitution of Counsel by Richard Lynn Bible, *Bible v. Schriro*, No. 2:98-CV-01859-PGR (D. Ariz. May 31, 2011); Order Denying 127 Motion for the Association or Substitution of Counsel, *Bible v. Schriro*, No. 2:98-CV-01859-PGR (D. Ariz. June 1, 2011). As appointed counsel was unable and unwilling to represent Ricky, the Federal Defender’s office entered an appearance and provided representation in the final days of the case. Notice of Appearance by Dale A. Baich on Behalf of Richard Lynn Bible, *Bible v. Schriro*, No. 2:98-CV-01859-PGR (D. Ariz. June 22, 2011), ECF No. 133; *see also* Notice of Appearance of Dale A. Baich for Appellant Richard Lynn Bible, *Bible v. Schriro*, No. 07-99017 (9th Cir. June 24, 2011), ECF No. 65.

⁶¹ “The drugs administered during the execution of . . . Bible were administered through the femoral central line.” *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *8 (D. Ariz. Dec. 21, 2011).

⁶² The Federal Defender’s Office was not appointed to represent Bobby.

⁶³ *Towery v. Brewer*, 672 F.3d 650, 652–53 (9th Cir. 2012).

⁶⁴ *See supra* Part II.D.

Bobby had a child-like smile on his face when the curtains opened.⁶⁵ He was not covered to his chin like Jeff, Donald, and Ricky; Bobby was only covered to his waist. The executioners were able to get peripheral access and insert the catheters in Bobby's arms. After his last words, Bobby was still smiling.

As the single dose of pentobarbital began to overtake him, Bobby's head rolled slowly, and he looked through the glass into the witness room. He was still smiling. His eyes were open; he yawned twice and took a deep breath. Bobby's fingers began to curl into his hands, and as the color left his face, his mouth and eyes opened. His face turned white.

On February 29, 2012—Leap Day⁶⁶—Bobby died with his eyes open. It took about ten minutes for him to die.

G. *Talking in Code*

Robert Towery⁶⁷ was executed by the state of Arizona on March 8, 2012, in Florence, Arizona. He was executed by lethal injection with a single dose of pentobarbital two weeks after Robert Moormann was put to death by the state.

By this time, we suspected the ADCRR was using central line access through the femoral vein as the default method of setting the IV access lines. In six out of seven executions since Robert Comer's execution in 2007, the executioners set central lines for IV access; only Robert Moormann was spared this highly invasive procedure.⁶⁸ Could it be that people on death row in Arizona had compromised peripheral veins at a higher rate than people on death row in other states? Executioners in other jurisdictions seemingly did not have problems accessing veins in the arms of the people they were about to execute at the same rate as Arizona executioners.

We met with Robert the night before his scheduled execution after he had his last meal. One issue we discussed was what he could expect the following morning during the execution process, particularly IV access. Robert was not concerned

⁶⁵ Bobby was described as “childlike and ‘two IQ points’ above the level where he would be considered mentally disabled and not eligible for execution.” “While on Death Watch . . . Moormann couldn't comprehend what was going to happen. Moormann became sick and had trouble breathing, sometimes in panic, and was taken to a hospital overnight. In the last years before his execution, he suffered a stroke and underwent a quintuple bypass.” Michael Kiefer & Dale Baich, *Poorly Executed: IVs and Ironies*, ARIZ. MIRROR (Apr. 26, 2023, at 5:00 AM), <https://azmirror.com/2023/04/26/poorly-executed-ivs-and-ironies> [<https://perma.cc/5RW3-T9GL>].

⁶⁶ Andy Ober, *The Science of Leap Day: How It Works, Why We Do It, and When We Skip It*, UNIV. ARIZ. NEWS (Feb. 15, 2024), <https://news.arizona.edu/employee-news/science-leap-day-how-it-works-why-we-do-it-and-when-we-skip-it> [<https://perma.cc/QZ6W-U652>].

⁶⁷ The Federal Defender's Office was appointed to represent Robert, and I assisted his legal team during the concluding stages of the case.

⁶⁸ Since 2007 through the execution of Aaron Gunches on March 19, 2025, *see infra* Part II.Q.I In eleven out of nineteen executions, the Arizona executioners set central lines in the femoral vein for IV access. *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *8 (D. Ariz. Dec. 21, 2011).

about that. He stood up, extended both arms to show the crook⁶⁹ of each, tightened both fists, and slightly flexed. He made the veins in his arms pop. Roberts said, “With veins like this, how can they miss.”⁷⁰

I told Robert that if the executioners hurt him, he needed to tell them that he wanted to talk to his lawyer, and that if they said no, he would need to tell me through his last words. Robert was concerned that if he did, the microphone could be turned off if the ADCRR deemed his words critical of the prison administration.⁷¹ This is consistent with a statement Ricky Bible made to me prior to his scheduled execution.⁷²

We came up with a code. Rather than say that he asked to talk to his lawyer during the IV insertion procedure, in his final words, “[Robert] would say something to the effect of[,] ‘Hey Dale[,] I should have called you.’ . . . [I]f there were problems with the insertion of the IV lines or that if he was being hurt, [Robert] would use the word ‘mistake’ during his last words.”⁷³

The next morning, on March 8, we met with Robert in the death house to say goodbye. He was in a holding cell.⁷⁴ The visit ended at 9:15 a.m. The execution was scheduled to begin at 10:00 a.m. Robert’s other selected witnesses and I were escorted to two different holding rooms. At 10:45 a.m., because the execution was running behind schedule, I asked an escort officer who was serving as my minder if there was a problem; after checking with the command center, she said no problems were reported.⁷⁵ I then asked to use the telephone and called my office. While on the phone at 11:03 a.m., I was told the witnesses were being moved to the witness room in Housing Unit 9.⁷⁶

Here is why Robert’s execution was delayed, as recounted by a Ninth Circuit judge in subsequent litigation:

Towery remained strapped to the execution table for more than an hour while execution team members repeatedly poked and prodded him in an effort to set up both a primary and back-up IV line.

⁶⁹ The antecubital fossa—the soft, shallow crease at the inner bend of the elbow. Kanwal Naveen S. Bains & Sarah L. Lappin, *Anatomy, Shoulder and Upper Limb, Elbow Cubital Fossa*, in STATPEARLS [INTERNET] (2023), <https://www.ncbi.nlm.nih.gov/books/NBK459250/> [<https://perma.cc/EV9W-ECYF>].

⁷⁰ Motion for Preliminary Injunction Ex. Y ¶ 11, *Towery v. Brewer*, No. 2:12-cv-00245-NVW (D. Ariz. May 1, 2012), ECF No. 60-1 [hereinafter *Towery Preliminary Injunction Motion*].

⁷¹ *Id.* at ¶¶ 12–13.

⁷² *Id.* at ¶ 14.

⁷³ *Id.* at ¶ 15.

⁷⁴ Robert described his experience while on death watch—the thirty-five-day period before the execution date, during which the condemned person is isolated and monitored 24/7 by video and two correctional officers. See ROBERT TOWERY, *DEATH WATCH DIARY*, at 4–39 (2012) (ebook).

⁷⁵ *Towery Preliminary Injunction Motion*, *supra* note 70, at ¶ 6.

⁷⁶ *Id.* at ¶¶ 7–8.

According to the Arizona Department of Corrections' ("ADC") log notes, at 9:49 a.m., Towery was restrained and secured to the execution table. At 9:52 a.m., the ADC Director specified the locations for the catheter sites. Towery remained strapped to the table for over thirty minutes, while the execution team made "multiple attempts" to insert left and right peripheral catheter IV lines. These attempts were unsuccessful. At 10:28 a.m., after these failed attempts, the IV Team Leader recommended a right femoral catheter as the primary IV line. This procedure required the use of a larger needle, a scalpel, and a "guide wire" to thread the needle into Towery's central femoral line.

According to the ADC log notes, the implementation of the central femoral line was completed at 10:50 a.m., nearly a full hour after the execution team began its work. At 10:59 a.m., a catheter was placed in Towery's right hand. Finally, at 11:17 a.m. Towery's execution began. Towery's autopsy revealed that both his femoral artery and femoral vein were punctured during the insertion of the IVs.⁷⁷

After everyone was assembled in the witness room, the curtain opened. Robert was on the execution gurney with a tent over his torso—central line femoral. Robert's eyes were wide open, red, and he looked scared. When Robert was asked if he had any last words, he apologized to the victim's friends and to his family and friends. He then said, "[H]e should have gone left and he went right. He went right when he should have gone left. He then went on to say he made 'mistake, after mistake after mistake.'" ⁷⁸ He went on, "In the end, I should have called you Dale."⁷⁹ "Potato, Potato, Potato" were his final words. It is the sound a Harley-Davidson motorcycle makes when idling.⁸⁰ Robert rode Harleys when he lived in the free world, and it was a personal message to his sister and nephew, who were witnessing the execution.

After the chemical began to flow, Robert held two fingers out. He was blinking as he looked out at the witnesses. He took three deep breaths, his eyes closed, and his mouth opened. In less than ten minutes, ADCRR Director Charles Ryan appeared in the room to announce that the execution was complete.

⁷⁷ *Lopez v. Brewer*, 680 F.3d 1084, 1093 (9th Cir. 2012) (mem.) (Pregerson, J., dissenting); see also *First Amend. Coal. of Ariz., Inc. v. Ryan*, 188 F. Supp. 3d 940, 947 (D. Ariz. 2016), *aff'd in part, rev'd in part and remanded*, 938 F.3d 1069, 1081 (9th Cir. 2019).

⁷⁸ Towery Preliminary Injunction Motion, *supra* note 70, at ¶ 17; see also *Lopez*, 680 F.3d at 1093.

⁷⁹ Towery Preliminary Injunction Motion, *supra* note 70, at ¶ 16; see also *Lopez*, 680 F.3d at 1093.

⁸⁰ Andrew Adam Newman, *The Engine Sound That Harley-Davidson Tried to Trademark*, RETAIL BREW (June 29, 2023), <https://www.retailbrew.com/stories/2023/06/29/engine-sound-harley-davidson-tried-to-trademark> [https://perma.cc/JMJ6-J9P9].

H. Arizona Makes Some Changes

On June 27, 2012, when the witnesses were all assembled for the execution of Samuel Lopez by the state of Arizona, something was different. The witness room had padded benches in the tiered viewing room. The witnesses could now sit instead of standing on a raised platform. There were no dividers that separated the four witness groups—the condemned persons, the media, the public, and the victims. And there were two video monitors affixed high up on the wall, one at each of the upper corners of the viewing window into the execution chamber. Why?

After the execution of Jeffrey Landrigan in 2010 and leading up to the scheduled execution of Sam Lopez, there were numerous lawsuits in the federal and state courts challenging the Arizona lethal injection protocol and how the ADCRR was carrying out executions.⁸¹ Although the courts did not enjoin ADCRR from going forward with executions, observations and comments were made by several judges that caused ADCRR to take notice and make some changes to the protocol.

In December 2011, a federal district court found that “[f]ive prisoners were executed by lethal injection between October 2010 and July 2011[,] [and] [a]t the direction of those responsible for administering these executions, ADC[RR] failed to follow certain components of its execution protocol.”⁸² In January 2012, the state amended its execution protocol. It removed many of the provisions it was found to have violated—including minimum qualifications for and the training of IV team members.

On February 27, 2012, the state changed the lethal injection protocol hours before an oral argument and just two days before the scheduled execution of Robert Moorman. At the last minute, the ADCRR discovered that one of the execution drugs had expired over a month earlier, leading a federal court to question “[h]ow such a discovery escaped the State for the past six weeks is beyond us, and gives us pause as to the regularity and reliability of Arizona’s protocols.”⁸³ The Ninth Circuit

⁸¹ See, e.g., *Dickens v. Brewer*, No. CV-07-1770-PHX-NVW, 2009 WL 1904294, at *1, *24 (D. Ariz., July 1, 2009), *aff’d*, 631 F.3d 1139, 1150 (9th Cir. 2011) (noting that the Ninth Circuit heard oral argument in *Dickens* following Landrigan’s execution); *Cook v. Brewer*, No. CV-10-2454-PHX-RCB, 2011 WL 251470, at *1–3 (D. Ariz. Jan. 26, 2011), *aff’d*, 637 F.3d 1002, 1008 (9th Cir. 2011); *Cook v. Brewer*, No. CV-11-557-PHX-RCB, 2011 WL 1119641, at *2–3 (D. Ariz. Mar. 28, 2011), *aff’d*, 649 F.3d 915, 919 (9th Cir. 2011), *cert. denied*, 563 U.S. 997 (2011); *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 2836754, at *1–2 (D. Ariz. July 18, 2011), *aff’d*, 652 F.3d 1060, 1060–61 (9th Cir. 2011) (“At argument, Arizona’s counsel made several representations. First, he represented that Arizona’s protocol for carrying out executions, a relevant portion of which is attached as Exhibit A to this order, had been followed in the past and, more importantly, will be followed in West’s execution. Specifically, he represented that the drugs called for in the protocol are available in the State’s possession, and will be used in West’s execution. Moreover, he represented that the protocol will be followed regarding the locations and order of preference for insertion sites as detailed in Paragraph G of the protocol.”); *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *4–5 (D. Ariz. Dec. 21, 2011), *appeal dismissed*, No. 12-15009 (9th Cir. 2013); *Cook v. State*, 281 P.3d 1053, 1056–57 (Ariz. Ct. App. 2012).

⁸² *West*, 2011 WL 6724628, at *7.

⁸³ *Towery v. Brewer*, 672 F.3d 650, 652–53 (9th Cir. 2012).

upheld the denial of a preliminary injunction but only based on the protocol “as amended by the State during oral argument”; it further noted that “the State’s frequent changes to its protocol during litigation are not sustainable.”⁸⁴

In a subsequent case, the Ninth Circuit again upheld the district court’s denial of a motion for preliminary injunction. Still, it cautioned “that Arizona’s ad hoc approach risks going beyond *Baze*’s⁸⁵ safe harbor.”⁸⁶ The Court expressed grave concern about the state’s practice of changing its protocol hours before an execution, to which the state essentially asked the Court to “trust that it will exercise its discretion in a constitutionally permissible manner.”⁸⁷ Additionally, one judge noted that “[t]he trouble that plagued Tower’s execution highlights the practical problems this obsessive secrecy creates for any meaningful litigation in the constricted time periods permitted by Arizona’s moving target approach to execution procedures.”⁸⁸

I. *Video Monitors On*

For the first time in Arizona, witnesses would watch the executioners insert the IV lines into the condemned person. The decision to allow this was not a magnanimous gesture by the ADCRR to embrace the First Amendment and allow for greater transparency during executions. Rather, the ADCRR had an epiphany after recent proceedings in the Ninth Circuit leading up to the execution of Sam Lopez. As noted, during oral arguments, judges peppered counsel for the ADCRR with pointed questions about its failure to follow its protocol. The judges let it be known that the continuing constitutionality of the Arizona execution protocol was fragile.⁸⁹ The Ninth Circuit was watching.

Two video monitors were affixed high up on the wall, one at each of the upper corners of the viewing window into the execution chamber. On those two screens, the witnesses could see an overhead shot of Sam Lopez⁹⁰ tightly strapped to the execution gurney and hear sounds in the execution chamber.

One of the executioners said to Sam in a clinical, but somewhat shaky, tone, “We are going to begin the IV procedure, and we want you to be comfortable.” The other executioner and four members of the Special Operations Team stood by. As one of the executioners was assessing Sam’s right arm, the man said, “You’ll feel a cold sensation,” while he dabbed the intended injection site with anesthetic. After

⁸⁴ *Id.* at 653.

⁸⁵ *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion) (creating a “safe harbor” of constitutionality for states with execution protocols “substantially similar to the protocol” at issue in the case).

⁸⁶ *Lopez v. Brewer*, 680 F.3d 1084, 1075 (9th Cir. 2012).

⁸⁷ *Id.* at 1070.

⁸⁸ *Id.* at 1083 (Berzon, J., concurring in part and dissenting in part).

⁸⁹ *See supra* Part II.H.

⁹⁰ Although I never met Sam personally, his legal team asked me to serve as a witness in his case. He was not represented by the Federal Defender’s Office.

securing IV lines in Sam's right and left arms, Sam asked, "Are these the only ones being inserted?" "Yes, sir," was the response.

The microphone was turned off. Sam was talking to someone in the room. He was covered to his waist with a bright, white sheet. Sam laid still, looking straight up and blinking his eyes.

The video monitors went dark, and the curtains opened. After the execution warrant was read for all to hear, Sam was asked if he had any last words. Still looking up as he laid flat on his back, Sam said, "No, I do not."

After the single dose of pentobarbital was injected, the eye blinking became more rapid, and Sam began to gulp. He took eight breaths and yawned before his eyes closed and mouth opened. Twenty-six minutes later, a man entered the execution room and announced in a booming voice, "I'm Director Ryan. The execution was concluded at 10:37 a.m." The curtain closed.

J. My Hand?

On August 8, 2012, the state of Arizona executed Daniel Cook.⁹¹ It was the second execution where the ADCRR allowed witnesses to see more of what went on behind the curtain and on the other side of the glass.

The video monitors flicked on, and we saw Dan already secured to the execution gurney. When the executioners could not set an IV line in Dan's right arm, they went to the left side of the gurney. Dan asked, "How come my hand?" The executioner responded, "I'll be right back." As Dan laid there, a Special Operations Team Member asked Dan how he was doing. "Alright," Dan said.

The executioner returned and said, "Your forearm will be the best catheter. We'll try a couple of times. If not, we will go to your groin; we'll do what we can to make you comfortable." The executioner mopped Dan's left arm with antiseptic and then jabbed it with a needle. There was some backflow of blood into the tubing connected to the catheter.

Then, the executioner went back to Dan's right arm. Dan was trying mightily to make the veins pop. More mopping and some sticks with the needle. Dan was grimacing. Just when the executioner thought the line was set, it was not, and the catheter was pulled out.

Back to the left side, a tourniquet was placed around Dan's left wrist. Dan was shaking as the needle was pushed into the top side of his left hand. The executioner asked, "Do we still have flow?" Dan was then covered to his waist with a white sheet. The video monitor went black.

When the curtains opened, Dan was looking into the witness room. His eyes were big and teary. Dan then began to shake and cry. He apologized to the victim's family and said, "I know that's not enough." He looked to his legal team and tried

⁹¹ The Federal Defender's Office was appointed to represent Dan, and I assisted his legal team during the course of the representation.

to wave, and said, “Thank you.” Silence as the microphone was turned off. Dan looked to the victim’s family and mouthed, “I’m sorry.”

Dan’s eyes and mouth remained open after the drug took effect.⁹² It took him thirty-five minutes to die after he was injected with a single dose of pentobarbital. Then, as in previous executions, that balding, bespectacled man wearing a suit entered the room and said, “This is Director Ryan. The execution was concluded at 11:03 a.m.” The shade was drawn.

K. *“I Felt a Pop, Whoa!”*

The next person I saw executed was Richard Stokley.⁹³ The state of Arizona executed Richard on December 5, 2012, with one dose of pentobarbital.

When the video monitors lit up, and the microphone was on, Richard said in response to a statement by one of the executioners, “I have a phlebotomist joke for you if you have the time.” Richard followed up shortly, saying, “I do wish I could die doing something meaningful.”

As the executioners worked on trying to find a vein in Richard’s arms, he said, “This doesn’t bother me . . . you did very good on that one,” and the catheter slid into his right forearm. Then, the executioners went to work on the left arm. One asked, “Is this side usually more fragile?” Richard responded, “It depends on who is doing the poking.” The jabbing continued, and the executioners failed to access a vein in the left arm, even assessing the bicep. The peripheral poking stopped after twenty-three minutes.

“We’re going to use an ultrasound . . . a local anesthetic . . . you’ll feel pressure,” one of the executioners said as he ripped open the hook-and-loop fastener⁹⁴ holding Richard’s right pant leg together. We had an aerial view of the

⁹² Michael Kiefer, who was a media witness, reported, “Cook blubbered and wept and then stiffened slowly, chin jutting up, back arching, for [thirty-five] minutes until he was pronounced dead.” Michael Kiefer, *Is the Death Penalty in Arizona on Life Support?*, ARIZ. REPUB. (Apr. 23, 2016, at 5:04 AM MT), <https://www.azcentral.com/story/news/local/arizona-investigations/2016/04/23/death-penalty-lethal-injection-arizona-midazolam/83242098/> [<https://perma.cc/XWH4-YFYU>]. Kiefer later wrote, “When the TV flickered on, Cook was laying on a gurney with his arms outspread like a wingspan. The camera angle was from above, and his head was at the bottom of the screen, and I couldn’t help but think how much it looked like a cruxifixion. (sic) It was startling.” As Cook was dying, it reminded Kiefer of “The Body of the Dead Christ,” by Hans Holbein. He added, “The painting is decidedly that of a man, and a dead one at that: viewed from the side, stretched out stiffly on a flat surface, eyes slightly open, chin jutting upward and mouth open. Another startling image.” Email from Michael Kiefer to Dale Baich (July 30, 2025, at 01:02 AM) (on file with author and the Ohio State Journal of Criminal Law).

⁹³ The Federal Defender’s Office was appointed to represent Richard, and I assisted his legal team throughout the course of the representation.

⁹⁴ “Hook and loop is a two component fastener, meaning there are two different sides that must be pressed together to fasten. One side is called the hook. The hook is the rough, scratchy side. This side sticks to lots of things, but it sticks best to the other side, called the loop.” *What is Hook & Loop?*, HOOK & LOOP (Sep. 9, 2013), <https://www.hookandloop.com/blog/what-is-hook->

minor surgical procedure.⁹⁵ One of the executioners cut into the diaper Richard was wearing.

Blue paper and transparent film dressing were staged and soon to be used. One of the executioners, with a syringe in hand, told Richard he was going to anesthetize the area. Richard replied, “I appreciate that. I always hated meanness.” After the shot, the executioners went to work. Using an ultrasound wand, sponges, and gauze on a stick, there was a lot of swabbing of Richard’s naked flesh.

As one of the executioners tried to insert the catheter into Richard’s femoral vein, Richard somewhat excitedly said, “I felt a pop, whoa! That’s real sensitive.” In a matter-of-fact tone, an executioner said, “Yes, it is.” The executioner continued his work, and Richard moaned and said, “I feel a little pain up there.”

Two minutes later, the executioner was still trying. Again, Richard groaned and said, “It stings.” There was guidewire, a scalpel, gauze, and lots of blood, as one of the executioners said, “We’re sewing this now.” After the executioners finished up their prep work, a tent was built over Richard’s torso. He was covered with a white sheet from his feet, to the tent, and ending at the middle of his chest. Richard’s right forearm was bleeding, and one of the Special Operation or Restraint Team members was wiping up blood off the floor of the killing room. It took thirty-six minutes to insert the central line in the femoral vein—camera off.

After the curtains opened and the warrant was read, Richard said, “Nah” when he was asked if he had any last words. When the pentobarbital began to take effect, Richard’s head jerked to the left, then up. There was a hard swallow, and his right hand was clenched in a fist. Ten minutes after the drug was injected, and six minutes after an executioner “confirmed [Richard] is sedated,” Richard’s entire body jerked with such force that there was some give in the restraints as they held him on the table. The witnesses were startled, and some jumped. What they did not know was that Richard had an implanted device called a cardiac resynchronization therapy defibrillator (CRT-D). The device was trying to shock Richard back to life.⁹⁶

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[<https://perma.cc/8GWM-XYNZ>].

⁹⁵ See LAIN, *supra* note 53.

⁹⁶ We consulted with medical experts and medical ethical experts on matters related to implantable cardioverter-defibrillators. We conferred with Richard numerous times. In the end, a decision was made to not raise a legal claim in the courts regarding this issue. Tennessee death-row prisoner Byron Black had an implanted device designed to provide pacing and defibrillation of his heart. Prior to his scheduled execution on August 5, 2025, Black sought a temporary injunction requiring the Tennessee Department of Corrections (TDOC) to deactivate the implanted device at the time of his execution. The Tennessee Chancery Court ordered the TDOC “to deactivate Mr. Black’s CIED device by deprogramming the device moments before administering the lethal injection . . . Defendants are directed to arrange to have the necessary medical or certified technical professional present, along with any necessary equipment, at the execution to deprogram and deactivate Mr. Black’s CIED device.” Order Granting Temporary Injunction, *Burns v. Strada*, No. 25-414-IV, (Tenn. Cnty. Ch. Ct. July 18, 2025). The temporary injunction was vacated on appeal as it was effectively a stay of execution and only the Tennessee Supreme Court had authority to modify an execution order. *Black v. Strada*, No. M2025-01095-SC-RDO-CV, 2025 WL 2166576, at *5–6, (Tenn. July 31, 2025). The court went on to note, “nothing in our decision today prevents the parties from reaching an agreement

“I’m Director Ryan. The execution is complete. Time of death 11:12 p.m.”

L. *Cooperation Appreciated*

Ed Schad was the next person I saw executed.⁹⁷ The date was October 9, 2013, in Florence, Arizona.

Ed was not wearing his eyeglasses when the video monitor flicked on. His pant legs were cut off at the knees. When one of the executioners said, “We’re going to try your right elbow,” Ed responded, “Go ahead.” When the needle was inserted, there was a quick burst of blood. While the executioners worked on Ed’s left arm, they were mumbling as they swabbed up blood on that side, and then they pushed the needle in. “You did fine; things are good; we appreciate your cooperation,” one of the executioners said before the microphone was turned off; the video monitor remained on.

A man wearing a gray suit and black tie could be seen from above. He checked his watch. There was talking but no sound. Members of the Restraint Team checked the straps holding Ed in place and wiped the blood from Ed’s right arm and the execution table. Ed kept looking straight up, eyes blinking, until they closed so he could rest up for what was about to happen to him. The video screens went blank.

When the curtains opened, Ed looked to the witness room and nodded to his spiritual advisor. He then looked straight up as the execution warrant was read. Part of his last words were, “I’m finally free.”

Ed’s eyes blinked as the pentobarbital entered his body. He swallowed hard, his head moved back, his breathing became heavier, and his eyes shut. Eight minutes later, that familiar man strutted into the execution chamber and said, “I’m Director Ryan. The execution is complete. Time of death 10:12 p.m.” Ed’s right arm was still bloody.

regarding deactivation of Mr. Black’s ICD should it become feasible for the procedure to be performed at an appropriate time.” *Id.* at *7. The Supreme Court denied certiorari. *Black v. Strada*, *cert. denied*, 606 U.S. ___, No. 25-5261 (Aug. 2025). Mr. Black was executed by the state of Tennessee on August 5, 2025. The Associated Press reported, “Black looked around the room as the execution started, lifting his head off the gurney multiple times, and could be heard sighing and breathing heavily. All seven media witnesses to the execution agreed he appeared to be in discomfort.” “‘Oh, it’s hurting so bad,’ Black said, as he lay with his hands and chest restrained to the gurney, a sheet covering up past his lower half, and an IV line in his arm.” Jonathan Mattise, *Tennessee Man Says He Hurt Badly During Lethal Injection Without Deactivating Defibrillator*, ASSOC. PRESS (Aug. 5, 2025, at 11:09 PM EDT), <https://apnews.com/article/tennessee-execution-defibrillator-bd1c3d5fcc3dd78faf9fc3ba9a5c7aad> [<https://perma.cc/87EB-HBZ7>].

⁹⁷ I never met Ed personally, but his legal team asked that I serve as a witness in his case. He was not represented by the Federal Defender’s Office.

M. I Can Help If You Can't Do It Right

Two weeks after Ed Schad was executed, Robert Jones was scheduled to die.⁹⁸ One dose of pentobarbital was the drug. It may be the last time that manufactured pentobarbital was used to carry out an execution in Arizona,⁹⁹ and maybe in the United States as well.¹⁰⁰

When the camera turned on, an executioner said, “We’re here to do an assessment of veins right now.” Robert, already secured to the execution table, laid still with his eyes closed. The executioners were tearing Robert’s sleeves, swabbing and feeling his arms, and finally using an ultrasound machine to search for a vein. Gel was being slathered on Robert’s right bicep. “The one I always use is up higher, back toward the middle of my arm is best,” Robert said as the executioner was trying

⁹⁸ The Federal Defender’s Office was appointed to represent Robert, and I assisted his legal team during the course of the representation.

⁹⁹ Notice of Disclosure, *Schad v. Brewer*, No. CV-13-02001-PHX-ROS (D. Ariz. Oct. 5, 2013), ECF No. 24. In the next execution in Arizona, a combination of midazolam and hydromorphone was used to execute Joe Wood. *See infra* Part II.N. In the next four executions, compounded pentobarbital, rather than manufactured pentobarbital was used in each execution. *See* Motion to Set Briefing Schedule for Warrant of Execution at 2, *State v. Dixon*, No. CR-08-0025-AP (Ariz. Jan. 5, 2022) (“ADCRR intends to carry out the sentence using compounded pentobarbital.”), <https://www.azcourts.gov/Portals/0/201/Press%20Releases/2012/HighProfilePage/Dixon/ASC-CR080025%20-%201-7-2022%20-%20FILED%20-%20MOTION%20TO%20SET%20BRIEFING%20SCHEDULE%20FOR%20MOTION%20FOR%20WARRANT%20OF%20EXECUTION.pdf?ver=wVWdqXQQ9VIQg3LfKhY-ng%3d%3d> [<https://perma.cc/7UFN-7HA9>]; Motion to Set Briefing Schedule for Warrant of Execution at 1–2, *State v. Atwood*, No. CR-87-0135-AP (Ariz. Jan. 5, 2022) (“ADCRR intends to execute him using compounded pentobarbital.”), <https://www.azcourts.gov/Portals/0/201/Press%20Releases/2012/HighProfilePage/Atwood/ASC-CR870135%20-%201-5-2022%20-%20FILED%20-%20MOTION%20TO%20SET%20BRIEFING%20SCHEDULE%20FOR%20MOTION%20FOR%20WARRANT%20OF%20EXECUTION.pdf?ver=OPbYIBg9INQARqse5y9b8Q%3d%3d> [<https://perma.cc/5UYZ-PUX2>]; Motion to Set Briefing Schedule for Warrant of Execution at 1–2, *State v. Hooper*, No. CR 83-0044-AP (Ariz. July 19, 2022) (“ADCRR intends to carry out the sentence using compounded pentobarbital.”), <https://www.azcourts.gov/Portals/0/201/ASC-CR830044%20-%207-19-2022%20-%20FILED%20-%20MOTION%20TO%20SET%20BRIEFING%20SCHEDULE%20FOR%20MOTION%20FOR%20WARRANT%20OF%20EXECUTION.pdf> [<https://perma.cc/4TF5-AL9B>]; Motion to Set Briefing Schedule for Warrant of Execution at 1–2, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Jan. 2, 2025) (“[T]he three executions carried out in 2022, all of which likewise used compounded pentobarbital.”), https://www.azcourts.gov/Portals/0/201/2025_01_02_05366292-0-0000-ReplyReMotionToSetBriefingSche.PDF [<https://perma.cc/4U3K-348X>].

¹⁰⁰ “Lundbeck had the sole domestic production plant for injectable pentobarbital, so there was no question as to who had made the pentobarbital that states were using in lethal injection.” In July 2011, Lundbeck announced that it was “abandoning its open market distribution system in favor of a tightly controlled closed distribution system with end-user agreements promising that Lundbeck’s product would not be used in executions.” *See* LAIN, *supra* note 53, at 146–47; *see also* Press Release, Lundbeck, Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (Jan. 7, 2011), <https://www.quotidianosanita.it/allegati/allegato7175448.pdf> [<https://perma.cc/8SVZ-2494>] (detailing Lundbeck’s implementation of a restricted distribution program to prevent its pentobarbital product from being sold to U.S. prisons for use in lethal injection, following pressure from human rights advocates).

to get a vein. The catheter was pulled out, and the executioners were still poking around. “Let my left hand free, and I can take care of it for you,” Robert offered. He was wincing and blowing air through his pursed lips. A minute or so later, “Got it,” said an executioner—one down, one to go.

“We have one here in case something goes wrong,” an executioner said, referring to the line that was set in Robert’s right arm. Then Robert got that what-the-fuck look on his face as the executioners open the right leg of his pants and start cutting. They were feeling around with their fingers and the ultrasound wand and marked a spot with ink. The salamander tattoo on Robert’s upper right thigh was there for all to see.

The executioners covered themselves with paper blue gowns, pulled on blue synthetic gloves, wiped down Robert and the prep area, and started to spread out a blue paper drape. While that was going on, Robert’s eyes were closed; he was blowing air from his cheeks to his lips while his fingers wiggled until they formed fists that alternated between clenching and flexing. One of the executioners injected Robert with an anesthetic and, after twiddling around, inserted the catheter, which immediately filled with blood. As the executioner inserted the guidewire, Robert continued to wince and blow his breath through his lips. He said, “I have a phobia against other people stinging me.”

When the line was set, the executioner sewed it in place with a stitch or two. Robert’s eyes were closed. When the executioner finished this task, he wiped the blood away, placed a clear film dressing in place, and, for good measure, taped the plastic line in place with white tape. He said, “We appreciate your cooperation.” Robert responded, “Thank you.”

They covered Robert with a white sheet to his knees, then erected a tent over his torso and pulled the cover to his chest. Robert’s eyes were closed; he was sighing and wiggling his fingers. Microphone off. Video off.

The curtain opened, the warrant was read, and with his eyes closed, Robert’s last words were, “Love and respect to my friends and family.” A short time after the pentobarbital was injected, Robert took two deep breaths, his mouth opened, and his face slowly turned from white to gray to blue. Fourteen minutes later, that man entered the room and said, “I am Director Ryan. The execution was concluded at 10:52 a.m.”

N. Call The Court

On June 26, 2014, Joseph Rudolph Wood III¹⁰¹ and five other plaintiffs filed a complaint in the federal district court seeking equitable, injunctive, and declaratory

¹⁰¹ Counsel appointed to represent Joe requested assistance from the Federal Defender’s Office due to its experience litigating method-of-execution challenges, especially in the final stages. I was one of the lawyers involved in the case.

relief.¹⁰² One of the issues in the case was the ADCRR's intent to use a two-drug protocol mixing midazolam and hydromorphone to execute Joe. It would only be the second time, post-*Furman*,¹⁰³ that this drug formula would be used to carry out an execution. There were problems the first time it was used.¹⁰⁴ Joe and the other plaintiffs were aware of the problems regarding the use of midazolam¹⁰⁵ and hydromorphone¹⁰⁶ to carry out an execution from media accounts¹⁰⁷ and meetings with their lawyers.

The plaintiffs sought relief under the First Amendment,¹⁰⁸ as they and the public had a right to reliable information about the drugs to be used in the execution in

¹⁰² Complaint for Equitable, Injunctive, and Declaratory Relief [42 U.S.C. § 1983] ¶ 2, Wood v. Ryan, No. 2:14-cv-01447-NVW-JFM (D. Ariz. June 26, 2014), ECF No. 1.

¹⁰³ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁰⁴ Ohio was the first state to use this drug combination and it did not work out so well. See Mark Memmott, *New Drug Combination Takes 24 Minutes to Execute Ohio Killer*, NPR (Jan. 16, 2014, at 2:29 PM ET), <https://www.npr.org/sections/thetwo-way/2014/01/16/263099489/new-drug-combination-takes-24-minutes-to-execute-ohio-killer> [<https://perma.cc/4BSU-5X3J>] (“[A]bout four minutes [after the execution began] McGuire started struggling and gasping loudly for air, making snorting and choking sounds which lasted for at least 10 minutes. His chest heaved and his left fist clinched as deep, snorting sounds emanated from his mouth. However, for the last several minutes before he was pronounced dead, he was still.” (quoting *Columbus Dispatch* reporter Alan Johnson)).

¹⁰⁵ See *Glossip v. Gross*, 576 U.S. 863, 952–53 (2015) (Sotomayor, J., joined by Ginsburg, Breyer & Kagan, JJ., dissenting) (“All three experts agreed that midazolam is from a class of sedative drugs known as benzodiazepines (a class that includes Valium and Xanax), and that it has no analgesic—or pain-relieving—effects. They further agreed that while midazolam can be used to render someone unconscious, it is not approved by the FDA for use as, and is not in fact used as, a ‘sole drug to produce and maintain anesthesia in surgical proceedings.’ Finally, all three experts recognized that midazolam is subject to a ceiling effect, which means that there is a point at which increasing the dose of the drug does not result in any greater effect.”) (internal citations omitted).

¹⁰⁶ Hydromorphone is a Schedule II opioid. “Hydromorphone is significantly more potent than morphine (with estimates of a relative potency of 7:1 up to 11:1 compared to morphine)[.]” Andrea M. Trescott et al., *Opioid Pharmacology*, PAIN PHYSICIAN 2008: OPIOID SPECIAL ISSUE at S133, S143 (2008), <https://www.painphysicianjournal.com/current/pdf?article=OTg3&journal=42> [<https://perma.cc/HRV5-YUWV>].

¹⁰⁷ At the time, there were widespread reports related to the use of midazolam as part of the execution drug formula. After Dennis McGuire was executed in Ohio, Clayton Lockett was executed by the state of Oklahoma, and midazolam was one of the drugs used in the three-drug combination. See, e.g., Brady Dennis & Lena H. Sun, *For More States, Execution Means Improvisation as Drug Supplies Dwindle*, WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/national/health-science/for-more-states-execution-means-improvisation-as-drug-supplies-dwindle/2014/04/30/53167218-d088-11e3-937f-d3026234b51c_story.html [<https://perma.cc/XL7K-3T5B>]; Dustin Volz, *Ohio to Carry Out Execution with Never-Before-Used Lethal Cocktail*, ATL. (Oct. 29, 2013), <https://www.theatlantic.com/national/archive/2013/10/ohio-to-carry-out-execution-with-never-before-used-lethal-cocktail/280973/> [<https://perma.cc/Z5XZ-BV9U>]; Jyllian Kemsley, *Botched Executions Put Lethal Injections Under New Scrutiny*, CHEM. & ENG'G NEWS (May 22, 2014), <https://cen.acs.org/articles/92/i21/Botched-Executions-Put-Lethal-Injections.html> [<https://perma.cc/59CS-A8CD>]; David Kroll, *The Drugs Used in Execution by Lethal Injection*, FORBES (May 3, 2014, at 7:52 AM EDIT), <https://www.forbes.com/sites/davidkroll/2014/05/01/the-pharmacology-and-toxicology-of-execution-by-lethal-injection/> [<https://perma.cc/6V3B-GL3V>].

¹⁰⁸ U.S. CONST. amend. I.

order to judge the appropriateness of the manner used to carry out executions. Because Joe had an execution date set for July 23, he filed a motion for preliminary injunction on July 2,¹⁰⁹ which was denied.¹¹⁰

The court of appeals reversed. It granted conditional relief enjoining Joe's execution until the state provides "(a) the name and provenance of the drugs to be used in the execution and (b) the qualifications of the medical personnel"¹¹¹ Once the information was provided, the injunction would be lifted.¹¹² The day before Joe's scheduled execution, the stay was vacated.¹¹³

We met with Joe the night before his scheduled execution. He was "afraid but not fearful." He had ongoing litigation in other matters pending in the state and federal courts. Joe told us the doctors checked his veins and said he "had good veins." Joe said to tell everyone he was "truly thankful for everything we did," and he had "a sense of comfort and accomplishment." Tomorrow, "my pain stops," he said.

Joe's scheduled execution was delayed for a few hours as the Arizona Supreme Court issued an administrative stay in the early morning hours of July 23.¹¹⁴ It was lifted a few hours later. The execution began at 1:35 p.m. when the video monitors in the witness room flickered to a live overhead shot of Joe strapped to the execution gurney.

The executioners were using blood pressure cuffs and blue rubber tourniquets to pop Joe's peripheral veins, then swabbing the crook of each arm before inserting the IV lines—some tape for good measure to hold the catheters and tubing in place. After everything was in position, some blood was wiped from the floor on the right side of the gurney. Camera and microphone off; curtains open.

The warrant was read, Joe said his last words, and then the mixture of midazolam and hydromorphone began to flow at 1:52 p.m. Joe was blinking; he puffed his cheeks, licked his lips, and turned his head to the right. Two minutes later, Joe frowned; his breathing was a bit heavier, and his eyes were open. A minute later, they closed. There was no movement, and it looked like Joe stopped breathing. At 1:57 p.m., after Joe was examined by one of the executioners, a voice over the speaker boomed, "It's confirmed the inmate is sedated." We waited. We watched.

Eight minutes after Joe was sedated, suddenly, he began to take big, deep breaths; he yawned as his body pushed up against the straps holding him down on the execution gurney. The witnesses in the room were startled, some jumped slightly. He stopped breathing. Two minutes later, the same thing—big, deep breaths, yawns,

¹⁰⁹ Motion for Preliminary Injunction, *Wood v. Ryan*, No. 2:14-cv-01447-NVW-JFM (D. Ariz. July 2, 2014), ECF No. 11.

¹¹⁰ *Wood v. Ryan*, No. CV-14-01447-PHX-NVW-JFM, 2014 WL 3385115, at *7 (D. Ariz. July 10, 2014).

¹¹¹ *Wood v. Ryan*, 759 F.3d 1076, 1088 (9th Cir. 2014).

¹¹² *Id.*

¹¹³ *Ryan v. Wood*, 573 U.S. 976, 976 (2014).

¹¹⁴ Order, *State v. Wood*, No. CR-14-0232-PC (Ariz. July 23, 2014) (stay pending review).

pushing up against the straps. Then Joe was gasping as he struggled to breathe. This went on and on and on and on.

One reporter “counted about 640 times [that] he gasped.”¹¹⁵ Another described it as “very disturbing to watch . . . like a fish on shore gulping for air. At a certain point, you wondered whether he was ever going to die.” Seven more times, the executioner walked into the chamber, and it was broadcast each time that Joe was sedated. We could hear when the microphone was on during the announcement, and it sounded like the loud rumbling of a freight train as Joe was gasping, gulping, and struggling to breathe.

The direction I got from the lawyer on July 16, 1996, before I walked in to witness John Joubert’s execution in Lincoln, Nebraska, stayed with me after all those years.¹¹⁶ A call needed to be made. At 2:50 p.m., I handed a note to another lawyer who was witnessing. It read, “[C]an you leave? Call Robin and Jennifer, tell her what’s going on. This has been going on for an hour” (sic).¹¹⁷ Within a matter of a few minutes, the attorneys back in the office filed a motion in federal district court asking for an emergency hearing to stop the execution. The motion read in part, “He is still alive.”¹¹⁸ The federal judge convened a telephonic hearing.¹¹⁹

I continued to watch Joe gasp and struggle to breathe. At 3:39 p.m., Joe stopped breathing. Ten minutes later, Director Ryan walked into the execution chamber, microphone in hand, and with a shamed look on his face, said, “The execution was complete at 3:49 p.m.” The curtains closed.

The state later revealed that Joe had been administered fifteen doses of the drugs;¹²⁰ this was unbeknownst to me or media witnesses. As a result of litigation following Joe’s execution, the state agreed not to use any benzodiazepine for

¹¹⁵ Bob Ortega, Michael Kiefer & Mariana Dale, *Execution of Arizona Murderer Takes Nearly 2 Hours*, ARIZ. REPUBLIC (July 24, 2014, at 12:24 AM MT), <https://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/> [<https://perma.cc/34Y3-9A8Z>].

¹¹⁶ See *supra* Part II.A.

¹¹⁷ Handwritten Note from Dale A. Baich (undated) (on file with author and the Ohio State Journal of Criminal Law).

¹¹⁸ Motion for Emergency Stay of Execution at 1, *Wood v. Ryan*, No. 2:14-cv-01447-NVW-JFM (D. Ariz. July 23, 2014), ECF No. 26.

¹¹⁹ Sealed Transcript of Telephonic Proceedings, *Wood v. Ryan*, No. 2:14-cv-01447-NVW-JFM (D. Ariz. July 23, 2014), ECF No. 32.

¹²⁰ See Michael Kiefer, *Arizona Inmate Injected 15 Times, Records Show*, ARIZ. REPUBLIC (Aug. 1, 2014, at 9:20 PM MT), <http://www.azcentral.com/story/news/local/Arizona/2014/08/01/arizona-botched-execution-report-injections/13492511> [<https://perma.cc/9QDN-965N>]; see also *First Amend. Coal. of Ariz., Inc. v. Ryan*, 188 F. Supp. 3d 940, 948 (D. Ariz. 2016), *aff’d in part, rev’d in part and remanded*, 938 F.3d 1069, 1081 (9th Cir. 2019) (“Twelve minutes into his execution, after first appearing sedated, Wood rose upwards against his restraints and gulped for air. At the 18–and 24-minute marks, the Department administered second and third doses of the midazolam-hydromorphone combination, without performing a consciousness check as provided under the written protocol. By approximately 100 minutes after the execution began, the Department had injected Wood 12 times with each drug. Finally, after nearly two hours and a total of 15 injections, Wood was pronounced dead.”) (internal citations and quotations omitted).

executions in the future and agreed to several other changes to its execution protocol.¹²¹ Courts ordered further transparency by the ADCRR during executions as well.¹²² And a lawyer is now able to have access to a mobile phone during the execution.¹²³

O. A Wake

Joseph Garcia¹²⁴ was executed in Huntsville, Texas, on December 4, 2018. It was the first execution I witnessed in Texas. Because there have been so many executions in Texas, it has its own assembly line and sense of efficiency.

Joseph was a member of the “Texas Seven,” a name created by the media to describe the seven people who escaped from a Texas prison and where one of the seven later killed a law enforcement officer.¹²⁵ One of the escapees died, and the remaining six were all sentenced to death. One shooter. Six people were sentenced to death. That is how they roll in Texas.

The media witnesses and Joseph’s witnesses were crammed in a small, dimly lit room coated with institutional green paint. The witnesses stood shoulder-to-shoulder, two or three deep. If one was in the back row, they would either need to be tall or stand on their tiptoes. When the curtain is pulled back, the window into the execution room has bars on one side of it. On the other side was the execution gurney and, beyond that, a wall with a mirrored window.

Joseph was secured to the table by five thick straps across his body, and his arms were secured to the gurney with a strap on each side. His hands were bound with adhesive tape and secured to the ends of the arms of the table.

There was not much to see or hear. Joseph was covered with a sheet. The lighting was not good in the execution room, and there were shadows. The gurney

¹²¹ See Stipulated Settlement Agreement and Dismissal of Claim One at 1, Wood v. Ryan, No. 2:14-cv-01447-NVW (D. Ariz. Dec. 19, 2016), ECF Nos. 152, 155; Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and Seven at 4, and Dismissal of Claims 6 and 7, Wood v. Ryan, No. 2:14-cv-01447-NVW-JFM (D. Ariz. June 21, 2017), ECF Nos. 186, 187.

¹²² See First Amend. Coal. of Ariz., Inc. v. Ryan, 188 F. Supp. 3d 940, 947 (D. Ariz. 2016), *aff’d in part, rev’d in part and remanded*, 938 F.3d 1069, 1081 (9th Cir. 2019); Guardian News & Media LLC v. Ryan, No. CV-14-02363-PHX-GMS, 2017 WL 4180324, at *12 (D. Ariz. Sept. 21, 2017), *appeal dismissed*, No. 17-17083, 2019 WL 13213492, at *1 (9th Cir. 2019).

¹²³ ARIZ. DEP’T OF CORRS., REHAB., & RENTRY, DEPARTMENT ORDER 710: EXECUTION PROCEDURES § 15.4.1.3 (2024), <https://corrections.az.gov/sites/default/files/documents/policies/700/0710%20-%20eff%2010-23-24.pdf> [<https://perma.cc/6E83-YRDK>] (“While the attorney witness is in the witness room, a member of the Witness Escort Team shall hold one mobile phone designated by the attorney, to be made available to the attorney in exigent circumstances. The mobile phone may not be used inside the witness room.”).

¹²⁴ The Federal Defender’s Office was appointed to represent Joseph, and I assisted his legal team throughout the course of the representation.

¹²⁵ Hannah Wiley, *Texas Executes Joseph Garcia, One of the “Texas Seven” Prison Escapees*, TEX. TRIB. (Dec. 4, 2018, at 7:00 PM Central), <https://www.texastribune.org/2018/12/04/Joseph-Garcia-Texas-seven-texas-execution/> [<https://perma.cc/833E-HGB2>].

was placed at a bit of an angle and at a slight incline. At some point there was a loud, continuous roar from outside the building. One of the rituals in Texas is when a person who was convicted of killing a law enforcement officer is about to be executed, current and retired law enforcement officers gather on motorcycles outside of the death house and rev their engines as the execution is taking place.¹²⁶

The warden asked Joseph if he had any last words. He did, but it was hard to hear above the thunder of the motorcycles right outside the building. Joseph said, “Yes[,] Sir. Dear Heavenly Father[,] please forgive them[,] for they know not what they do.”¹²⁷ After the pentobarbital was injected, Joseph’s right foot moved once or twice. After a few minutes, the curtain was pulled closed.

Another ritual in Texas was a first for me. After the execution, Joseph’s body was taken to a nearby chapel. A stretcher was wheeled into the sanctuary, and there was Joseph, laid out and wearing the same clothes that he had worn an hour or so earlier. A few of Joseph’s friends and his legal team gathered briefly to say goodbye at the post-execution wake.

P. *The Last Argument*

On August 28, 2020, in the middle of the COVID-19 pandemic, Keith Nelson¹²⁸ was executed by the United States of America with a single dose of pentobarbital in Terre Haute, Indiana. Keith was one of the thirteen people on federal death row executed during the execution spree engineered by President Donald Trump.¹²⁹

Keith’s federal habeas challenge of his murder conviction and death sentence come to an end, like some of the others on federal death row. His case, like twelve others, was chosen for execution for reasons of political expedience. The last

¹²⁶ See, e.g., Leah McDonald, *The Sound of Justice*, DAILY MAIL (Feb. 1, 2019, at 10:26 EDT), <https://www.dailymail.co.uk/news/article-6655889/Houston-police-gather-motorbikes-rev-engines-outside-execution-chamber.html> [<https://perma.cc/5VQQ-APP7>]; CNN.Com Wire Serv., *Police Accused of ‘Disgusting’ Behavior at Texas Killer’s Execution*, MERCURY NEWS (Apr. 22, 2022, at 9:39 AM PDT), <https://www.mercurynews.com/2022/04/22/police-accused-of-disgusting-behavior-at-texas-killers-execution/> [<https://perma.cc/HSY3-BLX9>].

¹²⁷ TEX. DEP’T CRIM. JUST., *Death Row Information: Joseph Garcia Last Statement*, https://www.tdcj.texas.gov/death_row/dr_info/garciajosephlast.html [<https://perma.cc/2V29-YCRX>] (last visited Sep. 11, 2025).

¹²⁸ The federal defender’s office was appointed to represent Keith. Another lawyer in the office and I represented him during the end stage of his case.

¹²⁹ Asawin Suebsaeng & Patrick Reis, *Trump’s Killing Spree: The Inside Story of His Race to Execute Every Prisoner He Could*, ROLLING STONE (Jan. 27, 2023), <https://www.rollingstone.com/politics/politics-features/trump-capital-punishment-brandon-bernard-lisa-montgomery-1234664126/> [<https://perma.cc/96YN-VVBB>]; Adam Liptak, *‘Expedited Spree of Executions’ Faced Little Supreme Court Scrutiny*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/01/18/us/executions-death-penalty-supreme-court.html> [<https://perma.cc/9GH7-L6LM>].

execution at Terre Haute before the spree was in 2003.¹³⁰ Until the Trump splurge, “[n]o president in more than 120 years had overseen as many federal executions[.]” and “[n]ot since the waning days of Grover Cleveland’s presidency in the late 1800s ha[d] the U.S. government executed federal inmates during a presidential transition[.]”¹³¹

Keith did not want to file a successor federal habeas petition or ask the president for clemency. But he did wish to participate in the litigation challenging the federal lethal injection protocol. Keith also asked to have his execution date vacated, as he did not receive proper notice of his execution date as required by federal execution protocol.¹³² That challenge was denied.¹³³

Injunctions against Keith’s execution were issued by the U.S. District Court for the District of Columbia, and one of these injunctions was upheld by the U.S. Court of Appeals for the District of Columbia Circuit—ultimately, however, all of the injunctions were taken away by a higher court.¹³⁴

Visiting Keith while he was at the end stage of his case during a pandemic presented some challenges. Co-counsel and I would meet at the Indianapolis airport after flying in from our home bases, taking all the COVID precautions as we drove west on I-70 for just over an hour to the United States Penitentiary (USP), Terre Haute. The hotels were generally empty, except a few days before execution dates were scheduled. Federal officials and executions teams filled the rooms. During our visits, we would update Keith on the status of his litigation and talk about anything a man facing death would want to talk about.

The day before Keith’s scheduled execution, a federal judge ruled that the government could not use the pentobarbital it had to execute Keith because the government had violated the FDCA. The government did not obtain a prescription for the pentobarbital.¹³⁵ Said another way, Keith’s execution could not go forward

¹³⁰ *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/data/executions?federal=Yes> [<https://perma.cc/55YH-R3Q2>] (last visited Sep. 11, 2025).

¹³¹ Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, ASSOC. PRESS (Jan. 16, 2021, at 4:20 AM EDT), <https://apnews.com/general-news-28e44cc5c026dc16472751bbde0ead50> [<https://perma.cc/4EBA-E678>].

¹³² *Roane v. Barr (In re Fed. Bureau of Prisons’ Execution Protocol Cases)*, No. 19-mc-145 (TSC), 2020 WL 13250406, at *1 (D.D.C. Aug. 20, 2020).

¹³³ *Id.* at *2.

¹³⁴ *Roane v. Barr*, 471 F. Supp. 3d 209, 209 (D.D.C. 2020), *vacated by Barr v. Lee*, 591 U.S. 979 (2020); *Roane v. Barr*, No. 19-mc-145 (TSC), 2020 WL 4915563, at *1 (D.D.C. Aug. 15, 2020), *aff’d in part, rev’d in part*, 980 F.3d 123 (D.C. Cir. 2020); *Roane v. Barr*, 485 F. Supp. 3d 233, 233 (D.D.C. 2020), *vacated by No. 20-5260* (D.C. Cir. Aug. 27, 2020), *aff’d but criticized*, 980 F.3d 123 (D.C. Cir. 2020).

¹³⁵ *Roane v. Barr*, 485 F. Supp. 3d at 239–41, 243. (“[T]he government’s failure to acquire a prescription for the use of pentobarbital in Nelson’s execution is contrary to law and thereby violates the APA [T]he pentobarbital the government intends to use in Nelson’s execution is not exempt from the FDCA’s premarketing, label, and prescription requirements. It is undisputed that the government has failed to adhere to these requirements In granting summary judgment for Plaintiffs

because the federal government broke the law. Later that night, the U.S. Court of Appeals for the District of Columbia Circuit vacated the injunction on the grounds that there were “insufficient findings and conclusions that irreparable injury [would] result from the statutory violation.”¹³⁶

Keith was slated to be executed at 3:00 p.m. Central Time on August 28, 2020. That morning, we asked the district court to clarify its earlier order and to issue a new injunction.¹³⁷ The federal district court judge scheduled a telephonic argument for 11:30 a.m. that day. Co-counsel and I dialed in to listen to the argument on a speakerphone as a colleague from a law firm, who was also co-counsel, argued the case. There were many lawyers litigating this case, as it impacted not only Keith but also the remaining people on federal death row who were in the president’s crosshairs. We also had a legal call with Keith set for noon before our scheduled 1:00 p.m. legal visit.

As noon approached, the telephonic argument continued. Co-counsel remained to listen to the hearing, and I stepped out of the hotel room into the hallway to make the call to Keith. I asked if he wanted to listen to the court hearing. He did. I stepped back into the room and set my phone down next to the speakerphone.

After the argument was over, Keith said it was pretty neat that he got to hear the lawyer arguing for him and the judge asking the questions she did. In the end, the judge denied the injunction,¹³⁸ but in the last few hours he had left to live, Keith heard his lawyers still fighting for him. He was grateful.

An hour later, we went to the prison for the final legal visit with Keith. He was on the other side of the glass in the visiting room, waiting when we arrived. Keith did not look good. He was rocking a bit and sweating. We were talking about something, I don’t remember what, and all of a sudden, a torrent of vomit gushed from Keith’s mouth. Co-counsel and I sprang to opposite corners on our side of the glass, eyes wide open. Again, another stream. Then, some spitting that went on for a few minutes. Keith said he was okay and felt better after puking. He was trying to clean himself up as a guard came by to tell us time was up. We did get to say goodbye.

Getting to and from the visiting room required an escort to get us through the labyrinth of long, wide hallways, past numerous gates, and on and off elevators. As we left one elevator and were waiting for a gate to open, we saw a dozen or so guards on the other side of the gate, dressed in all black, wearing body armor, helmets, and

on Count XI today, the court does not enter a preliminary stay. It enters final judgment granting Nelson the injunctive relief he seeks until the government can comply with the requirements of the FDCA.”).

¹³⁶ Order, *Roane v. Barr*, No. 20-5260 (D.C. Cir. Aug. 27, 2020), <https://dpic-cdn.org/production/documents/Execution-Protocol-Nelson-DC-Cir-Vacate-Permanent-Injunction-2020-8-27.pdf> [<https://perma.cc/X9UM-3YET>].

¹³⁷ Notice of Ruling and Request to Clarify and/or Amend Order and Issue New Injunction, *Roane v. Barr*, No. 19-mc-145 (Tsc) (D.D.C. Aug. 20, 2020).

¹³⁸ Order, *Roane v. Barr*, No. 19-mc-145 (Tsc) (D.D.C. Aug. 20, 2020).

goggles. They, and we, knew what they were about to do. They were going to get Keith.

The death house at USP Terre Haute is in a stand-alone building separate from where the people on death row are housed. We were loaded into a van, and a motorcade of vans drove in a procession until eventually coming to a stop. We waited for a while, still in the van, and then the van moved to the entrance to the death house. The red brick building was surrounded by a high chain-link fence topped with razor wire. As we stepped out of the van and through several gates, there were guards dressed in black holding what looked to be M-16s.

The witness room looked like a waiting room in a low-rent office: cheap, sturdy carpeting, a few plastic and metal chairs, dim lighting. There was a private restroom. A metal rail at the bottom of the viewing window was mounted to the wall. The window was covered by a green shade on the other side of the glass.

Twenty minutes after the execution was scheduled to begin, the curtain was raised. Keith was spread out and strapped down to the gurney. A white sheet was pulled up to his neck, but his arms were visible from the elbow down. A COVID mask covered his face. There were several officials and guards in the execution room, as well as Keith's spiritual advisor. When asked if he had a last statement, Keith remained mute and looked straight up. After the warrant was read, a U.S. Marshal with a telephone in hand said there were no impediments to proceed.

A minute later, Keith's breathing became a bit rapid. His ample stomach was visibly moving up and down. In the next minute Keith's breathing slowed, and then he took eight rapid breaths. Two minutes later, it looked like Keith stopped breathing, his hand turning from pink to white. At 3:31 p.m. Central Time, someone in the execution room, maybe the county coroner, checked Keith's pulse and then put a stethoscope to his chest. A minute later, Keith was declared dead.¹³⁹

This is what we said after Keith was gone: "[T]he execution of Keith Nelson did not make the world a safer place. Over the years, we have come to know Keith as someone who was different than the person who committed the horrible crime to which he admitted and pled guilty to in 2001. We saw his humanity, his compassion, and his sense of humor."¹⁴⁰

¹³⁹ See Press Release, U.S. Dep't of Just., Statement by Department of Justice Spokesperson Kerri Kupec on the Execution of Keith Dwayne Nelson (Aug. 28, 2020), <https://www.justice.gov/archives/opa/pr/statement-department-justice-spokesperson-kerri-kupec-execution-keith-dwayne-nelson> [<https://perma.cc/4BM2-DHRV>].

¹⁴⁰ Jessica Schneider, *U.S. Government Executes Killer of 10-Year-Old Girl*, CNN POLS. (Aug. 28, 2020, at 5:03 PM EDT), <https://www.cnn.com/2020/08/28/politics/keith-dwayne-nelson-executed/index.html> [<https://perma.cc/M5W8-U9XE>].

Q. *The Volunteer*

Aaron Gunches did something that ten percent¹⁴¹ of the people executed in the United States have done—he “volunteered” to be executed. A “volunteer” for execution has been defined as an “individual[] who waived at least part of their ordinary appeals or who terminated proceedings that would have entitled them to additional process prior to their execution.”¹⁴² The reasons driving a decision to volunteer are varied. They can include a lack of the mental competence needed to understand the consequences of deciding to waive appeals, mental illness, prison conditions, a desire to exercise personal autonomy, acknowledgement of culpability, or a sense of hopelessness in the legal process.¹⁴³ It gives a person on death row one thing that they can control: the day they die.

We do not know why Aaron Gunches¹⁴⁴ wanted to die. No court conducted a robust hearing to find out the reasons or to determine whether he was even competent to make that decision. Judges simply allowed him to represent himself—which he had the right to do—and when he reached the spot¹⁴⁵ along the procedural path in his legal challenges, he simply withdrew his petition, and his case came to

¹⁴¹ *Executions Overview: Execution Volunteers*, DEATH PENALTY INFO. CTR. (Apr. 25, 2025), <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers> [<https://perma.cc/BY92-EW4Y>].

¹⁴² *Id.*

¹⁴³ See John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 962–67 (2005); Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295, 304–06, 308, 321–22 (2014).

¹⁴⁴ Advisory counsel was appointed to assist Aaron. See *State v. Gunches*, No. CR-13-0282-AP, 2022 WL 22830991, at *1 (Ariz. Dec. 13, 2022). I consulted with advisory counsel. I was no longer an assistant federal public defender. Aaron invited me to be one of his witnesses.

¹⁴⁵ In Arizona, a direct appeal of a death sentence to the Arizona Supreme Court is mandatory. See ARIZ. REV. STAT. ANN. §§ 13-755(A) and 13-756(A) (2025) (both mandating “The Supreme Court shall review all death sentences.” Seeking collateral review of a death sentence through state post-conviction proceedings is voluntary). See also ARIZ. R. CRIM. P. 32.1 (stating “[a] defendant may file a notice requesting post-conviction relief under this rule . . . in any case in which the defendant was sentenced to death.”). Aaron’s direct appeals were final. See *State v. Gunches*, 234 P.3d 590, 595 (Ariz. 2010) (vacating “the sentence of death for first degree murder and remanding for a new penalty phase proceeding.”); *State v. Gunches*, 377 P.3d 993, 999 (Ariz. 2016) (affirming death sentence and holding “The trial court did not err in accepting Gunches’s valid waiver of mitigation.”). Gunches did file a post-conviction petition but subsequently withdrew it, as post-conviction proceedings are not mandatory in Arizona. See *infra* note 146 (observing that “things did not get better for Gunches’ attorneys in the next appeals stage, called post-conviction relief, back in the trial court, where defendants can raise new issues for the first time. Gunches again convinced the court to let him defend himself, then promptly fired his lawyers and withdrew the appeal. He never filed another, though it would have been within his rights to do so.”).

an end.¹⁴⁶ He then sent six letters to the Arizona Attorney General¹⁴⁷ and filed a motion in the Arizona Supreme Court asking it to issue an execution warrant.¹⁴⁸ In the end, the Arizona Supreme Court granted Aaron's wish,¹⁴⁹ even though there were serious unresolved issues related to the Arizona lethal injection protocol.¹⁵⁰

Was this state-assisted suicide?¹⁵¹

When I walked into the witness room along with another witness Aaron had selected to be there, the elected attorney general and county attorney were already seated closely together on a bleacher in the last row. They had the highest and farthest vantage point to watch what was about to happen. They were chatting in whispered tones but stopped when we walked into the room.

The setup in the witness room had changed a bit since the last time I had attended an execution in Arizona. After the Joe Wood execution in 2014, courts required more transparency during the execution process.¹⁵² There was a third monitor in the middle of the witness room above the window that separated the execution chamber from the observers. It showed a close-up of eight syringes—four black and four green. The two side monitors still showed a bird's-eye view of the gurney. One showed the entire length of the table, the other had a tighter shot from the middle of the table to the top, where Aaron's head would soon be. Anything outside the gurney was blacked out. My escort held a mobile phone in case I needed to use it.

Then, a little after 10:00 a.m., we saw Aaron appear on the two corner screens as the curtain covering the viewing window remained closed. Almost joyfully, he sprang onto the execution table while ten black-gloved hands guided him and quickly began to fasten the straps across his waist, feet, and arms. Aaron was wearing a white jumpsuit with short sleeves. He was not wearing shoes, only white

¹⁴⁶ Michael Kiefer, *A Killer Wrote His Own Death Warrant and Arizona Finally Signed It*, ARIZ. MIRROR (Mar. 19, 2025, at 6:27 PM), <https://azmirror.com/2025/03/19/aaron-gunches-execution-wrote-his-own-death-warrant-and-arizona-finally-signed-it/>. [<https://perma.cc/S3AN-E5RA>].

¹⁴⁷ *Id.*

¹⁴⁸ Motion: Issuance of Death Warrant, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Nov. 25, 2022); Motion: Appointment of Advisory Counsel, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Dec. 13, 2022); Motion: Communication and Participation/Self-Representation, Transfer, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Mar. 13, 2023); Response + Motion, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Jan. 8, 2025). To note, these motions may be found on the Arizona Supreme Court's website. *State of Arizona vs Aaron Brian Gunches*, ARIZ. SUP. CT., <https://www.azcourts.gov/newsandinfo/CR-13-0282-AP> [<https://perma.cc/NGK6-ABZR>] (last visited Sep. 11, 2025).

¹⁴⁹ Warrant of Execution, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Feb. 18, 2025).

¹⁵⁰ Some of those concerns are outlined in an *amica* brief filed with the Arizona Supreme Court. Brief of Amica Curiae Professor Corinna Barrett Lain in Support of Neither Party at 4–11, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Feb. 11, 2025). This *amica* brief may be accessed on the Arizona Supreme Court's website. *State of Arizona vs Aaron Brian Gunches*, *supra* note 148.

¹⁵¹ See Kiera Riley, *Was Aaron Gunches Execution a State-Assisted Suicide?*, ARIZ. CAPITOL TIMES (Mar. 21, 2025), <https://azcapitoltimes.com/news/2025/03/21/was-aaron-gunches-execution-a-state-assisted-suicide/> [<https://perma.cc/B93S-K7RC>].

¹⁵² See *supra* Part II.H.

socks. Three minutes later, he was covered by a crisp, white sheet to his chest. All the while, Aaron was calm and looked relaxed, almost like he was going to take a mid-morning snooze.

After a few minutes the curtain opened, and in marched four executioners wearing white hazmat-type suits, complete with hoods and white masks. One was pushing a shiny metal tray that held the tools of their trade—blue rubber tourniquets, gauze, white tape, EKG electrode monitor stickies, catheters, needles, and tubing. They got busy and acted with alacrity. This was much different than what I had previously seen in Arizona—four executioners instead of two. Efficient, not bumbling and stumbling.

There was no conversation. Aaron gazed straight up, looking bored. The needle went into Aaron’s right arm at 10:06 a.m. with one stick and no bleeding, and two minutes later, the other needle was secured in his left arm. The executioners fiddled a bit more, connecting all the tubing and making sure the EKG monitors were in the right spots on Aaron’s chest. The four executioners left the room, and I heard a door close.

What seemed like a long time passed, though it was two minutes at most, and Aaron continued to look straight up. At some point, Aaron mumbled, “What’s the hold up?”¹⁵³ A voice came over the speaker, reading the warrant, and asked Aaron if he had any last words. He shook his head, no. The voice then said, “The execution will now commence.” It was 10:14 a.m.

Aaron continued to look straight up. He did not turn to look at the witnesses. A hand with a blue glove pushed the first black syringe. It contained twenty milliliters of sterile saline solution.¹⁵⁴ Aaron rolled his head slightly; he was blinking his eyes; he licked his lips. Then the first green syringe was pushed at about 10:15 a.m. until the chemical was gone. It contained 2.5 grams of compounded¹⁵⁵ pentobarbital.¹⁵⁶ A

¹⁵³ Kiera Riley, *Aaron Brian Gunches Executed by Lethal Injection*, ARIZ. CAPITOL TIMES (Mar. 19, 2025), <https://azcapitoltimes.com/news/2025/03/19/aaron-brian-gunches-executed-by-lethal-injection/> [https://perma.cc/4EG9-MYJM].

¹⁵⁴ See ARIZ. DEP’T OF CORRS. REHAB. & REENTRY, DEPARTMENT ORDER: 710 – EXECUTION PROCEDURES ATTACH. D, at 2 chart A (2024), <https://corrections.az.gov/sites/default/files/documents/policies/700/0710%20-%20eff%2010-23-24.pdf> [hereinafter Order 710 (2024)]. This was the order in place when Aaron was executed. It was subsequently updated, but its provisions regarding saline content remain the same. ARIZ. DEP’T OF CORRS. REHAB. & REENTRY, DEPARTMENT ORDER: 710 – EXECUTION PROCEDURES attach. D, at 2 chart A (2025), <https://corrections.az.gov/sites/default/files/documents/policies/700/DO%20710%20-%20Eff.%205-20-25.pdf>. [https://perma.cc/PX3Q-9FHT] [hereinafter Order 710 (2025)].

¹⁵⁵ “Compounding is generally a practice in which a licensed pharmacist . . . combines, mixes or alters ingredients of a drug to create a medication tailored to the needs of an individual patient.” *Human Drug Compounding*, FDA (May 15, 2025), <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/human-drug-compounding> [https://perma.cc/B5VP-QJEL]. Compounded drugs are not approved by the FDA, “and lapses in quality control have caused patient injury and death.” Prashant Yadav, Rebecca Lynn Weintraub & Andy Stergachis, *When Government Agencies Turn to Unregulated Drug Sources: Implications for the Drug Supply Chain and Public Health Are Grave*, 58 J. AM. PHARMACISTS ASS’N 477, 477 (2018).

¹⁵⁶ See *id.*

minute or so later, Aaron took eight big breaths. Then, he struggled to breathe, and I heard a gurgle, as the microphone remained on to allow witnesses to hear the execution as required by a Ninth Circuit decision from 2019.¹⁵⁷ A few seconds later, Aaron's mouth opened wide. The blue-gloved hand then pressed on the second green syringe containing 2.5 grams of pentobarbital¹⁵⁸ until it was empty. Aaron did not move. Color faded from his face.

The last black syringe of the saline solution was pushed. The fingers on Aaron's right hand curled, and the color continued to drain from his skin. His mouth and eyes were closed. Aaron was declared dead at 10:33 a.m.¹⁵⁹

Aaron got his wish. However, the interests at stake when a state intends to kill in the name of its citizens are larger than those of the condemned, the state, or the victims. One could support the death penalty but oppose executions in the name of political expediency, especially when serious questions about the execution process remain. The state and the courts allowed Aaron to short-circuit the legal process required in death penalty cases. That should not be permitted. "To allow a [condemned prisoner] to choose his own sentence introduces unconscionable arbitrariness into the capital punishment system."¹⁶⁰

III. DEGREES OF TRANSPARENCY

"A witness is responsible to an event, feels the need to absorb it, in order to carry out his or her moral commitment to testify about it—or bear witness to it."¹⁶¹

What I saw and what I have been able to chronicle in this article depended on what the different prisons allowed the witnesses to see and hear leading up to and during the execution. The more I saw and heard, the more I learned.

Nebraska let the witnesses see John Joubert already strapped in the electric chair, but they did not let the witnesses see his head shaved or John being moved into the execution room and see him actually strapped into the electric chair. The witnesses did not get to see the leather mask fasten to his face and head and the tightening of the buckles on the mask. As former Florida Warden McAndrew described,¹⁶² that process was designed to break the nose of the condemned and the

¹⁵⁷ First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1075 (9th Cir. 2019) ("[T]he First Amendment right of access to governmental proceedings encompasses a right to hear the sounds of executions in their entirety. We also conclude that on the facts alleged, Arizona's restrictions on press and public access to the sounds of executions impermissibly burden that right.").

¹⁵⁸ See ARIZ. DEP'T OF CORRS., REHAB. & REENTRY, *supra* note 123.

¹⁵⁹ Press Release, Ariz. Dep't of Corrs., Rehab. & Reentry, Scheduled Execution of Inmate Aaron Gunches, ADCRR #145371 Completed (Mar. 19, 2025), <https://corrections.az.gov/news/scheduled-execution-inmate-aaron-gunches-adcrr-145371-completed> [<https://perma.cc/ML99-9S3B>].

¹⁶⁰ *Comer v. Schriro*, 480 F.3d 960, 977 (9th Cir. 2007) (Pregerson, J., dissenting) (quoting *Comer v. Schriro*, 463 F.3d 934 (9th Cir. 2006), *withdrawn sub nom. Comer v. Stewart*, 471 F.3d 1359 (9th Cir. 2006)); see also *Massie v. Sumner*, 624 F.2d 72, 74 (9th Cir. 1980).

¹⁶¹ LIFTON & MITCHELL, *supra* note 1, at 172 (emphasis omitted).

¹⁶² See TABONI, *supra* note 33.

mask itself would silence the person. During the execution, the witnesses were able to see John bolt up against the straps when he was jolted by the electricity and then slump back down when the current was off. We could see the color of his skin, water dripping from the sponges, and the puff of white smoke rise from the electrode attached to his leg. We sat there looking at the lifeless corpse for over four minutes until a man came into the execution chamber to signal to us that John was dead.¹⁶³

Witnesses to the lethal injection of Michael Beuke in Ohio saw the executioners insert the IV lines into Michael's arms, watched him walk into the execution chamber with both arms strapped to boards, saw him climb onto the gurney, and viewed Michael being strapped down. While the witnesses did not hear the sounds during that process, they did hear Michael's last words as he prayed the Rosary.¹⁶⁴

Texas and the federal government did not allow the witnesses to see much of anything. Joseph Garcia and Keith Nelson were already strapped to the execution gurneys when the curtains opened and covered with sheets. Joseph's last words were muted by the thunder of roaring motorcycle engines, which the prison permitted.¹⁶⁵ Keith had no last words.¹⁶⁶

As time went on, Arizona became more transparent about what witnesses see and hear during the execution process. What happened before the execution drugs were injected into Jeff Landrigan,¹⁶⁷ Donald Beaty,¹⁶⁸ Ricky Bible,¹⁶⁹ and Robert Moormann¹⁷⁰ is still a bit of a mystery. But because Robert Towery told the witnesses what went on behind the curtain,¹⁷¹ the process began to open up a bit. And because the Ninth Circuit held the ADCRR accountable during litigation in a series of cases,¹⁷² the execution process became more transparent. Now, in Arizona, witnesses can hear the condemned escorted into the execution chamber, strapped to the gurney, and see the IV lines inserted. The witnesses hear the last words of the condemned as well as the sounds as they die. There is a video monitor that shows a hand pushing the syringes that contain saline and the killing chemical.¹⁷³

Other states and the federal government should follow Arizona's lead and allow the witnesses to see and hear what happens during the execution process. This will contribute to the overall transparency of the death penalty process. Public oversight can help ensure that the execution is carried out in a manner where the condemned

¹⁶³ See *supra* Part II.A.

¹⁶⁴ See *supra* Part II.B.

¹⁶⁵ See *supra* Part II.O.

¹⁶⁶ See *supra* Part II.P.

¹⁶⁷ See *supra* Part II.C.

¹⁶⁸ See *supra* Part II.D.

¹⁶⁹ See *supra* Part II.E.

¹⁷⁰ See *supra* Part II.F.

¹⁷¹ See *supra* Part II.G.

¹⁷² See *supra* Parts II.H and N.

¹⁷³ See Order 710 (2025), *supra* note 154, at attach. D 7–8, §§ D.3, 6, 10–11.

is not purposely tortured or abused during the entire process. This will serve as a check against potential misconduct or procedural errors during an execution.

Still, more transparency and accountability are needed. Others have written or reported extensively and thoroughly about inept executioners and secrecy surrounding the qualifications of the executioners; or how governments conceal information about the execution drug suppliers,¹⁷⁴ and it is beyond the scope of this article to dive into these important questions regarding the transparency of the execution process. But when it comes to the government executing its citizens, the two questions that need to be asked to public officials and appointment bureaucrats are simple: what do you have to hide, and why do you want to hide it? In carrying out death sentences, states must abide by their obligations and responsibilities to “government transparency, regulatory compliance, freedom of contract, respect for the rule of law, and the utmost care in the most solemn of duties.”¹⁷⁵

CONCLUSION

I watched 16 people die. And as LIFTON AND MITCHELL wrote,¹⁷⁶ I believe I have a responsibility and obligation to share my observations.

The death penalty has always been about politics. It is a political decision to have the death penalty on the books, it is a political decision for a prosecutor to seek

¹⁷⁴ See *supra* note 48; see also, e.g., Danica Howell, *Kill ‘Em with Lies: The False Narrative of the American Execution Laboratory*, 69 ST. LOUIS U.L.J. 375, 401–02 (2025); Lauren Gill & Daniel Moritz-Rabson, *Company Linked to Federal Execution Spree Says It No Longer Produces Key Drug*, INTERCEPT (June 22, 2024, at 12:33 PM), <https://theintercept.com/2024/06/22/pentobarbital-execution-drug-absolute-standards/> [<https://perma.cc/J3X5-AZ9Q>]; Ed Pilkington, “Surreal Spectacle”: US Botched 35% of Execution Attempts This Year, GUARDIAN (Dec. 16, 2022, at 12:01 AM EST), <https://www.theguardian.com/world/2022/dec/15/us-death-penalty-data-execution-attempts-botched> [<https://perma.cc/S26U-B2FC>]; Chiara Eisner, *Carrying Out Executions Took a Secret Toll on Workers—Then Changed Their Politics*, NAT’L PUB. RADIO (Nov. 16, 2022, at 4:01 PM ET), <https://www.npr.org/2022/11/16/1136796857/death-penalty-executions-prison> [<https://perma.cc/2NMZ-PJFR>]; Austin Sarat et al., *The Fate of Lethal Injection: Decomposition of the Paradigm and Its Consequences*, 11 BR. J. AM. LEG. STUD. 1, 20–21 (2022); Noah Caldwell et al., *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NAT’L PUB. RADIO (Sep. 21, 2020, at 7:00 AM ET), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection> [<https://perma.cc/3KXA-7XBZ>]; Liliana Segura, “Our Most Cruel Experiment Yet”: Chilling Testimony in a Tennessee Trial Exposes Lethal Injection as Court-Sanctioned Torture, INTERCEPT (Aug. 5, 2018, at 11:40 AM), <https://theintercept.com/2018/08/05/death-penalty-lethal-injection-trial-tennessee/> [<https://perma.cc/43FX-7X8E>]; Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), <https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs> [<https://perma.cc/F725-ZBSU>]; Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 836–37 (2015); Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1366 (2014); Allison J. Nathan & Douglas A. Berman, *Baze-d and Confused: What’s the Deal with Lethal Injection?*, 156 U. PA. L. REV. 312, 315 (2008); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 95 (2007).

¹⁷⁵ LAIN, *supra* note 53, at 277–78.

¹⁷⁶ LIFTON & MITCHELL, *supra* note 1, at 172 (emphasis omitted).

the death penalty at the trial level, and it is a political decision to ask for an execution date to be set.

I share here so that we remember the death penalty is more than an idea where some people have strong views on both sides, and others do not know much about it. At bottom, the death penalty and executions are about our government, through elected officials and public servants, killing citizens on purpose, with premeditation, and by design.

It has been said that the more a person knows about the death penalty, the less likely one is to support it. These observations, I hope, will add to debates taking place on the question of whether the death penalty continues to be sound public policy, or is just a tarnished relic from our past that should be buried once and for all.

