

## **The Surprising Cause of Increasingly Horrific Executions: Death Penalty Abolitionists**

**By: Kristin M. Boynton**

The January 2024 execution of Kenneth Smith garnered worldwide attention,<sup>1</sup> including an official statement by the United Nations High Commissioner that criticized the new method used by the State.<sup>2</sup> The UN High Commissioner cited “serious concerns this novel and untested method of suffocation by nitrogen gas may amount to torture, or cruel, inhuman or degrading treatment.”<sup>3</sup> This “novel and untested method,” the use of nitrogen gas to execute a man on death row, was one of several new methods that came out of state officials’ determination to proceed with executions in the face of a shortage of traditionally used drugs.<sup>4</sup> The authorities made this determination despite international warnings that this method would “likely violate the prohibition on torture and other cruel, inhuman or degrading punishment,” breaching the *Convention Against Torture* treaty that the U.S. ratified in 1994 as well as legally-binding

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<sup>1</sup> Smith v. Hamm, 601 U.S. \_\_\_\_ (2024) (Sotomayor, J., dissenting) (“The world is watching.”) (citing US: Alarm Over Imminent Execution in Alabama, United Nations (Jan. 16, 2024), <https://www.ohchr.org/en/press-briefing-notes/2024/01/us-alarm-over-imminent-execution-alabama>, United States: UN Experts Alarmed at Prospect of First-Ever Untested Execution by Nitrogen Hypoxia in Alabama, United Nations (Jan. 3, 2024), <https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-alarmed-prospect-first-ever-untested-execution>).

<sup>2</sup> Alabama Execution, UN High Commissioner for Human Rights Volker Türk (Jan. 26, 2024), <https://www.ohchr.org/en/statements/2024/01/alabama-execution>.

<sup>3</sup> *Id.*

<sup>4</sup> See *The Death Penalty in 2023: Year End Report*, Death Penalty Information Center (Dec. 1, 2023), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report> (“Continued difficulties obtaining lethal injection drugs led some states to explore new, untested methods of execution or revive previously abandoned methods. Other states enacted or continued pauses on executions while the state’s method of execution was studied.”).

international norms.<sup>5</sup> So why was it used? Improbably, a pattern of increasingly inhumane methods of execution is partially due to the success of advocacy by a growing number of death penalty abolitionists.<sup>6</sup>

Jay Chapman<sup>7</sup>, a medical examiner, first proposed a three-drug-cocktail to facilitate lethal injection in 1977 by that became the primary method of execution by lethal injection through the early 2000s.<sup>8</sup> However, over the past few decades lethal injection executions have “become increasingly problematic,”<sup>9</sup> with some experts crowning it “the most botched” method of execution.<sup>10</sup> One study of autopsy records found that 84% of those killed by lethal injection had experienced severe pulmonary edema— meaning that instead of the quick, humane end-of-life that proponents describe and the public imagines, their lungs filled with blood, plasma, and other fluids.<sup>11</sup> This caused them to feel as if they were suffocating or drowning, inducing panic or

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<sup>5</sup> United States: UN Experts Alarmed at Prospect of First-Ever Untested Execution By Nitrogen Hypoxia In Alabama, Special Rapporteurs (Jan. 3, 2024), <https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-alarmed-prospect-first-ever-untested-execution> (signed by Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions; Alice Jill Edwards, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Ms. Tlaeng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Ms. Margaret Satterthwaite, Special Rapporteur on the Independence of Judges and Lawyers); UN Convention Against Torture, Convention Against Torture Initiative (visited Jan. 9, 2025) <https://cti2024.org/un-convention-against-torture>.

<sup>6</sup> ROBERT BLECKER, *THE DEATH OF PUNISHMENT*, (2013); See generally Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 BOSTON U. L. REV. 427 (2015) (asserting that the subsequent shortage is increasing the risk of harm through experimental drugs and secrecy statutes).

<sup>7</sup> Kate Pickert, *A Brief History of Lethal Injection*, TIME (Nov. 10, 2009) <https://content.time.com/time/nation/article/0,8599,1815535,00.html> (noting that Chapman’s experience was in the forensic pathology of those already deceased, not the pharmacology of living beings, and explaining his system as “a barbiturate (to anesthetize inmates), pancuronium bromide (to paralyze inmates and stop their breathing) and lastly potassium chloride (which stops the heart.”)).

<sup>8</sup> Alan Greenblatt, *States Struggle To Find An Execution Method That Works*, NPR (Apr. 30, 2014), <https://www.npr.org/2014/04/30/308379972/states-struggle-to-find-an-execution-method-that-works>

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

<sup>10</sup> *As Lethal Injection Turns Forty, States Botch a Record Number of Executions*, Death Penalty Information Center (Dec. 7, 2022), <https://deathpenaltyinfo.org/news/as-lethal-injection-turns-forty-states-botch-a-record-number-of-executions>.

<sup>11</sup> Noah Caldwell, Ailsa Chang, & Jolie Myers, *Gasping For Air: Autopsies Reveal Troubling Effects Of Lethal Injection*, NPR (Sept. 21, 2020), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection>.

terror.<sup>12</sup> The study's findings led to the country's first federal ruling that the pulmonary edema caused by lethal injection was cruel and unusual punishment in violation of the Eighth Amendment.<sup>13</sup> However, due to the Supreme Court's insistence that there *must* be a way to accomplish capital punishment,<sup>14</sup> the magistrate nevertheless denied the Motion for Preliminary Injunction to stay the execution, and the execution was ordered to proceed.<sup>15</sup> Fortunately, Governor Mike DeWine granted a postponement, saying "Ohio's not going to execute someone under my watch when a federal judge has found it to be cruel and unusual punishment."<sup>16</sup> Governor DeWine is not alone; a number of other states, and the federal government, have similarly announced moratoriums or pauses in capital punishment as issues surrounding its constitutionality and humanity are debated.<sup>17</sup>

Evidence surrounding the inhumanity of lethal injections is only one reason experts cite for decreasing public support.<sup>18</sup> The exoneration of almost 200 people sentenced to death over

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (referring to the 2019 decision of Magistrate Michael R. Merz in *In Re: Ohio Execution Protocol Litigation*, which stated, "We now know on the best expert testimony available that [midazolam] does not have any analgesic effect. Moreover, we have good evidence that midazolam will cause the 'waterboarding' effects of pulmonary edema. If Ohio executes Warren Henness under its present protocol, it will almost certainly subject him to severe pain and needless suffering. Reading the plain language of the Eighth Amendment, that should be enough to constitute cruel and unusual punishment . . . . Despite what we now know of the inadequacies of midazolam as an execution drug, the *Glossip* majority commands that a death row inmate must also plead and prove an appropriate alternative method of execution. That Henness has not done. The Motion for Preliminary Injunction . . . is DENIED." No. 2:11-cv-1016, 2019 U.S. Dist. LEXIS 8200, at \*252 (S.D. Ohio Jan. 14, 2019))

<sup>14</sup> *Glossip v. Gross*, 576 U.S. 863, 869 (2015) ("[B]ecause it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008))).

<sup>15</sup> Caldwell, Chang, & Myers, *supra* note 12.

<sup>16</sup> Andrew Welsh-Huggins, *Governor Says 'No Executions' Without Court-Backed Drugs*, AP (Feb. 26, 2019), <https://apnews.com/general-news-fa8c204d22cf42c283b19523cbb87f34>.

<sup>17</sup> Annette Choi & Dakin Andone, *Executions in the US Are in Decline - But Some Jurisdictions Lead the Rest*, CNN (Oct. 6, 2023), <https://www.cnn.com/2023/10/06/us/us-executions-death-penalty-dg/index.html> (remarking that 14 of the 27 states that still allow the death penalty have not executed anyone in 10 years or more; the federal government, California, Oregon, and Pennsylvania have announced moratoriums; and Arizona has temporarily paused executions).

<sup>18</sup> Gallup, *New 47% Low Say Death Penalty is Fairly Applied in U.S.* (Nov. 6, 2023), <https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx> (summarizing results of a 2023 survey that found that less than half of Americans believe capital punishment is applied fairly and that support for the death penalty is the least popular it has been since 1972).

the last 50 years has shed light on the court’s fallibility.<sup>19</sup> Capital sentences have also been ruled discriminatory<sup>20</sup> and virtually unchallengeable.<sup>21</sup> Despite this shift in public sentiment and passionate media coverage, the obvious route—challenging methods and fixing errors through the courts—has proved futile, “raising questions about the adequacy of state procedures and the ability of the legal system to protect innocent people.”<sup>22</sup>

This hopelessness may have been the catalyst for a different approach— following the Supreme Court’s refusal to grant relief in 2008’s *Baze v. Rees*, death penalty abolitionists began instead to target the suppliers of the drugs used in lethal injections.<sup>23</sup> At the time, there was only one U.S. company manufacturing sodium thiopental, a drug that was being used in all lethal injections.<sup>24</sup> In response to pressure from abolitionists,<sup>25</sup> the company, Hospira, sent letters to officials in all 50 states explicitly announcing that they “provide[] these products because they improve or save lives” and “do not support the use of any of [their] products in capital punishment procedures,” in early 2010.<sup>26</sup> After pausing stateside production, Hospira announced in early 2011 that they were halting plans to move production to Italy due to Italian authorities’

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<sup>19</sup> Death Penalty Information Center, *supra* note 3 (stating that 195 people who had been on death row had been exonerated between 1973 and 2023).

<sup>20</sup> Diplomatic Service of the European Union, Abolition of death penalty and fight against torture, European Union External Action (Oct. 4, 2023), [https://www.eeas.europa.eu/eeas/abolition-death-penalty-and-fight-against-torture\\_en#75093](https://www.eeas.europa.eu/eeas/abolition-death-penalty-and-fight-against-torture_en#75093) (stating that “[d]ata suggests discrimination in the application of the death penalty, including on the basis of poverty, economic vulnerability, political opinion, sexual orientation or gender identity, sex, psychosocial disability, and other grounds.”).

<sup>21</sup> See *Baze v. Rees*, 553 U.S. 35, 52, 62 (2008) (noting “[t]hroughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge.”); see also *Glossip v. Gross*, 576 U.S. 863 (2015) (denying a request for preliminary injunction against Oklahoma’s lethal injection protocol).

<sup>22</sup> Death Penalty Information Center, *supra* note 4.

<sup>23</sup> *Glossip v. Gross*, 576 U.S. 863, 869–70 (2015).

<sup>24</sup> *Drug Company: Stop Using Our Product For Executions*, Amnesty International <https://www.amnestyusa.org/updates/drug-company-stop-using-our-product-for-executions/> (last accessed Apr. 4, 2024).

<sup>25</sup> *Glossip v. Gross*, 576 U.S., at 870.

<sup>26</sup> KeeS Gioenhout, Letter to Ohio Department of Rehabilitation and Corrections (Mar. 31, 2010), available at [https://dpic-cdn.org/production/legacy/Statement-from-Hospira\\_2.pdf](https://dpic-cdn.org/production/legacy/Statement-from-Hospira_2.pdf).

concerns about “the use of Pentothal in capital punishment procedures in the United States,” and that they would instead be exiting the sodium thiopental market completely.<sup>27</sup> The New York Times reported that the Italian government’s stance was also attributable to pressure by the abolitionists.<sup>28</sup> Hospira’s attempt to distance itself wasn’t unique; since then, every pharmaceutical manufacturer of the 14 FDA-approved medicines that have been used or proposed for lethal injection have announced similar actions.<sup>29</sup> Abbott Laboratories, Cardinal Health, GlaxoSmithKline plc, Johnson & Johnson, Pfizer, and Baxter International are some of the most well-known on the list.<sup>30</sup>

Pressure from abolitionists also affected the international market. For instance, after receiving an open letter chastising them for not doing more to stop their pentobarbital from being used in lethal injections, Danish Lundbeck Pharmaceuticals—the only company licensed to manufacture this product in the U.S.—defended themselves by recounting efforts that they had already taken: expressing their opposition to state authorities, protesting publicly, and exploring taking their product out of the U.S. market altogether.<sup>31</sup> Soon after this statement, Lundbeck announced that they would no longer be selling pentobarbital to U.S. prisons.<sup>32</sup>

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<sup>27</sup> Press Release, Hospira, Hospira Statement Regarding Pentothal™ (sodium thiopental) Market Exit (Jan. 21, 2011).

<sup>28</sup> Raymond Bonner, *Letter From Europe: Drug Company in Cross Hairs of Death Penalty Opponents*, N. Y. TIMES, Mar. 30, 2011, <https://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html>.

<sup>29</sup> Industry Opposition to the Misuse of Medicines in Executions, Lethal Injection Information Center (June 2020) [https://lethalinjectioninfo.org/wp-content/uploads/2020/06/2020\\_06\\_10\\_PUB-Industry-Statements-Booklet.pdf](https://lethalinjectioninfo.org/wp-content/uploads/2020/06/2020_06_10_PUB-Industry-Statements-Booklet.pdf) (providing excerpts from companies’ public statements).

<sup>30</sup> *Id.*

<sup>31</sup> David J. Nicholl, Khurram A. Siddiqui, Mogens Dam, George Thomas, and Andre N. Sofair, on behalf of 58 others, *Open Letter to Ulf Wiinberg, Chief Executive of Lundbeck Pharmaceuticals*, LANCET 377, no. 9783 (2011) at 2079. [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(11\)60823-4.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(11)60823-4.pdf)

<sup>32</sup> Matt Ford, *Can Europe End the Death Penalty in America?*, ATLANTIC (Feb. 18, 2014), <https://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>

In June of 2011, the drugs used in lethal injections were so hard to obtain that the U.S. Secretary of Commerce sought assistance from the German Economics Minister.<sup>33</sup> Instead of providing the drugs, the Minister announced a national plan to prohibit sales of sodium thiopental to the United States.<sup>34</sup> That same year, the European Union imposed an embargo on all drugs that were used in lethal injections, including sodium thiopental and pentobarbital.<sup>35</sup> In order to keep their Propofol off of that list, German manufacturer Fresenius Kabi requires U.S. distributors to sign a contract that prohibits them from selling its Propofol to prisons.<sup>36</sup> And they take that agreement seriously: the company has “told reporters they would seize all products from any corrections departments discovered to be using their products in lethal injections,” and they even sued the State of Nebraska for acquiring their product for use in executions.<sup>37</sup> Manufacturers around the world have joined in refusing to sell to departments of correction, citing things like pressure from activists, potential litigation, and moral obligations for their stances.<sup>38</sup> The shortage has caused several states, including Ohio and Oklahoma, to pause execution by injection, describing lethal injection as a practical impossibility.<sup>39</sup>

Instead of ceasing all executions, though, states are getting creative. Some have created shield laws, keeping the name of companies who supply the drugs from the public eye; some

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Some Medical Supply Manufacturers Ban Use of IV Equipment in Lethal Injection Executions*, Death Penalty Information Center (Sept. 15, 2023), <https://deathpenaltyinfo.org/some-medical-supply-manufacturers-ban-use-of-iv-equipment-in-lethal-injection-executions>; Greenblatt, *supra* note 7.

<sup>36</sup> *Gov. Nixon Halts Execution Using Controversial Drug - Why The Change Of Plans?*, ST. LOUIS PUBLIC RADIO (Oct. 11, 2013) <https://www.stlpr.org/government-politics-issues/2013-10-11/gov-nixon-halts-execution-using-controversial-drug-why-the-change-of-plans>.

<sup>37</sup> Death Penalty Information Center, *supra* note 4.

<sup>38</sup> *Id.*

<sup>39</sup> Julie Carr Smyth, Farnoush Amiri, & Andrew Welsh-Huggins, *Ohio Governor: Lethal Injection No Longer Execution Option* (Dec. 8, 2020) (reporting Governor DeWine stated “Lethal injection appears to us to be impossible from a practical point of view today.”), *Glossip v. Gross*, 576 U.S. 863, 871 (2015) (“The District Court below found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma.”).

have chosen to try new methods of execution;<sup>40</sup> and others have chosen to “scramble” or “experiment” with new drugs.<sup>41</sup> All of these measures have prompted renewed litigation as those on death row challenge the unknown consequences of these choices.<sup>42</sup> As Deborah Denno, a Fordham University law professor and an expert on lethal injections, worries, “[w]e don’t know how these drugs are going to react because they’ve never been used to kill someone.”<sup>43</sup>

Thus, through their success in making lethal injections all but impossible, death penalty abolitionists caused the unforeseen consequence of the introduction of other methods, like the nitrogen gas used against Kenneth Smith. However, opponents of the death penalty, backed by the international community, continue to fight against all methods of execution.

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<sup>40</sup> Death Penalty Information Center, *supra* note 4.

<sup>41</sup> Greenblatt, *supra* note 7.

<sup>42</sup> Death Penalty Information Center, *supra* note 4.

<sup>43</sup> Molly Redden, *New Lethal Injections Could Cause Extreme Pain, Make Deaths “Drag On” for Hours*, MOTHER JONES (Nov. 7, 2013), <https://www.motherjones.com/politics/2013/11/ohio-lethal-injection-cocktail-execution-drugs/>.