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Lethal Injection: A Horrendous Brutality

Robin C. Konrad*

In 2012, I had purchased a non-refundable plane ticket to fly from Arizona to Alabama, where I was planning to witness the execution of one of my prior clients on April 12.¹ But on April 9, three days before his scheduled execution, he received a stay from the Alabama Supreme Court because of pending lethal-injection litigation.² He is still alive today because of the pending lethal-injection litigation. That is one of the reasons I love this type of litigation.

But I also hate this type of litigation. I am first and foremost a capital habeas attorney. As a capital habeas attorney, my job is to challenge the constitutionality of my client's convictions and his death sentence. In habeas proceedings, I often argue that my client was denied his Sixth Amendment right to effective assistance of trial counsel or that a prosecutor's misconduct deprived him of his right to a fair trial. I firmly believe there is ample evidence

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1. This speech was delivered as the keynote address of the 2016 Lara D. Gass Symposium on February 5, 2016. I was honored and humbled to be a participant among so many great lawyers and colleagues, and as a woman, I was particularly proud to speak at a symposium in memory of Lara D. Gass.

2. Order at 1, *Ex Parte* Carey Dale Grayson, Crim. App. No. CR-95-1511, (Ala. Apr. 9, 2012).

demonstrating that the death penalty is, in fact, unconstitutional and can never be carried out in constitutional manner.³ Despite this, we don't always win in federal habeas proceedings.

Therefore, once the federal courts have denied habeas relief, the state will generally move forward to carry out the now-deemed-valid death sentence. So I then have to switch hats; I am no longer challenging my client's death sentence. Instead, I must begrudgingly accept that the state is entitled to execute my client. However, although the state may be permitted to carry out his sentence, it must do so in compliance with not only the Eighth Amendment but also the First and Fourteenth Amendments. So at this stage of the process, I now seek to protect my client's civil rights.

My experience with lethal-injection litigation started in September 2007, when the Supreme Court granted certiorari in *Baze v. Rees*,⁴ a case out of Kentucky that challenged the constitutionality of the three-drug lethal-injection formula that was used by all death-penalty states at that time.⁵ With one exception, that grant of certiorari had the result of postponing the executions of all prisoners on death row across the country until after the merits ruling was issued in April 2008.⁶ The exception was Michael Richard, a Texas prisoner who was executed on the same day certiorari was granted because a court clerk refused to keep the door open past 5:00 p.m., even though Richard's lawyers had called the clerk asking if they could file a few minutes late due to computer issues.⁷

The Supreme Court's decision to review the *Baze* case resulted in a challenge to the lethal-injection procedures in Arizona, which

3. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2755–62 (2015) (Breyer, J., dissenting) (outlining the problems with capital punishment in America).

4. 551 U.S. 1192, 1192 (2007) (granting petitioners a writ of certiorari).

5. See *Baze v. Rees*, 553 U.S. 35, 46 (2008) (detailing petitioners' claims).

6. See *Lethal Injection: Stays Granted*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lethal-injection-stays-granted> (last visited Oct. 17, 2016) (listing stays granted between the Supreme Court's grant of Certiorari and its merit opinion) (on file with the Washington and Lee Law Review).

7. See Michael Brick, *Texas Judge Goes to Trial Over Execution*, N.Y. TIMES (Aug. 17, 2009), <http://www.nytimes.com/2009/08/18/us/18judge.html> (last visited Oct. 17, 2016) (examining the execution of Michael Richard) (on file with the Washington and Lee Law Review).

in turn kept the state from executing several of our clients for three years.⁸

Did this litigation ultimately save these clients' lives? No, but a stay of execution meant that they could investigate and litigate challenges to their convictions and death sentences that may have been overlooked including pursuing a DNA issue in one of our clients' cases. The fact that a client remains alive also allows them to benefit from any change in the law that may impact the issues presented in their case. For example, one of my clients had an execution date delayed two years because of the pending lethal-injection challenge. During those two years, we were able to investigate and develop a never-presented mitigation case that resulted in the United States Supreme Court granting a stay of execution on his claim of ineffective assistance of counsel.⁹ While he was ultimately executed in August 2012, we were able to litigate constitutional claims for him, and he was able to celebrate his fiftieth birthday.

To be sure, this litigation has resulted in more than temporary stays of execution. Lethal-injection litigation has also helped to bring transparency to the process, make states accountable for their actions, and provide clients with access to counsel and the courts.

The Supreme Court decision in *Baze* was fractured, but the opinion that was adopted by all lower courts was the plurality opinion authored by Chief Justice Roberts, which said that if states

8. On the same date that the Supreme Court granted certiorari in *Baze*, the Arizona Supreme Court scheduled the execution of Jeff Landrigan for October 25, 2007. Warrant of Execution, *State v. Landrigan*, No. CR-90-0323-AP (Ariz. Sept. 25, 2007). Because of *Baze*, Mr. Landrigan initiated lethal-injection litigation in state court, and the Arizona Supreme Court stayed his execution. *Id.* As a result of the lethal-injection litigation, Mr. Landrigan's execution was not reset until October 26, 2010. *Id.* The State of Arizona also sought warrants in several other cases after Mr. Landrigan's execution was stayed (Donald Beaty, Eric King, and Daniel Cook), but the Arizona Supreme Court denied the State's request because each of those prisoners had pending lawsuits challenging Arizona's lethal injection procedures. *See* Order, *State v. Cook*, No. CR-88-0301-AP (Ariz. Apr. 1, 2009) (order denying State's motion); Order, *State v. King*, No. CR-91-0084-AP (Ariz. May 6, 2009) (same); Order, *State v. Beaty*, No. CR-85-0211-AP/PC (Ariz. Feb. 4, 2010) (same).

9. *See* *Cook v. Arizona*, 563 U.S. 916 (2011) (granting application for stay of execution.)

had an execution protocol similar to that of Kentucky, including having safeguards in place to protect against a painful execution, then a prisoner would not be able to show an Eighth Amendment violation.¹⁰ So states, like Arizona, began to write their protocols similar to Kentucky's.

At that time, the state of Arizona did not provide its execution protocol and procedures to the public; however, Arizona revised its written protocol, putting in place safeguards similar to Kentucky's because of the civil-rights challenges brought by the prisoners.¹¹ Arizona then published it on the website, making it available to anyone.¹² As the state continued to execute prisoners, the prisoners continued to challenge the state's procedures, seeking to obtain further access to information regarding their executions. The more that the clients and—in turn—the public know, the less that the state can hide the way it plans to and actually carries out executions. While lethal-injection litigation challenges themselves could be considered losses in the sense that they might not ultimately prevent an execution, they are victories for the prisoners who are able to benefit from the changes that have occurred in direct response to the litigation.

And there is a larger unintended victory that has been born out of this litigation: dissenting opinions and a heightened national awareness about the death penalty.¹³

10. See *Baze*, 553 U.S. at 62 (“Kentucky’s decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment.”).

11. See *Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2011) (finding that Arizona’s written lethal-injection protocol “incorporates even more safeguards against maladministration than Kentucky’s protocol”).

12. Arizona continues to publish its protocol on its website today. See ARIZ. DEPT OF CORR., EXECUTION PROCEDURES 2–18 (Oct. 23, 2015), https://corrections.az.gov/sites/default/files/policies/700/0710_-_effective_10-23-15.pdf (outlining the procedures for planning and carrying out the execution of a person convicted of a capital offense and sentenced to death).

13. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2771 (2015) (Breyer, J., dissenting) (listing questions raised by civil rights litigation); *Wood v. Ryan*, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc); Editorial, *America and its Fellow Executioners*, N.Y. TIMES (Jan. 9, 2016), <http://www.nytimes.com/2016/01/10/opinion/america-and-its-fellow-executioners.html?smid=pl-share> (last visited Sept. 9, 2016) (“Americans, are increasingly coming to recognize the death penalty for what it is: morally

In order to continue to function in this completely dysfunctional system, we must focus on the wins. So rather than focus on our losses in habeas proceedings that have resulted in Arizona executing fourteen clients between October 2010 and July 2014, I want to share three particular successes we have had on behalf of our clients, even though these particular clients are no longer around.

One of these wins involves Arizona allowing witnesses to view the insertion of the intravenous (IV) lines. There were eight executions where the insertion of the IV lines occurred in secret, and we only learned where the catheters were placed after an autopsy. Nearly all of the IV lines were placed in the femoral vein, a method that requires a surgical procedure. The Department of Corrections (DOC) was setting femoral lines, even though its written protocol required the placement of IV lines in the arms¹⁴—like nearly every other state does.

Before the execution of Robert Towery in 2012, he and his attorney worked out a code so that Mr. Towery could communicate what happened during the insertion of the IV lines.¹⁵ If Mr. Towery asked for a lawyer during this process, then he would say during his last statement that he should have called his lawyer. If Mr. Towery experienced problems or pain during the IV process, he would use the word “mistake” during his last statement. The code was necessary because the DOC had informed Mr. Towery that if he said anything critical of the Department, then the DOC would cut off his last statement. During the last seconds of Mr. Towery’s life, he told the witnesses that “he went right when he should have

unacceptable, inhuman, barbaric, unjust and useless.”) (on file with the Washington and Lee Law Review).

14. See *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *14 (D. Ariz. Dec 21, 2011) (explaining that Arizona’s execution protocol required the execution personnel to “insert a primary IV catheter and a backup IV catheter in two separate locations in the prisoner’s peripheral veins utilizing appropriate medical procedures”); *id.* at *8 (noting that execution personnel “placed a femoral central line” in all of the prisoners who were executed in 2010 and 2011).

15. See *Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (discussing the testimony of Mr. Towery’s counsel); see also *id.* at 1082 (Berzon, J., concurring in part and dissenting in part) (“Towery and his lawyer developed a code by which Towery indicated that he sought access to counsel during the setting of the IV lines and was denied.”).

went left” and that he “made mistake after mistake after mistake.”¹⁶ He said that “in the end, he should have called his attorney.”¹⁷

It was through this code that we were able to learn that the State repeatedly tried but failed to set the IVs, and that Mr. Towery asked to speak with his attorney during this process but was denied. It took nearly an hour to establish an IV line.¹⁸ Mr. Towery’s attorney was never informed that his client asked to speak with him, even though his attorney specifically asked why the process was taking so long. An autopsy of Mr. Towery revealed at least nine punctures from attempts to set IV lines.¹⁹

Based on these facts, the next prisoner who was scheduled for execution brought a civil-rights lawsuit arguing that he should not be denied his right to counsel during the execution.²⁰ As a result, Arizona changed its protocol to allow witnesses, including attorneys, to view the part of the execution where the IV lines are inserted.²¹ This was a win in civil-rights litigation.

A second win involved access to our clients. This might be my favorite win because we won before the violation occurred rather than after. Several weeks before two scheduled executions, the State arbitrarily decided that we could not have an in-person meeting with our clients on the morning of an execution even though we had been doing this for years.²² Arizona executions are

16. Declaration of Dale A. Baich at 3, *Towery v. Brewer*, No. 2:12-cv-00245 (D. Ariz. Feb. 23, 2012), ECF No. 60-1.

17. *Id.*

18. *See Lopez*, 680 F.3d at 1073 (stating that IV access occurred “approximately an hour after the process began”).

19. *See Private Autopsy Examination of Robert Charles Towery* at 6, *Towery v. Brewer*, No. 2:12-cv-00245 (D. Ariz. Feb. 23, 2012), ECF No. 54-1 (noting repeated needle punctures).

20. *See Second Amended Complaint* at 28, *Towery v. Brewer*, No. 2:12-cv-00245 (D. Ariz. Feb. 23, 2012), ECF No. 58 (alleging that “Plaintiffs will have no means by which to meaningfully access the courts if they are denied privileged communication with attorneys in the twelve hours prior to an execution”).

21. *See Letter to Samuel Lopez from Dir. Charles Ryan* at 2, *Towery v. U.S. Dist. Court*, No. 12-71786 (9th Cir. June 7, 2012), ECF No. 2-2 (informing prisoner that witnesses could observe the insertion of IV lines via closed-circuit monitors).

22. *See Lopez v. Brewer*, 680 F.3d 1068, 1077 (9th Cir. 2012) (explaining that Director would restrict attorney access on the morning of an execution to telephone contact only).

usually scheduled at 10:00 a.m., yet the DOC decided that we could not meet with our clients after 9:00 p.m. the evening before the execution.²³ We challenged the DOC's decision. The Ninth Circuit unanimously found that the state action was without justification and ordered that the attorneys be permitted to have an in-person visit with the clients up until an hour before their scheduled execution.²⁴

This last visit is important for two reasons. First, we will often have litigation pending during that visit and we will need to inform our client of the status. With one of my clients, when I went into the visit, the Supreme Court had not yet ruled on his application for a stay. By having access to my client, I was able to personally inform him once we received word that the stay was denied, rather than having him hear it from a corrections officer. Second, being able to meet with our clients in the last moments of their life provides them with a sense of humanity and dignity. They are able to leave this world knowing that someone was on their side and advocating for them. This was a win in civil-rights litigation.

The third win is my least favorite, and it came at a very heavy price. I want to tell you about the circumstances surrounding the execution of Joseph Wood, whose execution has been described as the longest in U.S. history.²⁵ Mr. Wood took nearly two hours to die.

The State of Arizona planned to execute Mr. Wood using a two-drug combination of midazolam and hydromorphone that had been used in only one execution a few months earlier: Ohio's execution of Dennis McGuire. Mr. McGuire's medical experts warned that this drug combination would result in a prisoner gasping or hyperventilating as he died.²⁶ And that is exactly what happened

23. See *id.* ("The 2012 Protocol, as written, permits the Director to preclude any in-person non-contact visits with counsel beyond 9:00 p.m. the day before the execution.")

24. See *id.* at 1078 (directing "the Director to permit counsel in-person non-contact visitation until 9:00 a.m. on the morning of a scheduled execution").

25. See Bill Whitaker, *The Execution of Joseph Wood*, SIXTY MINUTES (Nov. 29, 2015), <http://www.cbsnews.com/news/execution-of-joseph-wood-60-minutes/> (last visited Oct. 17, 2016) (mentioning that the execution took almost two hours to complete) (on file with the Washington and Lee Law Review).

26. See Josh Sweigart, *Ohio Increases Drug Dosage for Executions*, NEW REPUBLIC (Apr. 28, 2014), <http://www.newrepublic.com/article/119068/exclusive->

in Ohio; Mr. McGuire gasped for air and took twenty-six minutes to die.²⁷ Despite Ohio's failed experiment, Arizona planned to use the same drug combination months later in executing Mr. Wood.

In the weeks leading up to Mr. Wood's scheduled execution, we filed a lawsuit asserting that Mr. Wood, as a member of the public, had a First Amendment right to information about the drugs to be used in carrying out his death sentence, including why Arizona selected this formula.²⁸ Mr. Wood briefly won a stay of execution from a Ninth Circuit panel, where the majority ordered that the State could not carry out the execution until the State provided information about the drugs and qualifications of the personnel involved in his execution.²⁹ The State asked the full court to rehear this decision; the court denied rehearing, and then-Chief Judge Kozinski dissented from that denial.

In his dissent, Judge Kozinski—historically a death-penalty supporter from the bench—attacked the use of lethal injection in executions. Without reservation, he stressed that “[s]ubverting medicines meant to heal the human body to the opposite purpose was an enterprise doomed to failure.”³⁰ In his words:

Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final

emails-reveal-statesworries-about-problematic-execution (last visited Oct. 17, 2016) (examining Ohio's decision to use midazolam and hydromorphone) (on file with the Washington and Lee Law Review).

27. See Lawrence Hummer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw Was Inhumane*, *GUARDIAN* (Jan. 22, 2014), <https://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane> (last visited Oct. 17, 2016) (“I’d been told that a ‘normal’ execution lasted five minutes—this experimental two-drug concoction had taken 26 minutes.”) (on file with the Washington and Lee Law Review).

28. Complaint, *Wood v. Ryan* at 16, 2:14-cv-01447-NVW (D. Ariz. filed June 24, 2014), ECF No. 1.

29. See *Wood v. Ryan*, 759 F.3d 1076, 1088 (9th Cir. 2014) (granting a preliminary injunction without deciding the merits of the case). The panel decision was reversed by the Supreme Court the day before Mr. Wood's execution. See generally *Ryan v. Wood*, 135 S. Ct. 21 (2014) (granting State's application to vacate judgment).

30. *Wood*, 759 F.3d at 1102 (Kozinski, C.J., dissenting from denial of rehearing en banc).

moments . . . But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.³¹

The day after Judge Kozinski claimed that lethal injection executions are made to look “serene and peaceful,” Arizona executed Mr. Wood. And according to witnesses, the event was neither serene nor peaceful.³² Several minutes after the drugs were injected, Mr. Wood began to gasp for breath.³³ And he gasped. And gasped. And gasped.

A reporter who witnessed the execution said Mr. Wood “gulped like a fish on land.”³⁴ The reporter also described the sound Mr. Wood made as “a snoring, sucking, similar to when a swimming-pool filter starts taking in air, a louder noise than [the reporter could] imitate.”³⁵ Nearly an hour after Mr. Wood’s execution had started, he had not stopped gasping. One of his attorneys witnessing the execution left the room and asked for immediate access to a telephone. It took nine minutes for her to be escorted back to an area where she had access to a telephone, nine minutes during which her client continued to gasp for breath on the gurney.

I was on standby in the office, and she called me a little over an hour after the execution had started. As soon as I learned that Mr. Wood was still alive gasping for breath, I, along with everyone else at the office, scrambled to draft an emergency motion for stay of execution. We filed motions in the federal district court, the

31. *Id.* at 1102–03.

32. See Mark Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was ‘Gasp[ing] and Struggl[ing] to Breathe’*, WASH. POST (July 23, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/> (last visited Oct. 17, 2016) (detailing witness accounts) (on file with the Washington and Lee Law Review).

33. See *id.* (Wood’s attorney watched “Wood ‘gasp and breathe heavily’ for more than an hour and 40 minutes”).

34. Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZ. REPUBLIC (July 26, 2014), <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/> (last visited Oct. 17, 2016) (on file with the Washington and Lee Law Review).

35. *Id.*

Ninth Circuit, and the U.S. Supreme Court.³⁶ The federal judge who had presided over the previous lethal-injection challenges was attending a funeral service at the courthouse for a fellow judge. But as soon as he was informed of the emergency motion, he left the service and held a telephonic hearing.³⁷

I was on the phone representing my client not knowing what had transpired in the past twenty minutes or so that it had taken to initiate the proceedings. The State's attorney, on the other hand, had direct access to the Director of the Department of Corrections, who was present at the execution.³⁸ The State's attorney told the court that Mr. Wood was still breathing, but that he was effectively brain dead.³⁹ The court asked how that determination could be made as there were no electroencephalogram (EEG) leads connected to Mr. Wood's brain.⁴⁰

The State's attorney also told the judge that a second dose of drugs was given to Mr. Wood; that representation was made an hour and half into Mr. Wood's execution.⁴¹ We would later find out that an hour and a half into the execution, Mr. Wood had not just been given a second dose, or a third dose, or even a fourth dose of drugs. An hour and a half into the execution, Mr. Wood had been given thirteen doses of a two-drug formula that the State's own written protocol indicated would be administered in one single dose.⁴² Yet the State had told the United States Supreme Court, when asking to lift the stay imposed by the Ninth Circuit, that "nearly every detail about [Mr. Wood's] execution is provided to

36. Motion for Emergency Stay of Execution, Wood v. Ryan, No. 2:14-cv-01447 (D. Ariz. July 23, 2014), ECF No. 26; *see also* Motion for Emergency Stay of Execution, Wood v. Ryan, No. 14-16310 (9th Cir. July 23, 2014), ECF No. 36; Motion for Emergency Stay of Execution, Wood v. Ryan, No. 14A99 (July 23, 2014).

37. *See generally* Transcript of Telephonic Motion for Emergency Stay of Execution at 18, Wood v. Ryan, No. 2:14-cv-01447 (D. Ariz. July 23, 2014).

38. *See id.* at 5 (noting that the Assistant Attorney General had the "director on the line").

39. *Id.* at 7.

40. *Id.* at 8.

41. *Id.* at 7.

42. *See* Second Amended Complaint at 32, Wood v. Ryan, No. 2:14-cv-01447 (D. Ariz. Jan. 29, 2016), ECF No. 97 (alleging doses in excess of written procedure).

him and to the general public, *including exactly what and how much lethal drugs will be used.*⁴³ While the court was making its ruling, the State’s attorney told us that Mr. Wood died.⁴⁴

Arizona has not carried out another execution since Mr. Wood’s and has stipulated that it will not seek to do so until the ongoing civil rights case has been resolved. Out of this awful event, there was a small win. The State recently amended its protocol and will now allow counsel for the condemned prisoner to have immediate access to a mobile phone in exigent circumstances.⁴⁵ This was a win in civil-rights litigation.

Finally, I want to discuss a case that we lost (five to four) at the Supreme Court last term. And even though we lost the case, we gained a win because of Justice Breyer’s dissent and the national attention that it has brought to the death penalty. This is the case formerly known as *Warner v. Gross*.⁴⁶ The case arose out of a lawsuit brought by twenty prisoners on Oklahoma’s death row after the horrific execution of Clayton Lockett on April 29, 2014.⁴⁷

The circumstances surrounding Mr. Lockett’s execution were described by the paramedic who participated in the execution as “a cluster” and an “atmosphere of apprehension.”⁴⁸ Oklahoma had decided to use a drug it had never used before—midazolam. The warden in charge of the execution said, “The executioners didn’t

43. Reply re: Application to Vacate Stay of Execution at 2, *Ryan v. Wood*, 135 S. Ct. 21 (2014) (No. 14A82).

44. See Transcript of Telephonic Motion for Emergency Stay of Execution, *supra* note 37, at 16.

45. See ARIZ. DEP’T OF CORR., *supra* note 12 (“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.”).

46. 135 S. Ct. 2726 (2015). The case was renamed *Glossip v. Gross* when lead plaintiff Charles Warner was executed before the Court considered his case. See *infra* note 57 (noting that Warner was one of four prisoners sentenced to death when the case was initially filed).

47. See Complaint, *Warner v. Gross*, No. 5:14-cv-00665 (W.D. Okla. June 25, 2014), ECF No. 1 (“Each of the Plaintiffs is under a sentence of death imposed by the judgment of an Oklahoma court before November 1, 2011.”).

48. OKLA. DEP’T OF PUBLIC SAFETY, PARAMEDIC/EMERGENCY MEDICAL TECHNICIAN INTERVIEW 22 (May 23, 2014), <https://assets.documentcloud.org/documents/2092545/paramedic-second-interview.pdf>.

know anything about this drug. No one did.”⁴⁹ The execution did not turn out as the state of Oklahoma planned.

After Mr. Lockett had been given the drug midazolam, which the state was using for the purpose of keeping him unconscious throughout the process, and after the physician-executioner determined Mr. Lockett was, in fact, unconscious,⁵⁰ he awoke. Mr. Lockett began jerking and writhing against the restraints,⁵¹ and witnesses heard him say “oh man,”⁵² “something is wrong,”⁵³ and “this shit is fucking with my mind.”⁵⁴ After this, the blinds were then closed so that witnesses could no longer watch the execution, but Mr. Lockett remained alive. The physician-executioner, who had realized the IV line, at some point, had failed, attempted to set another IV line; he punctured Mr. Lockett’s artery instead, causing what the warden described as a “bloody mess.”⁵⁵ Forty-three minutes after it had begun, the execution was called off by the Governor.⁵⁶ Mr. Lockett died ten minutes later.

The civil rights lawsuit filed after Mr. Lockett’s execution was the case that ended up in the Supreme Court; the argument was held on the one-year anniversary of Mr. Lockett’s death. Most people know the case as *Glossip v. Gross*, but when we filed the petition for a writ of certiorari and the stay application, it was on behalf of four Oklahoma death row prisoners: Charles Warner,

49. OKLA. DEP’T OF PUBLIC SAFETY, WARDEN ANITA TRAMMELL INTERVIEW 56 (June 2, 2014) [hereinafter WARDEN ANITA TRAMMELL INTERVIEW], http://www.tulsaworld.com/dps-interview-of-osp-warden-anita-trammell/pdf_7b6599c0-60dd-5df4-a1c5-9184dbc3c90e.html (last visited Aug. 26, 2016) (on file with the Washington and Lee Law Review).

50. Transcript of Recorded Interview of Director Robert Patton, Okla. Dep’t of Public Safety 32 (June 3, 2014), http://www.tulsaworld.com/dps-interview-of-doc-director-robert-patton/pdf_2cfbb3_c1-da49-5b04-b34f-7b1d1ffcbe5.html (last visited Oct. 17, 2016) (on file with the Washington and Lee Law Review).

51. Transcript of Preliminary Injunction Hearing at 19, 193, Warner v. Gross, No. 5:14-cv-00665-F, (W.D. Okla. Dec. 17–19, 2014).

52. *Id.*

53. *Id.*; Ruling at 14, Warner v. Gross, No. 5:14-cv-00665-F (W.D. Okla. Dec. 22, 2014).

54. Ruling at 14, Warner v. Gross, No. 5:14-cv-00665-F (W.D. Okla. Dec. 22, 2014).

55. WARDEN ANITA TRAMMELL INTERVIEW, *supra* note 49, at 51.

56. OKLA. DEP’T OF PUB. SAFETY, THE EXECUTION OF CLAYTON D. LOCKETT 18–19 (2014).

Richard Glossip, John Grant, and Benjamin Cole.⁵⁷ Charles Warner was the named petitioner because he was the one with the earliest execution date, scheduled for 6:00 p.m. on Thursday, January 15, 2015. The other execution dates followed behind in late January, mid-February, and early March.

We lost in the district court on December 22, 2014;⁵⁸ we lost in the Tenth Circuit on January 13, 2015;⁵⁹ and we filed our papers with the Supreme Court the next day. On January 15, at 6:11 p.m., I received a call from the Supreme Court clerk letting me know that the stay application had been denied, but that there was a dissent by Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan.⁶⁰ And it was a powerful dissent. The eight-page dissent did not stop Oklahoma from killing Mr. Warner, but it did acknowledge that we had science on our side and the drug formula that Oklahoma was using was likely unconstitutional; they thought we should have gotten a stay.⁶¹

Mr. Warner was pronounced dead approximately one hour later.⁶² I thought that was the end of the story; it was not. One

57. Warner v. Gross, 776 F.3d 721 (10th Cir. 2015), *cert granted sub. nom.* Glossip v. Gross, 135 S. Ct. 1173 (2015).

58. See generally Warner v. Gross, No. CIV-14-0665-F, 2014 WL 7671680 (W.D. Okla. Dec. 22, 2014).

59. See Gross, 776 F.3d at 736 (“We ultimately conclude, having rejected plaintiffs’ various challenges to the district court’s analysis of Counts 2 and 7, that the district court correctly determined that plaintiffs failed to establish a significant possibility of success . . .”).

60. See Warner v. Gross, 135 S. Ct. 824, 827 (2015) (Sotomayor, J., dissenting from the denial of the application for stay of execution) (noting that she is “deeply troubled” by the evidence presented by petitioners and that she “struggle[s] to see” how the district court’s “decision to credit the testimony of a single purported expert can be supported given the substantial body of conflicting empirical and anecdotal evidence”).

61. See *id.* at 828 (“I believe that we should have granted petitioners’ application for stay. The questions before us are especially important now, given States’ increasing reliance on new and scientifically untested methods of execution.”)

62. See Andrew Buncombe, *Charles Warner Execution: Oklahoma Inmate’s Last Words Are ‘My Body Is on Fire’ as State Carries Out First Death Penalty in Nine Months*, INDEPENDENT (Jan. 15, 2015), <http://www.independent.co.uk/news/world/americas/charles-warner-execution-my-body-is-on-fire-9981842.html> (last visited Oct. 17, 2016) (noting that Warner was pronounced dead at 7:28 p.m.) (on file with the Washington and Lee Law Review).

week later, on Friday afternoon, I was sitting in my office when I received another telephone call from the Supreme Court clerk. This time, he called to tell me that the Court—even though it had denied the application to stay the executions—had decided to grant review in this case.⁶³

The case before the Court on review was a narrow one: it was about Oklahoma’s use of a specific drug in executions, the petitioner’s burden of proof, and the district court’s commission of clear error.⁶⁴

I honestly believed that the Court was interested in the questions presented when I was standing at the podium arguing on behalf of my clients. It turns out, I was wrong. Little did I know that this oral argument would later be described by Slate journalist Dahlia Lithwick as a “horrifying day at Court” where the Justices reacted with “nasty tempers and bitter resentments.”⁶⁵ It felt as though the lawyers had not even needed to be there; the Justices were doing just fine on their own arguing amongst themselves.

What was going on during argument was bigger—much bigger—than a case merely addressing Oklahoma’s use of a particular drug in executions and challenging the district court’s errors. Fortunately, Justice Breyer had his own agenda. And his dissent has become perhaps the most important dissent in recent death penalty jurisprudence.⁶⁶ It is a dissent that has nothing to do with the questions related to lethal injection that were presented to the Court for review.

63. See *Glossip v. Gross*, 135 S. Ct. 1173, 1173 (2015) (granting writ of certiorari).

64. See Brief for Petitioner at (i), *Glossip v. Gross*, 135 S. Ct. 2726 (2015) 14-7955 (stating questions presented).

65. Dahlia Lithwick, *A Horrifying Day at Court: Death Brings Out the Worst in the Justices*, SLATE (Apr. 30, 2015), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2015/04/glossip_v_gross_supreme_court_justices_argue_about_lethal_injection_abolition.html (last visited Oct. 17, 2016) (on file with the Washington and Lee Law Review).

66. See *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting) (“[R]ather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”).

Rather, it is a dissent that was foreshadowed by a question that Justice Breyer asked during oral argument: “Perhaps there is that larger question, that . . . if there is no method of executing a person that does not cause unacceptable pain, that, in addition to other things, might show that the death penalty is not consistent with the Eighth Amendment.”⁶⁷ While there was certainly truth to Justice Breyer’s hypothetical, that was not the question presented to the Court.

Justice Breyer’s dissent, which was joined by Justice Ginsburg, is more than thirty pages long and explains all of the problems with how the death penalty is currently imposed.⁶⁸ This dissent provides a road map of the serious unreliability, the arbitrariness in application, and the unconscionably long delays in the administration of the death penalty. As Justice Breyer explains, these factors, combined with the fact that most places within the United States have abandoned its use and based on his own experience on the Court, have led him to believe that the death penalty now likely constitutes a legally prohibited “cruel and unusual punishment.”⁶⁹

I know firsthand each of the problems that Justice Breyer describes. How can the death penalty be reliable in a case where it was imposed on my twenty-four-year-old brain-damaged client who killed no one? My client was parked at a rest stop with his very disturbed teenage friend, a friend who crossed the four-lane interstate and shot and killed two people execution style.⁷⁰ My

67. Transcript of Oral Argument at 21, *Glossip v. Gross*, No. 14-7955, 135 S. Ct. 2726 (2015).

68. See *Glossip* 135 S. Ct. at 2755–56 (Breyer, J., dissenting) (“Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose.”). Although Justice Sotomayor’s dissent demonstrates the problems with implementing lethal-injection protocols, her dissent does not have significance beyond the facts of the case and to litigants raising claims similar to those presented in *Glossip*. *Id.* at 2780–81.

69. *Id.* at 2756.

70. See, e.g., *Dickens v. Ryan*, 740 F.3d 1302, 1339 (9th Cir. 2014) (en banc) (Christen, J., dissenting) (“Imposing the death penalty on Gregory Dickens, the getaway driver in an armed robbery ‘who neither took life, attempted to take life, nor intended to take life,’ violates the Eighth and Fourteenth Amendments and is an unreasonable application of clearly established federal law.”) (citation

client received the death penalty because his teenage friend, who was a known pathological liar, testified against him—lying on the stand and saying that my client had commanded him to kill the witnesses via walkie-talkies. On direct appeal and in the habeas appeal, the state admitted that this information was untrue.⁷¹

This client received the death penalty at a time where Arizona used judges, not juries, to impose the sentence. Three jurors on their own accord wrote the judge after trial saying that they did not think my client should get death, and one juror wasn't even sure my client was guilty.⁷² The judge—who had rejected his own son for being gay⁷³—sentenced my openly gay client to death. How can that sentence be reliable?

The reliability of a death sentence also depends on the effectiveness of defense counsel. In one case, my client's lead trial counsel, who represented my client for over one year before going to trial, admitted that he spent approximately six to eight hours preparing for trial.⁷⁴ My client's trial lasted one day. The jury deliberated 12 minutes to determine his guilt.⁷⁵ How can that conviction, let alone the death sentence, be reliable?

The application of the death penalty is not only unreliable, but also entirely arbitrary and depends often on factors such as location. If a defendant is charged with killing someone in a certain county, then he will be more likely to face a death sentence. One of my clients has schizophrenia and was charged with shooting a

omitted); *see also id.* at 1324 (Watford, J., concurring) (noting that he “would have held that the Eighth Amendment bars Dickens’ execution” if he were not required to owe deference to the state court decision if it the “interpretation is erroneous”).

71. *Id.* at 1344 (Christen, J., dissenting) (noting that the “the Arizona Assistant Attorney General conceded that neither the jury nor the trial court believed Amaral’s walkie-talkie story”); *see also* Trial Oral Argument at 52:38-53:03 (June 24, 2013), *Dickens v. Ryan*, 740 F.3d 1302, 1339 (9th Cir. 2014) (counsel disavowing the walkie-talkie story).

72. *See* Opening Brief at 22–23, *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (No. 08-99017) (quoting three juror’s letters).

73. *See* Excerpt of Record at 858–60, *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (No. 08-99017) (affidavit describing the outward hostility Judge Cole expressed toward gay people, including his own son).

74. *See* Petitioner’s Brief on Merits at 33, *Flowers v. Thomas*, No. 2:10-cv-00579-MEF (M.D. Ala. 2012), ECF No. 35 (discussing counsel’s testimony).

75. *See* Petition for Writ of Habeas Corpus at 5, *Flowers v. Allen*, (No. 2:10-cv-00579-MEF (M.D. Ala. 2012), ECF No. 1.

man, who ultimately died because of the incompetence of those providing medical care.⁷⁶ The prosecutors did not think that this should be a death penalty case, but the County Attorney told them that they had to seek death because at least one aggravating circumstance existed—that the victim was killed for pecuniary gain.⁷⁷ But states now have so many aggravating circumstances that any murder can fit into one of the categories. How is this not arbitrary?

Finally, the death penalty, which can take decades before it is carried out, serves no legitimate penological purpose. As Justice Breyer explains, the “delay is in part a problem that the Constitution’s own demands create.”⁷⁸ Because the Constitution requires procedural safeguards and heightened reliability to ensure fairness and accuracy when the ultimate punishment is imposed, capital case review takes a long time. The cruelty of delay is two-fold.

First, “lengthy delay in and of itself is especially cruel because it ‘subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.’”⁷⁹ In Arizona, death row prisoners are kept in a single cell with no access to natural light, but a fluorescent “security” light remains on at all times. The prisoners never have human contact—no family contact, no lawyer contact, no person to ever touch them in a kind manner. Three times per week, the prisoners are permitted to go outside and to take a shower. The outdoor facility is a rectangular area with high concrete walls covered at the top with mesh so that they can never look at the sky without seeing it covered by wire. Unless the prisoner has a legal or personal visit, he remains in his cell the rest of the time.⁸⁰

76. Amended Petition for Writ of Habeas Corpus at 147–48, *White v. Ryan*, No. 3:08-cv-08139-GMS (D. Ariz. July 10, 2015), ECF No. 273.

77. *Id.*

78. *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting).

79. *Id.* at 2765 (citing *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari)).

80. See generally *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1034 (D. Ariz. 2002); *Cruel Isolation: Amnesty International’s Concerns About Conditions in Arizona Maximum Security Prisons*, AMNESTY INT’L (Apr. 2, 2012) <http://www.amnestyusa.org/research/reports/cruel-isolation-amnesty-international-s-concerns-about-conditions-in-arizona-maximum-security-prison> (last visited

Second, “lengthy delay undermines the death penalty’s penological rationale”: deterrence and retribution.⁸¹ While there has been debate as to whether the death penalty will, in fact, deter a person from killing someone, my own experience has led me to believe that it does not serve as a deterrent. Many individuals who end up on death row are seriously mentally ill, come from dysfunctional and traumatic backgrounds, were highly intoxicated at the time of the crime, and never even contemplated the risks or the benefits of the act that resulted in their death sentence. Several of my clients were not even aware that the death penalty was a punishment in their state before they were convicted.

The value of retribution—restoring the community with its loss—is decreased as the years go by. In some cases, the victim’s family members have passed away; the community is not the same community that sentenced the offender twenty-plus years ago. And most often, the offender is no longer the same person who committed the crime in the years prior. In prison, he is no longer able to abuse drugs or alcohol, he is often provided psychiatric medication, and he often develops meaningful relationships with other people. In essence, the goal of retribution really only serves the purpose of revenge. We as a society are better than that.

So, while a dissent may not immediately save my client’s life—and certainly Justice Sotomayor and her three joining members of the bench could not save Charles Warner’s life—it serves a bigger purpose. To quote one of my favorite Justices, Thurgood Marshall, who inspired me as I studied in the same law school that he did: “We must dissent from the indifference. We must dissent from the apathy We must dissent because America can do better, because America has no choice but to do better.”⁸² Dissenting opinions can be crucial in leading America to do better—to rid itself of an unjust system that can never be fairly or consistently applied.

This is where capital defense attorneys come into play. I am constantly inspired by so many of my colleagues—the ones I know personally, the ones I know through listservs, and the ones I read

Oct. 17, 2016) (on file with the Washington and Lee Law Review).

81. *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting).

82. Former Supreme Court Justice Thurgood Marshall, *The Liberty Medal Acceptance Speech* (July 4, 1992), <http://genius.com/Thurgood-marshall-the-liberty-medal-acceptance-speech-annotated> (last visited Oct. 17, 2016) (on file with the Washington and Lee Law Review).

and hear about. As long as executions continue, we will continue to work. It is a system stacked against our clients, but we continue to work. We work even when we think that it won't matter, that we won't win, that the judge won't grant our client any relief. We still continue to file pleadings, argue cases, and attend executions. This is often our job, at times almost literally, twenty-four hours a day, seven days a week. We commit our hearts and our minds to individuals because occasionally we do win, even little victories. We do this, because we believe America can do better. We believe that the time has come for the state to stop "committing a horrendous brutality on our behalf."⁸³

83. *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc).