

Tulsa Law Review

Volume 54 | Number 1

Fall 2018

Poor Execution: Putting an End to Gruesome Death Penalties in Oklahoma

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Dallas Jones, *Poor Execution: Putting an End to Gruesome Death Penalties in Oklahoma*, 54 *Tulsa L. Rev.* 149 (2018).

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POOR EXECUTION: PUTTING AN END TO GRUESOME DEATH PENALTIES IN OKLAHOMA

“This method has never been used before and is experimental . . . How can we trust Oklahoma to get this right when the state’s recent history reveals a culture of carelessness and mistakes in executions?”

-Dale A. Baich, March 14, 2018¹

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1. Oklahoma criminal defense attorney Dale Baich was quoted in the *Washington Post* on March 14, 2018, when asked about the potential changes in Oklahoma’s primary method of execution.

I. INTRODUCTION

Opposition to cruel and unusual punishment is core to the foundation of the American government. Yet, lethal injection manifests in such inhumanity. The State of Oklahoma scheduled two executions on the night of April 29, 2014. Clayton Lockett was up first. The State bound Clayton in the state penitentiary's execution chamber and injected him with an experimental replacement drug called midazolam. This drug is the first of a three-part cocktail, which Oklahoma originally adopted and currently uses in its lethal injections.² Traditionally, this first drug serves as an anesthetic.³ The second and third parts of the "cocktail" cause severe pain if injected while a person is still conscious.⁴ The drug took effect, and the doctor in the execution chambers declared Clayton unconscious.⁵ However, a few minutes later, witnesses heard Clayton try to speak as he mumbled and convulsed in pain.⁶ The prison warden, Anita Trammel, said she "thought [he] spoke."⁷ The State drew the blinds to block the spectators' view, and forty minutes after Clayton's initial injection, his seething pain finally subsided when he died of an excruciating heart attack.⁸ The State of Oklahoma entered a stay of execution for the second man scheduled to die that night.⁹

Regrettably, this gruesome story reaches beyond the State of Oklahoma. On January 16, 2014, the State of Ohio executed Dennis McGuire by lethal injection. Ohio used the same experimental anesthetic as the State of Oklahoma in attempting to render Dennis unconscious.¹⁰ Shortly after the injection, witnesses—Dennis' family among them—watched as he agonized for over ten minutes.¹¹ One witness inside the execution chamber stated that a few minutes after the injection, "[Dennis'] stomach swelled up in an unusual way."¹² The witness described the following eleven minutes involved Dennis clenching his fists, "fighting for breath," and gasping so loudly you could hear him "through the . . . wall that separated [them]."¹³ However, according to Dennis' family and friends, the time

2. Deborah W. Denno, *Courting Death: The Supreme Court and Capital Punishment*, 130 HARV. L. REV. 1827, 1862 (May 2017).

3. Denno, *supra* note 2, at 1862; In Clayton Lockett's execution, Oklahoma used midazolam as the first-part anesthetic. Oklahoma is among six states which has used the drug, and the state has not used midazolam since the death of Clayton Lockett. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR. ("DPIC"), <https://deathpenaltyinfo.org/state-lethal-injection>.

4. Pancuronium bromide and Potassium chloride. *State by State Lethal Injection*, *supra* note 3. See also Eric Berger, Article, *Gross Error*, WASH. L. REV. 929, 938–39 (Oct. 2016).

5. Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett was a 'bloody mess'*, GUARDIAN (Dec. 13, 2014, 11:04 AM), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

6. Fretland, *supra* note 5; See also Samantha J. Weichert, *Justice for Jailbirds: Summoning Bioethical Liberation for Death Row and Reinventing Indiana's House Bill 41*, 13 IND. HEALTH L. REV. 272, 306 (2016).

7. Fretland, *supra* note 5.

8. *Id.*

9. *Id.*

10. Lawrence Hummer, *I Witness Ohio's Execution of Dennis McGuire. What I Saw was Inhumane*, GUARDIAN (Jan. 22, 2014, 1:51 PM), <https://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane>.

11. *Id.*

12. *Id.*

13. *Id.*

felt like an eternity, as they helplessly watched Dennis painfully struggle for one more breath.¹⁴

On July 23, 2014, the State of Arizona injected and executed Joseph Wood. A little before 2:00 p.m. that afternoon, Joseph received the same experimental anesthetic that Oklahoma used, and the anesthesiologist inside the execution chamber pronounced him unconscious a few minutes later.¹⁵ An Arizona reporter noticed Joseph's mouth open and his chest lift shortly after he was declared unconscious.¹⁶ For the following hour and a half Joseph convulsed and gasped.¹⁷ Amid Joseph's torturous last ninety minutes, multiple reporters in the room admitted that they did not believe Joseph was going to die.¹⁸ During Joseph's struggle, one of the reporters made a mark on a notepad each time Joseph opened his mouth.¹⁹ He ticked off more than 640.²⁰

In December of 2016, the State of Alabama executed Ronald Smith by lethal injection. A witness said that for approximately thirteen minutes Ronald continued to gasp and clench his fists in apparent pain.²¹ Prior to the execution, Ronald challenged the State of Alabama's protocol claiming that the untested anesthetic would not serve its purpose of sedation before administering the second and third parts of the cocktail.²² Ronald's fears became reality. Yet again, after receiving the same experimental anesthetic, Ronald went from a sedated state to heaving, coughing, and struggling to breathe.²³ During Ronald's agony, one of his attorneys stated out loud that he had warned prison officials this execution would likely be tragically botched.²⁴ Unfortunately for Ronald, and the witnesses to Ronald's death, there was no contingency plan for ending Ronald's life in a humane way.²⁵

Despite these cases of botched executions, the State of Oklahoma continues to use lethal injection as its primary way of executing its inmates.²⁶ Most recently, Oklahoma used the untested drug midazolam as its anesthetic in the execution protocol. Midazolam was the drug used in the botched executions of Clayton Lockett, Dennis McGuire, Joseph Wood, and Ronald Smith. Under current Oklahoma law, "[t]he punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced."²⁷ If lethal injection is deemed "unconstitutional by an appellate court of

14. *Id.*

15. Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, THE REPUBLIC (Jul. 23, 2014, 10:32 PM), <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Kiefer, *supra* note 15.

21. Kent Faulk, *Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed For 13 Minutes During Execution*, REAL-TIME NEWS FROM BIRMINGHAM (Jun. 6, 2017, 5:13 PM), http://www.al.com/news/birmingham/index.ssf/2016/12/alabama_death_row_inmate_is_se.html.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. OKLA. STAT. tit. 22, § 1014.

27. *Id.*

competent jurisdiction” or the lethal quantity of the drug or drugs become “otherwise unavailable,” the Oklahoma lethal injection/execution protocol statute has multiple backup plans for the inmate’s execution to still be carried out.²⁸ Among the alternatives are nitrogen hypoxia (i.e., a present-day gas chamber), electrocution, and firing squad.²⁹

Oklahoma intends to address the State’s lethal injection issues by turning to nitrogen gas inhalation as its primary method. Oklahoma’s recent response verifies that lethal injection has failed. While the State’s recognition of the problem should be encouraging, unfortunately it is just moving towards another untried and irresponsible idea. Like lethal injection, Oklahoma is creating a brand-new execution method and procedure out of thin air. Dale Baich, an Oklahoma death-row defense attorney, shares similar doubts.³⁰ Mr. Baich recently stated that “Oklahoma is once again asking us to trust it as officials ‘learn-on-the-job.’”³¹ Based on the botched executions above, that approach has a disastrous track record.

To fully understand the current state of the death penalty in Oklahoma, it is important to look back and see how we got where we are today. The very recent cases of botched executions are eye-opening. Unfortunately, needlessly painful executions are not new in the United States. This country’s efforts to discover humane modes of executing people has only resulted in diverse ways of inflicting pain and suffering to an individual in his or her final hours.

In 1977, a State senator from Oklahoma created the newest method of execution by happenstance.³² Over the past fifty years that method—lethal injection—has become the primary way that States execute individuals on death row in the thirty-two States that currently allow the death penalty.³³

While Oklahoma’s three-drug protocol has remained common practice, drug shortages have forced States to invent new combinations without prior testing.³⁴ In the early 2000s, death-penalty abolitionists began placing enormous amounts of pressure on pharmaceutical companies that supplied drugs to state prisons for lethal injections.³⁵ This pressure caused a shortage in the original anesthetic to the three-part protocol, sodium thiopental. In response, Oklahoma led the charge in replacing it with an animal anesthetic, pentobarbital.³⁶ Soon after, the supply of pentobarbital became restricted as well, and by

28. *Id.*

29. *Id.*

30. Mark Berman, *Oklahoma Says it Will Begin Using Nitrogen for All Executions in an Unprecedented Move*, WASH. POST (Mar. 14, 2018, 5:56 PM), https://www.washingtonpost.com/news/post-nation/wp/2018/03/14/oklahoma-says-it-will-begin-using-nitrogen-for-all-executions-in-an-unprecedented-move/?utm_term=.74aa17a1652d. This death penalty change for the State of Oklahoma came out on March 14, 2018, 48 hours before this article’s submission deadline.

31. *Id.*

32. Josh Sanburn, *Creator of Lethal Injection Method: ‘I Don’t See Anything that Is More Humane’*, TIME (May 15, 2014), <http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/>.

33. Nathan R. Chicoine, Note, *Flawless Execution: Examining Ways to Reduce South Dakota’s Lethal Injection Risks*, 57 S.D. L. REV. 98, 98 (2012).

34. See Megan Doyle, Note, *Guerilla Warfare: The Importance of Pharmaceutical Company Support, or Lack Thereof, in the Constitutionality of the Death Penalty in the United States*, 27 U. FLA. J.L. & PUB. POL’Y 191, 202 (Aug. 2016).

35. *Id.*

36. *Id.*

2013 many States had an expiration date of when supply of the drug would be cut off. Midazolam is the latest replacement for pentobarbital used by death penalty States and it was introduced by Florida in late 2013.³⁷ Oklahoma followed shortly after by using midazolam in the execution of Clayton Lockett in the Spring of 2014.³⁸ Although its supply is already diminishing due to the same drug shortage issues, its use caused the excruciating deaths of individuals in multiple States throughout the country.

Oklahoma's three-drug protocol is severely inhumane. Tellingly, the drugs are not even allowed in euthanizing animals. In a Supreme Court case against Florida's three-drug protocol, which is the same as Oklahoma's, three highly experienced veterinarians submitted a brief on behalf of the defendant comparing Florida's protocol for executing its inmates with the protocol that veterinarians use in euthanizing animals.³⁹ In short, the veterinarians concluded that not only was the process for euthanasia much more in-depth, but it was also more humane.⁴⁰ Specifically, the veterinarians showed how their profession ensures that the animals' state of consciousness, loss of reflex, and loss of response to stimuli are all validated.⁴¹ This is a process not used in the execution of human beings.⁴² Secondly, the veterinarians showed that the medical professionals who administer drugs to animals are much more highly trained than those that administer drugs to human beings.⁴³ Finally, the veterinarians stated that among veterinarians nationwide, one of the drugs used in the lethal injection protocol is a drug that veterinarians refuse to give to animals at an appropriate level of anesthesia.⁴⁴

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment.⁴⁵ In 2008, the United States Supreme Court set out a standard to help make this determination.⁴⁶ To constitute cruel and unusual punishment an execution method must present a substantial risk of serious harm.⁴⁷ A risk of serious harm is substantial if the method is substantially riskier compared with known and available alternatives.⁴⁸ In arguing a better alternative under *Baze v. Rees*, it must be: (1) feasible; (2) readily implemented; and (3) significantly reduce a substantial risk of severe pain.⁴⁹ The Court has yet to apply this three-part test to the firing squad.

The use of firing squad meets the *Baze* test as a better alternative to lethal injection and Oklahoma's primary use of lethal injection over firing squad should be found unconstitutional. Oklahoma's most recent proposal to use nitrogen gas inhalation fails as

37. *State by State Lethal Injection*, *supra* note 3.

38. Fretland, *supra* note 5.

39. See Brief for Clarence Edward Hill et. al. as Amici Curiae Supporting Petitioner, *Hill v. McDonough*, 547 U.S. 573 (2006) (No. 05-8794), 2006 WL 542180 (hereinafter "Brief for Petitioner").

40. *Id.* at 14.

41. *Id.* at 9.

42. *Id.* at 16.

43. *Id.* at 5.

44. Brief for Petitioner, *supra* note 39, at 10.

45. U.S. Const. amend. VIII.

46. *Baze v. Rees*, 553 U.S. 35, 52 (2008).

47. *Id.*

48. *Id.*

49. *Id.*

well. The nitrogen gas procedure proposed by Oklahoma has never been used before.⁵⁰ Robert Dunham, executive director of the Death Penalty Information Center recently described the new process as “‘an experimentation’ that would likely cause suffering.”⁵¹ Meanwhile, firing squad is cost-effective, easy to put in place, and states know how it works. Oklahoma’s access to the necessary location, tools, and highly-skilled marksmen make the firing squad method feasible and readily implemented. Also, firing squad significantly reduces a substantial risk of pain in comparison. Unlike lethal injection, which has caused torture to several individuals over the past decade, firing squad is instant, comparatively painless, and has resulted in far fewer botched executions.⁵² After considering five execution methods used throughout this country’s history, this comment will first demonstrate that Oklahoma’s current statutory lethal injection protocol is unsuitable for four reasons: (1) scarcity of appropriate medication; (2) inappropriateness of paralytic use even in animal euthanasia; (3) risk for infliction of unconstitutional cruel and unusual pain with current drugs; and (4) low efficacy. Then, it will demonstrate that the Legislature should instead codify execution by firing squad as the primary State execution method.

II. HISTORY OF THE DEATH PENALTY

Dating as far back as the Eighteenth Century B.C., the death penalty has been the ultimate punishment.⁵³ Early governments executed people via brutal means, including crucifixion, drowning, beating to death, burning alive, and impalement.⁵⁴ Since the Nineteenth Century, States have used five primary methods of execution: (1) hangings; (2) electrocution; (3) gas chamber; (4) lethal injection; and (5) firing squad.⁵⁵ Among the most recent methods used in the United States, all except firing squad inflict ruthless suffering before death; no different than executions from hundreds of years ago.

A. The Death Penalty’s Constitutional Fall and Rise in the Twentieth Century

Abolitionists of the death penalty have existed throughout America’s history,⁵⁶ but its proponents grew stronger in the middle of the Twentieth Century.⁵⁷ After the 1930s produced the most executions in any American decade⁵⁸, the 1940s saw a steady decline.⁵⁹

50. Timothy Williams, *Oklahoma Turns to Gas for Executions Amid Turmoil Over Lethal Injection*, N.Y. TIMES, (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/us/oklahoma-nitrogen-executions.html>.

51. *Id.*

52. *Arthur v. Dunn*, 137 S. Ct. 725, 734 (2017). Justice Sotomayor stated this about death by firing squad in this recent Supreme Court decision. In comparing execution methods with firing squad, Justice Sotomayor states that “available evidence suggests” that a correctly performed shooting could solve the problem of drawn out executions by lethal injection. *Id.* at 733.

53. *Part I: History of the Death Penalty*, DPIC, <https://deathpenaltyinfo.org/part-i-history-death-penalty>.

54. *Id.*

55. See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 83–87 (4th ed. 2012).

56. *Part I: History of the Death Penalty*, *supra* note 53.

57. *Id.*

58. *Id.*

59. *Id.*

And by the 1950s, public sentiment began to shift away from the death penalty.⁶⁰ There were 119 executions in the year 1950, and the number consistently declined into the 1970s.⁶¹

The United States Supreme Court responded to the country's trending objection to the inhumaneness of the death penalty when it decided *Furman v. Georgia* in 1972. *Furman* involved three separate death row inmates challenging the constitutionality of the death penalty laws of Texas and Georgia.⁶² The Court held that the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."⁶³

The *Furman* Court resulted in a five to four decision.⁶⁴ Like public sentiment, there was clearly a split among the nine Supreme Court justices in 1972. However, the issue in *Furman* was not whether the death penalty by itself was constitutional, but whether Georgia's and Texas's state laws for implementing the death penalty were carried out in a humane way. In fact, only two of the nine justices believed the death penalty was unconstitutional in all instances.⁶⁵ For example, in Justice White's concurrence, he stated that he did not believe that the death penalty was unconstitutional "per se."⁶⁶ The Court acknowledged that it assumed that "punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous."⁶⁷

In short, the *Furman* Court determined that the imposition of the death penalty under arbitrarily and randomly administered systems, like Texas and Georgia law at the time, in which juries are given unrestricted and unguided discretion to impose a sentence of life or death constitutes "cruel and unusual" punishment.⁶⁸ In response to *Furman's* decision, several states revised their death penalty laws to satisfy the requirements set out in *Furman*.⁶⁹ It did not take long for a revised state statute to reach the United States Supreme Court, and in 1976, the Court reaffirmed the constitutionality of Georgia's implementation of the death penalty in *Gregg v. Georgia*.

In *Gregg*, Troy Gregg was tried and convicted under Georgia law.⁷⁰ Since the decision in *Furman* four years earlier, Georgia bifurcated its procedure into a trial stage and a penalty stage.⁷¹ The trial court found Gregg guilty.⁷² At the penalty stage, the jury found that the circumstances of the murder perpetrated by Gregg warranted the sentence of death.⁷³ The State appellate courts affirmed, and the case made it up to the Supreme

60. *Id.*

61. *Part I: History of the Death Penalty*, *supra* note 53.

62. *Furman v. Georgia*, 408 U.S. 238, 229 (1972).

63. *Id.*

64. *Id.* at 238.

65. *Id.* at 306. (Stewart, J., concurring).

66. *Id.* at 311.

67. *Furman*, 408 U.S. at 241.

68. *Id.* at 238.

69. COYNE & ENTZEROTH, *supra* note 55, at 139.

70. *Gregg v. Georgia*, 428 U.S. 153, 153 (1976).

71. *Id.*

72. *Id.*

73. *Id.*

Court.⁷⁴ It found that the “punishment of death for the crime of murder did not . . . violate the Eighth and Fourteenth Amendments.”⁷⁵

Again, implementing the death penalty in a humane way was the front and center issue for the Supreme Court. Justice Stewart, in providing guidance to State legislatures on how to properly implement the death penalty, concluded that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”⁷⁶ Today, Oklahoma’s death penalty statute for lethal injection is inadequate. The statute fails to name a drug which is available or define what “accepted standards of medical practice” is referring to.⁷⁷ This has caused prolonged agony for individuals being put to death by lethal injection.⁷⁸

B. Hangings, Electrocuting, and Gas Chamber Have All Failed

Until the year 1890, death by hanging was the primary method of execution used in the United States.⁷⁹ Thousands from the public often observed hangings.⁸⁰ The executioner blindfolded the individual.⁸¹ Then, the individual stood on a trap door with a rope fastened around his neck.⁸² After the trap door opened, the individual went from feelings of fear to feelings of physical anguish. The individual could dangle for minutes, or even hours, until he died from strangulation or suffocation.⁸³ By the mid-1800s, public executions were condemned as cruel by most U.S. citizens, and several states enacted laws for private hangings instead.⁸⁴ The last hanging in the United States took place in Delaware on January 25, 1996.⁸⁵

More than a century before the last hanging, there was already a push to find a more humane alternative.⁸⁶ In August of 1890, the State of New York executed William Kemmler by electrocution, marking the first execution in the electric chair.⁸⁷ Electrocuting became the accepted way of execution for human beings on death row.⁸⁸ Akin to the visible brutality and pain of failed lethal injections, electrocutions are also a difficult sight to see. The prisoner is taken to the execution chamber and strapped to the chair with belts

74. *Id.*

75. *Gregg*, 428 U.S. at 154

76. *Id.* at 195.

77. OKLA. STAT. tit. 22, § 1014.

78. Fretland, *supra* note 5.

79. *The Death Penalty: Hangings*, METHODS OF EXECUTION, <https://deathpenaltycurriculum.org/student/c/about/methods/hanging.htm>.

80. COYNE & ENTZEROTH, *supra* note 55, at 101.

81. *Id.* at 83.

82. *Id.*

83. *The Death Penalty: Hangings*, *supra* note 79.

84. COYNE & ENTZEROTH, *supra* note 50, at 101–02.

85. *The Death Penalty: Hangings*, *supra* note 79. The states of Delaware, New Hampshire, and Washington all still authorize execution by hanging. *Id.*

86. COYNE & ENTZEROTH, *supra* note 55, at 84.

87. *125 Years Ago, First Execution Using Electric Chair was Botched*, DPIC, <https://deathpenaltyinfo.org/node/6216>.

88. COYNE & ENTZEROTH, *supra* note 55, at 84.

across his body.⁸⁹ One copper electrode is attached to the prisoner's head, and another electrode is attached to the prisoner's leg.⁹⁰ An instant surge of electricity then barrels through the electrodes for several seconds, potentially even minutes.⁹¹ In Mr. Kemmler's case, the first jolt was unsuccessful, and a second jolt was required to kill the first prisoner by electrocution.⁹² The process lasted around two full minutes.⁹³

More recently, Virginia executed Robert Gleason Jr. by electrocution in 2013.⁹⁴ Following Robert's last words, a leather strap was tightened across Robert's eyes and mouth.⁹⁵ Next, soaked sponges connected to power cables were placed on Robert's head and leg.⁹⁶ A simple push of a button in a separate room sent 1,800 volts of electricity surging through Robert's body.⁹⁷ Electricity coursed in cycles through Robert's body throughout the final five minutes of his life. Virginia, along with nine other States, allow prisoners to choose between electrocution and lethal injection, and Mr. Gleason chose the chair.⁹⁸

In 1924, the first execution by lethal gas was performed in the State of Nevada.⁹⁹ In the original case, the State surprised Jon Gee with cyanide gas while Mr. Gee was asleep in his cell.¹⁰⁰ Eventually, the idea expanded into creating a gas chamber where the lethal gas would be contained.¹⁰¹ The inmate is strapped to a chair.¹⁰² Below the chair is a bowl filled with the lethal gas concoction.¹⁰³ A lever in a separate room is released that drops the cyanide into the bowl below the inmate.¹⁰⁴ The gas swarms up through the chair, and once inhaled, the inmate can no longer breathe.¹⁰⁵ According to Dr. Richard Traystman, the Vice Chancellor for research at the University of Colorado-Denver, the inmate "is unquestionably experiencing pain," describing the feeling of death by lethal gas as "similar to the pain felt by a person during a heart attack."¹⁰⁶

In 2015, Oklahoma passed a law authorizing nitrogen hypoxia as a method of execution.¹⁰⁷ The general idea to this method is the same as the gas chamber. However,

89. *Id.*

90. *Id.*

91. *Id.* at 85.

92. *125 Years Ago, First Execution Using Electric Chair Was Botched*, *supra* note 87.

93. Nine states still authorize electrocution in this country. *Id.*

94. *Kiss My A**, Put Me on the Highway to Jackson and Call My Irish Buddies: Defiant Last Words of Death Row Killer as He is Strapped to the Electric Chair*, DAILYMAIL, <http://www.dailymail.co.uk/news/article-2263723/Robert-Gleason-Jr-death-using-electric-chair-execution-2013.html>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. COYNE & ENTZEROTH, *supra* note 555, at 86.

100. *Descriptions of Execution Methods*, DPIC, <https://deathpenaltyinfo.org/descriptions-execution-methods?scid=8&did=479#firing>.

101. COYNE & ENTZEROTH, *supra* note 55, at 86.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. COYNE & ENTZEROTH, *supra* note 55, at 86.

107. Josh Sanburn, *The Dawn of a New Form of Capital Punishment*, TIME (Apr. 17, 2015, 4:51 PM), time.com/3749879/nitrogen-gas-execution-oklahoma-lethal-injection/.

according to Solomon Snyder, a neuroscientist at Johns Hopkins University School of Medicine, the method could likely involve placing a gas mask over the inmate's neck and face.¹⁰⁸ The mask would then be filled with pure nitrogen from a nearby canister, and cause death to the inmate through oxygen deprivation.¹⁰⁹ Nearly ninety years after this country's first attempted execution by gas, and forty years of using lethal injection as the State's primary method, Oklahoma still seems to be lost in its search for a death penalty method as it and other states across the country continue to put individuals through painful deaths by untested drugs.

C. Lethal Injection's Rise to Prevalence

Oklahoma blindly led the death penalty charge after *Gregg*. States did not waste any time after the *Furman* moratorium was lifted in *Gregg*, and in January of 1977, Gary Gilmore was the first person to be executed after the Court's later decision. According to the Bureau of Justice Statistics, there were nearly 137 death penalty convictions in the year 1977.¹¹⁰ The State of Oklahoma has always been a leading State in the death penalty, and the State's reaction after *Gregg* was no different. In response, and in anticipation of several death penalty cases, an Oklahoma state senator called the Oklahoma state medical examiner, Dr. Jay Chapman, to develop a more humane execution method.¹¹¹

Up until this moment in our country's history, executions had been carried out in a number of ways. Prior to the changes in our country in the late 1800s, those methods for execution included unfathomable approaches such as crucifixion or burning alive.¹¹² The following 130 years saw hanging, electrocution, and gas chamber all have their time as America's primary method.¹¹³ But at this moment in time, a State had never taken away an individual's life by injecting a lethal drug in their system. Within a few days, Dr. Chapman responded to the Oklahoma Senator, recommending this brand-new idea.¹¹⁴

Dr. Chapman was not a licensed anesthesiologist.¹¹⁵ In fact, although he is considered the "father of lethal injection," Dr. Chapman has admitted that his creation was a "very minor blip on the work that [he] did."¹¹⁶ Dr. Chapman's idea was to follow the procedure for anesthesia at the time.¹¹⁷ From there, they would just "carry it to extremes" until the protocol killed the human being.¹¹⁸

108. *Id.*

109. *Id.*

110. *Deterrence and the Death Penalty*, THE NATIONAL ACADEMIC PRESS (2012), <https://www.nap.edu/read/13363/chapter/4#16>.

111. Sanburn, *supra* note 32.

112. *Part I: History of the Death Penalty*, *supra* note 53.

113. *Id.*

114. Sanburn, *supra* note 32.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

The plan for the injection was broken into three parts.¹¹⁹ First, a person would be injected with sodium thiopental.¹²⁰ This drug served as an anesthetic¹²¹ and would be injected into the person to limit the person's unbearable pain to come. Without the first-part anesthetic, the pain of the second-part and third-part injections running through an individual's veins are inescapable. Second, once a person was sedated, that individual would be injected with pancuronium bromide.¹²² This drug served as a paralytic agent.¹²³ Finally, once a person was sedated and paralyzed, they would be injected with potassium chloride.¹²⁴ Potassium chloride stopped the heart.¹²⁵ Dr. Chapman decided that the drug could serve a different purpose when taken in far too large a dosage: to kill a human being.¹²⁶ Although this drug stops the heart when taken in an unnaturally high dosage¹²⁷, if an individual can feel any pain at all, the potassium chloride will cause that individual to suffer until their final breath.

Within a year, and with virtually no testing, Oklahoma adopted lethal injection as a method of execution.¹²⁸ Several States quickly followed Oklahoma by adopting the method of lethal injection. In a 2014 interview with TIME, Dr. Chapman was asked why other States did not consider changing the lethal injection method that Oklahoma created off the cuff in 1977.¹²⁹ Dr. Chapman responded by stating, "I don't know. I guess they just blindly followed it."¹³⁰

American laws have consistently tried to find more "civilized" and "humane" ways of implementing the death penalty. Death by lethal injection has become the latest trend. Since the decision in *Gregg* in 1976, and the Oklahoma lethal injection legislation in 1977, all thirty-two States that allow the death penalty use lethal injection as its primary method of execution.¹³¹

*D. Firing Squad is the Solution Because it is Relatively Painless, Instant, and Effective*¹³²

Although not as prevalent, some States used death by firing squad as a method of execution. First, the inmate sits in a chair in front of a wall.¹³³ The wall is oval-shaped, and has sandbags stacked all the way around the wall to prevent any of the bullets from

119. Sanburn, *supra* note 32.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Sanburn, *supra* note 32. Paradoxically, potassium chloride is a drug used to help the health of human beings when taken in very small doses prescribed by a doctor. *Potassium Chloride Tablet, Extended Release Particles/Crystals*, WEBMD, <https://www.webmd.com/drugs/2/drug-676-7058/potassium-chloride-oral/potassium-extended-release-dispersible-tablet-oral/details>.

125. Sanburn, *supra* note 32.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Sanburn, *supra* note 32.

131. *State by State Lethal Injection*, *supra* note 3.

132. Arthur, 137 S. Ct. at 734.

133. COYNE & ENTZEROTH, *supra* note 55, at 84.

ricochet.¹³⁴ A dark hood is then placed over the inmate's head by a member of the prison staff.¹³⁵ Next, a doctor locates the inmate's heart with a stethoscope and marks the heart as a target.¹³⁶ The inmate is surrounded by five heavily-trained marksmen who each have a rifle loaded with a single round.¹³⁷ To spare the conscience of the shooters, one rifle contains a blank round.¹³⁸ In 2010, the State of Utah performed the most recent execution by firing squad.¹³⁹ Prior to a recent change by the Utah legislature, firing squad was only a method used in Utah if chosen by the inmate. Ronnie Lee Gardner chose execution by firing squad over lethal injection in 2010.¹⁴⁰ People continue to request firing squad over lethal injection to avoid the pain that lethal injection can bring.¹⁴¹

What spurred Utah's cause of action in reauthorizing death by firing squad is significant and eye-opening. In immediate response to Oklahoma's botched lethal injection of Clayton Lockett, Utah Representative Paul Ray introduced legislation to bring back firing squad to the State of Utah.¹⁴² In an interview of Representative Ray after he introduced the bill, he argued that death by firing squad is "probably the most humane way to kill somebody."¹⁴³ The Utah lawmaker went on to justify firing squad because, unlike botched lethal injections, where the prisoner suffers for minutes or even hours, "[t]he prisoner dies instantly" by use of firing squad.¹⁴⁴ Representative Ray acknowledged that "[t]here's no easy way to put somebody to death, but you need to be efficient and effective about it."¹⁴⁵ And while lethal injections have produced prolonged suffering for the inmate, "[t]here's no suffering" with firing squad.¹⁴⁶ Ray's bill passed through the Utah House of Representatives in the middle of February.¹⁴⁷ Just a few weeks later, Utah's Senate voted

134. Remy Melina, *Death Penalty By Firing Squad: How Is It Carried Out?*, LIVE SCIENCE, <https://www.livescience.com/10710-death-penalty-firing-squad-carried.html>.

135. See COYNE & ENTZEROTH, *supra* note 55, at 84.

136. See COYNE & ENTZEROTH, *supra* note 55, at 84; see *Descriptions of Execution Methods*, *supra* note 100.

137. See COYNE & ENTZEROTH, *supra* note 55, at 84; see *Descriptions of Execution Methods*, *supra* note 100.

138. See COYNE & ENTZEROTH, *supra* note 55, at 84; see *Descriptions of Execution Methods*, *supra* note 100. A "blank round" is defined as a cartridge for a firearm that contains gunpowder but does not contain a bullet. When fired, the blank round makes a similar explosive sound as an actual gun. [https://en.wikipedia.org/wiki/Blank_\(cartridge\)](https://en.wikipedia.org/wiki/Blank_(cartridge)). Although some may argue that a trained shooter can tell the difference in shooting a blank round versus shooting an actual round, all five marksmen volunteered to be shooters in Utah's latest firing squad execution. Jennifer Dobner, *Utah Cops Volunteer For Firing Squad Duty*, ASSOCIATED PRESS (June 18, 2010), <https://www.policeone.com/patrol-issues/articles/2084253-Utah-cops-volunteer-for-firing-squad-duty/>.

139. See *Descriptions of Execution Methods*, *supra* note 100.

140. Brady McCombs, *Utah Is Bringing Back 'Death by Firing Squad'—Here's How It Works*, ASSOCIATED PRESS (Mar. 24, 2015, 7:43 AM), www.businessinsider.com/utah-is-bringing-back-death-by-firing-squad—heres-how-it-works-2015-3.

141. Ralph Ellis, *Inmate Seeks Execution by Firing Squad, Says Lethal Injection Too Painful*, CNN (May 12, 2017, 10:43 PM), www.cnn.com/2017/05/12/us/firing-squad-georgia-death-penalty/index.html.

142. *Utah Lawmaker Proposes Firing Squad Executions for Death Row Inmates*, GUARDIAN (May 17, 2014), <https://www.theguardian.com/world/2014/may/17/utah-execution-firing-squad-death-row-injection>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *HB 11 - Authorizes Execution by Firing Squad - Key Vote*, VOTE SMART, <https://votesmart.org/bill/19528/51348/authorizes-execution-by-firing-squad#.Wnxvb0xFzIU>.

the bill through by a near two-to-one margin.¹⁴⁸ On March 23, 2015, Utah's Governor Gary Herbert signed the bill into law.¹⁴⁹

III. DRUG SCARCITY CAUSES UNSAFE AND IRRESPONSIBLE EXECUTIONS

The State of Oklahoma set the standard for the widely, and blindly, accepted way of implementing the death penalty by lethal injection.¹⁵⁰ Oklahoma has continued to use the three-drug protocol that Dr. Chapman designed forty years ago. The State of Oklahoma executed ninety-three people using this three-part combination.¹⁵¹ A massive global shortage in production of lethal injection drugs, primarily the first-part anesthetic sodium thiopental, caused major problems in accessing the drugs for lethal injection.

In the early 2000s, the pharmaceutical company that supplied state prisons with sodium thiopental, Hospira, began having issues in the manufacturing of the drug.¹⁵² At the time, Hospira was the sole maker of sodium thiopental in the United States.¹⁵³ Amid Hospira's manufacturing issues, anti-death-penalty activists began informing drug companies and other European governments that their drugs were being used in executions.¹⁵⁴ The moral dilemma caused by Hospira's drugs being used to end people's lives caused companies to withhold the drugs, leaving death-penalty states like Oklahoma looking for new ways to carry out lethal injections.¹⁵⁵ Pressure continued to mount, and in August of 2009, Hospira completely stopped its production of sodium thiopental.¹⁵⁶

In 2010, Oklahoma continued its role in America as both a leader and an impulsive creator for lethal injections in the United States. In an immediate response to Hospira's cut-off of sodium thiopental, the State of Oklahoma became the first to use pentobarbital in place of sodium thiopental as the first part of its three-drug execution protocol. Pentobarbital was to be used for the same anesthetic purpose as sodium thiopental. The use of the new drug incurred substantial scrutiny because the effectiveness of pentobarbital had not been proven.¹⁵⁷ Anti-death-penalty activists argued that the drug was supposed to be used as an anesthetic for animals, not as a way to kill a human being.¹⁵⁸ Attorneys for John David Duty, a man Oklahoma executed in 2010 using the brand-new drug combination, even argued that the drug was not approved by the Federal Drug Administration.¹⁵⁹ Despite the huge public outcry, Oklahoma gave the drug a brand-new

148. *Id.*

149. *Id.*

150. *See* Sanburn, *supra* note 32.

151. *State by State Lethal Injection*, *supra* note 3. This information was as of October 14, 2010. *Id.*

152. Maurice Chammah & Tom Meagher, *How the Drug Shortage Has Slowed the Death-Penalty Treadmill*, MARSHALL PROJECT (Apr. 12, 2016, 5:29 PM), <https://www.themarshallproject.org/2016/04/12/how-the-drug-shortage-has-slowed-the-death-penalty-treadmill>.

153. Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704754304576095980790129692>.

154. Chammah & Meagher, *supra* note 152.

155. *Id.*

156. Emanuella Grinberg, *Drug Shortage Leads to Condemned Man Receiving Anesthetic for Animals*, CNN (Dec. 17, 2010, 1:10 AM), www.cnn.com/2010/CRIME/12/17/oklahoma.execution.drugs/index.html.

157. *Id.*

158. *Id.*

159. *Id.*

use in December of 2010. For the following four years, the State of Oklahoma executed sixteen individuals using this new three-drug combination.¹⁶⁰ However, pentobarbital eventually faced the same issues as sodium thiopental did a few years prior—pressure from death-penalty activists dried up its supply.¹⁶¹ Once again, Oklahoma desperately looked elsewhere for alternatives.

Like the State of Oklahoma, the State of Florida was dealing with the same dried up supply of pentobarbital. In response to losing its supply, Florida introduced a drug called midazolam as the first-part anesthetic in executing William Happ in 2013.¹⁶² The chain of events which started with Dr. Chapman in 1977, the drug shortages in the early 2000s, and ultimately the introduction of midazolam in 2013, led to Oklahoma's first use of midazolam in 2014.¹⁶³ Oklahoma's first victim was Clayton Lockett.¹⁶⁴

After Florida brought midazolam to the forefront, Oklahoma did not waste any time to use the drug for itself. Clayton's forty minutes of pain and suffering were a direct result of midazolam's ineffectiveness.¹⁶⁵ His botched execution took place in April of 2014.¹⁶⁶ Midazolam also failed Ronald Smith in Alabama's botched execution in 2016.¹⁶⁷ Once again, the untested drug caused another individual to seethe and struggle for breath in his final minutes.¹⁶⁸

The State of Arkansas was the next to implement midazolam as its anesthetic of choice. In 2017, Arkansas' supply of midazolam was set to expire at the end of April.¹⁶⁹ In response, Arkansas scheduled an unprecedented eight executions over an eleven-day period prior to month's end.¹⁷⁰ Four of the executions were stayed, but the other four were carried out.¹⁷¹ Putting the last of Arkansas's midazolam to use, Ledell Lee was executed on April 20, Marcel Williams and Jack Jones were executed on April 24, and Kenneth Williams was executed on April 27.¹⁷² Following a recurrent theme of previous botched executions, reports from witnesses stated that Kenneth's body "lurched violently about three minutes into the execution."¹⁷³ Witnesses to the execution singled out midazolam as the sole cause.¹⁷⁴

160. *State by State Lethal Injection*, *supra* note 3.

161. *States Scramble To Deal With Shortages Of Execution Drugs*, NPR (Mar. 11, 2015, 4:36 PM), <https://www.npr.org/2015/03/11/392375383/states-scramble-to-deal-with-shortages-of-execution-drugs>.

162. Bill Cotterell, *Florida Executes Man with New Lethal Injection Drug*, REUTERS (Oct. 15, 2013, 7:05 PM), <https://www.reuters.com/article/us-usa-florida-execution/florida-executes-man-with-new-lethal-injection-drug-idUSBRE99F00020131016>.

163. *State by State Lethal Injection*, *supra* note 3.

164. *Id.*

165. *See* Fretland, *supra* note 5.

166. *Id.*

167. Faulk, *supra* note 21.

168. *Id.*

169. *Background on Arkansas April 2017 Executions*, DPIC, https://deathpenaltyinfo.org/Background_on_Arkansas_April_2017_Executions.

170. *Id.*

171. *Id.*

172. *Id.*

173. Faith Karimi, Dakin Andone, & Jason Hanna, *Arkansas Executes Kenneth Williams, 4th Inmate In 8 Days*, CNN (Apr. 28, 2017, 1:13 PM), www.cnn.com/2017/04/28/us/arkansas-execution-kenneth-williams/index.html.

174. *Id.*

With the latest shortage of midazolam, and the numerous botched executions with midazolam to blame, the Florida Supreme Court abandoned its state's use in January of 2017.¹⁷⁵ Oklahoma stopped its use of midazolam after the botched execution of Clayton Lockett spurred another case from Oklahoma, which made it to the United States Supreme Court in 2015.

IV. SUPREME COURT DECISIONS ESTABLISH THE FRAMEWORK FOR ANALYZING DEATH PENALTY METHODS

A. *Baze v. Rees Lays Out the Death Penalty Standard*

Prior to the Supreme Court case that arose out of Clayton Lockett's botched execution in Oklahoma, the Court addressed another lethal injection challenge from Kentucky in 2008.¹⁷⁶ In *Baze*, death row inmates challenged the State of Kentucky's three-drug protocol.¹⁷⁷ At the time, at least thirty of the thirty-six death penalty states (Kentucky included) used the same three-drug protocol, which used sodium thiopental as the anesthetic.¹⁷⁸ The suit occurred right before the States began running out of the drug. The inmates claimed that the method of lethal injection violated their Eighth Amendment rights.¹⁷⁹ The issue before the Court did not involve the constitutionality of capital punishment as a whole, but whether using the three-drug protocol to execute people went too far in depriving their rights against cruel and unusual punishment.¹⁸⁰

Perhaps the Kentucky inmates saw a few years into the future. One of the inmates' primary arguments asserted that there were too many opportunities for error when administering the drug protocol.¹⁸¹ The Court even acknowledged in *Baze* that "[i]t is uncontested that, failing a proper dose of [the anesthetic] that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration" of the second and third drugs.¹⁸² One need not look any further than the multiple botched executions over the past decade where this horror sadly came to fruition.

Despite these foreseeable fears, the Court in *Baze* did not find the 2008 method to violate an inmate's Eighth Amendment rights.¹⁸³ The Court rejected the claim under a "substantial risk of serious harm" standard.¹⁸⁴ However, it also set out a three-part test to determine if an execution method is "cruel and unusual."¹⁸⁵ In order to meet the substantial risk of serious harm standard, the alternative presented by an individual to lethal injection

175. *State by State Lethal Injection*, *supra* note 3.

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

177. *Id.*

178. *Id.* at 40.

179. *Id.* at 41.

180. *Id.*

181. *Baze*, 553 U.S. at 54.

182. *Id.* at 53.

183. *Id.* at 63.

184. *Id.* at 53–54.

185. *Id.* at 52.

must be: (1) feasible; (2) readily implemented; and (3) in fact significantly reduce a substantial risk of severe pain in comparison.¹⁸⁶

B. Lethal Injection Catches a Break Because the Glossip v. Gross Plaintiffs Failed to Present a Viable Alternative

Oklahoma's 2014 botched execution of Clayton Lockett, with the State's first use of midazolam, caused reaction throughout the country. Utah responded by reauthorizing firing squad as a method of execution.¹⁸⁷ Oklahoma responded by leaving its lethal injection protocol the exact same, apart from increasing the dosage of the untested drug.¹⁸⁸ Twenty-one Oklahoma death row inmates responded by filing a federal civil rights claim challenging Oklahoma's lethal injection protocol.¹⁸⁹ In November of 2014, four of the twenty-one plaintiffs moved for a preliminary injunction to prevent Oklahoma from going forward with the four men's executions.¹⁹⁰

In the following month, the United States District Court for the Western District of Oklahoma held an evidentiary hearing on the preliminary injunction.¹⁹¹ Three of the expert witnesses provided testimony about the drug midazolam.¹⁹² At the conclusion of the hearing, the district court denied the four plaintiffs' motion.¹⁹³ The case was quickly appealed to the Tenth Circuit Court of Appeals, which affirmed the district court's decision.¹⁹⁴ Shortly after, the State of Oklahoma executed one of the four plaintiffs in mid-January 2015.¹⁹⁵

The United States Supreme Court granted review of the case and issued stays of execution for the remaining three plaintiffs.¹⁹⁶ In a five-to-four opinion, the United States Supreme Court concluded that the use of the drug midazolam was constitutional.¹⁹⁷ However, the Court was not given the opportunity to compare midazolam with a better replacement option for the death penalty because the petitioners did not present one.

There were two primary reasons for the Supreme Court's decision in *Glossip*. First, the petitioners failed to present adequate alternatives to Oklahoma's lethal injection protocol.¹⁹⁸ In upholding the use of midazolam, the *Glossip* Court looked to the standard it set forth in *Baze v. Rees*, which required inmates to identify an available alternative to the challenged method of execution that is feasible, readily implemented, and significantly reduces a substantial risk of severe pain.¹⁹⁹ In *Glossip*, the petitioners argued that sodium

186. *Baze*, 553 U.S. at 52. See also Mark B. Samburg, *Cruel and Unusual? The Bifurcation of Eighth Amendment Inquiries After Baze v. Rees*, 44 HARV. C.R.-C.V. L. REV. 213, 226 (2009).

187. UTAH CODE ANN. § 77-18-5.5.

188. *Glossip v. Gross*, 135 S. Ct. 2726, 2740, 2782 (2015).

189. *Id.* at 2735.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Glossip*, 135 S. Ct. at 2736.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 2726.

198. *Glossip*, 135 S. Ct. at 2782.

199. *Baze v. Rees*, 553 U.S. 35, 52 (2008).

thiopental and pentobarbital were better alternatives to the drug midazolam.²⁰⁰ But the Court noted that the nationwide shortages of these alternative drugs made them unavailable to the State of Oklahoma.²⁰¹ Thus there were not *available* alternatives to midazolam. The petitioners' alternative drug arguments hamstrung the majority, and the Court was unable to focus on the State of Oklahoma's knee-jerk reaction of replacing its anesthetic drug. Just one year earlier, before Clayton Lockett's execution by midazolam, Oklahoma's supply of the anesthetic drug pentobarbital had entirely dried up.²⁰²

The petitioners' only presented sodium thiopental and pentobarbital as alternatives, so the Court was constrained to consider only those two possible alternatives and could not look to other available alternatives which may have passed the three-part test set out in *Baze*. Notably, however, Justice Alito's majority opinion seemed to elude to another method of execution that could succeed under the standard: firing squad.²⁰³ Since 1879, the Supreme Court has approved of firing squad executions.²⁰⁴ Where lethal injection can result in graphic and intense suffering, firing squad is instant and full-proof. Justice Alito described the use of firing squad as "relatively quick and painless," and reiterated that the use of firing squad is constitutional.²⁰⁵

The other major factor in *Glossip* concerned the effectiveness of the drug midazolam.²⁰⁶ Despite persuasive evidence to the contrary put forth by the plaintiff's expert witness at trial, the district court based some of its conclusion on the claims of the defendant's expert witness.²⁰⁷ After Oklahoma botched the Clayton Lockett execution, it raised the dosage of midazolam from 100 milligrams to 500 milligrams.²⁰⁸ Therefore, a primary question revolved around whether a higher dosage of midazolam would result in a "greater effect." And more specifically, whether the higher dosage would prevent an inmate from feeling the agony of the second and third lethal drugs, like the botched execution of Clayton Lockett just months before.²⁰⁹

The petitioners argued to the Court that the "district court should not have credited" the Respondent's expert witness because he admitted that his findings were based on "extrapolat[i]ons] from studies done about much lower therapeutic doses of midazolam."²¹⁰ However, the Court once again found itself constrained, and the extrapolations of the district court were found reasonable because midazolam is never administered in such high dosage.²¹¹ In part of the dissenting opinion, Justice Sotomayor argued the obviousness of the higher dosage being insufficient by referencing Arizona's

200. *Glossip*, 135 S. Ct. at 2738.

201. *Id.*; see Doyle, *supra* note 34, at 203–04 (showing the difficulty of obtaining the drugs where the Virginia Department of Corrections had to request pentobarbital from an "undisclosed pharmacy.").

202. *Glossip*, 135 S. Ct. at 2733–34.

203. *Id.* at 2739.

204. *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878).

205. *Id.*; *Glossip*, 135 S. Ct. at 2739.

206. *Glossip*, 135 S. Ct. at 2736.

207. *Id.* at 2784. (Sotomayor, J., dissenting).

208. *Id.* at 2782. (Sotomayor, J., dissenting).

209. *Id.* at 2783. (Sotomayor, J., dissenting).

210. *Id.* at 2741.

211. *Glossip*, 135 S. Ct. at 2741.

botched execution of Joseph Wood.²¹² Perhaps the most excruciating execution in recent years, Joseph suffered and gasped for ninety minutes before his misery was finally complete.²¹³ Joseph was given 750 milligrams of midazolam as the first part of his lethal drug protocol, fifty percent higher than where Oklahoma blindly raised its dosage.²¹⁴

Experts on both sides agreed that midazolam induces unconsciousness.²¹⁵ However, they disputed whether the drug could be utilized to maintain unconsciousness. Despite the evidence of Joseph Wood's botched execution over the prior summer, the State's expert believed that a 500-milligram dose of midazolam would render a person unconscious during an execution procedure.²¹⁶ The State's expert concluded that because the dosage was "at least 100 times the normal therapeutic dose," the drug would properly keep a person unconscious.²¹⁷ The State's expert witness used no empirical research to support his conclusion.²¹⁸ He even recognized that there had been zero testing of midazolam in conjunction with the other two lethal drugs involved in Oklahoma's protocol.²¹⁹

Instead of citing scholarly empirical work to support his opinion, the State's expert relied on two sources in an effort to validate the drug's effectiveness: a "Material Safety Data Sheet" produced by the midazolam manufacturer; and www.drugs.com.²²⁰ In Justice Sotomayor's dissent, she points out that, if anything, the www.drugs.com website supported the Plaintiffs' contentions in that it stated that midazolam "should not be used alone for maintenance of anesthesia."²²¹ The dissent continued to poke holes in the sole expert, calling the State's expert findings "unsupported and implausible."²²²

The Plaintiffs relied on the expert testimony of Dr. David Lubarsky, an anesthesiologist.²²³ In Dr. Lubarsky's scientific opinion, midazolam is not sufficient to produce a surgical plane of anesthesia in human beings.²²⁴ Dr. Lubarsky analogized the use of anesthetics during surgery, and he stated that midazolam would never be used as a sole anesthetic during surgery.²²⁵ Meanwhile, Oklahoma wished to use it as the sole anesthetic for putting an individual to death. Moreover, Dr. Lubarsky emphasized that the Federal Drug Administration has not approved the drug midazolam as a sole anesthetic.²²⁶

Oklahoma's death penalty law vaguely addresses medical practice. Its law for inflicting punishment by death states that the punishment of death "shall be carried out by the administration of a lethal quantity of a drug or drugs . . . according to accepted

212. *Id.* at 2783.

213. Kiefer, *supra* note 15.

214. *Glossip*, 135 S. Ct. at 2735, 2783 (2015).

215. *Id.* at 2783. (Sotomayor, J., dissenting).

216. *Id.* at 2784. (Sotomayor, J., dissenting).

217. *Id.*

218. *Id.*

219. *Glossip*, 135 S. Ct. at 2787. (Sotomayor, J., dissenting).

220. *Id.* at 2784. (Sotomayor, J., dissenting).

221. *Id.* at 2786. (Sotomayor, J., dissenting).

222. *Id.* at 2781. (Sotomayor, J., dissenting).

223. *Glossip*, 135 S. Ct. at 2782–83. (Sotomayor, J., dissenting).

224. *Id.* at 2789. (Sotomayor, J., dissenting).

225. *Id.* See also Eric Berger, Article, *Gross Error*, WASH. L. REV. 929, 953 (Oct. 2016).

226. *Glossip*, 135 S. Ct. at 2782; see also *Gross Error*, *supra* note 225, at 971. In this case, Missouri purchased and used lethal injection drugs that lacked FDA approval from an Oklahoma pharmacy that "subsequently admitted to 1,892 violations of state pharmacy regulations." *Id.*

standards of medical practice.”²²⁷ This supports the inference that Oklahoma’s lethal injection protocol is illegal under its own statute. Finally, over Dr. Lubarsky’s years as an anesthesiologist, he was of the strong opinion that at no level would midazolam reliably keep an inmate unconscious once the second and third drugs were delivered.²²⁸

V. LETHAL INJECTION EVEN FAILS TO MEET THE ACCEPTED STANDARDS FOR
EUTHANIZING ANIMALS

Not even animals are treated so inhumanely in the United States. In January of 2006, death-row inmate Clarence Hill filed a federal civil rights claim alleging that the three-drug lethal injection method the State of Florida planned to use on him constituted cruel and unusual punishment.²²⁹ Specifically, he argued that the first of the three-part cocktail might “insufficiently render the condemned prisoner unconscious.”²³⁰ Clarence Hill was scheduled to die four days later, but the United States Supreme Court granted certiorari, and Clarence eventually had his case heard.²³¹ In support of Clarence’s argument, three highly experienced and knowledgeable veterinarians submitted an amicus brief to the Court.²³² With decades of experience between the three doctors, Dr. Kevin Concannon, Dr. Dennis Geiser, and Dr. Glenn Pettifer described the protocol for euthanizing animals, and compared the protocol to Florida’s inhumane and inadequate administration of executing human beings.²³³

The doctors described several factors which contribute to how three-drug protocols used by Florida and other States (*e.g.*, Oklahoma) do not adhere to the same level of “humanity” in executing a human being as a veterinarian would require before euthanizing a dog or cat.²³⁴ The doctors compared a veterinarian’s protocol for euthanasia with the protocol for human executions in three ways in order to show that “Florida’s discretionary procedures for lethal injection deviate in several respects from the minimum standards . . . for the humane [euthanizing] of animals.”²³⁵ First, the doctor’s compared their protocol for determining if a “surgical plane of anesthesia has been reached and maintained” with the protocol for execution.²³⁶ A “surgical plane of anesthesia” refers to a multi-step process which ensures that the animal being euthanized has reached a state of loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli.²³⁷ Second, the doctors compared the differences in the training of the individuals

227. OKLA. STAT. tit. 22, § 1014.

228. *Glossip*, 135 S. Ct. at 2782–83. (Sotomayor, J., dissenting).

229. *Hill v. McDonough*, 464 F.3d 1256, 1257 (11th Cir. 2006).

230. *Id.*; 42 U.S.C.A. § 1983 (1996).

231. *Hill*, 464 F.3d at 1257.

232. *See* Brief for Petitioner, *supra* note 39.

233. *Id.* at 16.

234. *Id.* at 15.

235. *Id.* at 6.

236. *Id.* at 5.

237. Brief for Petitioner, *supra* note 39, at 9.

administering the drugs.²³⁸ Finally, the doctors compared the two different stances on the use of pancuronium bromide, which is the second part of the lethal injection cocktail.²³⁹

Under the American Veterinary Medical Association standards, the anesthetic used in euthanizing animals should be “potent, long-acting” and “stable.”²⁴⁰ The American Veterinary Medical Association disallows the use of the long-time anesthetic drug used by Florida and Oklahoma because it is considered an “ultra-short acting anesthetic.”²⁴¹ Based on research done by the American Veterinary Medical Association, the “short-acting” anesthetic drug will not allow the animal to completely lose consciousness and reflex muscle response, causing the animal to feel unnecessary pain before death.²⁴² Veterinarians use extra precautions by using a long-acting drug to make sure the final minutes of an animals’ life are as peaceful as possible.²⁴³

Despite the American Veterinary Medical Association’s research-based protocol which assuredly eases all pain from the euthanizing of animals, our country’s death penalty protocol virtually takes an opposite approach. Instead, killing a human being on death row involves using a “short-acting” drug which may or may not sufficiently dull his pain. Further, the American Veterinary Medical Association standards call potassium chloride “unacceptable and absolutely condemned” because of the severe amount of pain it causes to a conscious animal.²⁴⁴ Our country, led by the State of Oklahoma, injects potassium chloride into human beings.²⁴⁵

The veterinarians also compared the training of those who administer drugs in the euthanizing of animals with the training required under the State’s lethal injection protocol.²⁴⁶ Individuals who administer drugs to animals are specifically trained to do so.²⁴⁷ In contrast, under Florida law, the individuals charged with administering the “short-acting” anesthetic drug do not have to be trained in anesthesiology.²⁴⁸ These individuals do not even have to have any training in determining whether midazolam has taken its proper effect on the human being.²⁴⁹ Furthermore, there is constant contact with the animal during the euthanizing procedure to ensure that the “plane of anesthesia” continues throughout the entire process.²⁵⁰ But when a person is executed, Florida’s protocol does not require that person to be observed at any point.²⁵¹

Finally, the veterinarians pointed out in their argument to the Court that the use of pancuronium bromide, the paralytic agent used in States like Oklahoma and Florida, has

238. *Id.* at 5.

239. *Id.* at 14–15.

240. *Id.* at 7.

241. *Id.* at 9. When used on a conscious patient, the American Veterinary Medical Association calls the drug “unacceptable and absolutely condemned.” *Id.*

242. Brief for Petitioner, *supra* note 39, at 9–10.

243. *Id.*

244. *Id.*

245. *State by State Lethal Injection*, *supra* note 3.

246. Brief for Petitioner, *supra* note 39, at 5.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Brief for Petitioner, *supra* note 39, at 5.

been determined to be completely detrimental and not allowed in the euthanizing of animals.²⁵² For starters, the American Veterinary Medical Association consider the paralytic unnecessary because “the drug masks consciousness.”²⁵³ Pancuronium bromide makes it impossible for the individual administering the drug to determine if the human being is conscious and properly anesthetized.²⁵⁴ Counterintuitive to the entire process, pancuronium bromide does not serve to dull a human’s pain, but instead can create the impression that a human being is calm—while they are actually suffering.²⁵⁵

This potential mistake of delivering pain to a person while they appear unconscious is one that medical practitioners across the country take very seriously. The fear and awareness on the part of the medical practitioners are high because a patient who is anesthetized but not paralyzed is able to move in response to a painful stimulus.²⁵⁶ However, if that same patient is anesthetized and paralyzed, he will be unable to respond visibly to a painful stimulus.²⁵⁷ Under those circumstances, the patient is unable to give the medical practitioner any sign that the patient is actually suffering, while they appear to be in a calm state.²⁵⁸

When a human being is still conscious after receiving the first-part anesthetic, and the human being appears unconscious after receiving the second-part paralytic, the third-part drug fails to serve the purpose of stopping the heart because the pain from the drug happens first. Instead, that human being will die in agony from suffocation.²⁵⁹ The witnesses around the individual would not bear to watch if they could see that individual gasp for their final breaths. Instead, the witnesses to that individual’s death have no idea. Veterinarians unanimously refuse to treat animals in such an inhumane way in their final hours.²⁶⁰

Since the upholding of the death penalty in 1976, Oklahoma and Florida have conducted the third and fourth highest number of executions in the United States.²⁶¹ Not surprisingly, their State laws for executing death row inmates are similar. Like Florida’s, Oklahoma’s protocol does not even come close to offering the assurances of veterinarian euthanasia that the subject will reach a “surgical plane of anesthesia.”²⁶² Under Oklahoma law, the three drug parts to the lethal injection protocol are not even spelled out.²⁶³ Instead, the law mandates that the “lethal quantity of a drug or drugs” be administered “until death

252. *Id.* at 6.

253. *Id.* at 14.

254. *Id.* at 10.

255. *Id.* at 6.

256. *See* American Association of Nurse Anesthetist Awareness Brochure, <https://web.archive.org/web/20150928200618/http://www.aana.com/resources2/bookstore/Documents/awarenessbrochure0110.pdf> (last visited Jun. 8, 2018).

257. *Id.*

258. Brief for Petitioner, *supra* note 39, at 14–15.

259. *Id.* at 6.

260. *Id.* at 16.

261. *Number of Executions by State and Region Since 1976*, DPIC, <https://deathpenaltyinfo.org/number-executions-state-and-region-1976>.

262. *See* OKLA. STAT. tit. 22, § 1014.

263. *Id.*

is pronounced . . . according to accepted medical practice standards.”²⁶⁴ Evidently, these standards are less stringent than ones used in animal euthanasia and by the American Veterinary Medical Association standards. When Oklahoma killed Clayton Lockett in 2014, the State administered the drugs under this protocol, and Clayton agonized for over forty minutes before having his life end in a miserable heart attack.²⁶⁵

Additionally, the veterinarians who administer drugs to animals being euthanized are specifically trained to do so and Oklahoma does not take the same precautions when killing human beings. Under Oklahoma law, the lethal drugs are administered “until death is pronounced by a licensed physician.”²⁶⁶ The statute fails to state who administers the drugs, and the law does not distinguish what type of “physician” makes the final determination of death.²⁶⁷ When Oklahoma originated the use of lethal injection fifty years ago, it did so without an anesthesiologist.²⁶⁸ Now, even after the multitude of botched executions, Oklahoma continues to implement lethal injection without the use of an expert anesthesiologist. Meanwhile, veterinarian standards ensure that doctors specifically trained to administer the drugs euthanize animals.²⁶⁹

Although the State of Oklahoma has changed its anesthetic drug of choice over the past few years, it has stayed consistent with the use of pancuronium bromide as its second-part, paralytic agent.²⁷⁰ Veterinarians across the country refuse to use this drug due to the risk of hindering the doctor’s ability to assess the animals’ consciousness and potentially allowing the animal to die from suffocation.²⁷¹ However, this has not stopped Oklahoma and other death-penalty states from administering the drug. This seems especially unfortunate for death row human beings like Joseph Wood, who gasped, convulsed, and appeared to suffocate for around ninety minutes in his 2014 botched execution.²⁷²

VI. THE *BAZE* TEST SHOWS THAT THE FIRING SQUAD IS THE BEST AVAILABLE ALTERNATIVE

The Eighth Amendment of the United States Constitution has three parts. “Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishment* inflicted.”²⁷³ Our country ratified this amendment in 1791, and yet, part three remains a partial mystery to this day. Measuring a punishment’s cruelty and whether it is “unusual” is often debatable depending on the circumstances. However, the United States Supreme Court set out a test in 2008 for what constitutes cruel and unusual punishment as an execution method.²⁷⁴

264. *Id.*

265. Fretland, *supra* note 5.

266. OKLA. STAT. ANN. TIT. 22, § 1014(A) (West 2016).

267. *Id.*

268. *See* Sanburn, *supra* note 32.

269. Brief for Petitioner, *supra* note 39, at 5.

270. *State by State Lethal Injection*, *supra* note 3.

271. *See* Brief for Petitioner, *supra* note 39, at 5–6.

272. *See* Kiefer, *supra* note 15.

273. U.S. CONST. amend. VIII.

274. *Baze v. Rees*, 553 U.S. 35, 52 (2008).

In order to show that a State's execution method is cruel and unusual, an individual must show that the risk of the current method is substantial when compared to the known and available alternatives.²⁷⁵ The alternative presented must be: (1) feasible; (2) readily implemented; and (3) significantly reduce a substantial risk of severe pain.²⁷⁶ The individuals in *Baze* argued that the implementation of a single drug protocol, instead of most State's three-part protocol, would significantly reduce the risk of pain.²⁷⁷ The Court found this argument unpersuasive.²⁷⁸

The *Baze* Court believed at the time that lethal injection was the most humane way to execute an individual. However, drug shortages and botched executions remain a consistent problem. Only a handful of States across the country have executed anyone in recent years.²⁷⁹ And the trend appears to be on a steady decline.²⁸⁰ Multiple States have had issues with midazolam because other drugs are not available.²⁸¹ Florida's highest court stopped the use of midazolam in 2017.²⁸² Oklahoma has not executed another individual since the Supreme Court decided *Glossip* in 2015. Perhaps the *Baze* Court believed that lethal injection was feasible and readily implemented at the time. But ten years later, all indications appear to show a lack of supply, and a higher risk of severe pain.

A. Four Failed Methods

The four methods of hanging, electrocution, gas chamber, and lethal injection share a commonality: they each fail the *Baze* test. Hanging an individual may be readily implemented given its minimal procedure. However, its feasibility and ability to significantly reduce pain fail dramatically. The individual dangles from a rope, gasps for air, and convulses. The pain is unbearable and lasts far too long to be found in any way humane. Electrocution and gas chamber give the same gruesome result. Neither are feasible because each option takes far too long to end an individual's life. The pain and unpredictability of electricity surging through an individual's veins or poisonous gas choking the life out an individual does nothing to reduce the pain.

Just like hanging, electrocution, and the gas chamber, lethal injection fails the *Baze* test as well. Lethal injections fail to be feasible given the execution method has been around for over forty years and States still cannot find a reliable protocol. The drug shortage in the past decade has resulted in close to zero access to the drugs, and the States still botch the executions when they manage to obtain the drugs. For this reason, not only are lethal injections not feasible, but lethal injections are not readily implemented. Look no further than the executions of Clayton Lockett, Dennis McGuire, Joseph Wood, and Ronald Smith. These individuals would not have suffered in their final hour if the protocol was readily implemented. Finally, lethal injection does not significantly reduce a

275. *Id.*

276. *Id.*

277. *Id.* at 56

278. *Id.*

279. *Facts About the Death Penalty*, DPIC, <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

280. *Id.*

281. *See* Fretland, *supra* note 5. Kiefer, *supra* note 15.

282. *State by State Lethal Injection*, *supra* note 3.

substantial risk of severe pain. Numerous cases over the past decade are direct evidence that lethal injections produce the same torturous agony of hangings, electrocutions, and gas chambers.

B. Firing Squad is the Viable Alternative

When viewed under *Baze*, firing squad passes the three-part test. In *Baze*, the Court analyzed other types of lethal injection alternatives.²⁸³ It did not analyze other execution methods. In March of 2015, Utah reauthorized firing squad as a viable method of execution.²⁸⁴ Oklahoma law already authorizes firing squad as an accepted method of execution.²⁸⁵ The use of firing squad meets this criterion; therefore, Oklahoma's primary use of lethal injection over firing squad should be found unconstitutional. In applying the three-part analysis from *Baze* to the other options, hanging, electrocution, gas chamber, and lethal injection all fail the test.

Firing squad is feasible and readily implemented in Oklahoma. Setting aside the fact that Oklahoma law already authorizes the use of firing squad, the method is also feasible and ready to implement because it has been used in the United States within the past few years.²⁸⁶ Presumably, the State of Oklahoma would have no problem supplying five guns with the proper ammunition. And compared with the impossible task of accessing suitable drugs for lethal injection, rifles would be easily accessible. Individuals with proper licensing can purchase a rifle for under four-hundred dollars in the United States.²⁸⁷ It is hardly far-fetched to believe that the Oklahoma Department of Correction's access to guns is much easier. Meanwhile, States find it nearly impossible to access drugs for lethal injections.²⁸⁸ Besides that, Oklahoma would just need five trained individuals to perform the shooting. In Ronnie Lee Gardner's 2010 execution by firing squad, the shooters were five certified police officers who had volunteered for the job.²⁸⁹ The shooters remained anonymous.²⁹⁰ Oklahoma would likely have capable volunteers who could remain anonymous shooters as well.

Also, firing squad significantly reduces the risk of severe pain that lethal injection creates. The documented incidents over the past decade of individuals seething in agony, shaking in pain, and gasping for one last breath are clear indications of the painful risks of lethal injection. In contrast, four bullets to the heart in an instant ends any risk of pain to the individual.²⁹¹ Justice Sotomayor discussed the use of firing squad in *Arthur v. Dunn*

283. See *Baze v. Rees*, 553 U.S. 35, 51 (2008).

284. Utah Code Ann. § 77-18-5.5 (West 2016).

285. OKLA. STAT. ANN. TIT. 22, § 1014 (West 2016).

286. McCombs, *supra* note 140. Here, Ronnie Lee Gardner chose firing squad in the State of Utah. *Id.*

287. See *Gun Ownership by State*, CBS NEWS, <https://www.cbsnews.com/pictures/gun-ownership-rates-by-state/23/>.

288. Grinberg, *supra* note 156; *Background on Arkansas April 2017 Executions*, *supra* note 169 (showing where Arkansas' access to midazolam was set to expire and the State scheduled eight executions in an eleven day span.).

289. Dobner, *supra* note 138.

290. *Id.* All five shooters stood twenty-five feet away, each with rifles, and one blank bullet so nobody knew who fired the fatal shot. *Id.*

291. P. Thomas Distanislaio, III, Comment, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as its Primary Method of Execution*, 49 U. RICH. L. REV. 779, 799 (Mar. 2015) (stating that "the initial pain to

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in February of 2017: “[i]n addition to being instant, death by shooting may also be comparatively painless . . . And historically, the firing squad has yielded significantly fewer botched executions.”²⁹²

VII. CONCLUSION

Historically, Oklahoma has led in death penalty movements, and other States have followed. The State of Oklahoma has the opportunity to leverage its leadership by example—this time for the better. It must make the change to stop tragic lethal injections like those of Clayton Lockett, Dennis McGuire, Joseph Wood, and Ronald Smith, among others. Although Oklahoma’s recent proposal to use nitrogen gas inhalation clearly verifies that lethal injection has failed in Oklahoma, it still does not solve the State’s death penalty problem. Like the blind invention of lethal injection over forty years ago, Oklahoma “is once again asking us to trust it as officials ‘learn-on-the-job’” by proposing another irresponsible way to execute individuals.²⁹³

To resolve this critical issue, the Oklahoma Legislature should find its current lethal injection protocol unsuitable due to the inability to obtain the medication, the inappropriateness of paralytic use even in animal euthanasia, and the unconstitutional cruel and unusual pain that the drugs impose on individuals. Further, because firing squad serves as the best known and available alternative which is feasible, readily implemented, and significantly reduces the substantial risk of severe pain that lethal injection too often inflicts, the Oklahoma Legislature should codify execution by firing squad as the primary execution method. The State of Oklahoma can once again serve as a leader in this debate, while stopping the unnecessary issues of painful and prolonged executions of individuals. Such an improvement would be consistent with the nation’s strong value for humane modes of punishment.

—Dallas Jones*

the victim is ‘comparable to being punched in the chest,’” and “most lives [are] extinguished in minutes, if not seconds”).

292. *Arthur v. Dunn*, 137 S. Ct. 725, 734 (2017) (Sotomayor, J., dissenting).

293. Berman, *supra* note 30.

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