

**USA**

**AN EMBARRASSMENT  
OF HITCHES**

**REFLECTIONS ON THE DEATH  
PENALTY, 35 YEARS AFTER *GREGG  
v. GEORGIA*, AS STATES SCRAMBLE  
FOR LETHAL INJECTION DRUGS**

**AMNESTY  
INTERNATIONAL**



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“Until *Furman v. Georgia* (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution.”

US Supreme Court, *Gregg v. Georgia*, 2 July 1976

Following the *Gregg v. Georgia* ruling, executions resumed with the firing squad killing of Gary Gilmore on 17 January 1977 in Utah



## 1. INTRODUCTION: AN EMBARRASSMENT OF HITCHES

*I am outraged that the Justice Department, having had the facts for many months, would wait literally until the day before a scheduled execution to file an objection over the proposed change in one of the drugs to be used to execute this killer*  
Arizona Attorney General Tom Horne, 25 May 2011<sup>1</sup>

At 7.30pm on 25 May 2011, a new entry was added to the history of judicial killing in the US state of Arizona. One hundred and one years after the first hanging in the state penitentiary at Florence, seven and a half decades after the first execution by lethal gas there, and nearly 20 years after its first lethal injection, state employees secured 56-year-old Donald Beaty to their “execution table” and killed him using pentobarbital as the first ingredient of their deadly three-drug mix. In its previous 23 lethal injection executions, Arizona had used sodium thiopental as the anaesthetic component.

The state had intended to kill Donald Beaty nine and a half hours earlier – after holding him on death row since 1985 for the murder of a 13-year-old girl – but its quarter-century-long homicidal pursuit had run into a problem. The state had been warned by the US Department of Justice that the importation by the Arizona Department of Corrections (ADC or ADOC) in 2010 of sodium thiopental from a company in the United Kingdom – a wholesaler operating out of space rented at the rear of a driving school in west London – may have violated federal law. So, just 18 hours before the execution, the state told the Arizona Supreme Court that “to avoid questions about the legality of ADC’s use of sodium thiopental obtained from a foreign supplier, pentobarbital from a domestic source” would be used to kill the condemned man.<sup>2</sup>

Arizona’s switch to pentobarbital came despite the drug’s Denmark-based manufacturer condemning the use of its product for the purpose of state killing. The company, Lundbeck, had already written to the Arizona authorities “strongly stating our objection to their use of our product to end lives, since it contradicts everything we are in business to do, namely provide therapies that help improve people’s lives.”<sup>3</sup> It also emphasised that another reason for its concern was that the drug’s efficacy if used outside of “the approved labelling” could not be guaranteed; its use for execution would fall into this category.<sup>4</sup>

Exactly a month before Arizona’s precipitate change in drugs, the Director of its Department of Corrections had placed an opinion piece in the *Arizona Republic* newspaper to give assurances of the legality of his department’s acquisition of the sodium thiopental and that, although his department was “considering the use of alternative chemicals and protocols”, any changes would be “determined after a full and comprehensive review”.<sup>5</sup> When the Arizona authorities announced the sudden switch in drugs on 24 May, Donald Beaty’s lawyers appealed to the courts for a stay of execution:

“The State knew for *eight months* that there were serious concerns about the legality of its importation of sodium thiopental. In fact, the State ordered the pentobarbital it intends to use tomorrow on September 28, 2010. Accordingly, it could have changed the protocol at that time, and provided death-row prisoners and this Court with the opportunity to carefully evaluate the changes. Instead, however, through its own actions, the State has placed itself in the position of rushing to change its lethal protocol at the last minute. Now, ADOC has given notice *literally* on the eve of Beaty’s execution that it would change the critical drug that is necessary to ensure that he does not suffer. ADOC should not now be allowed to hurry an execution using pentobarbital, especially in light of the fact that the concerns related to the illegally imported sodium thiopental have been questioned since October 2010.”<sup>6</sup>

Meanwhile, Arizona's Attorney General had issued a news release asserting that the federal government was "to blame" for delaying the execution of Donald Beaty. He said he was "outraged" that the US Department of Justice had "chosen to exercise its prosecutorial discretion to further delay the execution of this vile criminal." The conduct of the federal government, he continued, was "a slap in the face" to the victim's family who should not have to endure "even one more minute of pain before they know the man who murdered their child has paid the price for his evil crime". He added that the federal government now owed the family an apology "for adding to their grief".<sup>7</sup>

A few weeks earlier, the British Embassy in Washington DC had written to the US authorities to express the UK government's "deep concern" at the importation from the UK of sodium thiopental for executions in the USA. The UK was particularly "dismayed" at the execution in Arizona of Jeffrey Landrigan in late 2010 using such drugs and called on the US authorities to do all they could to prevent the drug obtained from the UK being used in further executions.

By late May 2011, Arizona had executed two of the five plaintiffs – Donald Beaty and Eric King – named in a civil action filed in February in federal court suing certain federal authorities for allowing the importation of sodium thiopental from the UK in alleged violation of federal law, and had been hours from killing a third before it was stopped by the US Supreme Court (on a separate issue).<sup>8</sup> The lawsuit – lodged by lawyers at the Office of the Federal Public Defenders in Phoenix and, by the end of June 2011, yet to be ruled upon – was described by the Arizona Attorney General as a "frivolous use of tax dollars" and their efforts to have the imported drugs recalled or such imports prohibited as "absurd".<sup>9</sup> He did not mention the growing concern in the USA that the death penalty itself is an enormous waste of "tax dollars",<sup>10</sup> or that, leading up to the execution of Jeffrey Landrigan, a number of federal judges had described Arizona's conduct in relation to its acquisition of sodium thiopental from abroad and its refusal to disclose information about it as "unseemly at best, and inhumane at worst".<sup>11</sup>

Such episodes surely leave many people in the USA viewing their capital justice system as a source of national embarrassment, if not shame, in an increasingly abolitionist world. Certainly, 35 years after the US Supreme Court ruled in *Gregg v. Georgia* that executions could resume in the USA after nearly a decade without them, the country's use of the death penalty has been bordering on the shambolic.

The application of this inherently cruel and degrading punishment has long been shown to be mixed with substantial doses of discrimination, arbitrariness and error in the USA.<sup>12</sup> In addition to this big picture of the capital justice system's broad failings, the killing end of the capital process has in recent years been under a spotlight cast by legal challenges to the three-drug lethal injection protocols used by most of the USA's death penalty states, as well as the federal government, to anesthetize, paralyze and kill condemned prisoners. After years of litigation on such protocols, in the words of a federal court in 2011,

"The problems that can arise from the use of such a protocol are well known: if the sodium thiopental is not administered correctly, the inmate will be improperly anaesthetized during the execution and will experience tremendous pain and suffering from the administration of the pancuronium bromide and potassium chloride".<sup>13</sup>

In late 2007, rather than steering the country towards abolition as expected of it under international standards, the US Department of Justice chose to intervene in support of state-level executioners.<sup>14</sup> It intervened with a legal brief in the *Baze v. Rees* case, which the US

Supreme Court had taken to examine the constitutionality of the three-drug lethal injection method. The Supreme Court gave the government what it had argued for when it gave the USA's executioners the go-ahead to continue with lethal injections after a seven-month pause while the Justices had considered the issues raised. More than 150 people have been put to death in the USA since the *Baze v. Rees* ruling of 16 April 2008. All but four of them were killed by lethal injection, which has now been used in more than 85 per cent of executions since the *Gregg* ruling of 2 July 1976.

In the past 18 months of this now 35-year experiment with capital punishment, authorities in the USA have faced difficulties in obtaining ingredients for lethal injection. With the sole US manufacturer of sodium thiopental, the barbiturate used in most such executions since 1976, suspending production and in early 2011 withdrawing from the market altogether, the USA's death penalty states have turned to each other, to sources overseas, and to the federal government, to seek solutions. A letter sent in January 2011 by the Attorneys General of 13 of the USA's death penalty states to the federal Attorney General explained the problem:

"The protocol used by most of the jurisdictions employing lethal injection includes the drug sodium thiopental, an ultra-short-acting barbiturate. Sodium thiopental is in very short supply worldwide and, for various reasons, essentially unavailable on the open market. For those jurisdictions that have the drug available, their supplies are very small – measured in a handful of doses. The result is that many jurisdictions shortly will be unable to perform executions in cases where appeals have been exhausted and Governors have signed death warrants. Therefore, we solicit your assistance in either identifying an appropriate source for sodium thiopental or making supplies held by the Federal Government available to the States."<sup>15</sup>

The US Attorney General responded that he was "optimistic" that solutions could be found to allow lethal injections to proceed.<sup>16</sup> Amnesty International regrets that he did not respond in a manner consistent with the direction sought under international standards – such as by suggesting that this latest problem in an already error-prone and resource-consuming policy could be used as an opportunity to nudge the country away from the death penalty. It seems that since his reply, the US Secretary of Commerce has sought assistance on the drug problem from at least one (abolitionist) country, even as the Drug Enforcement Administration (DEA) of the US Department of Justice has been initiating investigations into the legality of imports of sodium thiopental by states.

A few days after the Attorney General's response, two of the 13 states that had written to him improvised a "solution" – the Tennessee prison authorities gave eight grams of the drug to their counterparts in Alabama. However, Tennessee, like Arizona, had itself bought its batch of the drug from the wholesaler in the UK, and the Alabama Department of Corrections was apparently then contacted by the DEA in its role as the federal agency enforcing the USA's controlled substances laws and regulations. Alabama handed over to the DEA for the agency's investigations "all of the sodium thiopental it had received from Tennessee", apparently leaving itself with sodium thiopental due to expire on 1 April 2011, and an upcoming execution in May. On 26 April, the Alabama Commissioner of Corrections announced that the Department had amended its (confidential) three-drug execution protocol to allow for the use of pentobarbital in future executions.<sup>17</sup> Alabama carried out its first such lethal injection on 19 May 2011 after a US District Court judge ruled that the "balance of harms and the public interest weigh[ed] against a stay of execution" for death row prisoner Jason Williams.<sup>18</sup>

In the past year, a number of states have moved to one-drug protocols under which the condemned prisoner is injected with an overdose of anaesthetic, whether sodium thiopental or an alternative barbiturate. Other jurisdictions, including Texas, which accounts for more

than four times as many executions since 1976 as any other state, are staying with the three-drug approach for the time being, again employing either sodium thiopental if able to obtain it or a substitute as the anaesthetic component. Pentobarbital is becoming the substitute of choice – over the condemnation of the drug’s manufacturer Lundbeck, which has promised that it will “continue to urge states in the US to refrain from using pentobarbital for the execution of prisoners as it contradicts everything we stand for as a company”, and has since indicated that it may take further steps.<sup>19</sup> In recent months pentobarbital has been used in executions in Texas, South Carolina, Oklahoma, Ohio, Georgia and Mississippi, as well as in Alabama and Arizona. At the time of writing, Delaware was due to carry out its first execution since 2005 and its first lethal injection under a protocol changed in May 2011 to allow use of pentobarbital as a substitute for sodium thiopental.<sup>20</sup> Oregon had also scheduled what would be its first execution since 1997 and was also planning to use pentobarbital under its three-drug protocol.<sup>21</sup> And the last execution in Georgia before the 35<sup>th</sup> anniversary of the *Gregg v. Georgia* ruling was its first using pentobarbital (its supply of sodium thiopental imported from the UK was seized by the DEA in March 2011). The condemned man’s lawyer has called for an independent investigation into the execution of 23 June 2011, supported by the conclusion of an anaesthesiology expert that the prisoner was “inadequately anesthetized” and had “suffered greatly” during the execution.<sup>22</sup>

Concurring in the *Baze v. Rees* judgment three years ago, then Senior Justice John Paul Stevens wrote that, when the Court had decided to take the *Baze* case, he had “assumed that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not.” Justice Stevens, who has since retired from the Court, was right. Legal challenges to lethal injection procedures have continued. Litigation in federal court on California’s lethal injection protocol, for example, which has blocked executions in the state since 2006, is set to go on into 2012. In late 2010, the state came close to carrying out an execution. California authorities conducted a “secret mission” to get sodium thiopental from their counterparts at the Arizona state penitentiary, but the execution they were planning was stayed by the federal courts, with a number of federal judges expressing incredulity at the state of affairs.

Elsewhere, litigation also looks set to continue in response to how the authorities have variously sought to address the sodium thiopental shortage. In May 2011, for example, the Nebraska Supreme Court stopped the state from carrying out its first-ever lethal injection, and its first execution by any method for 14 years, after the condemned man’s lawyer challenged Nebraska’s lethal injection protocol and the state’s recent import of sodium thiopental from a company in India. Similar questions are the subject of litigation in South Dakota which purchased sodium thiopental from the same company, a company which has since said it will not knowingly sell any more of the drug for US executions. In addition to the last-minute intervention of the federal government in the Donald Beaty execution in Arizona, questions raised about imports of sodium thiopental from the UK have also resulted in the DEA seizing sodium thiopental from the Georgia Department of Corrections and in at least four other states – Kentucky, Tennessee, South Carolina and Alabama – handing over batches of the drug to the DEA, or having them seized by the agency, for investigation.<sup>23</sup> Lawyers for death row inmates in Arizona, Nebraska and Texas have called for federal investigations into the procurement of the drug by authorities in those states as well.

Amnesty International opposes the death penalty, in every case, in every country, unconditionally, regardless of the execution method chosen by the state. As such, while the organization continues to monitor developments relating to lethal injection protocols in the USA, it has generally limited its engagement on this issue to action relating to companies and exporting countries.<sup>24</sup> The organization nevertheless notes the tireless work undertaken,

principally by lawyers in the USA representing death row prisoners, to challenge a method of execution promoted by its advocates as being somehow compatible with human dignity. This litigation has challenged complacency, uncovered shoddy state practices, and given more reasons for US society to question why it allows the state to continue to exercise this lethal authority over a selection of those it convicts of murder.

In late 2009 the state of Ohio switched from a three-drug to a one-drug execution protocol, carrying out the first execution in the USA under this method, and has since then switched from sodium thiopental to pentobarbital as the drug used. As this tinkering with the apparatus of execution continues, the big picture remains unchanged. In January 2011, for example, Senior Ohio Supreme Court Justice Paul Pfeifer, who when he was a state legislator was a co-author of Ohio's death penalty statute enacted in 1981, wrote:

“I helped craft the law, and I have helped enforce it. From my rather unique perspective, I have come to the conclusion that we are not well served by our ongoing attachment to capital punishment... I ask: do we want our state government – and thus, by extension, all of us – to be in the business of taking lives in what amounts to a death lottery? I can't imagine that's something about which most of us feel comfortable. And, thus, I believe the time has come to abolish the death penalty in Ohio”.<sup>25</sup>

That time has surely come across the USA as a whole. As authorities there continue to try to fix the unfixable, this report, set against the backdrop of the lethal injection goings-on and the 35<sup>th</sup> anniversary of the *Gregg v. Georgia* ruling, offers some reflections on US capital justice, as Amnesty International continues its decades-long campaign for an end to the death penalty worldwide.

Earlier this year, defending his state's import of lethal injection drugs from the UK, the Arizona Attorney General resorted to a familiar refrain: “Lethal injection is considered the most humane method of carrying out an execution”.<sup>26</sup> Yet no amount of refining execution procedures can disguise the incompatibility of the death penalty with human dignity or mask the global abolitionist trend currently being bucked by the USA. And while the USA's use of lethal injection may spare its politicians from having to defend more visually gruesome execution methods, the country's continuing pursuit of judicial killing by any method deals a serious if not fatal blow to its claims to be a progressive force for human rights.

Amnesty International urges officials in the USA – at local, state and federal level – to work for abolition. Pending abolition, they should make every effort to bring about an immediate moratorium on executions.

The federal government has a leadership role to play in this. It should acknowledge that although international human rights law recognizes the existence of the death penalty in some countries, international standards are abolitionist in outlook and therefore place an expectation on governments that they will work towards abolition. The federal government should lead by example, with a view to ending the USA's increasing isolation on this fundamental human rights issue.

The US Attorney General should stop authorizing federal prosecutors to seek death sentences. The Justice Department should no longer intervene in favour of state-level executioners in litigation in federal court. The US Department of Commerce and other federal agencies should oppose any trading in drugs for use in lethal injection executions. The Convening Authority for military commissions should not forward any charges as capital in prosecutions at the US Naval Base in Guantánamo Bay in Cuba. Military prosecutors should cease any pursuit of death sentences. Congress and the administration should work to withdraw all reservations and understandings filed by the USA upon ratification of treaties impacting on the death penalty.

## 2. AT LAST BLUSH? RETRIBUTION AND ISOLATION

*US Commerce Secretary Gary Locke met with the recently-appointed Vice Chancellor and Federal Minister of Economics and Technology Dr. Philipp Rösler today and discussed ways to strengthen US-Germany commercial relations. Locke and Rösler had a productive conversation on a variety of topics...*

US Department of Commerce press release, 7 June 2011<sup>27</sup>

It seems that the US Secretary of Commerce did not get all he asked for in his meeting with his German counterpart on 7 June 2011. According to *Der Spiegel*, Secretary Locke asked for Germany's assistance in addressing the shortage of lethal injection drugs for executions in the USA. "I noted the request and declined", German Federal Minister of Economics and Technology Dr Phillip Rösler later recalled, adding that he would prohibit any export of sodium thiopental from Germany for US executions if orders were placed with German pharmaceutical companies.<sup>28</sup>

Before that the Danish government had joined with the manufacturer of pentobarbital to appeal to states in the USA to stop "misusing" the drug for executions.<sup>29</sup> And in April 2011, the United Kingdom government had written to the US Department of State to express its concern about the import from the UK into the USA of sodium thiopental. It reiterated that the UK "firmly opposes the death penalty in all circumstances as a matter of principle".<sup>30</sup>

On the question of capital punishment, the letter from the British Embassy in Washington DC said, the "UK and US governments do not see eye to eye". It could be said that a majority of countries do not see "eye to eye" with the USA on the death penalty, while support in the USA for the retributive notion of an "eye for an eye" remains one of the reasons for its increasing isolation on this fundamental human rights issue.

In the *Baze v. Rees* ruling in 2008 upholding the three-drug lethal injection method, the then most senior Justice, John Paul Stevens, noted that "it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty" in the USA. He pointed to recent evidence that 37 per cent of death penalty proponents had cited "an eye for an eye / they took a life / fits the crime" as their reason for supporting capital punishment. Another 13 per cent had cited "They deserve it" as the reason.<sup>31</sup>

Retribution in the death penalty context, wrote a Supreme Court Justice concurring in the 1972 *Furman v. Georgia* ruling that overturned the USA's existing capital statutes, in short "means that criminals are put to death because they deserve it".<sup>32</sup> In his dissent against the *Gregg v. Georgia* ruling four years later that allowed executions to restart in the USA under new laws, another of the Justices considered the question of societal retribution as justification for judicial killing. The "mere fact that the community demands the murderer's life in return for the evil he has done", wrote Justice Thurgood Marshall, "cannot sustain the death penalty". In any society that purports to respect human dignity, he argued, the notion of the "taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth."<sup>33</sup>

A few days after Donald Beaty was killed in Arizona's execution chamber in May 2011 after 26 years on death row with the state having switched its lethal drug combination at the last minute, a letter from a local reader was published in the online edition of the *Arizona Republic* newspaper:

“Why do we allow death-row inmates to live so long? This is wrong to allow them to live a full life after a heinous crime. Their victims weren’t given this right. And 20 or 30 years later when these inmates’ time has come, they argue it is against their constitutional rights to be executed because of a change in serum. It seems the public forgets about the victims and their families. They want to focus on the criminal and make sure he doesn’t suffer. Let him feel the pain his victim or victims felt. I say they get one appeal to be used in the first 6 months and then they are executed. If the guilty don’t like serum, let’s go the old way: Hang them with a nice American-made rope.”<sup>34</sup>

As outlined further below, variations of this retributive sentiment are commonly heard from death penalty supporters in the USA and the topic of retribution in the era of lethal injection became a bone of contention in the *Baze* ruling in 2008. Provoking the accusation from Justice Antonin Scalia that he was engaging in “rule by judicial fiat”, Justice Stevens suggested that the gradual movement of society away from “public and painful” retribution was one reason that “state-sanctioned killing” was “becoming more and more anachronistic”.

Justice Stevens – who in 1976 had voted with the majority in the *Gregg v. Georgia* judgment and since retiring from the Court in 2010 has said that he now believes that that decision was wrong – used the *Baze* ruling to go beyond the narrow lethal injection issue and reveal that his 33 years on the Court had led him to conclude that the “imposition of the death penalty represents the pointless and needless extinction of life” and was therefore unconstitutionally cruel.<sup>35</sup> He pointed to the absence of “reliable statistical evidence that capital punishment in fact deters potential offenders”, as well as to other flaws, including the risk of irrevocable error as illustrated by the “abundant evidence” of wrongful convictions in capital cases, and the continuing “unacceptable role” of racial discrimination in the application of the death penalty.

In his judicial spat with Justice Stevens in the *Baze* ruling, Justice Scalia suggested that proving whether or not a criminal sanction serves a retributive goal was a judgment that is “inherently subjective and unsusceptible of judicial review”. If this is the case, it is hardly something that should inspire confidence in the death penalty – the effectiveness of an irrevocable punishment in meeting its stated goals should surely at least be demonstrable, rather than merely a matter of personal opinion. Regardless of the sustainability of the retribution argument, however, tampering with the method of execution cannot alter the bigger picture surrounding the death penalty. Strap prisoners down in order to kill them with one brand or type of drug rather than another does not render the act compatible with human dignity. Execute an innocent person with a bullet instead of by chemical poison, and the error is not eradicated. Kill by noose rather than in the electric chair a prisoner whose death sentence is marked by discrimination or arbitrariness, and the unfairness does not die with the condemned. It is still cemented into irreversible permanence.

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It is the death penalty’s fundamental flaws that have led to what once seemed a permanent part of the legal landscape in many countries being dissolved. This global trend against the death penalty – 139 countries are now abolitionist in law or practice – was on display at the UN Human Rights Council in Geneva in November 2010 when the USA’s human rights record was examined under the Universal Periodic Review (UPR) process. Many governments called on the USA to end its attachment to judicial killing. In doing so, none raised the

question of execution methods; in this *human rights* forum, they were concerned with the death penalty *per se*, a fundamental human rights issue.

In March 2011, in its formal written response to these recommendations, the USA dismissed calls from the Russia Federation, Uruguay, Hungary, Slovakia, Holy See, Algeria, United Kingdom, Belgium, Switzerland, Italy, New Zealand, Netherlands, Cyprus, Australia, Norway, Turkey, Germany, France, Ireland, Nicaragua, Spain, Denmark, and Venezuela which had variously called for a moratorium on executions in the USA with a view to abolition. Displaying a willingness to take a look at certain aspects of capital punishment rather than end it altogether, the US government said it was in principle supportive of studies into and effective strategies against racial disparities in the application of the death penalty. At the same time, it rejected calls from Cuba and Ireland for an end to its use against people with mental illness.<sup>36</sup> In partially supporting a recommendation from Sweden, the USA stated that “we will continue to ensure that implementation of the death penalty complies with our international obligations”.<sup>37</sup>

This latter assertion harks back to the oral response of the US delegation at the Human Rights Council in Geneva in November 2010, when it acknowledged the multiple recommendations about the death penalty in the USA, but sought to bat them away with a familiar assertion:

“Many recommendations concern the administration of capital punishment... While we respect those who make these recommendations, we note that they reflect continuing policy differences, not a genuine difference about what international human rights law requires.”<sup>38</sup>

Other governments should not take no for an answer. While it is true that international human rights law, including article 6 of the International Covenant on Civil and Political Rights (ICCPR), recognizes that some countries retain the death penalty, this acknowledgment of present reality should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of article 6.6 of the ICCPR. The USA signed the ICCPR three and a half decades ago and ratified it nearly 20 years ago.<sup>39</sup> The UN Human Rights Committee, the expert body established under the ICCPR to monitor its implementation, has said that article 6

“refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life”.<sup>40</sup>

The Committee also noted that at that time, progress towards “abolishing or limiting the application of the death penalty” was “quite inadequate”. Dozens of countries have abolished the death penalty since this General Comment was issued in 1982, at which point four people had been executed in the USA since the *Gregg* ruling. Over 1,250 more men and women have been put to death across the country since then. Clearly, officials in the USA are failing to do all they can to bring nationwide abolition closer in any reasonable timeframe. The death penalty is a habit that dies hard in a country that prioritizes perceived domestic public opinion for this policy over evolving international standards against it.

In its initial report to the UN Human Rights Committee in 1994, the USA said that: “the majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country”.<sup>41</sup> A dozen years later, in 2006, after reviewing the USA’s second

and third periodic reports, the Committee was concerned by expansion of the scope of the death penalty in the USA in the intervening period and the government's failure to acknowledge the full extent of the evidence of racial and economic discrimination in the capital justice system. The Committee urged the USA to "place a moratorium on capital sentences, bearing in mind the desirability of abolishing the death penalty".<sup>42</sup>

Far from moving in the direction sought by the Human Rights Committee, the following year the US administration intervened on the side of the country's executioners and urged the US Supreme Court to uphold the three-drug lethal injection method in the *Baze v. Rees* case. In doing so the US administration stressed the enduring nature of the death penalty in the USA:

Legislators and governors in Illinois, New Jersey and New Mexico have lit the abolitionist path in the USA and at the same time shown that officials perceived as somewhat unresponsive to opinion outside their domestic constituencies may be more sensitive to international trends and US isolation on this human rights issue than might often appear

"The use of capital punishment in America dates virtually from the foundation of the first colony... Like the States, the federal government has conducted executions since the Nation's founding."<sup>43</sup>

It is long past time for US authorities to stop pointing to the existence of the death penalty as a reason not to abolish it. They now have some domestic examples to follow. Since the US government filed its brief in the *Baze* case in late 2007, legislators and governors in Illinois, New Jersey and New Mexico have lit the abolitionist path in the USA and at the same time shown that officials perceived as somewhat unresponsive to opinion outside their domestic constituencies can be more sensitive to international trends and US isolation on this human rights issue than might often appear.

"From an international human rights perspective", said New Mexico's Governor Bill Richardson in 2009 when signing the bill to abolish the death penalty in his state, "there is no reason the United States should be behind the rest of the world on this issue". Two years earlier, his counterpart in New Jersey, Jon Corzine, had signed an abolitionist bill, and described this legislative achievement as "a day of progress – for the State of New Jersey and for the millions of people across our nation and around the globe who reject the death penalty". And on 9 March 2011, Governor Pat Quinn of Illinois asserted that "we are taking an important step forward in our history as Illinois joins the 15 other states and many nations of the world that have abolished the death penalty".

Back at the UN Human Rights Council in Geneva nine days after Governor Quinn had signed the abolition legislation in Illinois, the Legal Adviser to the United States Department of State repeated the official US line that opposition to the USA's death penalty from other governments "reflect[s] continuing differences of policy, not differences about what the rules of international human rights law currently require."<sup>44</sup> The problem here is that even if there was a clear rule of international law prohibiting the death penalty there is no guarantee that the USA would adhere to it, as it maintains that it is bound only by domestic constitutional standards in relation to capital punishment (see Section 8).

Until 2005, the USA was one of the very few countries in the world that executed prisoners for crimes committed when they were children, in clear violation of a long standing principle of international human rights law.<sup>45</sup> In 1999 – as the current Legal Adviser to the State Department will recall as he was at that time its Assistant Secretary of State for Democracy, Human Rights and Labor – the administration of President Bill Clinton was invited by the Supreme Court to give its views on the death penalty against children. It told the Court that

neither the USA's ratification of the ICCPR nor any other provision of international human rights law prohibited the execution in the USA of individuals who were under 18 years old at the time of their crimes.<sup>46</sup> The administration got what it argued for when the Court decided not to examine the issue. Nine more of these young offenders were put to death in the USA between 1999 and March 2005 when the US Supreme Court, in *Roper v. Simmons*, finally banned the practice.

Before the *Roper* ruling, the USA found it awkward if not impossible to criticize the use of the death penalty against children in the handful of other countries that clung to the practice. After the *Roper* decision, this changed. In its reports on human rights in Iran in 2005, 2006 and 2007, for example, the US Department of State wrote: "As a party to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, the country is obligated not to execute persons for crimes committed when they were younger than 18."<sup>47</sup> It had not said this in earlier human rights reports.<sup>48</sup> Its about-turn was particularly stunning given that the USA killed 17 such prisoners *after* it ratified the ICCPR in June 1992, and given what it had argued to the US Supreme Court in 1999.

Today, the USA promotes its ban on the death penalty against children as an indicator of the safeguards in place in a capital justice system it maintains is reserved for the worst of the worst crimes and offenders. Its post-2005 reports to the UN Human Rights Committee, UN Committee Against Torture and the Committee on the Elimination of Racial Discrimination, and for the Universal Periodic Review process in 2010, all pointed to the *Roper* decision. In effect, the judicial abolition of the death penalty against children – a binding legal obligation on the USA under international law long before the *Roper* ruling – is being used to defend the USA's use of capital punishment more generally.<sup>49</sup> Such an approach would be inconsistent with the ICCPR's requirement that nothing in article 6 (which includes the prohibition of the death penalty for the crimes of children) be invoked to delay full abolition.

The same can be said of lethal injection. While minimizing suffering during execution is consistent with international safeguards,<sup>50</sup> this minimum safeguard should not be viewed as an end in itself but a step towards abolition as envisaged in article 6 of the ICCPR and other international instruments. Clearly lethal injection is not being seen in this way in the USA, where the first execution by lethal injection took place nearly three decades ago – in the same year that the UN Human Rights Committee issued its General Comment on article 6 cited above – and where this cruel ritual has been repeated more than 1,000 times since. Lethal injection has become an integral part of preserving the death penalty, perhaps helping to explain why state officials have engaged in some unseemly practices while confronting the nationwide shortage of sodium thiopental. Having promoted lethal injection as more "humane" than other execution methods, officials would be left in a difficult position were they forced to return to methods such as hanging, with its echoes from the USA's history of lynching and "wild west" justice, or other visually grotesque techniques such as lethal gas and electrocution. Providing a method of killing condemned prisoners that witnesses and the public can stomach and politicians can more easily defend has undoubtedly bolstered the death penalty in a country that, generally lacking a political class willing to apply an international human rights perspective to the question of capital punishment, might otherwise have turned against it sooner.

Media reporting of lethal injection in action illustrates the point. At a press conference after the lethal injection of Arizona death row inmate Eric King on 29 March 2011, for example, a member of the media who had witnessed the execution reported that "this was nothing more than Mr King going to sleep. It was very peaceful, very calm, no outburst..."<sup>51</sup> In a live television broadcast following the execution, a TV reporter added that "witnesses say the

moment the curtain opened, Eric King was actually smiling, he looked around the room, he apparently had a white sheet over him and he kind of waved at some of the folks that were there on his behalf".<sup>52</sup> The chief prosecutor from the county where King was tried for two murders committed during a robbery said, after witnessing the state killing of Eric King, that "out of a violent act in which two people died, the end was rather subdued."<sup>53</sup>

That lethal injection can be seen to be as much about the sensibilities of those who witness it as it is about the prisoner killed by it was suggested in the *Baze* decision upholding the three-drug execution method. US Supreme Court Chief Justice John Roberts wrote that the state's use of pancuronium bromide as the second drug, used to paralyse the prisoner in the process of killing him or her, "does not offend" the US Constitution. The state, the Chief Justice wrote, "has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress". It is minimizing the distress of witnesses – who will usually include representatives of the media – that is being pursued. It is not good publicity for the death penalty when witnesses emerge from an execution by electrocution relating how a prisoner's head caught fire or how there was the smell of burning flesh, or how the condemned prisoner's struggle against lethal gas lasted for long minutes of visible torture before death.<sup>54</sup>

Chief Justice Roberts had opened the *Baze* opinion by providing a potted history of how states in the USA had altered their execution methods over time in the purported pursuit of "more humane means" of carrying out death sentences:

"By the middle of the 19<sup>th</sup> century, hanging was the nearly universal form of execution in the United States. In 1888, New York became the first State to authorize electrocution as a form of capital punishment. By 1915, 11 other States had followed suit, motivated by the well-grounded belief that electrocution is less painful and more humane than hanging. Electrocution remained the predominant mode of execution for nearly a century, although several methods, including hanging, firing squad, and lethal gas were in use at one time. Following the 9-year hiatus in executions that ended with our decision in *Gregg v. Georgia*, however, state legislatures began responding to public calls to re-examine electrocution as a means of assuring a humane death. In 1977, legislators in Oklahoma, after consulting with the head of the anaesthesiology department at the University of Oklahoma College of Medicine, introduced the first bill proposing lethal injection as the State's method of execution. A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States".

As already noted, in his concurring opinion in the *Baze* ruling, Justice Stevens considered retribution as a rationale for the death penalty. Here he addressed the conflict between what he saw as a humanitarian impulse behind the adoption of lethal injection for executions and an understandable "thirst for vengeance" for the crimes the death penalty is supposedly reserved for in the USA:

"In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution is based".

Justice Scalia took issue with Justice Steven's opinion, accusing him of, "with only the most

thinly veiled condemnation”, characterising support for the death penalty as being driven by vengeance. Fourteen years earlier, Justice Scalia had responded in similar vein to the now famous 1994 dissent of Justice Harry Blackmun who had, like Justice Stevens would in 2008, come out against the death penalty after decades on the Court. Justice Blackmun had opened his dissent with a general description of an execution by lethal injection:

“Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold [the prisoner], no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.”<sup>55</sup>

Justice Scalia responded:

“Justice Blackmun begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us — the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional — for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!”

Variations on this theme – that lethal injection is “too good” for the condemned inmate and the murder victim did not have the benefit of such “humane” killing – are regularly heard from death penalty proponents.<sup>56</sup> A witness to Kenneth Mosley’s lethal injection in January 2010 in Texas, for example, said that he was surprised that the execution was quiet and conducted without the prisoner expressing pain: “It seemed just too easy, too easy of a punishment”, the witness said.<sup>57</sup> At the execution of Kenneth Biros in Ohio on 8 December 2009 – the first time a lethal injection using a single drug was carried out in a US execution – members of the murder victim’s family applauded when the time of death was announced by the prison warden. “Rock on”, the victim’s sister was quoted as saying, that was “too easy”.<sup>58</sup>

For the family of the person killed by the state, the situation is far from “easy”. At the execution of Steve Henley in Tennessee in February 2009, his family members sobbed and shouted as he was killed by lethal injection for a crime more than two decades earlier he maintained to the end he did not commit.<sup>59</sup> In addition to the suffering of the condemned inmate during the years on death row, the family of the prisoner has to live with the cycle of hope and despair that this punishment delivers.

At the execution of Robert Thompson in Texas in November 2009, the condemned man’s mother became visibly distressed and asked to be taken from the witness room as her son was put to death for a murder that he had not actually committed.<sup>60</sup> Robert Thompson had received a rare recommendation for clemency from the Texas Board of Pardons and Paroles, but Governor Rick Perry rejected it. It had been Thompson’s accomplice, Sammy Butler, who had fired the shot that killed the murder victim during the robbery carried out by the two men. Butler received a life sentence. Upholding Thompson’s death sentence in 2007, the US District Court had ruled that, “while symmetry of results may be intellectually satisfying... nothing in federal law precludes applying the death penalty to those who participate in a

crime with a principal who does not receive a death sentence... While justice must satisfy the appearance of justice, the Constitution does not require that Thompson's conviction and sentence be less severe than Butler's".<sup>61</sup> Under the retributive notion of a life for a life, it seems, it did not matter which of the two defendants' lives was taken.

Neither did satisfying the appearance of justice seem to matter to the state in the case of Holly Wood, who was executed in Alabama on 9 September 2010. At the trial of this African American man in 1994, by a vote of 10 to two, the jury voted to recommend the death penalty. The vote was split along racial lines, with the two black jurors voting for life imprisonment and the 10 whites voting for execution. Blacks had been disproportionately removed by the prosecution during jury selection.<sup>62</sup>

At the 1998 Alabama trial of Eddie Powell, a black man, for the rape and murder of a 70-year-old white woman in 1995, there were 29 African Americans in the original jury pool. One of them ended up on the eventual jury, along with eleven white jurors. A year earlier, another jury of nine whites and three blacks had convicted Eddie Powell of the crime. At the sentencing they had voted by nine votes to three for execution. Ten votes were needed for the death penalty, however. A mistrial was declared for the sentencing phase, but the judge subsequently granted a defence motion for a whole new trial on a separate issue. For the retrial in 1998, a new jury was selected. This new jury – of 11 whites and one black – again voted to convict. This time they voted by 11 to one to recommend that Eddie Powell be put to death in the state's electric chair.

In 2010, lawyers for Eddie Powell petitioned the US Supreme Court to take his case, including on questions relating to the possibility that racial discrimination had infected the jury selection as well as the trial:

*As an American citizen and a former US Marine I am outraged that your organization would see fit to complain about the treatment of an American traitor. This man should be put to death. He should be getting tortured and his slow execution should be on pay per view. Butt out.*

Email sent to Amnesty International, 21 April 2011, in response to its action for improved conditions for military detainee Bradley Manning

"During the trial, the prosecutor introduced, as demonstrative evidence, large blow-up photographs of both the elderly victim in a flowery dress, and Mr Powell, in an orange prison jump suit. The prosecutor also successfully requested an antiquated jury instruction which highlighted the fact that the case involved a victim and defendant of different races. In closing [argument], the prosecutor read a portion of testimony that used the word 'black' twelve times interspersed with the word 'rape' five times, and concluded with, 'she knows the person was black, and 'he raped me''".<sup>63</sup>

In January 2011, the US Supreme Court refused to take the case. On 16 June 2011, Eddie Powell was killed in Alabama's execution chamber, becoming the second prisoner to be executed there with the state using pentobarbital rather than sodium thiopental as the first of the three drugs. While Eddie Powell was on death row, the state had moved from electrocution to lethal injection and from sodium thiopental to pentobarbital, but echoes from the USA's history of racial discrimination in the death penalty never went away.<sup>64</sup>

A week before the state killed Eddie Powell, life-for-a-life retribution seemed to be in the air elsewhere in Alabama when 20-year-old African American Tawuan Townes was sentenced to death for a murder committed in November 2008 when he was 18. The jury had voted by 10 to two for the death penalty, and the judge accepted their recommendation. After the sentence was handed down on 10 June 2011, the prosecutor said: "The defendant wanted to plead guilty for life without parole, and we rejected that because we feel [the victim's] life

was worth more than life without parole". He also said, apparently missing the irony, having just obtained a death sentence, "Human life is the most important thing".<sup>65</sup>

The state of Tennessee has been planning to end the life of Stephen West for the past 25 years. This death row prisoner, who has a history of mental illness (see Section 6), had refused to appeal his death sentence and in 2001 elected to die by electrocution rather than by lethal injection (a choice provided to Tennessee's condemned convicted before 2000). On that occasion, his execution was stayed a few hours before it was due to be carried out after he decided to take up his appeals. In recent years his case has been one of those at the forefront of challenging Tennessee's three-drug lethal injection protocol. In April 2011, with Tennessee like other states scrambling to address the sodium thiopental shortage, a reader of the *Knoxville News Sentinel* wrote to the editor of that newspaper in a letter that would be echoed the following month in the *Arizona Republic* (see above):

"For months I've been reading articles about Stephen Michael West and Billy Ray Irick [also on death row in Tennessee]. These 2 murderers have been on death row for more than 25 years. The taxpayers have supported them and taken care of all their needs. I believe it is time to put an end to this waste of taxpayer dollars.

If the drugs needed for execution are not available, then I suggest the next best thing would be hanging. There are no drugs required and the death penalty would be carried out swiftly.

In my opinion, those on death row should be executed within 30 days, not almost 25 years. A quick justice is what is needed. Let's put a stop to treating murders [sic] with compassion after their victims suffered unspeakable torture and death."<sup>66</sup>

It "is difficult to believe that any State today wishes to proclaim adherence to naked vengeance", wrote US Supreme Court Justice William Brennan nearly 40 years ago,<sup>67</sup> but regardless of whether any particular support for the death penalty comes close to vengeance, retribution surely demands consistency in application of the sanction supposedly serving this goal. Justice Brennan argued that "when the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment."<sup>68</sup> Society's restraints on using the death penalty (in the USA only a very small number of the thousands of murders that occur there each year result in execution), together with the biases and human fallibilities that taint any criminal justice system, preclude the possibility of handing out this irrevocable punishment in any fair and reliable way.

More than 80 people in Connecticut recently signed a letter to their state legislature. What they had in common was that all of them had lost at least one relative to murder. They wrote:

"Some believe that they stand with victims' families by supporting the death penalty for 'particularly heinous murders'. We have difficulty understanding this position. The implication is that other murders are ordinary and do not merit the death penalty. From experience, we can tell you that ever murder is heinous, a tragedy for the lost one's family. The death penalty has the effect of elevating certain victims' families above others."

They were not arguing for the death penalty to be expanded to cover all murders, but to be abolished (see also Section 8). They said:

“Nothing can erase the loss that a senseless act of violence brought into our lives. But we can honor the memory of our loved ones and other families who may face tragedy by working for effective responses to violence. The death penalty, rather than preventing violence, only perpetuates it... And as the state hangs onto this broken system, it wastes millions of dollars that could go toward much needed victims’ services”.<sup>69</sup>

In his dissent from the *Gregg* ruling 35 years ago, Justice Marshall had suggested that “the American people, fully informed as to the purposes of the death penalty and its liabilities, would, in my view, reject it as morally unacceptable”. He noted research supporting his hypothesis, namely that “the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.”<sup>70</sup>

A fully informed public, for example, might reach the same conclusion as did New Jersey Governor Jon Corzine who, when signing his state’s abolitionist bill in 2007, said that the death penalty is “economic folly”, given that it cost more than life imprisonment. Abolishing the death penalty in Illinois in 2011, Governor Pat Quinn in similar vein asserted that “the enormous sums expended by the state in maintaining a death penalty system would be better spent on preventing crime and assisting victims’ families in overcoming their pain and grief”. Whether or not Justice Stevens was correct in identifying a humanitarian impulse behind the adoption of lethal injection, redirecting any such impulse towards assistance for the victims of crime would surely be a more constructive approach in the 21<sup>st</sup> century than the dead-end pursuit of the “humane” execution.

Those advocating for executions to be carried out more speedily might also think twice if they fully reflected on the fact that putting a time limit of, say two years (let alone the 30 days advocated by the *Knoxville News Sentinel* reader or the six months suggested by the contributor to the *Arizona Republic*) between conviction and execution would have meant the execution in the USA since 1976 of scores of prisoners for crimes they did not commit. The average time between conviction and exoneration of the more than 130 prisoners released from death rows since 1976 on grounds of innocence was almost 10 years.<sup>71</sup>

As countries have learned about the realities of the death penalty – its ineffectiveness, its incompatibility with human rights, and its inescapable risk of irrevocable error – they have turned against it.<sup>72</sup> Events in New Jersey, New Mexico and Illinois point to such a learning process, not least for the governor of New Mexico who said that throughout his adult life he had been a “firm believer in the death penalty as a just punishment”. But the statements made by all three governors when signing their abolitionist bills echoed each other in their recognition of why the death penalty is *and always will be* the wrong policy. Governor Quinn of Illinois said that “our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment”. He referred to the “inherent” flaws of the death penalty and the “impossibility” of devising a system that is “consistent, free of discrimination on the basis of race, geography or economic circumstance” and that “always gets it right”. He had found “no credible evidence that the death penalty has a deterrent effect on the crime of murder”.

In New Mexico, Governor Richardson also questioned the purported deterrent effect of the death penalty, as well as concluding that “the system is inherently defective”. To carry out an irrevocable punishment, he said, “we must have ultimate confidence – I would say certitude – that the system is without flaw or prejudice.” This, he added, “is demonstrably not the case”. In New Jersey, Governor Corzine suggested that “government cannot provide a foolproof death penalty that precludes the possibility of executing the innocent”. The death

penalty, he said, had little if any deterrent value, while risking a brutalizing effect through its erosion of “our commitment to the sanctity of life”.

It is important to remember, as questions of domestic law swirl around the lethal injection issue, that the problems with the death penalty are not confined to the actual act of killing a human being. Indeed, it was noteworthy that Governor Corzine was the only one of the three governors who made any reference at all to the method of execution when giving his reasons for endorsing abolition, suggesting that “it is difficult, if not impossible, to devise a humane technique of execution”. Even if it were possible, however, the cruelty of the death sentence itself would remain, as noted by a US Supreme Court Justice in 1999:

“It is difficult to deny the suffering inherent in a prolonged wait for execution – a matter which courts and individual judges have long recognized. More than a century ago, this Court described as ‘horrible’ the ‘feelings’ that accompany uncertainty about whether, or when, the execution will take place. The California Supreme Court has referred to the ‘dehumanizing effects of... lengthy imprisonment prior to execution.’ In *Furman v. Georgia*, Justice Brennan wrote of the ‘inevitable long wait’ that exacts ‘a frightful toll.’ Justice Frankfurter noted that the ‘onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.’ And death row conditions of special isolation may well aggravate that suffering.”<sup>73</sup>

The assertion that lethal injections are the current culmination of the country’s pursuit of pain-free executions also brings to mind another part of Justice Brennan’s concurrence in the 1972 *Furman* ruling that overturned the country’s existing death penalty laws:

“When we consider why [cruel punishments] have been condemned,...we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.”<sup>74</sup>

Two years after the 1976 *Gregg* ruling that ended the moratorium on the death penalty, David Powell was sent to death row in Texas for the murder of a police officer in May 1978.<sup>75</sup> The state “toyed” with his life for 11,575 days before ending it on 15 June 2010.<sup>76</sup> As the execution approached, the clemency authorities rejected compelling evidence of Powell’s rehabilitation and good conduct on death row since he was first convicted 32 years earlier and labelled by a jury as too dangerous to be allowed to live, even in prison. He was permanently “discarded” – becoming the 460<sup>th</sup> person killed in the Texas death chamber since 1977. All 459 of the others had been executed since David Powell was first sent to death row.

Between David Powell’s original conviction and his execution, more than 70 countries had legislated to abolish the death penalty. At the heart of this global abolitionist drive is the understanding that “the use of the death penalty undermines human dignity”.<sup>77</sup> The “basic concept” of human dignity is also said by the US Supreme Court to lie at the heart of the constitutional ban on “cruel and unusual” punishments.<sup>78</sup> For Justice Brennan, this was decisive in his rejection of the death penalty in the *Gregg* ruling. The death penalty he said, was “inconsistent with the fundamental premise of the [cruel and unusual punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity.”

Releasing the US Department of State’s human rights assessment of other countries in 2010, Secretary of State Hillary Clinton asserted that, “The idea of human rights begins with

a fundamental commitment to the dignity that is the birthright of every man, woman and child.”<sup>79</sup> While the USA dismisses other governments’ opposition to its use of the death penalty as reflecting nothing more than policy differences, it could be said that the USA’s continuing resort to the death penalty in an increasingly abolitionist world illustrates a growing gulf between what the USA and the international community understand by ‘human dignity’ in the context of criminal justice.

At the UN Human Rights Council on 18 March 2011, as he had five months earlier, the Department of State Legal Adviser again acknowledged the widespread opposition to the USA’s use of the death penalty, including from “close friends and allies”. Exactly two years before, on 18 March 2009, Governor Bill Richardson had signed New Mexico’s abolitionist legislation, noting that “Many of the countries that continue to support and use the death penalty are also the most repressive nations in the world. That’s not something to be proud of.”

When those countries the USA might consider roughly of like mind when it comes to human rights have long since eradicated the death penalty and are asking it to do the same, officials in the USA may try to portray the use of lethal injection as providing for execution-with-dignity in a modern rights-friendly state. The US government told the UN Committee against Torture in 2006,

“Lethal injection was chosen as the method of execution for federal death sentences precisely because it could be carried out with no discomfort to the inmate. The lethal injection procedure is administered by qualified personnel.”<sup>80</sup>

This message is repeated over and over again. After Cal Brown was killed in Washington State’s execution chamber on 10 September 2010, for example, the state Department of Corrections stressed that it had been carried out “professionally, humanely and was dignified”. The King County Prosecutor, who witnessed the execution, said that the killing had been “quick and painless”.<sup>81</sup>

A glimpse at state lethal injection protocols further illustrates the point. In South Dakota, the “execution of an inmate will be carried out...in a professional, humane and dignified manner.” In Washington State, the prison authorities may conduct a physical examination of the inmate prior to execution in order to determine whether there is anything that could affect the execution process and whether any special steps need to be taken to “ensure a swift and humane death”.<sup>82</sup> The State of Ohio asserts that its executions by lethal injection will be conducted “in a professional, humane, sensitive, and dignified manner”. It promises that the lethal injection will “quickly and painlessly cause death”. It provides a “psychological debriefing process” for anyone “involved in the execution process”, to “recognize stressors associated with executions” and to “work through” any “negative” or “positive” “aspects and feelings”.<sup>83</sup> In Arizona, affected members of staff are informed about “effective coping mechanisms” for use “prior to, during and after the execution”.<sup>84</sup>

So the gloss of dignity lethal injection paints on the death penalty spares witnesses the more grotesque sights and smells of state killing by other methods and spares officials the political and judicial fallout from such killing. While pancuronium bromide is literally a chemical mask – paralysing the prisoner to protect the state’s “interest in preserving the dignity of the procedure” – lethal injection more generally, regardless of the number of drugs used, or their brand, masks the reality of the death penalty in a quasi-medical procedure – to the frustration of particularly ardent proponents of judicial killing who think something more painful should be done to the prisoner, but perhaps to the relief of officials, whether or not

the sort of opinions expressed by such proponents mirror their own views or are personally embarrassing to them.

The embarrassment or anxiety of officials involved in the death penalty in a world where most countries have abandoned this punishment has been detected by a US professor of law and sociology who suggests that

“In America today the execution is often marked by a different emotional tone – one of embarrassment, anxiety, and even guilt... [A]t least in some parts of America today, the whole process has the feel of dirty work, tainting not just the executioners but everyone else as well. Death work is surrounded by euphemisms...

The case for the death penalty may seem uncontested to unapologetic traditionalists and unabashed retributivists. But the practice of capital punishment in America today places officials and their supporters in a cultural contradiction, obliging them to behave in ways that are at once lawful and transgressive. It traps them in the uncomfortable space between the cultural norms of liberal humanism and the legal practice of putting offenders to death”.<sup>85</sup>

From beginning to end, the US Supreme Court said in January 2010, “judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect”.<sup>86</sup> Here lies a fundamental paradox – the appearance of dignity is not the same as respect for dignity. Whether or not capital proceedings are conducted with constitutionally adequate decorum cannot disguise the fact that at the heart of such proceedings is the state’s quest for a punishment – a policy choice, not a legal necessity – that cannot be squared with human dignity. Neither can lethal injection rid this punishment of this reality.

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In the preface to the US State Department’s most recent human rights reports, Secretary of State Clinton said that “Our belief in the universal principles of freedom, justice, and peace guides us on a daily basis as we work to make human rights a human reality.”<sup>87</sup> The USA’s continuing failure to make abolition of the death penalty a reality directly contradicts its stated commitment to the principles of the Universal Declaration of Human Rights with its vision of a world in which the rights to life and freedom from cruel, inhuman or degrading punishment of all people, regardless of who they are or what they have done, are fully respected.

Recognition of the death penalty as a fundamental human rights issue lies behind resolutions passed in 2007, 2008 and 2010 by the UN General Assembly calling for a worldwide moratorium on executions. The General Assembly has repeatedly asserted that “a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights”.<sup>88</sup>

The USA’s claims to be a progressive force for human rights cannot survive its use of the death penalty, regardless of the methods it uses to kill condemned prisoners.

### 3. AN EXPERIMENT WITHIN AN EXPERIMENT

*New drug, old drug, it doesn't matter.... The fact that I'll be placed on a table and poisoned to death, I can't find any comfort in that. It's kind of a sick feeling*  
Johnnie Baston, executed in Ohio, 10 March 2011<sup>89</sup>

If the USA's contemporary foray into the death penalty is an experiment, as it has been described by at least one Supreme Court Justice, its continuing pursuit of an execution method acceptable to the courts and domestic public opinion is the experiment within the experiment.<sup>90</sup> The wider experiment has failed already, unless a cruel, costly, ineffective, error-prone and discriminatory policy was its goal. And neither it nor the sub-experiment can ever succeed if compatibility with human rights principles is the aim.

California is one of the country's main laboratories in this lethal endeavour. More than one in five of the approximately 3,200 men and women under sentence of death in the USA are on death row there. About two dozen of them have been on death row for some three decades, 30 per cent for 20 years or more, and some 70 per cent for at least a decade. Five times as many death row prisoners in California who have died since 1978 have killed themselves or died of natural causes than have been executed.<sup>91</sup> There has not been an execution in California for more than five years because of problems with its lethal injection protocol.

The death penalty in California is pursued in the name of the people; or at least in the name of the state's electorate as it voted more than three decades ago. In 1972, following a ruling by the California Supreme Court that the death penalty violated the state constitutional ban on "cruel or unusual punishment", the electorate passed a constitutional amendment – that the death penalty was not cruel or unusual. California's current death penalty statute was approved in a ballot in November 1978. They were promised "the protection of the strongest, most effective death penalty law in the nation".<sup>92</sup>

Thirty years later, in 2008, the California Commission on the Fair Administration of Justice concluded that the capital justice system was "dysfunctional":

"The lapse of time from sentence of death to execution averages over two decades in California. Just to keep cases moving at this snail's pace, we spend large amounts of taxpayers' money each year: by conservative estimates, well over one hundred million dollars annually. The families of murder victims are cruelly deluded into believing that justice will be delivered with finality during their lifetimes. Those condemned to death in violation of law must wait years until the courts determine they are entitled to a new trial or penalty hearing. The strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy. To reduce the average lapse of time from sentence to execution by half, to the national average of 12 years, we will have to spend nearly twice what we are spending now. The time has come to address death penalty reform in a frank and honest way. To function effectively, the death penalty must be carried out with reasonable dispatch, but at the same time in a manner that assures fairness, accuracy and non-discrimination."<sup>93</sup>

One might have thought that such excoriating criticism would have swiftly led to the state deciding that it should rid itself of a troublesome and ineffective policy.<sup>94</sup> Three years later, however, California's pursuit of something better than a "dysfunctional" capital justice system continues, and is now well into its fourth decade.

A case in California that has brought attention both to the wider death penalty and to the lethal injection issue is that of Michael Morales. In 2006, more than two decades after sending Morales to California's death row, the trial judge wrote to the state governor to appeal for clemency. Former Superior Court Judge Charles McGrath no longer had confidence in the death sentence. A key witness at the 1983 trial – a jailhouse informant – had testified that Morales had confessed the crime to him in jail. At the time of the trial, Judge McGrath had found the informant's testimony credible, but in his letter to the Governor, he wrote that new information had since emerged that the informant's testimony – “upon which I relied in sentencing Mr Morales to death” – was false.

Governor Arnold Schwarzenegger rejected clemency, but the execution of Michael Morales did not go ahead as scheduled on 21 February 2006 and no executions have been carried out since then in California.<sup>95</sup> Lawyers for Morales challenged the state's lethal injection protocol. The state argued that it should be allowed to kill Michael Morales at the allotted time and that his challenge was merely a “last-minute ploy”, that the concerns he raised were “purely speculative”, and that there was “no basis for supposing that the protocol will not be administered properly, or that the personnel responsible for conducting the execution will be inadequately trained or otherwise incapable of discharging their responsibilities”.<sup>96</sup>

This was not what the US District Court found. In December 2006, District Judge Jeremy Fogel ruled that California's execution procedures were seriously deficient in numerous ways, including a lack of training, supervision and oversight of the execution team, inconsistent and unreliable record-keeping, poor conditions in the execution chamber, and improper mixing, preparation and administration of sodium thiopental by the lethal injection team.<sup>97</sup> “Shit does happen” was one of the execution team members' reaction to the team's problems with establishing an intravenous line during an execution in 2005, noted Judge Fogel. The judge also pointed to “extremely troubling evidence that “substantial quantities of sodium thiopental” had gone missing from the prison pharmacy in circumstances possibly warranting a criminal investigation.

The state's own execution logs suggested that in at least six of the 13 executions carried out in California between 1999 and 2006 the prisoner may still have been conscious when the second drug, pancuronium bromide, was injected. Judge Fogel noted that it was undisputed that if the sodium thiopental was not administered properly or was otherwise ineffective and the condemned prisoner was therefore conscious when injected with pancuronium bromide (or the third drug potassium chloride), he or she would suffer “excruciating pain”.<sup>98</sup> The paralytic effect of the pancuronium bromide, however, would mask any outward sign of this suffering to onlookers.

Nevertheless, although California's lethal injection system was “broken”, wrote Judge Fogel, it “can be fixed”.<sup>99</sup> The executed get no second chances. The state, it seems, gets many. Its death penalty experiment continues. The Warden at San Quentin prison, where California's death row is located, has said that he needs until the end of August 2011 to select a new execution team. As of June 2011, litigation on the lethal injection issue before Judge Fogel was scheduled to continue into 2012.<sup>100</sup>

As already noted, the contemporary era of judicial killing in the USA began after the Supreme Court invalidated the country's existing death penalty statutes in 1972 (*Furman v. Georgia*) and approved new state laws four years later (*Gregg v. Georgia*). In his coming out against the death penalty in 1994, Supreme Court Justice Harry Blackmun wrote that the post-*Furman* aim had been to develop a capital justice system that met the goals of “individual fairness, reasonable consistency, and absence of error”. After 20 years of engaging in this endeavour,

Justice Blackmun concluded that the “death penalty experiment has failed” and that he would no longer participate. The problem, he said, was “that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.”<sup>101</sup>

Justice Blackmun’s 1994 dissent – which came 17 years after executions resumed in the USA – is as valid today, 17 years later, and it has remained a point of reference. For example, when Governor George Ryan of Illinois commuted the death sentences of all 167 death row inmates in the state and pardoned four others in 2003, he pointed to Justice Blackmun’s “realization, in the twilight of his distinguished career, that the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake”. Governor Ryan said that while he could not express it as “eloquently” as Justice Blackmun, “I must act”, adding that “our capital system is haunted by the demon of error – error in determining guilt, and error in determining who among the guilty deserves to die”.

Justice Blackmun’s words were also recalled in 2007 when the full US Court of Appeals for the Sixth Circuit reinstated Ohio prisoner Jason Getsy’s death sentence, which a panel of the court had earlier overturned on the grounds that it was unconstitutionally disproportionate to the life sentence that the instigator of the crime received for procuring the murder. One of the six judges dissenting against reinstatement of the death sentence, citing the Blackmun dissent, argued that the Getsy case clearly illustrated how “the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.”<sup>103</sup> Jason Getsy was put to death on 18 August 2009 (see Section 7).

*No amount of experimentation can ever prove me right; a single experiment can prove me wrong*  
Albert Einstein, theoretical physicist (1879-1955)

*It doesn't matter how beautiful your theory is, it doesn't matter how smart you are. If it doesn't agree with experiment, it's wrong*  
Richard Feynman, theoretical physicist (1918-1988)<sup>102</sup>

Jason Getsy became the last of 32 men put to death in Ohio since 1976 under a three-drug lethal injection process. In November 2009 the state of Ohio responded to ongoing legal challenges to its three-drug procedure – and to events two months earlier when its lethal injection team attempted and failed over the course of two hours to execute death row prisoner Romell Broom (see Section 6) – by changing to a one-drug protocol whereby the condemned inmate would be injected with five grams of sodium thiopental, essentially an overdose of this anaesthetic. Then, having executed 10 prisoners with sodium thiopental between December 2009 and February 2011, and facing the national shortage of this drug, Ohio decided to switch to pentobarbital. It carried out its first such execution and the first in the USA using pentobarbital in a one-drug protocol on 10 March 2011. The execution of Johnnie Baston went ahead over the objections of, among others, the manufacturer of pentobarbital.<sup>104</sup>

Litigation on the Ohio lethal injection protocol has continued, as have revisions to the protocol itself. A brief filed in federal court by the state Attorney General’s office on 27 May 2011 notes that the “most recent” protocol “has a stated effective date of April 11, 2011”. The brief continues:

“Ohio’s primary or ‘Plan A’ method consists of intravenous administration of five grams of pentobarbital. IV sites in the prisoner’s arm are established by an Emergency Medical Technician (EMT) and a phlebotomist, and the drugs are administered by an EMT through tubing from an adjacent equipment room. Ohio’s secondary or ‘Plan B’ method

is the intramuscular injection by an EMT of 10mg of midazolam and 40mg of hydromorphone. The alternative method is intended for use when it is not possible to insert IV catheters into a peripheral vein or when IV administration fails... After the IV catheters are inserted, or a decision is made to use the alternate method, the curtain is opened, and remains open until the drugs have been successfully administered or the execution is abandoned".<sup>105</sup>

The state also maintains that it can tailor its executions to particular inmates. In the case of Kenneth Smith, for example, facing execution on 19 July 2011:

"Inmate Smith's larynx was surgically removed as a result of cancer. He has a tracheoesophageal fistula with a voice prosthesis which permits him to speak... The execution table in the death chamber will be modified to have a wedge-shaped cushion inserted at the head, so that the head of the bed will be elevated at least four inches higher than its current elevation. This should make the total elevation of the head of the bed at least 9 inches above the foot. After the IV needles are inserted, a selection will be made as to which the arm will be the primary site for the intravenous administration of the medication. The arm that is not selected will be released so that Inmate Smith will be able to use that hand to make a final statement, to help clear his throat, and to do other things which his condition requires."

Again, then, this is the sub-experiment in the USA's death penalty laboratory – the pursuit of execution procedures that will withstand domestic judicial scrutiny and be acceptable to witnesses to the execution and domestic "public opinion". In a recent history of the USA's death penalty, cited by the Supreme Court in the *Baze* ruling in 2008, the advent of lethal injection in the 1970s was recalled thus:

"Americans had long sought a means of executing criminals that would minimize the condemned person's pain and the spectators' discomfort. The electric chair and the gas chamber had been most recent steps in this process, but decades of occasionally gruesome electrocutions and gas chamber deaths, painful for the condemned prisoner and nauseating for the spectators, had eliminated the optimism associated with the two methods earlier in the century. Lethal injection promised to be cleaner."<sup>106</sup>

Lethal injection has been far from problem-free, as witnesses to executions have been privy to from the outset and federal judges, including District Judge Fogel, have found during the course of litigation in recent years.<sup>107</sup> That litigation has revealed shoddy state practices and the sodium thiopental shortage has led to questionable state conduct and more litigation.

In 1977 Oklahoma was the first state in the USA to adopt lethal injection.<sup>109</sup> In 2010, it became the first to switch from sodium thiopental to pentobarbital as the anaesthetic component of the three-drug method. On 17 August 2010, lawyers for death row inmate Jeffrey Matthews had filed an emergency motion with his execution scheduled for 6pm that day at the Oklahoma State Penitentiary. They had learned in a telephone call the previous day from a state Assistant Attorney General that the state Department of Corrections had been unable to obtain the

*"[Death row inmate Donald] Moeller, and this court, can rest assured that South Dakota has endeavoured to dot each i and cross each t in its planning for Moeller's execution, if only to foreclose further delay in the imposition of its sentence of death on Moeller. If there is a defect of constitutional dimensions anywhere in its execution plan, the State of South Dakota is pleased to have the court identify it and is prepared to correct it".*

South Dakota state brief, federal court, 20 June 2011<sup>108</sup>

sodium thiopental for the execution. The lawyers were informed that the state intended to use another drug, Brevital, also known as methohexital. The lawyers characterized the state's intention to use it as "nothing more than experimental." The motion also questioned why the state had left it until the eleventh hour to notify the lawyers of the intended change. The Department of Corrections had apparently learned in mid-July that the dose of sodium thiopental intended for the execution of Jeffrey Matthews had expired. Indeed on the morning of 2 August 2010, two weeks before the scheduled execution, an email was sent from the Office of Oklahoma's Attorney General and copied to multiple state government addresses across the USA. It read:

"Oklahoma has an execution scheduled for August 17 and we have not been successful in finding any sodium thiopental to carry out the execution. I understand that other states have run into this problem. Can you please advise me of the course of action that has been taken in this situation? Or, if anyone has any information on how to obtain this drug or any other ultra short-acting barbiturate, that would be extremely helpful".<sup>110</sup>

US District Judge Stephen Friot issued a stay of execution on 17 August 2010. On 19 November, however, he ruled against the challenge brought by Jeffrey Matthews and John Duty, another Oklahoma inmate facing imminent execution. John Duty was put to death on 16 December, with pentobarbital as the anaesthetic component of the lethal injection. John Duty was the first prisoner to be executed in the USA using this drug in a three-drug protocol. On 11 January 2011, Jeffrey Matthews became the third, following the execution of Billy Alverson five days earlier.

Oklahoma accounts for more executions per capita of its population than any other in the USA.<sup>111</sup> Its use of the death penalty over the years has on occasion violated international law (such as in its execution of offenders who were under 18 at the time of the crime) and been marked, among other things, by prosecutorial misconduct, inadequate legal representation for indigent defendants, wrongful convictions and inconsistent sentencing.<sup>112</sup> The state government continues to back judicial killing, however.

On 18 April 2011, Governor Mary Fallin signed into law a bill passed by the Oklahoma legislature that loosened the wording of the execution law to account for the shifting lethal injection landscape.<sup>113</sup> The bill maintains the state's double back-up position that should lethal injection ever be found unconstitutional, it would be replaced by electrocution, and if that were found unconstitutional, a firing squad would be used. But lethal injection remains the favoured method and the bill amends the existing execution framework – "the punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short acting barbiturate in combination with a chemical paralytic agent until death is pronounced..." – to one where "the punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced..."<sup>114</sup> At the same time, the bill adds the following:

"The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings. The purchase of drugs, medical supplies or medical equipment necessary to carry out the execution shall not be subject to the provisions of the Oklahoma Central Purchasing Act."

Oklahoma and its neighbouring state of Texas together account for less than 10 per cent of the country's population but some 45 per cent of its executions since the *Gregg* ruling in 1976, geographic bias on a grand scale, regardless of the execution method. Texas carried

out the first execution by lethal injection in the USA in 1982 and three decades later again followed Oklahoma's lead when adopting a revised lethal injection protocol on 15 March 2011 under which it, too, would switch from sodium thiopental to pentobarbital as the anaesthetic in its three-drug method.<sup>115</sup>

In late March 2011, lawyers for two death row inmates called on the Texas and federal authorities to conduct investigations into whether the Texas Department of Criminal Justice violated state or federal law when it listed a hospital (Huntsville Unit Hospital) that has been closed for two and a half decades as the delivery destination for the pentobarbital it purchased from a wholesaler in the USA.<sup>116</sup> On 3 May 2011, Texas carried out its first execution using pentobarbital instead of sodium thiopental as the barbiturate in the three-drug combination.

Nebraska's bid to carry out its first-ever execution by lethal injection has coincided with the national shortage of sodium thiopental. Nebraska was the last state in the USA to use electrocution as its sole execution method, until, in 2008, the state Supreme Court ruled it unconstitutional.<sup>117</sup> In August 2009, a bill providing for lethal injection in Nebraska passed into law, and in mid-2011, the state moved to carry out its first execution by lethal injection – and first execution at all since 1997 – in the case of Carey Dean Moore. On 24 January 2011, the Nebraska Attorney General filed a motion in the state Supreme Court to set an execution date for Carey Moore. Earlier that month, the state Department of Corrections had received a shipment of sodium thiopental – enough for more than 150 executions – from a company in India. After an execution date was set, Carey Dean Moore's lawyer filed an emergency motion in the Nebraska Supreme Court. He also filed a legal brief in a lower court raising challenges relating to the state's lethal injection protocol and to its purchase of sodium thiopental from India (see Section 5). On 25 May 2011, the state Supreme Court noted the legal action initiated in the lower court by Carey Dean Moore and that the court proceeding was "sufficient cause" to warrant a stay of execution. The Supreme Court ordered such a stay and withdrew the execution warrant it had issued on 21 April scheduling the execution for 14 June. While the state may have run into problems as a result of its acquisition of sodium thiopental, the longer-term questions about how it secured a death sentence against Carey Dean Moore also linger.

Carey Dean Moore, now over 50 years old, but only 21 at the time of the crime, was sentenced to death in 1980.<sup>118</sup> He was convicted of the murder of two taxi drivers, after having called their cabs out to remote locations. His death sentence was overturned in 1990 by the US Court of Appeals for the Eighth Circuit on the grounds that one of the aggravating factors making the crime punishable by death – namely that it had shown "exceptional depravity" – was unconstitutionally vague. In 1992, the US Supreme Court declined to intervene and the case was sent back for re-sentencing. Despite a request by the state to redefine what was meant by "exceptional depravity", the Nebraska Supreme Court declined to do so. At the re-sentencing, the trial court therefore constructed its own definition of the term, under which it could consider an open-ended range of factors. This included whether there was "cold, calculated planning of the victim's death as exemplified... by the purposeful selection of a particular victim on the basis of special characteristics", including age. Because of evidence that Carey Dean Moore had selected victims who were older than him (both were 47 years old), the three-judge panel decided that this constituted "exceptional depravity" and sentenced him to death in 1995.

In 2000, a federal magistrate judge concluded that the death sentence should not stand because the state had failed to narrow the sentencing court's discretion and that the trial court had then effectively fashioned its new sentencing criteria to fit the facts of Moore's

case and in so doing had violated his due process rights. In 2002, a three-judge panel of the Eighth Circuit agreed that Nebraska had done nothing to narrow the aggravating factor and that Moore should be re-sentenced. However, the state appealed for a rehearing by the full court. In 2003, seven judges voted to uphold the death sentence. Six dissented. Four of the dissenting judges argued that “throughout the entirety of this case, one thing has remained static: neither the Nebraska Legislature nor the Nebraska Supreme Court has fashioned a death penalty sentencing scheme that provides the sentencing body with a cogent, meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not”.<sup>119</sup> The US Supreme Court again declined to intervene.

According to the US Supreme Court, the death penalty in the USA is supposed to be reserved for “those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”<sup>120</sup> The capital justice system will never escape questions about the consistency of its life or death selection process. Two decades after seeking and obtaining a death sentence against Daniel Cook in Arizona in 1988, for example, the prosecutor from the trial expressed his concern as the condemned man’s execution drew nearer. In a sworn statement signed in 2010, the former prosecutor said that had he known about the mitigating evidence relating to Daniel Cook – including his background of severe childhood abuse and serious mental disorders – he “would not have sought the death penalty in this case”, believing that the punishment should be reserved for “offenders who were considered the worst of the worst”.

The former prosecutor in Daniel Cook’s case also recalled that the lawyer appointed to defend Cook at trial was “at the low end of the competency scale for the handling of the defense of a standard felony” and “appeared neither capable nor willing to put forth the effort necessary to represent a defendant charged with a capital offense”. Shortly before trial, Daniel Cook had decided to waive his right to counsel, later stating that he had believed that his only options were to continue with a lawyer he viewed as incompetent or to represent himself. In his 2010 statement, the former prosecutor added that Daniel Cook “was clearly not competent to act as his own counsel.” Daniel Cook was sentenced to death. His co-defendant, who admitted killing one of the two murder victims in the crime and was originally charged with capital murder, received a prison sentence in return for pleading guilty to second-degree murder and testifying against Cook.

While Daniel Cook received a stay of execution from the US Supreme Court a few hours before he was due to be put to death on 5 April 2011, the Court had allowed the state of Arizona to kill Jeffrey Landrigan six months earlier. For his trial in 1990, too poor to afford his own lawyer, Jeffrey Landrigan had been appointed one to represent him – an attorney who had never worked on a death penalty case before. For the sentencing phase, the lawyer prepared only two witnesses to testify. One was the defendant’s biological mother (who had abandoned him when he was six months old) and one was his former wife. However, the defendant refused to allow either to testify. The lawyer did not present any expert testimony on his client’s background. The judge sentenced Jeffrey Landrigan to death.

In 1999, a federal District Court judge refused to hold an evidentiary hearing into the claim that the lawyer had been constitutionally ineffective by failing to investigate and present mitigating evidence of Jeffrey Landrigan’s background of deprivation and abuse. In 2005, by nine votes to two, the US Court of Appeals for the Ninth Circuit concluded that the District Judge had abused her discretion by denying such a hearing. The majority concluded there was a reasonable probability that if the trial judge had heard the mitigating evidence that had been presented on appeal she would not have passed a death sentence. In 2007, the now retired trial judge effectively agreed. She concluded that had she heard the mitigating evidence, “especially the evidence of Mr Landrigan’s organic brain damage, the impact of

fetal alcohol syndrome on his behaviour, his genetic predispositions and the apparent abandonment by his birth mother”, she would not have passed a death sentence. Indeed, a 1998 neuropsychological report on Jeffrey Landrigan’s severe impairments, she said, would have left her with “no choice” but to find that the mitigating circumstances demanded “leniency”. Nevertheless, by five votes to four, the US Supreme Court overturned the Ninth Circuit’s ruling, on the grounds that Jeffrey Landrigan would not have allowed his lawyer to present any mitigating evidence that he might have uncovered. The four dissenting Justices accused their colleagues of “pure guesswork”.

As explored further in Section 7, split appeal court decisions on death penalty cases raise particular concerns in view of the irrevocable nature of this punishment. But disagreements between appellate judges are only one indicator of the inevitable uncertainty that must doom to failure an experiment aimed at selecting in a consistent, fair, reliable and predictable manner those who “deserve” to die for their crimes. The fault lines created by human fallibility – police error, prosecutorial discretion, defence lawyer failure, juror confusion, poor lawmaking, and so on – clash fatally with the finality of the death penalty.

The 12 jurors who sent Scott Pinholster to California’s death row in 1984 took more than two days of jury-room deliberation to decide to vote for a death sentence. Their apparent uncertainty about execution occurred even though the defence lawyers had failed to present a range of available mitigating evidence about Scott Pinholster’s background and mental health, an absence of mitigation that the prosecutor actively exploited to argue for the death penalty. Perhaps if the defence representation had not been so ineffective, and the jury had been presented with such evidence, the balance would have been tipped towards life. In 2003, a federal judge decided that it would have – that there was a “reasonable probability” that the result of the trial would have been different if the jury had had such information. The District Court Judge reached his conclusion after conducting a three-day evidentiary hearing in September 2002. He noted that the trial lawyers had spent only six and a half hours preparing for the sentencing phase, at which they had only presented one witness, the defendant’s mother, whose brief testimony was “damaging, incomplete, and inaccurate”. Not only that, there was “considerable mitigating evidence regarding Pinholster’s dysfunctional, abusive and impoverished background that was available to counsel if they had sought to uncover it”. In addition, there was “substantial evidence” that he suffered from mental impairments caused by childhood head injuries.<sup>121</sup>

In 2009, eight judges on the US Court of Appeals for the Ninth Circuit agreed with the District Court, and only three did not.<sup>122</sup> The eight wrote that they were “fully persuaded” that it had been “objectively unreasonable” for the California Supreme Court to have decided that none of the 12 jurors would have voted against a death sentence for Scott Pinholster if presented with the mitigating evidence, “especially in light of the fact that the jury deliberated for almost two and a half days before finally returning a death verdict”. Moreover, the trial lawyers’ failure was “inexcusable”. They noted the “uniqueness” of the death penalty and “the corresponding need for reliability in the determination that death is the appropriate punishment”.<sup>123</sup> Despite their view that the “guarantees of the US Constitution” compelled their ruling, however, they were overridden by the US Supreme Court in April 2011. But even that decision was divided, with only five of the nine Justices deciding that Pinholster was not entitled to relief. In one dissenting opinion, three of the Justices asserted that the contrast between what the trial lawyers had presented to the jury and “the substantial mitigation evidence at their fingertips” was “stark”. They argued that a juror made aware of the defendant’s “troubled background and psychiatric issues”, including his possible bipolar disorder and his bizarre conduct at the time of the crime, may well have voted against execution.<sup>124</sup>

Scott Pinholster remains on death row, with a majority of the federal judges to have considered his case having voted that he had received constitutionally ineffective assistance of counsel at trial. Meanwhile, California's intention to kill this man – a plan it has pursued for the more than a quarter of a century since the jury condemned him – is currently blocked by the continuing litigation on the state's lethal injection protocol.

As state authorities in California and elsewhere have scrambled for lethal injection drugs, wider legal claims in the cases of those they are seeking to kill have continued, including questions of prosecutorial misconduct or inadequate legal representation. In 2010, Kentucky death row inmate Gregory Wilson was set an execution date there while two others were not, because at the time the state only had enough sodium thiopental for one execution (see below). A few days before it was due to be carried out, the execution was blocked by a judge who had legal questions surrounding the execution protocol and the condemned inmate's mental capacity. The judge also noted the "remarkable course of events" at the 1988 trial when Wilson had had to represent himself "because of a dispute with the trial judge over the judge's appointment as his counsel of a volunteer attorney with no death penalty trial or appellate experience". As a result, Judge Shepherd added, "Mr Wilson appears to be the only inmate on death row in Kentucky who had no lawyer at trial". Judge Shepherd also noted the revelations since the trial – not disclosed by the prosecution – that Gregory Wilson's co-defendant, Brenda Humphrey, "had a long running sexual affair" before and during the trial with another judge in the courthouse "who was a colleague and close friend" of the judge presiding over their trial.

Charles Hood came close to execution in Texas in 2008. At that time, he would have been put to death with the three-drug cocktail of sodium thiopental, pancuronium bromide and potassium chloride. If the state gets him to the death chamber in the foreseeable future, pentobarbital will replace the sodium thiopental as the anaesthetic component of the lethal mix. The change cannot wipe away concern over the case. Unknown to the defence lawyers at his 1990 murder trial, the judge and the prosecutor were having an affair. A later appeal included an affidavit from a former member of the prosecutor's office claiming that it was "common knowledge" that the judge and the prosecutor had had a six-year relationship from 1987 to 1993. On 16 June 2008, 10 leading US ethicists filed a statement with the Texas Court of Criminal Appeals lending their support to the argument that such a relationship was a "structural defect" in the proceedings against Hood that had rendered his trial "invalid." In court-ordered sworn testimony submitted on 8 and 9 September 2008, the former prosecutor and former judge confirmed that they had had an intimate relationship for several years. In an editorial on 6 September, the New York Times suggested that "Even supporters of capital punishment should be appalled at the prospect of executing a man after a trial that — if Mr Hood's charges are true — was so grossly unfair."<sup>125</sup> Charles Hood remains on death row, where he has now lived for more than two decades.

In 2006, Senior US District Court Judge Harold Albritton ruled that Alabama death row inmate Holly Wood had been denied his right to effective assistance of counsel at his sentencing in 1994, when he had been represented by a lawyer who had been admitted to the bar five months earlier, had no trial or criminal law experience, had never worked on a capital case before, and failed to present compelling mitigating evidence of Wood's mental impairments. In 2008, the US Court of Appeals overturned the ruling, over the dissent of one of the three judges who cited the "egregious failures" and "sheer neglect" of defence counsel at trial. In 2010, the US Supreme Court upheld the sentence. Two Justices dissented, arguing that the failure of the trial lawyers to investigate Wood's mental disability was the product of "inattention and neglect." Holly Wood was executed on 9 September 2010. In the year that Holly Wood was sentenced to death, Justice Blackmun wrote in his dissent against the death penalty:

“We hope, of course, that the defendant whose life is at risk will be represented by competent counsel – someone who is inspired by the awareness that a less than vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants' rights – even now, as the prospect of meaningful judicial oversight has diminished. In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.

But even if we can feel confident that these actors will fulfill their roles to the best of their human ability, our collective conscience will remain uneasy.”

Justice Blackmun had long been “uneasy” about the death penalty, even though he voted against the *Furman* ruling in 1972 and for the *Gregg* ruling in 1976. His position was that the death penalty was a matter best left for legislatures to decide. For their part, political authorities in the USA endorsing the use of the death penalty are quick to defer to the ‘collective conscience’, but slow to seek to lead it away from this punishment. The death penalty as regulated by the US Supreme Court, they argue, is constitutional, and whether and how it is applied is up to the people, through their legislatures, to determine.

The US Supreme Court applies a notion of society’s “evolving standards of decency” – as measured by legislative activity across the states – when deciding whether aspects of the death penalty experiment should be abandoned. As the Court has put it, “the rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.”<sup>128</sup> Applying this analysis, the Court has in recent years outlawed the death penalty for crimes committed by children and people with learning disabilities (“mental retardation”), as well as for non-homicidal sexual crimes against children.<sup>129</sup>

“Capital punishment in Oregon has a history almost as long as the state is old. The death penalty became law four times in Oregon’s history. It was voted out twice and struck down by the Oregon Supreme Court once. Executions, although an infrequent, minor part of corrections in Oregon, pique the public’s interest and hopefully will always remain a source of controversy, passion and discourse.”<sup>126</sup>

“ODOC placed the order for all drugs needed to carry out Mr Haugen’s death sentence by lethal injection. ODOC ordered the drugs in February 2011... ODOC has decided to use the drug Pentobarbital instead of Sodium Thiopental in carrying out Mr Haugen’s death sentence.”<sup>127</sup>

Oregon Department of Corrections (ODOC). At the time of writing ODOC was scheduled to execute Gary Haugen on 16 August 2011

According to the Supreme Court’s “evolving standards” analysis in these cases, standards in the USA are evolving more slowly than in most other countries. For example, by the late 20<sup>th</sup> century the USA was one of the last countries in the world to still be using the death penalty against children, long after most other governments had stopped the practice. The same was true in the case of its use of the death penalty against offenders with learning disabilities.

But the US government – which is the level of government responsible for ratification of international human rights treaties and representation of the USA before international human rights monitoring bodies – far from doing everything it can to lead a speedier evolution of national standards and meet the abolitionist vision of article 6 of the ICCPR (see Section 2), has too often done the opposite.

For example, after the US Supreme Court prohibited the use of the death penalty for the rape of a child where the child is not killed – having found a national consensus to have evolved against such executions – the US government asked the Court to “reconsider its decision in light of the currently prevailing moral judgment of society... that capital punishment is appropriate for child rapists”.<sup>130</sup> It pointed to the passage through Congress in 2006 of a revision of US military law reclassifying rape into two separate crimes – rape of an adult and rape of a child, and argued that the maximum punishment in a court martial for the rape of a child was death. In the original decision, the Supreme Court had failed to consider this law. However, it rejected the call for a rehearing and stood by its original decision.

As already noted, the US Government also chose to intervene when the Supreme Court agreed to examine the constitutionality of lethal injection. The federal government pointed not to international standards and the USA’s increasing isolation on this issue, but to what it saw as a national consensus for lethal injection as a reason to uphold it. In its brief to the Court it argued that where a majority of jurisdictions “use a particular method of execution, it suggests the existence of a consensus that the method in question is the most humane of the currently available methods, because as modern sensibilities have moved away from particular methods of carrying out a death sentence, so too have the death-penalty procedures of the States and the Federal Government”.<sup>131</sup>

Also in the *Baze* case, a grouping of 20 of the USA’s death penalty states cited the “nation’s moral preferences” when they urged the Supreme Court to uphold the three-drug lethal injection method:

“To be sure, the nation’s moral preferences may continue to evolve. Indeed, given historical trends, it is reasonable to assume that the nation’s moral preferences are likely to change again. But the best measurement of where those preferences are today... is the nation’s legislative consensus, which points squarely to the almost universal acceptance of lethal injection using a [three-drug] protocol... Simply put, federalism has worked in the death-penalty context: the nation’s moral preferences for humane executions have been effected – over centuries – in State Houses across the country”.<sup>132</sup>

The Supreme Court allowed lethal injections to resume, with the plurality opinion in the *Baze v. Rees* judgment pointing to the widespread political support for this method of execution in the USA: “We note at the outset that it is difficult to regard a practice as objectively intolerable when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well.”

Three years after the *Baze* decision, however, the experiment within the experiment – pursuit of the trouble-free execution – remains in trouble. The sub-experiment nevertheless continues, alongside the broader doomed-to-fail endeavour to find a fair, reliable and effective death penalty. For some at least the endeavour has gone on too long already, including those who like former US Supreme Court Justice John Paul Stevens, have had close experience of the death penalty.

“THE CONDEMNED PRISONER WILL BE PLACED ON THE EXECUTION TABLE AND RESTRAINED BY MEANS OF APPROPRIATE FASTENERS TO ENSURE SAFETY AND SECURITY OF THE PRISONER...”

Procedures for military executions, US Army Regulation 190-55, 17 January 2006

Former California county judge Donald McCartin told National Public Radio in April 2010 that he had done a 180 degree turn on capital punishment, having “just maybe become more educated when I’m retired and I see the system a little bit differently”. A few days earlier, in

an opinion piece in the Los Angeles Times, the retired judge had argued that California “should stop playing the killing game”. He added that during his 1978 to 1993 tenure on the Orange County Superior Court in California he had “accepted with pride” the badge of “the hanging judge of Orange County” attached to him because of the number of death sentences passed in his court. However, none of the 10 men sentenced to death in his court, he explained, including one sent to death row in 1979, had been executed:

“I am deeply angered by the fact that our system of laws has become so complex and convoluted that it makes mockery of decisions I once believed promised resolution for the family members of victims... It makes me angry to have been made a player in a system so inefficient, so ineffective, so expensive and so emotionally costly.”

As the government of California looks to make financial savings in a time of economic recession, there is, the retired judge suggested, a “simple cut” it could make; end the death penalty. Such a move would

“save hundreds of millions of dollars, countless man-hours, unimaginable court time and years of emotional torture for victim’s family members waiting for that magical sense of ‘closure’ they’ve been falsely promised with death sentences that will never be carried out... [T]o ask them to endure the years of being dragged through the courts in pursuit of the ultimate punishment is a cruel lie.”<sup>133</sup>

A new study calculates that California’s death penalty system has cost state and federal taxpayers four billion dollars since 1978, and that, for example, in 2009 the additional costs of capital trials, legal representation for condemned prisoners and maintaining death row added approximately 184 million dollars to the state budget “above what taxpayers would have spent without the death penalty”.<sup>134</sup> The study, conducted by a federal appeals court judge and a California law professor, concluded that abolition would result in the “immediate savings of millions of dollars per year and a savings of billions of dollars of the next 20 years.” On the day the findings of this research were reported, a California Senator announced that she would introduce a bill to abolish the death penalty in the state. Senator Loni Hancock, chair of the California’s Senate Public Safety Committee, said:

“Capital punishment is an expensive failure and an example of the dysfunction of our prisons. California’s death row is the largest and most costly in the United States. It is not helping to protect our state; it is helping to bankrupt us.

Study after study has shown that capital punishment as a penalty is not a deterrent and that the multiple appeals that drag on for years and years multiply costs and add to the uncertainty and anxiety of victims. The death penalty failings cannot be fixed; it must be repealed... It is not simply a cost issue. More than a dozen people were wrongly executed in Illinois before that state banned the death penalty earlier this year. I don’t want to see that kind of tragic statistic in California... Today we’re not tough on crime; we’re tough on the taxpayer. Every time we spend money on failed policies like the death penalty, we drain money from having more police officers on the street, more job training, more education, more of the things that would truly make for safer communities.”<sup>135</sup>

Amnesty International welcomes Senator Hancock’s recognition that the death penalty is a failed policy. It urges California’s legislature and its electorate to embrace abolition.<sup>136</sup> The fact that executions remain on hold as a result of the ongoing lethal injection litigation should be seen as an opportunity to bring about a permanent end to executions.

While lethal injection is the experiment within the experiment, the whole death penalty endeavour, according to the US administration, part of an even wider experiment. In 2010, the USA submitted its report to the UN Human Rights Council for the UPR process. The introduction to the report contains the following paragraph:

“The ideas that informed and inform the American experiment can be found all over the world, and the people who have built it over centuries have come from every continent. The American experiment is a human experiment; the values on which it is based, including a commitment to human rights, are clearly engrained in our own national conscience, but they are universal”.<sup>137</sup>

Far from representing universal values, the death penalty has been abandoned by a majority of governments all over the world. The USA is behind the times – clinging to a sanction that most countries have consigned to their history books.

State and federal authorities in the USA should end their death penalty experiment. They should do so not just to end the troubles with obtaining lethal injection drugs, but in recognition that the death penalty is a policy that offers no constructive solutions to violent crime and never will. Authorities in Illinois, New Mexico and New Jersey have shown the right way. Those in California, among others, continue to head in the wrong direction.

## 4. ‘YOU GUYS IN AZ ARE LIFE SAVERS’

*Got the 12 grams from AZ. I am going to have agents from OCS down south pick it up tomorrow and drive it directly to SQ... Also important that we get at that pharmacy in England. GREAT JOB.*

Email, California Department of Corrections, 29 September 2010<sup>138</sup>

State officials might be expected to take a dim view of secret drug transactions conducted to facilitate homicide. Not celebrate them.<sup>139</sup>

On the afternoon of 29 September 2010 the Undersecretary for Operations at the California Department of Corrections and Rehabilitation (CDCR) emailed the Department’s Assistant Secretary for Correctional Safety. The email read:

“May have a secret and important mission for you. Not sure you are following, but we are unable to do the execution because nationwide we have been unable to procure one of the three drugs needed. The quantity we currently have expires 10/1/10. So, out of the blue I find some from AZ [Arizona]. I might need one of your So Cal [Southern California] guys go to Florence, AZ and pick up a quantity of the drug and drive it to SQ [San Quentin State Prison]. Not asking you to do anything just yet, will let you know. Could you handle something like this[?]”<sup>140</sup>

To which the Assistant Secretary for Correctional Safety responded a few minutes later, “Absolutely. Give me the green light and it will be done very discreetly.”<sup>141</sup> Shortly after that, the Deputy Director of the Arizona Department of Corrections (ADC) emailed the Undersecretary for Operations in California with some news, as well as gratitude about an earlier drug transaction:

“[ADC] Director [Charles] Ryan has authorized the Arizona Department of Corrections to provide you with 12 grams of the Thiopental Sodium we have just acquired. You also have our thanks for the Pancuronium Bromide your agency has provided to ADC. Please

let us know when your employees would like to arrive at the Arizona State Prison Complex-Florence, located at Florence, Arizona, in order to pick up the drugs...”<sup>142</sup>

Two hours earlier, officials at San Quentin had “removed 35 10mL vials of Pancuronium Bromide from the Lethal Injection Facility to ship to Arizona”.<sup>143</sup> The ADC Security Operations Administrator asked that the “medication” be delivered to the state prison at Florence.<sup>144</sup>

Back in California, having been advised by the CDCR Undersecretary of Operations that the matter was “very political and media sensitive”, the Department’s Assistant Secretary for Correctional Safety organized agents to fly to Phoenix and then drive to the Arizona State Prison Complex where, on the morning of 30 September, the prison warden handed them 24 vials (12 grams) of sodium thiopental for use in California’s execution chamber.<sup>145</sup>

California had revised its previous lethal injection procedures after US District Court Judge Jeremy Fogel found them wanting in 2006 (see above), and the state’s new protocol took effect on 29 August 2010. On 30 August, the state scheduled the execution of death row prisoner Albert Brown to take place just after midnight on 29 September. The adoption of the new lethal injection protocol and the setting of the execution date coincided with the nationwide shortage of sodium thiopental, still the anaesthetic to be used under Californian’s revised three-drug protocol. By early August, the state Department of Corrections had “contacted all states and Feds” for sodium thiopental, but “with no luck”. One jurisdiction, the identity of which the California authorities have not revealed, apparently did have some of the drug that was beyond its expiry date and had attempted to obtain a waiver from the federal Food and Drug Administration (FDA) to use it, but had hit a “brick wall”.<sup>146</sup>

On 23 August 2010, the Undersecretary for Operations at the CDCR sent an email to the Department’s Secretary and its General Counsel at the Office of Legal Affairs. It was celebratory in tone:

“I just got great news. [redacted] advised that he has got and is shipping the lethal injection drugs to SQ pharmacy. Its enough to do one execution. Bad news is the drug expires in Oct. But at least we should be ready. He is still looking for more”.<sup>147</sup>

The General Counsel emailed from his Blackberry, “That is great news!” The following day the consultant hired by the CDCR as a lethal injection expert received an email telling him that “we have received all of the Pancuronium today... We are expecting a small amount of the Thiopental Sodium today also... We are expecting all of the Potassium Chloride Wednesday or Thursday this week”.<sup>148</sup> The consultant’s response to this was “Great news!”<sup>149</sup>

The death penalty, wrote a US Supreme Court Justice in 1972, is “antagonistic to any sense of reverence for life”<sup>150</sup>. The “deliberate extinguishment of human life by the State”, wrote another, “is uniquely degrading to human dignity”.<sup>151</sup> The dignity of office is surely not served when public officials celebrate their “successes” in pursuit of state-sanctioned killing. Instead it would seem more a sign of how, as Governor Jon Corzine suggested when he signed legislation abolishing the death penalty in New Jersey in 2007, the state’s endorsement of judicial homicide “undermines our commitment to the sanctity of life” and was another reason why “we must evolve to ending that endorsement”.

It transpired that the amount of the sodium thiopental obtained by California was eight grams and had an expiry date of 1 October 2010. A CDCR official emailed the Undersecretary of Operations to inform him that 21 grams of sodium thiopental were needed “per event”

(execution), referring to the additional quantity of drug required for training purposes prior to the execution.<sup>152</sup> In another email sent two minutes later the official added that the “first scheduled execution is on Sept 29. 2 days before it expires”.<sup>153</sup> The state’s search for more sodium thiopental continued.

As the execution date approached, the state fought in the courts to get Albert Brown to the death chamber. In US District Court the state asserted that it had “improved the lethal injection procedures, built a new lethal-injection facility [apparently on a misunderstanding],<sup>154</sup> and trained an execution team that is prepared to conduct the execution of both Brown and other condemned inmates”. With echoes of what it had argued four years earlier when it had accused Michael Morales of illegitimate last-ditch ploys to avoid execution, the state argued that in the context of imposing a capital decision, the appeal court “must take into consideration the State’s strong interest in proceeding with its judgment and any attempt by the inmate at manipulation”.<sup>155</sup> The state itself failed to mention that the amount of sodium thiopental it had managed to acquire was small and had an expiry date of 1 October 2010.

The state was successful in the District Court. In his ruling on 24 September, Judge Fogel noted that it was impossible for him to “engage in a thorough analysis of the relevant factual and legal issues in the days remaining before Brown’s execution date”, and although he “would have preferred” to address any constitutional issues on California’s new execution protocol in a “more orderly fashion”, he could find “no legal impediment to the setting of Brown’s execution date”, and ruled that the authorities were “entitled to proceed with the execution”.<sup>156</sup> His decision was appealed to the US Court of Appeals for the Ninth Circuit.

In a brief filed in the Ninth Circuit on 27 September 2010, still three days before the “secret mission” to Arizona, the Californian authorities finally revealed their limited quantity of sodium thiopental and the fact that it was about to expire, although it relegated its admission to a footnote:

*“After a four-year moratorium on executions in California, multiple proceedings in federal court, a state administrative law proceeding, and state court appeals, it is incredible to think that the deliberative process might be driven by the expiration date of the execution drug”*

US Court of Appeals, September 2010

“It is, of course, the state’s strong interest in enforcing its criminal laws that impels it to seek execution dates. As the District Court observed, ‘there was no legal impediment to the setting of Brown’s execution date.’ There are, however, a number of practical constraints surrounding the scheduled date: The state’s existing inventory of sodium thiopental consists of 7.5 grams, with an expiration date of October 1, 2010. Additional supplies are not expected to be available until the first quarter of 2011.”<sup>157</sup>

The next day a panel of the Ninth Circuit expressed incredulity at the state of affairs:

“The timing of Brown’s execution date is apparently dictated in part by the fact that the state’s existing inventory of sodium thiopental consists of 7.5 grams, with an expiration date of October 1, 2010. After a four-year moratorium on executions in California, multiple proceedings in federal court, a state administrative law proceeding, and state court appeals, it is incredible to think that the deliberative process might be driven by the expiration date of the execution drug.”<sup>158</sup>

It seems that CDCR officials might have been aiming to use the seven and a half grams for the pre-execution run-throughs and the 12 grams obtained from Arizona for the execution itself (six grams for the execution and six for back-up).<sup>159</sup> In any event, the Ninth Circuit

Court was apparently oblivious to this and sent the case back to Judge Fogel. Albert Brown's execution had by then been rescheduled for 9pm on 30 September, three hours before the expiry of the 7-8 gram batch of sodium thiopental.<sup>160</sup> Judge Fogel noted that at the time of the earlier proceedings before him the Californian authorities had known, but had chosen not to disclose, the fact of this expiry date. He noted that the state's "very recent acknowledgment that they have only a very limited supply of sodium thiopental on hand is particularly relevant, as it appears that there is insufficient quantity of the drug available to permit the pre-execution training and mixing described in the regulations". He added that he "greatly" appreciated the direction given by the Ninth Circuit that he now "should take the time necessary to address the State's newly revised protocol". He issued a stay of execution.<sup>161</sup>

On 5 October, Judge Fogel ordered the Californian authorities to keep him "fully informed" of the status of any orders they had placed for sodium thiopental. The following day, the state's Attorney General reported that on 30 September 2010, the CDCR had obtained 12 grams of sodium thiopental with an expiry date in 2014. The notice did not mention the CDCR's "secret mission" to Arizona to get it.

Meanwhile, in Arizona, as California was arguing in federal court to be allowed to kill Albert Brown, on 21 September 2010 the Arizona Supreme Court granted the state Attorney General's request to set an execution date for death row inmate Jeffrey Landrigan. The execution was set for 26 October 2010 at the state prison in Florence. Arizona, too, had a problem. It had not only run out of sodium thiopental, but also the other two chemicals it needed under its three-drug protocol, pancuronium bromide and potassium chloride.

In an email sent on the afternoon of 28 September, ADC's Deputy Director informed the California Department of Corrections that Arizona had been able to obtain all three drugs from abroad.<sup>162</sup> The following day the Deputy Director confirmed that Arizona was prepared to share its sodium thiopental (obtained from the UK) with California, which resulted in the "secret mission" two days later.<sup>163</sup> The CDCR Undersecretary for Operations responded: "You guys in AZ are life savers. Buy you a beer next time I get that way".<sup>164</sup>

A little under a month later, the Arizona "life savers" killed Jeffrey Landrigan in their lethal injection chamber. They have carried out further such killings since.

## **5. TERMINATING THE EXTERMINATING TRADE**

*Yes. Make it happen. Get a good quantity but ensure it has an extended shelf life!*  
Email, Georgia Department of Corrections, 15 July 2010

If the California authorities failed to see the chilling irony of calling their Arizona partners-in-execution "life savers", they had already displayed no qualms about turning to institutions dedicated to patient care in seeking to replenish the state's supply of lethal injection drugs. By mid-August 2010 personnel at the California Department of Corrections had called at least 23 hospitals to see if they had sodium thiopental available.<sup>165</sup> By the time the Arizona prison authorities agreed to help in late September, it seems that the California officials had called "approximately 100 hospitals and local general surgery centers".<sup>166</sup>

Meanwhile, state officials had begun trawling pharmaceutical suppliers around the world. In contrast to the abolitionist learning curve joined by so many countries, here states were learning from each other where they might find drug sources for their execution chambers.<sup>167</sup>

Two days after Jeffrey Landrigan's execution date was set in September 2010, the Arizona Department of Corrections faxed a company in the United Kingdom, Dream Pharma, with an order for the three lethal injection drugs it needed under its execution protocol. The ADC had learned of this company, a wholesaler operating out of space rented at the rear of a driving school in west London, from another death penalty state, Arkansas, where the state Department of Corrections had placed an order with the company on 10 September 2010.<sup>168</sup> The Arizona Department's fax to Dream Pharma carried the instruction that "this order must be received by the Department no later than October 1, 2010". This deadline was because the Department was under a judicial order to tell the Arizona Supreme Court by that date whether it had enough drugs to carry out the execution.

The ADC had been told that Arkansas had not yet received its order of lethal injection drugs and that this "may be due to the process of getting the shipment through Customs and the FDA".<sup>169</sup> On 24 September 2010, the ADC Director wrote to the Food and Drug Administration to ask if the agency could attend to the shipment of drugs "expeditiously" in order that

*"Please look for all imports of this product for 2008-2010 and make copies of declarations filed. Additionally, are there declarations for shipments to AZ [Arizona] and SC [South Carolina] pending? The White House is involved and trying to sort things out. Please let me know as soon as possible on Friday"*

DEA email, 'Imports of sodium thiopental', Thursday 11 November 2010

Arizona's execution team could comply with the state Supreme Court's order and kill Jeffrey Landrigan on the scheduled date.<sup>170</sup> Also on 24 September, the Arizona Attorney General filed a motion in the Arizona Supreme Court requesting an execution warrant for another death row inmate, Daniel Cook. Cook's execution was subsequently set for 5 April 2011.

FDA cooperation was forthcoming, according to a 27 September 2010 email from the FDA in Phoenix, Arizona, to a colleague in Memphis, Tennessee, headed "lethal injection pharmacology arrival". The email announced that the drugs would be arriving on a flight from the UK the following day, and asked the recipient, "Please do not detain this entry. The product is scheduled for immediate delivery to Arizona Corrections Department" (emphasis in original). The shipment from Dream Pharma consisted of six packs each containing 25 five hundred milligram vials of sodium thiopental, 18 packs of 10 vials of pancuronium bromide, and potassium chloride in 45 packs of 10 vials each. The Dream Pharma invoice to the ADC (for UK£4,528) was headed "pharmaceuticals not restricted".

At this stage, this was all secret. As the Arizona authorities argued in court to be allowed to kill Jeffrey Landrigan, two federal courts were clearly disturbed by the state's refusal to disclose the source of and other details about the sodium thiopental with which it intended to carry out the execution. US District Judge Roslyn Silver wrote that she was "perplexed" by the state's "highly unusual actions" in the case. She noted that the state had "never adequately explained their rationale for withholding all evidence regarding the drug".<sup>171</sup> She ordered a stay of execution.

The state appealed to the Ninth Circuit, with the Attorney General of Arizona issuing a news release explaining that the state had "declined to reveal the manufacturer because Arizona law prohibits disclosure of the 'identity of executioners and other persons who participate in or perform ancillary functions in an execution'."<sup>172</sup> As it would later transpire, the identity of the "participant" in Jeffrey Landrigan's execution being withheld was Dream Pharma, a company which, according to its website, is "dedicated to the healthcare providers".<sup>173</sup>

The Ninth Circuit refused to lift the stay, with four of its judges taking the opportunity to describe the state's conduct as "unseemly at best, and inhumane at worst".<sup>174</sup> The state of Arizona went to the US Supreme Court, which overturned the stay, by five votes to four. The

majority wrote that there was “no evidence in the record to suggest that the drug obtained from a foreign source is unsafe... [S]peculation cannot substitute for evidence that the use of the drug is *sure or very likely* to cause serious illness and needless suffering. There was no showing that the drug was unlawfully obtained...”<sup>175</sup> Jeffrey Landrigan was killed a few hours later. Since then, as noted above, Arizona has switched to pentobarbital precisely as a result of questions around the legality of its importation of sodium thiopental from the UK.

District Judge Silver had earlier noted that sodium thiopental is a controlled substance under US federal law subject to import/export restrictions, adding that “the precise method” by which the state of Arizona had obtained the sodium thiopental in question had “not been disclosed”, and that it was unclear whether the authorities had complied with any required importation procedures.<sup>176</sup> The Controlled Substances Act (CSA) established a “closed system” of distribution of controlled substances, under which no such substance can be transferred between two entities unless they are registered with the Drug Enforcement Administration or exempt from registration.<sup>177</sup> The DEA at the US Department of Justice is the federal agency whose mandate includes enforcement of the USA’s controlled substances laws and regulations. In recent years, the DEA has been seeking to address the problem of “rogue internet pharmacy schemes” circumventing regulatory oversight of controlled substances.<sup>178</sup> A number of criminal prosecutions have resulted.<sup>179</sup>

In July 2010, during its search for sodium thiopental, the California prison authorities had located a source in Pakistan, and subsequently sought the assistance of the DEA in importing 210 grams of sodium thiopental from that country. Specifically, the CDCR sought DEA permission for the Warden of San Quentin State Prison to be allowed to “directly order the thiopental from Pakistan” for delivery to the prison where it would be used in the lethal injection chamber.<sup>180</sup> It appears that DEA refused to provide the requested permission.

In October 2010, having been pointed by the Arizona authorities to the United Kingdom as a source, CDCR purchased some 525 grams of sodium thiopental with an expiry date of May 2014 from the UK, enough for scores of executions.<sup>181</sup> After some delays, it received the drugs on 20 January 2011.<sup>182</sup> In an email on 28 September, the CDCR had been informed by its counterparts in Arizona of the ADC’s method for expediting the shipment through customs and the FDA.<sup>183</sup>

A lawsuit was filed in US federal court in February 2011 against the FDA and other federal agencies or agents on behalf of death row prisoners, in Arizona, California and Tennessee.<sup>184</sup> In a motion filed in March, the plaintiffs asserted that since June 2010, Dream Pharma had sent at least seven shipments of sodium thiopental to Departments of Corrections in the USA. At first, the motion continued, FDA personnel had “denied entry to the Dream shipments”, recognizing that the imported product was “misbranded” under federal law and issuing “Notices of Detention against those shipments”. Subsequently, the lawsuit asserts, the FDA “reversed course”, between August 2010 and January 2011 granting entry to shipments from Dream Pharma to Arkansas, Arizona, Tennessee, California, South Carolina and Georgia.<sup>185</sup>

This is not the first time that FDA action or inaction on lethal injection drugs has been the subject of a lawsuit brought on behalf of death row inmates. That ended in 1985, in *Heckler v. Chaney*, when the US Supreme Court held that the FDA’s refusal to take various investigatory and enforcement actions on lethal injection drugs was not subject to judicial review.<sup>186</sup> The case had been brought on behalf of death row prisoners in Oklahoma and Texas arguing that the drugs were not approved for use in executions and that in the death row context they would be administered by untrained personnel. More than 1,070 executions by lethal injection have been carried out in the USA since the *Heckler* ruling. That 1985

ruling may yet stand in the way of judicial consideration of more recent FDA actions, if the District Court judge accepts the US Justice Department's arguments.

On 4 January 2011, the FDA emailed a statement to members of the media explaining its position on imports of sodium thiopental for executions, and citing the *Heckler* precedent:

"The US Food and Drug Administration (FDA) is charged by Congress with protecting the public health. Ensuring the safety and effectiveness of pharmaceuticals used for medical purposes is a core part of FDA's mission. Reviewing substances imported or used for the purpose of state-authorized lethal injection clearly falls outside of FDA's explicit public health role. FDA does not verify the identity, potency, safety, or effectiveness of substances imported for this purpose... Accordingly, FDA chooses to continue to defer to law enforcement on all matters involving lethal injection, consistent with the US Supreme Court's ruling in *Heckler v. Chaney* (1985)."

On 20 April 2011, the US Department of Justice filed a motion to dismiss the lawsuit brought against the FDA in February. The lawsuit, the motion asserted, did "not even graze" the reasoning of the US Supreme Court in the *Heckler* decision two and a half decades earlier that the FDA's discretionary decision-making relating to this issue was judicially unreviewable.<sup>187</sup> Not only that, the motion argued, the FDA's discretionary approach to the imports of sodium thiopental for executions was "reasonable", as it would "conserve its limited enforcement resources". The Justice Department brief also noted reports of recent actions undertaken by another federal agency, the DEA, including in Georgia.

Before the Georgia prison authorities obtained sodium thiopental from overseas, the Warden of the Georgia Diagnostic and Classification Prison, where death row is located, had borrowed 10 vials of the drug from his counterpart in Tennessee. Georgia subsequently located and purchased the drug from Dream Pharma in the UK. On 15 July 2010, having been informed by the Director of Procurement for the Georgia Department of Corrections (GDC) that the Department was wishing to purchase sodium thiopental directly from Dream Pharma for use in executions (a previous purchase had been held up by customs in Memphis, Tennessee), an email from the company responded "I am more than happy to assist".<sup>189</sup>

"...just wanted to make sure you guys knew. It's been all over the media here that AZ [Arizona] was getting [sodium thiopental] from the same source as GA [Georgia], so if we snatch some from our prison, it's going to be big news. Stay out of trouble."

Email from Acting Special Agent in Charge, US Drug Enforcement Administration (DEA), Phoenix Division, to Deputy Assistant Administrator, Office of Diversion Control, DEA<sup>188</sup>

Asked by a staff member whether the Department should go ahead and make a purchase from Dream Pharma, its Assistant Commissioner/Chief of Staff responded "Yes. Make it happen. Get a good quantity but ensure it has an extended shelf life!"<sup>190</sup> It seems that fifty 500 mg vials of sodium thiopental were sent to the GDC by Dream Pharma on 21 July 2010 and arrived there eight days later. The company had asked for a "letter on the Government letterhead" explaining why the product was needed. This letter would be "included in your shipment for the attention of the US custom officer". "Hopefully", the company stated, "your package will not be stopped". Despite sodium thiopental being a "Schedule III controlled substance" under US law, the shipment label and invoice were labelled "pharmaceuticals not restricted".

On 27 September 2010, the State of Georgia executed Brandon Rhode using sodium thiopental purchased from Dream Pharma (see Section 6). Four months later, it executed Emmanuel Hammond, also using sodium thiopental obtained from this company (see box).

On 16 March 2011, DEA agents went to the Georgia Diagnostic and Classification Prison in Jackson, Georgia, which houses the state's death row, and seized the prison's supply of sodium thiopental imported from the UK in 2010. A DEA spokesman was quoted as saying that "there were questions about the way the drugs were imported over here", and that the matter was now the subject of a "regulatory investigation".<sup>191</sup> The DEA operation came three weeks after lawyers for Andrew DeYoung, a death row inmate in Georgia, wrote to US Attorney General Eric Holder urging him to "direct appropriate agencies within your Department to conduct a prompt and thorough investigation" of evidence that the Georgia Department of Corrections had violated federal law in the way in which it had imported the sodium thiopental.<sup>192</sup>

With its supply of sodium thiopental in the possession of the DEA, but wanting to pursue executions, the Georgia authorities turned to pentobarbital as a substitute, again over the objection of Lundbeck. Around 20 May 2011, the state amended its lethal injection protocol to substitute pentobarbital for sodium thiopental, and on 3 June, the state obtained pentobarbital from a pharmaceutical company in Ohio.<sup>194</sup> In a letter to the Georgia authorities five days later, Lundbeck reiterated its concern about the "safety and efficacy" of using pentobarbital in "prison executions", and urged Georgia not to use Lundbeck's drug "in the execution of prisoners in your state because it contradicts everything we are in business to do – provide therapies that improve people's lives".<sup>195</sup>

Two weeks later, on 23 June 2011, Georgia carried out its first execution using pentobarbital as the anaesthetic component of the three-drug combination, killing Roy Blankenship, who had been sentenced to death three decades earlier.<sup>196</sup> Following the execution, Roy Blankenship's lawyer called on the Georgia Department of Corrections to commission an independent investigation into evidence that the prisoner had "experienced severe pain and suffering before he died", and called on the state Supreme Court to order a halt to all lethal injections in Georgia.<sup>197</sup> In an affidavit based on his "comprehensive interview" of an Associated Press journalist who witnessed the execution, a practising anaesthesiologist and Associate Professor of Anaesthesia at Harvard Medical

"[According to the media eyewitness], as the lethal injection commenced Mr Blankenship jerked his head toward his left arm and made a startled face while blinking rapidly. He had a 'tight' grimacing expression on his face and leaned backward. Shortly thereafter, Mr Blankenship grimaced, gasped and lurched twice toward his right arm. During the next minute, Mr Blankenship lifted his head, shuddered and mouthed words. Three (3) minutes after the injection, Mr Blankenship had his eyes open and made swallowing motions. Four (4) minutes after injection, Mr Blankenship became motionless. About six (6) minutes after the injection, the nurse assessed Mr Blankenship's eyes using a stick-like instrument about fingertips-to-mid-forearm length to do something to the area on or about his eyes. Critically, Mr Blankenship's eyes were still open and never closed during the entirety of the lethal injection process. About thirteen (13) minutes after the injection, Mr Blankenship was declared dead. Again, his eyes were open throughout.

Based on his lurching toward his arms and the lifting of his head and the mouthing of words, I can say with certainty that Mr Blankenship was inadequately anesthetized and was conscious for approximately the first three minutes of the execution and that he suffered greatly. Mr Blankenship should not have been conscious or exhibiting these movements, nor should his eyes have been open, after the injection of pentobarbital.

Given prior executions of Brandon Rhode and Emanuel Hammond in September 2010 and January 2011, respectively, during which these inmates reportedly exhibited similar movements and opened their eyes (Rhode's eyes were open throughout the execution process), Mr Blankenship's execution further evidences that during judicial lethal injections in Georgia there is a substantial risk of serious harm such that condemned inmates are significantly likely to face extreme, torturous and needless pain and suffering."

From affidavit of anaesthesiology expert, 28 June 2011<sup>193</sup>

School expressed “certainty that Mr Blankenship was inadequately anesthetized and was conscious for approximately the first three minutes of the execution and that he suffered greatly” (see box).<sup>198</sup> The Attorney General of Georgia asserted that there was “no basis” for the Court to take the “unprecedented and unwarranted action” requested by the lawyer.<sup>199</sup>

It was Georgia’s Department of Corrections which had earlier assisted its counterparts in Kentucky to locate sodium thiopental. In November 2009, the Kentucky Attorney General had asked the state governor to set execution dates for three prisoners, one of whom was Ralph Baze, whose challenge to Kentucky’s lethal injection protocol had led to the US Supreme Court’s *Baze v. Rees* ruling of 16 April 2008. The governor was subsequently advised that the state Department of Corrections had been “making efforts, without success, to secure enough Pentothal to carry out the three executions in a timely manner”, and “we currently have a sufficient amount of Pentothal on hand for one execution”.<sup>200</sup> Governor Steven Beshear duly signed only one of the three death warrants – scheduling the execution of Gregory Wilson to take place two weeks before the expiry date on the remaining batch of sodium thiopental – and put the other two warrants to one side while the state continued its search for lethal drugs.<sup>201</sup> The governor explained that he would not act upon the other two death warrants “until the state’s supply of sodium thiopental is replenished.”<sup>202</sup>

In February 2010, Kentucky’s prison authorities were instructed by the state administration to conduct a “comprehensive and exhaustive search for sodium thiopental, from both domestic and international sources”, including “hospitals, pharmacies, distributors / suppliers”, as well as “those states that use sodium thiopental in their lethal injection protocol”.<sup>203</sup> The state Department of Corrections contacted its counterparts in Georgia, Nebraska, South Dakota and Tennessee, and found that a company in Georgia called CorrectHealth – whose stated “primary purpose is to provide healthcare services to patients in correctional facilities”<sup>204</sup> – “has the chemical available”. The Department placed an order for 18 grams.<sup>205</sup> The order was received on 14 February 2011.<sup>206</sup> Once that was received, the Kentucky Department of Corrections had enough sodium thiopental (with an expiry date of May 2014) for three executions; enough pancuronium bromide (expiry date 1 November 2011) for six executions; and enough potassium chloride (expiry date 1 February 2012) for four executions.<sup>207</sup> The Kentucky Department of Corrections continued “to contact other agencies to determine availability of the chemical for future reference”.<sup>208</sup>

On 22 March 2011, Ralph Baze’s lawyer wrote to US Attorney General Eric Holder to urge that, like Georgia, Kentucky be investigated and its supply of sodium thiopental seized.<sup>209</sup> On 1 April, Kentucky officials announced that the state had handed over sodium thiopental to the DEA. Officials in neighbouring Tennessee said that their state too had handed over quantities of the drug to the DEA.<sup>210</sup> Two weeks later, it was reported that the South Carolina authorities – with an execution scheduled for 6 May 2011 – had contacted the DEA to inform the agency how the Department of Corrections had obtained its sodium thiopental.<sup>211</sup> The Department had purchased sodium thiopental from the UK in late 2010.<sup>212</sup> With the DEA having taken its sodium thiopental, South Carolina then carried out its 6 May 2011 execution of Jeffrey Motts using pentobarbital as the anaesthetic component of its three-drug method.

According to a complaint filed with the Georgia Composite Medical Board in June 2011 by the Southern Center for Human Rights in Atlanta, in taking action against Kentucky and Tennessee, the DEA had been following the evidence that the Georgia Department of Corrections was “not the only entity that purchased and imported a supply of sodium thiopental from the company doing business out of the back of the London driving school”. The drug had, the complaint asserted, also been imported by CorrectHealth and a related company Rainbow Medical Associates, which then sold it on to Kentucky and Tennessee’s death penalty authorities. The founder of both companies is also the Georgia’s “execution

doctor” who is “present at each Georgia execution by lethal injection”.<sup>213</sup> The complaint seeks revocation of his licence to practice medicine, not for his participation in executions (“that is a question of ethics”) but for his alleged violation of state and federal law in importing and distributing sodium thiopental.<sup>214</sup>

After it had purchased its 18 grams of sodium thiopental from Georgia, the Kentucky correctional authorities looked to obtain more of the drug and contacted, among others, the Nebraska Department of Correctional Services (NDCS). The latter directed them to Kayem Pharmaceutical in Mumbai, India. Nebraska had purchased sodium thiopental from this company in November 2010. The Department of Correctional Services wanted to purchase 60 grams, but the company would only sell sodium thiopental in minimum orders of 500 grams. The Pharmacy Administrator at the NDCS suggested to the company that “maybe we can come to some agreement” and expressed confidence in the prospect of “a mutually rewarding relationship”.<sup>215</sup>

In the end, the Nebraska authorities purchased 500 grams of the drug at a cost of US\$2,056.15. The shipment arrived in Nebraska the following month. The sodium thiopental had been manufactured by Neon Laboratories in Mumbai in September 2010 and had an expiry date of August 2012. On 7 January 2011, the FDA released it to the NDCS, “in keeping with established practice” under which the agency “does not review or approve products for the purpose of lethal injection”. The FDA added its standard disclaimer on such releases, stating that it had “not reviewed the products in this shipment to determine their identity, safety, effectiveness, purity or any other characteristics”.<sup>216</sup> Two weeks later, “in response to a media request”, the NDCS Director issued a press release, announcing that it had received the 500 grams of sodium thiopental from Kayem Pharmaceutical, and that “a sample was tested and confirmed to be sodium thiopental by an independent US laboratory.”<sup>217</sup>

The invoice from Kayem Pharmaceutical, dated 13 November 2010, was headed “harmless medicine”. The amount purchased by Nebraska was sufficient for “approximately 166 executions” under its lethal injection protocol.<sup>218</sup> The NDCS Director announced that “with the receipt of this chemical, the Department is ready to fulfil its statutory obligation with regard to capital punishment”.<sup>219</sup> Three days later, the state filed a motion in the Nebraska Supreme Court requesting an execution date for Carey Dean Moore.<sup>220</sup> On 21 April, the Court set the date for his execution at 14 June 2011.

On 28 March 2011, lawyers for Carey Dean Moore wrote to US Attorney General Eric Holder arguing that there was “strong evidence indicating that Nebraska illegally imported a lethal injection drug from India, with no attention to the requirements of the Controlled Substances Act (CSA)” and calling for the “DEA and other appropriate agencies to conduct prompt and thorough investigation(s) of the issues”.<sup>221</sup> As noted in Section 3, the execution of Carey Dean Moore – which would have been the first ever lethal injection in Nebraska – was blocked by the state Supreme Court on 25 May 2011 pending litigation on questions relating to the lethal injection protocol and the state’s acquisition of sodium thiopental. On 27 May 2011, the state filed a motion to lift the stay of execution but this was denied on 8 June.

It has since been reported that the Nebraska prison authorities were advised on 11 and 12 April 2011 by the DEA that sodium thiopental purchased from India would need to be seized by the DEA or destroyed. The NDCS was reportedly instructed by the DEA to hand the drugs over to a state law enforcement agency for destruction. Then on 25 May 2011 the NDCS obtained a permit to import sodium thiopental, but by late June 2011 had not yet purchased any more of the drug. This information was only revealed to Carey Dean Moore’s lawyer on 27

June 2011. If the reports are accurate, for the last two months that the Nebraska authorities were litigating to be allowed to execute Carey Dean Moore on 14 June 2011, it seems they knew that they did not have the lethal injection drugs to carry out the execution, but did not reveal this to the defence lawyer or to the courts.<sup>222</sup>

Meanwhile the Kentucky Commissioner of Corrections had contacted Kayem Pharmaceutical on 22 February 2011 and was informed that the minimum purchase was 500 grams of sodium thiopental, with a shelf life of two years, at the estimated cost of \$5350 including shipping. At the time of writing it was not clear if this purchase had been or would be made. It would be enough for around 80 executions (in two years), according to the state Department of Corrections. Kentucky has 35 prisoners on death row, and has carried out three executions since 1977, one by electrocution and two by lethal injection. By late June 2011, there were no executions scheduled in the state (Gregory Wilson's scheduled execution (see Section 3) had been stayed in September 2010).<sup>223</sup>

South Dakota has carried out one execution since 1977 – killing Elijah Page by lethal injection in July 2007 after he gave up his appeals. In mid-March 2011, lawyers for Donald Moeller, one of two men remaining on South Dakota's death row, filed a complaint in federal court on the lethal injection issue, asserting that “following Nebraska's lead”, the South Dakota authorities had “contacted Kayem Pharmaceutical about purchasing sodium thiopental for Mr Moeller's execution”.<sup>224</sup> On 6 April 2011, the state Attorney General issued a press release to announce that the state had purchased enough sodium thiopental “to carry out the death sentences of the two inmates”.<sup>225</sup> In the course of litigation later that month the state disclosed that the sodium thiopental had indeed been imported from Kayem Pharmaceutical, that the amount purchased was 500 grams, that it had an expiry date of September 2012, that it cost nearly five and a half thousand dollars, and that the purchase had occurred with “the knowledge and participation of the FDA and DEA”.<sup>226</sup> Donald Moeller has been on death row for nearly two decades having been convicted of the rape and murder of a nine-year-old girl in 1992. The state is arguing that more than 20 years after the murder, Donald Moeller has “effectively never been punished for his crime”, and that his lethal injection challenge should now be “summarily denied so that he may receive his long-delayed lawful and just punishment for the monstrous crime he committed”.<sup>227</sup>

On 21 March 2011, lawyers for Arizona death row inmates Eric King and Daniel Cook wrote to US Attorney General Eric Holder calling for an investigation by the DEA and/or other agencies into “possible violations” by the Arizona Department of Corrections of the federal Controlled Substances Act. Eric King was executed on 29 March 2011. Daniel Cook was scheduled to be put to death on 5 April 2011. Bolstered by its success in the US Supreme Court in the Landrigan case in October 2010, in the Cook case the state of Arizona was less secretive than it had been in arguing to be allowed to execute Jeffrey Landrigan using drugs obtained from a country and company it had initially refused to identify. Now it was more confident. In a brief to the Ninth Circuit, the state wrote,

“Cook has not established that any state or federal law prohibits a state from obtaining drugs from another country for use in carrying out executions... Furthermore, drugs obtained from the same supplier in England were used recently to carry out the execution of Jeffrey Landrigan. Cook, who is represented by the same attorneys who represented Landrigan, did not assert in the district court that there were any problems with the Landrigan execution, and his baseless speculation regarding the use of drugs from the same supplier to carry out Cook's execution does not establish a viable claim for relief”.<sup>228</sup>

In fact, lawyers for Daniel Cook raised a number of concerns about the efficacy of the drugs obtained from Dream Pharma. They cited information from the Medicines and Healthcare Regulatory Agency (MHRA), a UK governmental agency, that there had been a dozen “adverse drug reaction reports” concerning sodium thiopental in the past two years, five of which related to “lack of efficacy”, two of which involved batches from Dream Pharma. They also provided the Ninth Circuit with an affidavit signed by the former chaplain at the Huntsville Unit in Texas where he had witnessed 95 executions between 1980 and 1995. In an affidavit in January 2011, he stated:

“In every lethal injection where the thiopental was unexpired, ‘fresh’ and properly administered, the prisoner’s eyes would close within ten to twelve seconds after the thiopental was administered, indicating unconsciousness. In virtually every execution I witnessed, this was the common response to the thiopental. If a prisoner did not lose consciousness almost immediately, I would inquire with the executioner after the death about the thiopental, and in this way, over the course of those 95 lethal injections, I learned that when this happened, it was due to the thiopental being close to or possibly past its expiration date.”<sup>229</sup>

Jeffrey Landrigan’s lawyer has also signed an affidavit that Landrigan’s eyes had remained open during his lethal injection and were “still half to a quarter way open” when the execution was declared completed 10 minutes after it began.<sup>230</sup> A witness to the execution of Brandon Rhode in Georgia made a similar observation, asserting that Rhode had

“maintained eye contact with me as the drugs were administered and for about the next 15 minutes. After 15 minutes, I could see that his eyes remained open. A minute or so later, Brandon was pronounced dead. I could still see that his eyes were open at the point when he was pronounced dead. Throughout the process, he never closed his eyes as though he was losing consciousness. He just died”.<sup>231</sup>

This witness, a Baptist minister, stated that he had witnessed a number of previous executions in Georgia and in all cases the prisoner had closed his eyes shortly after the lethal injection began.

The state responded that “the number of problems reported is meaningless given a lack of explanation regarding the problems and how those problems relate to the use of drugs at issue to carry out executions” and in the absence of “legal or medical support” for the significance of a condemned inmate’s eyes being open at the point of death. In any event, the state continued, Arizona had carried out the “publicly-witnessed” executions of Jeffrey Landrigan and Eric King using “similarly acquired drugs” and these two inmates were killed “without any problems or difficulties in administering the lethal drugs”.<sup>232</sup> The experiment with lethal injection continues.

“As you know, the UK firmly opposes the death penalty in all circumstances as a matter of principle. I am aware that the UK and US governments do not see eye to eye on this. It is nonetheless deeply concerning to hear reports that US States may be importing Sodium Thiopental (a drug which has legitimate therapeutic uses but can also be used in executions) from the UK in order to put convicted persons to death...

We are especially dismayed to hear about the execution of Jeffrey Landrigan in Arizona on 26 October, given reports that he suffered from severe mental health problems... We are also very concerned about the possibility of UK drugs being used in future executions in the US... We would therefore be very grateful for any steps the Federal Government can take to prevent it being used here, especially in order to harm rather than heal”.

Letter to US Department of State from British Embassy in Washington, DC, 8 April 2011

The Ninth Circuit refused to block Daniel Cook's execution. It pointed out that the US Supreme Court had allowed the execution of Jeffrey Landrigan to go ahead in October 2010 – using sodium thiopental imported from the same UK company – and that the Court had ruled that the District Court had abused its discretion by staying Landrigan's execution. In its decision on Daniel Cook's case, the Ninth Circuit added in a footnote:

“We express no view as to whether the sodium thiopental was obtained in violation of federal law. The actual legality of importing this drug is not at issue here, we are only concerned with the constitutionality of its use on Mr Cook”.<sup>233</sup>

On 4 April 2011, the US Supreme Court issued a stay of execution in Daniel Cook's case. It did not stop the execution on the drugs issues, but on questions raised about his legal representation. The Department of Corrections cancelled the execution. Since then, as outlined in the introduction, Arizona has switched to pentobarbital following a warning from the US Department of Justice that it may have violated federal law when it imported its sodium thiopental. It carried out its first execution using pentobarbital in late May 2011.

Because drugs such as sodium thiopental and sodium pentobarbital have an important medical use, Amnesty International does not call for an end to production of these drugs, nor for a blanket ban on their export to any country.<sup>234</sup> However it believes that using such drugs as part of a process of state-ordered killing is antithetical to the purpose of such medicines. No reputable pharmacopeia includes judicial execution as a recommended use of the drug. Therefore Amnesty International calls on pharmaceutical companies to make clear that their drugs are intended to promote health and save lives, and to take steps to urge importers to use the drug in conformity with recommendations for clinical use.

Furthermore Amnesty International urges governments of exporting countries to licence export of these drugs only where importers have given assurances that the drugs will be used for legitimate medical care and not for the purposes of state-ordered homicide.

As noted in the introduction, in early November 2010, the growing opposition to the death penalty worldwide was apparent at the UN Human Rights Council, with numerous governments calling for an end to executions in the USA. Later that month, such opposition was also to be seen in the response of the UK government to the revelations that the UK company, Dream Pharma, had been facilitating executions in the USA. On 30 November 2010, it became illegal under UK law for anyone to export from the UK “pharmaceutical goods for human use containing the active ingredient thiopental sodium” where the destination is the USA or, if the destination is not the USA, “the exporter knows that the final destination of the goods” is the USA.<sup>235</sup>

Amnesty International and others have called on the European Commission to review and amend Council Regulation (EC) No. 1236/2005 (which both controls and prohibits the international trade in certain equipment that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment). Specifically, EU member states and the European Commission have been urged to include drugs used in the lethal injection protocol in Annex III of the Regulation (which is a list of items to be regulated not prohibited) and to introduce a “torture-death penalty end use clause” to enable EU states to refuse export licenses for items that clearly have no practical use other than for the purposes of capital punishment; or where there are reasonable grounds to believe that such items would be used for the purposes of capital punishment.

If pharmaceutical companies themselves move to stop exporting to countries in which their drugs are abused for state-ordered execution, where this results in shortages, it can impact

adversely on provision of legitimate and necessary medical procedures that require these drugs. Amnesty International believes that in such cases the onus is on the governments of the importing countries to ensure the drugs are used only to protect patient well-being in line with manufacturers' recommendations and not for execution.

Over six decades have passed since the USA helped to bring about adoption of the Universal Declaration of Human Rights, with its vision of a world in which the right to life for everyone is upheld. One of the USA's stated central foreign policy goals continues to be "the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights."<sup>236</sup> Its use of the death penalty, and its imports and use of drugs developed for humane medicinal purposes, to facilitate this policy, are an affront to the Universal Declaration.

## **6. WITH LETHAL CARE, MIMICKING THE CLINIC**

*The whole point of the lethal-injection procedure is to avoid the needless infliction of pain  
and to hasten death*

US Government, December 2007<sup>237</sup>

Pursuit of the "humane" execution in the USA has turned the country's execution chambers into something resembling hospital facilities, albeit ones run under a dystopian branch of medicine driven by homicidal rather than curative or palliative motivation.<sup>238</sup>

For the past quarter of a century, Ohio death row inmate Romell Broom has lived with the prospect of being taken out of his cell, strapped down and killed by government employees. For the past year and a half, that prospect has been combined with memories of what happened on 15 September 2009 when he survived the state's efforts to carry out its death threat on that day. He is the only prisoner currently on death row in the USA who has gone through an execution attempt and lived to tell the tale:

"While I was in the cell, Warden Philip Kerns came in with guard escorts and read the death warrant to me. After that, two nurses came in and advised me to lay down... The nurses were simultaneously trying to access the veins in my arms. The female nurse tried three separate times to access veins in the middle of my left arm. The male nurse tried three separate times to access veins three times in the middle of my right arm. After those six attempts, the nurses told me to take a break. I continued to lay on the bed for around two and one half minutes.

After the break, the female nurse tried twice to access veins in my left arm. She must have hit a muscle because the pain made me scream out loud. The male nurse attempted three times to access veins in my right arm. The first time the male nurse successfully accessed a vein in my right arm. He attempted to insert the IV, but he lost it and blood started to run down my arm. The female nurse left the room. The correction officer asked her if she was okay. She responded, 'no' and walked out.

The death squad leader made a statement to the effect that this was hard on everyone and suggested that they take another break. The male nurse then left. The correction officer on my right patted me on my right shoulder and told me to relax while we take a break. At this point, I was in a great deal of pain. The puncture wounds hurt and made it difficult to stretch or move my arms.

The male nurse returned with some hot towels...The male nurse applied the towels to my arms and massaged my left arm. The nurse told me that the towels would help them access the veins. After applying the towels, the male nurse attempted to access my veins once in the middle of my left arm and three more times in my left hand...

I tried to assist them by helping to tie my own arm... The death squad leader advised me that we were going to take another break and again told me to relax. At that point I became very upset. I began to cry because I was in pain and my arms were swelling. The nurses were placing needles in areas that were already bruised and swollen...

The head nurse attempted to access veins in my right ankle... During this attempt the needle hit my bone and was very painful. I screamed. At the same time the head nurse was attempting to access veins twice in my right hands. It appeared as though they had given up on the left arm because at that point it was bruised and swollen. The level of pain was at its maximum. I had been poked at least 18 times in multiple areas all in an attempt to give me drugs that would take my life".<sup>239</sup>

After about two hours, the execution was abandoned and the Governor issued a week-long reprieve, after which a judicial stay of execution was granted. Eighteen months later, Romell Broom remains on death row, with the state still intending to take him back to the execution chamber for a second attempt at killing him. It has argued:

"Broom's execution was delayed for several hours before [the lethal injection] team began the actual execution process, awaiting a ruling on Broom's pending request for a stay of his execution. Any 'psychological anguish' that he suffered as a result of the eventual postponement of his execution cannot reasonably be considered greater than the 'psychological anguish' he suffered while waiting for the decision of the court on his final request for a stay. Indeed it cannot be reasonably believed that Broom suffered greater anguish as the result of the eventual postponement – after all, at the end of the day he was still alive."<sup>240</sup>

Someone who was not alive at the end of the day selected by the state for his execution was Lawrence Reynolds. On the night of 7 March 2010, he had been found unconscious in his death row cell in the Ohio State Penitentiary 36 hours before the state was due to kill him by injecting him with lethal drugs. He had apparently taken a drug overdose himself. On 8 March, the state governor issued a statement that the prisoner's current medical condition "has made it impossible to proceed with his execution tomorrow", and so the governor issued a one-week reprieve to allow Lawrence Reynolds to be treated in hospital. A week later, on 16 March, Reynolds was sufficiently recovered to be killed.

The state's overriding homicidal intent towards the condemned again came starkly into focus in September 2010 in Georgia in the case of Brandon Rhode. Again, the state saved his life shortly before ending it.<sup>241</sup>

Brandon Rhode was scheduled to be put to death at 7pm on 21 September 2010, but early that morning he had tried to kill himself. He had sliced open his right arm with a razor blade, causing a deep wound. He had then cut open his left arm, before slicing a four centimetre-deep cut on the right side of his neck. He was transferred out of death row to a regional hospital for emergency treatment. On 22 September, his lawyer learned that "Brandon had been in full 'code', meaning that he was in immediate danger of losing his life. He had lost massive amounts of blood".

The Georgia Supreme Court granted an emergency stay of execution, but only until 23

September. One by one, courts refused to delay the execution beyond 28 September, the date that the week-long death warrant expired, failing to remove the case from the time pressures imposed by the warrant and allowed full consideration of the issues raised.

On 23 September, US District Judge William Duffey refused to block the execution, ruling that it appeared to him that “the remedy to which [Brandon Rhode] may be entitled is, at most, an order that the Lethal Injection Procedure be properly enforced until [Rhode] is executed tomorrow”. Judge Duffey ordered the state authorities to search Brandon Rhode’s cell or any other area to which he would have access for razors, belts or t-shirts, to ensure that two guards were assigned continuously to observe Brandon Rhode in his cell or elsewhere in the time leading up to his execution, to prevent Rhode from “aggravating” the injuries he inflicted upon himself on 21 September, and to protect against the infliction of “any further injuries to his person”. Then the state could kill the prisoner by injecting him with lethal drugs.

Finally, on 27 September, the execution was delayed past its 7pm scheduled time while the Georgia authorities awaited word from the US Supreme Court. The latter refused to stay the execution, and it went ahead with the lethal injection team taking about half an hour to find a vein in which to inject Brandon Rhode. Once they had done so, it took 14 minutes for the drugs to kill him.<sup>242</sup>

Lethal injection has frequently not lived up to its promise of providing a swift trouble-free killing method. There are numerous examples across a number of states of lethal injection teams having prolonged difficulties locating a suitable vein in which to inject the lethal drugs, and examples of other problems during the lethal injection process.<sup>243</sup>

In 2006, in the course of litigation on North Carolina’s three-drug lethal injection protocol, a senior US District Court Judge noted evidence provided by lawyers who reported having witnessed death row inmates “writhing, convulsing, and gagging” during their executions. During the October 2003 execution of Edward Hartman, for example, the condemned man’s “throat began thrusting outward and collapsing inward”, according to one his lawyers. She continued: “His neck pulsed, protruded, and shook repeatedly. Eddie’s chest at first pulsated frequently, then intermittently, and at least twice I saw Eddie’s chest heave violently...Throughout the execution, Eddie’s eyes were partly open while his body relentlessly convulsed and contorted.” Another lawyer reported having watched Timothy Keel’s body “twitching and moving about” for about 10 minutes during his execution in November 2003. In the case of John Daniels, executed that same month, another lawyer reported that after the execution began, “all of a sudden he started to convulse, violently. He sat up and gagged. We could hear him through the glass. A short time later, he sat up and gagged and choked again, and struggled with his arms under the sheet. He appeared to me to be in pain. He finally lay back down and was still.”<sup>244</sup>

Pursuit of the “humane” execution in the USA has turned the country’s execution chambers into something resembling hospital facilities, albeit ones run under a dystopian branch of medicine driven by homicidal rather than curative or palliative motivation.

In the *Baze* ruling in April 2008, Chief Justice Roberts, joined by Justices Anthony Kennedy and Alito, had held that to constitute “cruel and unusual” punishment, an execution method must present a “substantial” or “objectively intolerable” risk of serious harm. A judicial stay of execution should not be issued, the opinion went, “unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain” and that “the risk is substantial when compared to the known and available alternatives”.

Here, Justice Clarence Thomas showed his concern in a separate opinion in which he was joined by Justice Antonin Scalia: “It may well be that other methods of execution such as hanging, the firing squad, electrocution, and lethal gas involve risks of pain that could be eliminated by switching to lethal injection.” Or to look at it another way, if the rope, the bullet, the electric chair, or the cyanide capsule were deemed unavailable to executioners in the USA, what would happen if lethal injection ran into difficulties?

And run into difficulties it has, something that was always likely to happen because of the medicalized nature of lethal injection. Judge Alito alluded to this characteristic when he noted that although the risk of pain during such executions by lethal injection would be “minimized” if medical professionals were to conduct them, codes of medical ethics “prohibit their participation in executions”, citing positions adopted by the American Medical Association, the American Nurses Association and the National Association of Emergency Medical Technicians in this regard.

What neither Judge Alito nor any his fellow Justices addressed in the *Baze* ruling was that the manufacturers of the drugs used in lethal injection might also flinch at the prospect of being associated with a punishment abandoned by a clear majority of countries.

A year after the *Baze* ruling, the pharmaceutical company Hospira wrote to prison authorities in the USA, including in Ohio and Nebraska. In its letter it noted that “some correctional facilities” in the USA used sodium thiopental, pancuronium bromide, and potassium chloride “to administer the lethal injection in capital punishment cases”. The letter noted that “as a manufacturer of all three agents... Hospira provides these products because they improve or save lives”. As such, the letter continued, “we do not support the use of any of our products in capital punishment procedures.”<sup>245</sup>

Hospira stopped producing sodium thiopental in 2009 due to problems obtaining the drug’s active ingredient.<sup>246</sup> On 21 January 2011 it announced its decision to permanently withdraw from the market. It said that it had intended to resume production at its plant in Italy, but that after “dialogue with the Italian authorities concerning the use of Pentothal in capital punishment procedures in the United States – a use Hospira has never condoned”, the company could not “take the risk that we will be held liable by the Italian authorities if the product is diverted for use in capital punishment”. The company took the view that it could not prevent the drug from being diverted for use in executions, as the Italian authorities were demanding, and so decided to exit the market.<sup>247</sup> Hospira was the sole manufacturer or supplier of sodium thiopental in the USA.

As noted above, Oklahoma, Ohio and Texas have now switched to Pentobarbital instead of sodium thiopental. In January 2011, the Ohio authorities were contacted by the pharmaceutical company Lundbeck Inc, based in Denmark. The letter stated:

“In the wake of the decision of Hospira to cease production of sodium thiopental, which is used in the execution of prisoners, Lundbeck has become aware that the State of Ohio has now decided to use Lundbeck’s product Nembutal® (pentobarbital sodium injection USP) for this purpose. Lundbeck is adamantly opposed to the use of Nembutal, or any other product for that matter, for the purpose of capital punishment.

We recognize that we cannot control how licensed health care professionals use this or any pharmaceutical product. Nevertheless, we urge you to discontinue the use of Nembutal in the execution of prisoners in your state because it contradicts everything we are in business to do – provide therapies that improve people’s lives.”<sup>248</sup>

Lundbeck has also written to other states upon learning they were or might be turning to pentobarbital for executions, and by April 2011 had, in addition to Ohio, written to the Governors and Departments of Correction Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, Texas and Virginia to urge them not to do so. It said:

“Lundbeck markets pentobarbital solely for its approved use, among other things to treat serious conditions such as a severe and life threatening emergency epilepsy. Pentobarbital remains an important treatment option for physicians in the US for controlling seizures in patients with refractory status epilepticus when other medications fail. This important medical need is further validated by data from the company’s distributors in the U.S, which shows that more than 700 unique hospitals have ordered pentobarbital during the last 12 months, including approximately 70 percent of hospitals associated with specialized epilepsy centers. The use of this product to carry out the death penalty in US prisons falls outside its approved indications. Lundbeck cannot assure the associated safety and efficacy profiles in such instances. Lundbeck does not promote pentobarbital for use in lethal injections or any other unapproved use.”

At first, Lundbeck took the position that there were “no viable steps” that the company could take “to prevent end-users from obtaining the product for unapproved use, short of withdrawing the product from the market.” This was not an option, given its legitimate and crucial medical purposes. However, it said that it would continue to “explore ways to restrict access by prisons to pentobarbital” and to urge states in the USA to refrain from using pentobarbital for the execution of prisoners. More recently, it has been reported that Lundbeck considers that it may be able to do more to seek to prevent its product ending up in execution chambers in the USA, including by switching to specialist wholesalers and imposing end-user agreements.<sup>249</sup>

Kayem Pharmaceutical has also come out against supplying drugs for US executioners. In a statement issued in April 2011, it said: “In view of the sensitivity involved with sale of our Thiopental Sodium to various Jails/Prisons in USA and as alleged to be used for the purpose of Lethal Injection, we voluntary declare that we as Indian Pharma Dealer who cherish the Ethos of Hinduism (A believer even in non-livings as the creation of God) refrain ourselves in selling this drug where the purpose is purely for Lethal Injection and its misuse.”<sup>250</sup>

As already noted, the state of Tennessee has been one of the states to have handed over sodium thiopental, apparently imported from the UK, to the DEA for its investigations. Meanwhile, litigation on Tennessee’s lethal injection protocol continues. In November 2010 lawyers for Stephen West, a Tennessee death row prisoner, had obtained a judicial ruling a week before he was due to be executed that the protocol was unconstitutional because it allowed for “death by suffocation while the prisoner is conscious”.<sup>251</sup> The judge has since ruled that the state’s revised protocol is constitutional.<sup>252</sup> Stephen West is also one of the death row inmates named in the lawsuit against the FDA filed in federal court in Washington, DC in February 2011 (as noted above, two of the Arizona inmates named on the lawsuit have since been executed). Stephen West’s case highlights the broader problems with the death penalty as well as the continuing sub-experiment with a medicalized execution process.

After conducting a two-day evidentiary hearing in November 2010, a state trial-level judge ruled that Tennessee’s 2007 three-drug lethal injection protocol was unconstitutional.<sup>253</sup> Stephen West had been due to be put to death under that protocol at the end of the month. In her ruling from the bench, Judge Claudia Bonnyman noted the “principle settled by *Gregg versus Georgia* that capital punishment is constitutional” adding that “it necessarily follows that there must be a means of carrying it out”. She ruled that the amount and concentration

of sodium thiopental administered under the Tennessee lethal injection protocol was insufficient to guarantee the condemned inmate unconsciousness before the other two drugs were injected, but added that it appeared to her there were “feasible and readily available alternative procedures” that would restore constitutionality by ensuring unconsciousness and minimizing the risk of “severe suffering or pain” during execution.

Two days later, six days from Stephen West’s scheduled execution on 30 November 2010, the Tennessee authorities produced a revised lethal injection protocol. The new procedure included a process to assess the consciousness of the condemned prisoner after administration of the sodium thiopental (the warden would brush the back of his or her hand over the condemned inmate’s eyelashes, call his or her name and gently shake the prisoner), and to provide for an additional dose of this drug if the inmate was found to be conscious after the first dose. On 29 November, the Tennessee Supreme Court issued a stay of execution to allow the lower court judge to determine whether the revised protocol was sufficient to eliminate the deficiencies she had pointed to in the previous version of the protocol. On 2 March 2011, Judge Bonnyman ruled that the new protocol was constitutional, that “the consciousness checks seem to take care of the problem”. Again she reiterated that “capital punishment is constitutional, and there must be – there may be some pain as an inescapable consequence of death”. She added that she took “no pleasure in ruling on a case in which a life and lives hang in the balance”. Her ruling was on appeal at the time of writing.

Meanwhile, the broader experiment in the death penalty is highlighted in the case of Stephen West who was sentenced to death in March 1987 for the murder of Wanda Romines and her 15-year-old daughter Sheila in their home in eastern Tennessee on 17 March 1986. Stephen West and 17-year-old Ronald Martin were charged with the murders. It is not disputed that both were present at the crime. They were tried separately, with Stephen West being brought to trial first. His lawyers argued that Ronald Martin was the architect of the crime and that Stephen West had failed to stop the crime under threats of violence from the younger man. Ronald Martin was ineligible for the death penalty under state law because he was under 18 at the time of the crime. He was sentenced to life imprisonment. While he was in pre-trial custody, he had discussed the crime with a cellmate. In a conversation captured on audiotape, he said that Stephen West did not kill the two victims, but that he, Ronald Martin, had done it. At Stephen West’s trial, the judge ruled that the tape was inadmissible on the grounds that it was hearsay.

Stephen West was represented at trial by two lawyers, neither of whom had worked on a death penalty case before. Their failure to investigate and present evidence of severe parental abuse in Stephen West’s childhood would become one of the main issues on appeal. Several mental health experts have concluded that childhood abuse had left Stephen West with a serious mental disorder that affected his conduct at the time of the crime, and that this was an issue that could have been relevant at the trial as a defence against his conviction for capital murder or in mitigation against the death penalty.

“The regulations provide that if selected to be a member of the [execution] team, employees can no longer work or be assigned to any condemned housing unit [death row], either full or part-time... The rationale for such a restriction is to provide as much insulation between the employee and the condemned inmate as possible since the employee may have some feelings about the condemned and it may impact on his or her ability to do the job that he or she is selected to do.”

California government brief, US District Court, 21 March 2011<sup>254</sup>

In 1998 Stephen West’s father signed an affidavit stating “his mother and I severely abused Stephen from the time he was born in a mental institution in Indiana until he left home to

join the army. We physically abused him by hitting him with our hands, sticks, bottles or anything else we had. This abuse was extreme and always very violent. Stephen was slammed against a wall so hard when he was a baby that he was knocked cross-eyed and required surgery." In 2001, a forensic psychologist stated "it is clear that Mr West suffered from intense psychological trauma and anxiety as a child directly due to the severe physical and emotional abuse of his parents". She concluded that he likely suffered from Posttraumatic Stress Disorder (PTSD), and that the "extreme trauma and anxiety during childhood set the stage for Mr West's having an acute stress response [during the crime] and becoming emotionally overwhelmed by the situation". In 2002, another doctor specializing in clinical and forensic psychiatry noted that Stephen West's family has a "significant history of mental illness", including bipolar disorder, and that his mother attempted suicide when pregnant with him. The expert wrote that "Stephen survived prolonged, life threatening maltreatment at the hands of his mother and her husband", including being beaten, kicked, punched and thrown into walls, and that the boy was also subjected to other "acts of cruelty", including public humiliation, degradation, captivity and isolation. He concluded that this kind of abuse "breaks the bonds that children need to develop into healthy adults" and from it Stephen West had developed an "insidious progressive form" of PTSD that "controlled and constricted his entire life", and that affected his conduct at the time of the crime. A third mental health expert drew similar conclusions, also in 2002.

The trial jury heard no evidence of such abuse or expert opinion about the effects it might have had on Stephen West. In 2008, a three-judge panel of the US Court of Appeals for the Sixth Circuit upheld the death sentence. The two judges in the majority wrote that if Stephen West's trial lawyers had discovered the evidence of his childhood abuse, they might have chosen to portray him "as the product of an unstable and abusive home" and that the jury "might have believed that the abuse made West the kind of person who was psychologically unable to confront or disobey strong, threatening people such as [Ronald] Martin" and might have chosen to spare his life. The two judges further speculated, however, that "the very same evidence may have had the opposite effect on the jury"; that the jurors "might have believed that violence begets violence and that West's past abuse made him the kind of person" who could have committed such a crime; and that they "might have despised West and sentenced him to death with greater zeal". The third judge dissented, accusing her two colleagues of taking an approach that "flies in the face of Supreme Court precedent". She concluded that had the trial lawyers "presented evidence of abuse and its effects on West, it is extremely likely that at least one juror would have determined that West's explanation for what happened to him while the crime took place – essentially that he froze – was plausible, making the death penalty unwarranted"

A review in May 2010 of Stephen West's prison records revealed that from 2001 to 2006 he had been diagnosed with major depressive disorder with psychotic features. In 2006, the diagnosis was changed to one of chronic paranoid schizophrenia", and it was noted that he was suffering "anxiety, depression and auditory hallucinations". In 2008, the diagnosis was again changed, this time to schizoaffective disorder, reflecting the prison doctor's view of Stephen West, whose family has a history of mental illness, as having symptoms of schizophrenia – delusions and hallucinations – and of bipolar disorder – mania and depression. Stephen West has been prescribed various medications on death row, including high doses of the anti-psychotic drug Thorazine.

Having treated Stephen West's mental illness with drugs, the state intends to turn to medicine to kill him.

## 7. RAZOR-THIN, NEEDLE-SHARP, DEADLY DIVIDE

*It is by such razor-thin margins that we determine who lives and who dies*  
Former Chief Justice, Supreme Court of Georgia<sup>255</sup>

The saying “justice is what the judge ate for breakfast” may be more than a caricature, suggests a recent study. The researchers, examining sequential parole rulings by Israeli courts, found that the percentage of rulings in favour of parole was around 65 per cent at the beginning of court sessions, dropping to around zero prior to the judge taking a break for food, and returning abruptly to 65 per cent after such breaks.<sup>256</sup>

Jeffrey Landrigan was executed in Arizona on 26 October 2010 because he lost by one vote in the US Supreme Court a few hours earlier. By five votes to four, the Supreme Court lifted a stay of execution imposed by a District Court Judge and upheld by the US Court of Appeals for the Ninth Circuit. Judges on both those lower courts had clearly been troubled by Arizona’s lack of transparency in relation to its acquisition of drugs with which it intended to kill Landrigan (see Section 5).

This was the second time Jeffrey Landrigan had lost by one vote in the Supreme Court. Three and a half years earlier, the same five Justices who voted that Arizona could kill him without providing more information about its imported lethal injection drugs had voted to reinstate his death sentence overturned by the lower courts because of what they had found to be his inadequate legal representation at trial.

While Amnesty International is not suggesting that the US Supreme Court allowed Arizona to kill Jeffrey Landrigan because more Justices were feeling hungry or tired than were not,<sup>257</sup> the research into the Israeli court decisions raises interesting questions:

“Does the outcome of legal cases depend solely on laws and facts? Legal formalism holds that judges apply legal reasons to the facts of a case in a rational, mechanical, and deliberative manner. An alternative view of the law – encapsulated in the highly influential 20<sup>th</sup> century legal realist movement – is rooted in the observation of US Supreme Court Justice Oliver Wendell Holmes that ‘the life of the law has not been logic; it has been experience’. Realists argue that the rational application of legal reasons does not sufficiently explain judicial decisions and that psychological, political, and social factors influence rulings as well.”

The researchers said that their findings indicated that “extraneous variables can influence judicial decisions, which bolsters the growing body of evidence that points to the susceptibility of experienced judges to psychological biases”. If this is true, it surely raises particular concerns in the case of the death penalty, a judicial sanction unique in its finality.

The death penalty is a divisive issue, as US District Court Judge Jeremy Fogel noted when he ruled on the serious deficiencies he had found in California’s lethal injection protocol:

“Few issues in American society have generated as much impassioned debate as the death penalty. At one end of the spectrum, abolitionists condemn the intentional taking of human life by the State as barbaric and profoundly immoral. At the other, proponents see death, even a painful death, as the only just punishment for crimes that inflict unimaginable suffering on victims and their surviving loved ones. Even among those with less absolute positions, there are vigorous arguments about the social, penological, and economic costs and benefits of capital punishment. Any legal proceeding arising in this

context thus acts as a powerful magnet, an opportunity for people who care about this divisive issue to express their opinions and vent their frustrations.”<sup>258</sup>

If the death penalty divides the public, it also has frequently divided the judiciary. While splits on courts are far from unique to death penalty cases, their frequent occurrence in this context raises particular concerns given the uniqueness of this punishment. In addition to the possibility that such divisions can leave the impression of ideological judicial decision-making (in Landrigan’s case, for example, the five so-called “conservative” Justices twice voted against the prisoner while four “liberal” Justices voted in his favour each time), and thereby undermine public confidence in the even-handedness of the judicial system,<sup>259</sup> close votes on courts also beg another question. If a case is so lacking in clarity that one vote either way means the difference between life and death, should this be acceptable even to death penalty supporters given the irrevocability of execution? Governor Richardson said when signing away New Mexico’s death penalty, to conduct an irreversible punishment “we must have ultimate confidence – I would say certitude – that the system is without flaw or prejudice.” Deep divides among judges points to anything but certainty.

The case of Jason Getsy – the last person to be executed under Ohio’s three drug execution method before it switched to a single drug to kill condemned prisoners – was one that was marked by judicial splits.

In 1995 in Ohio, John Santine recruited three 19-year-old youths to kill his business rival, Charles Serafino. In the event, the intended victim’s wife was shot and killed, whereas Charles Serafino survived. All four – John Santine and the three teenagers were charged with murder. Two of the teenagers were sentenced to prison terms while the third, Jason Getsy, was sentenced to death for “murder for hire”. John Santine was convicted of murder, but acquitted of “murder for hire,” and was therefore not eligible for the death penalty. He was sentenced to life imprisonment, eligible for parole from 2022.<sup>260</sup>

In 2006, a three-judge panel of the US Court of Appeals for the Sixth Circuit voted two to one to overturn the death sentence: “We agree with the Ohio Supreme Court that Santine is probably more – certainly no less – culpable than Getsy, the young boy he hired, but we do not agree that the death verdict can stand.” The majority wrote that the jury verdicts in the Santine and Getsy trials were “irreconcilable” because “murder for hire requires at least two participants: the hiring party and the person hired... If the jury convicts only one of multiple defendants charged with the crime of murder for hire, this is a fatally inconsistent verdict requiring reversal.” The full court agreed to reconsider the decision, however, and in 2007 reinstated the death sentence, by a vote of eight to six. Four US Supreme Court Justices voted for a stay of execution, one short of the necessary number to make that happen.<sup>261</sup> The judicial split in the Getsy case was accompanied by a divide within the executive clemency authorities. In July 2009, the Ohio parole board voted by five to two that the Governor should commute the death sentence. The Governor rejected the recommendation and Jason Getsy was killed by lethal injection on 18 August 2009.

California inmate Kevin Cooper has already been denied executive clemency once – in 2004 – but a judicial stay at that time blocked his execution. He has now been on California’s death row for 25 years. He has consistently maintained his innocence of the four murders for which he was sentenced to death. Since 2004, a dozen federal appellate judges have indicated their doubts about his guilt.

On the night of 4 June 1983, Douglas and Peggy Ryen were hacked and stabbed to death in their home in Chino Hills, California, along with their 10-year-old daughter Jessica and 11-year-old houseguest Christopher Hughes. The couple’s eight-year-old son, Joshua Ryen, was

seriously wounded, but survived. He told investigators that the attackers were three or four white men. In hospital, he saw a picture of Kevin Cooper on television and said that Cooper, who is black, was not the attacker. However, the boy's later testimony – that he only saw one attacker – was introduced at the 1985 trial. In recent years further evidence supporting Kevin Cooper's claim of innocence has emerged, including for example, testimony from three witnesses who say they saw three white men near the crime scene on the night of the murders with blood on them.

Kevin Cooper was less than eight hours from execution in 2004 when the US Court of Appeals for the Ninth Circuit granted a stay and sent the case back to the District Court for testing on blood and hair evidence, including to establish if the police had planted evidence. The District Court ruled in 2005 that the testing had not proved Kevin Cooper's innocence – his lawyers (and five Ninth Circuit judges) maintain that it did not do the testing as ordered. Nevertheless, in 2007, a three-judge panel of the Ninth Circuit upheld the District Court's ruling. One of the judges described the result as “wholly discomfiting” because of evidence of tampering and destruction, but noted that she was constrained by US federal law, which places substantial obstacles in the way of successful appeals. Judge Margaret McKeown wrote:

“Significant evidence bearing on Cooper's guilt has been lost, destroyed or left unpursued, including, for example, blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish Cooper's guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the evidence”.

In 2009, the Ninth Circuit refused to have the whole court rehear the case. Eleven of its judges dissented. One of the dissenting opinions, running to more than 80 pages and signed by five judges, warned that “the State of California may be about to execute an innocent man”. On the question of the evidence testing, they said: “There is no way to say this politely. The district court failed to provide Cooper a fair hearing and...imposed unreasonable conditions on the testing” ordered by the Ninth Circuit. They pointed to a test result that, if valid, indicated that evidence had been planted, and they asserted that the district court had blocked further scrutiny of this issue.

While Kevin Cooper was still on death row at the time of writing, but with executions in California on hold as a result of the ongoing lethal injection litigation, another man whose case had caused serious divisions within the federal judiciary ended in execution in 2010. In 2006, the US Court of Appeals for the Ninth Circuit overturned Washington State death row inmate Cal Brown's death sentence on the grounds that a prospective juror had been unlawfully excluded at jury selection. The man in question had said that he believed the death penalty was “appropriate in severe cases” and that he would take into account mitigating and aggravating factors. “Most importantly,” the Ninth Circuit noted, “he promised he would ‘follow the law’ without reservation.” However, the state had objected to the juror on the grounds that he was too reluctant to impose the death penalty and the trial judge allowed the prosecution to exclude him. His exclusion, the Ninth Circuit court said, meant that “Brown's death sentence cannot stand.”

In his concurring opinion in the *Baze v. Rees* ruling, Justice Stevens counted among the problems of the death penalty the “rules that deprive the defendant of a trial by jurors representing a fair cross section of the community”. At capital jury selection in the USA, those citizens who would be “irrevocably committed” to vote against the death penalty can be excluded by the prosecution, under a 1968 US Supreme Court ruling. In 1985, the

Supreme Court amended this standard to one where a prospective juror can be dismissed if his or her feelings about the death penalty would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath”.

In 2007, the US Supreme Court reinstated Cal Brown’s death sentence. As it would later that year do in the *Baze* case on lethal injections, the US Department of Justice intervened in favour of the state in its bid to get the prisoner to the death chamber. In an amicus curiae brief filed in the Court, the US administration urged the Justices to reverse the judgment of the Ninth Circuit Court of Appeals in Cal Brown’s case.<sup>262</sup> The Court did do, ruling that “deference to the trial court is appropriate” and that “by not according the required deference, the Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress and by our cases.” Justice Stevens, joined by three other Justices, dissented, accusing the majority of choosing to “defer blindly” to a state court’s mistake, and of upholding “the disqualification of a juror whose only failing was to harbour some slight reservation in imposing the most severe of sanctions.” They continued: “The Court has fundamentally redefined – or maybe just misunderstood – the meaning of ‘substantially impaired’ and, in doing so, has gotten it horribly backwards. It appears to be under the impression that trial courts should be encouraging the inclusion of jurors who will impose the death penalty rather than only ensuring the exclusion of those who say that, in all circumstances, they cannot.”

In 2010, the State of Washington revised its execution protocol for the fifth time since resuming executions in 1993. On 8 March 2010, it adopted one-drug lethal injection as its “primary and presumed method of execution”, although allowing the “Inmate Subject to the Death Penalty” to chose the previous three-drug method or the state’s original execution technique, hanging.

Having treated Cal Brown on death row for mental health problems, including with the drugs lithium and depakote, the state killed him using another drug, sodium thiopental. His execution, on 10 September 2010, was the state’s first execution for nine years and the first using its one-drug protocol. There was judicial dissent right at the end. One of the three judges on the Ninth Circuit court that refused to stay the execution argued that the prisoner “was entitled to further information about the qualification and training of the members of the lethal injection team”, which had been challenged in the lead-up to the execution.<sup>263</sup> In any event, revisions to the state’s lethal injection method could not obliterate the judicial concerns that had marked the death sentence over the years, regardless of the indisputable seriousness of the crime for which it was handed down.

*“Two of the drugs needed to carry out the [death] sentence are currently on the national drug shortage list. This presents an immense challenge in that it directly impacts our ability to provide a seamless, safe and effective method to carry out the sentence... I am seeking a special waiver of registration to import Pancuronium Bromide, and Thiopental Sodium to be purchased from a provider outside the United States.”*

Letter from Superintendent of the Washington State Penitentiary (WSP) to the DEA, 13 August 2010

*“DEA has reviewed the information you provided and must deny your request...”*

Letter from DEA to Superintendent of WSP, 15 November 2010

The death penalty in Washington State more generally has divided its judiciary also. Capital justice came under scrutiny following the case of Gary Ridgway, who in 2003 avoided the death penalty in return for his confession to murdering 48 women. The fact that he would serve a life sentence, while others would be executed for crimes with far fewer victims has, as the state Supreme Court put it in 2006, “caused many in our community to seriously

question whether the death penalty can, in fairness, be proportional when applied to any other defendant.” However, the court upheld the state’s death penalty. The five judges in the majority said that while they did not “minimize the importance of this moral question...it is a question best left to the people and to their elected representatives in the legislature.” Four dissenting judges argued that “When Gary Ridgway, the worst mass murderer in this state’s history, escapes the death penalty, serious flaws become apparent... If the Ridgway case was the only case at the far end of the spectrum, perhaps his penalty of life in prison rather than death could be explained or dismissed. Ridgway, however, is not the only case in which a mass murderer escaped death.” The dissenters went on to list other such cases which they said “exemplify the arbitrariness with which the penalty of death is exacted....The death penalty is like lightning, randomly striking some defendants and not others... No rational explanation exists to explain why some individuals escape the penalty of death and others do not.”

This was a problem that was supposed to have been fixed in the post-*Gregg v. Georgia* experiment with the death penalty in the USA. The 1976 *Gregg* ruling held 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”. The *Gregg* ruling noted that “while some have suggested that standards to guide a capital jury’s sentencing deliberations are impossible to formulate, the fact is that such standards have been developed”, and pointed to the Model Penal Code developed in the 1960s by the American Law Institute. Section 210.6 of the code, cited by the *Gregg* majority, sought to provide legislators in states which decided to retain the death penalty with rules aimed at maximizing fairness and reliability in capital sentencing. Thirty-three years later, in 2009, the American Law Institute voted to withdraw §210.6 “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment”. It noted that §210.6 was “an untested innovation in 1962. Now we have decades of experience with the evolution of American capital punishment systems and capital punishment laws over the last half century”.<sup>264</sup> In assessing whether to withdraw §210.6, the American Law Institute had considered, among other things, the inadequacies of the US Supreme Court’s constitutional regulation of the death penalty and of federal habeas corpus review generally, the politicization of the death penalty, racial discrimination, systemic juror confusion in capital cases, the under-funding of defence counsel services, and death sentences against the innocent.

Since retiring from the US Supreme Court, former Justice John Paul Stevens has said that there was one vote during his nearly 35 years on the Court that he regretted – his vote with the majority in *Gregg v. Georgia* which he now thinks was an “incorrect decision”.<sup>265</sup> As noted

Given that the *Gregg* ruling was passed by seven votes to two, if Justices Blackmun, Powell and Stevens had voted in 1976 how they later suggested they would have voted had they known how the USA’s experiment with the death penalty would turn out, judicial killing would not have been resumed in 1977, if at all.

above, in 1994, nearly two decades after he had voted with Justice Stevens in the *Gregg* ruling, Justice Harry Blackmun announced that he would no longer “tinker with the machinery of death”.<sup>266</sup> Justice Lewis Powell, another who had voted for the *Gregg* ruling, after his retirement said that he had “come to think that capital punishment should be abolished”.<sup>267</sup> Given that the *Gregg* ruling was passed by seven votes to two, if Justices Blackmun, Powell and Stevens had voted in 1976 how they later suggested they would have voted had they known how the USA’s experiment with the death penalty would turn out, judicial killing would not have been resumed in 1977, if at all. All the more reason for the USA to end its death penalty experiment today.

## 8. DRUG PROBLEM? TIME TO KICK THE HABIT

*Capital punishment in the US needs to be seen within the context of American federalism and democracy, where the elected governments at the federal and state levels have the power to make decisions regarding the use of the death penalty*

US Embassy (Vienna) replies to Amnesty International members, Austria, May 2011

During litigation in his court on California's lethal injection procedures, which began in early 2006 and looks set to continue into 2012, federal District Court Judge Jeremy Fogel has repeatedly emphasised that he is not examining the constitutionality of the death penalty, or the constitutionality of lethal injection *per se* as an execution method, or "the wisdom of the death penalty".<sup>268</sup> The latter he said was for the public and the elected branches of government to resolve.

Meanwhile, on the global stage, the federal government asserts that the use of the death penalty in the USA is a domestic matter and opposition to it from other governments is merely indicative of a difference of policy, not a question of what international human rights law requires. This nod of deference to international law should be placed alongside the fact that the USA continues to maintain that it is bound only by domestic constitutional standards in relation to the death penalty, including who it subjects to this punishment, how it ends their lives, and how long and under what conditions it keeps them on death row before killing them.

When ratifying the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1994, the USA lodged the following "understanding":

"the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

In 2000, after considering the USA's initial report to it, the UN Committee Against Torture urged the USA to withdraw its reservations, understandings and declarations (RUDs) to UNCAT. However, the USA has not done so, and at the time of its second periodic report to the Committee, asserted that it "considers the issue of capital punishment to be outside the scope of its reporting obligations under the Torture Convention".

In similar vein, when ratifying the ICCPR in 1992 the USA adopted the following reservation:

"the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

In 2006, in the wake of the *Roper v. Simmons* ruling of the US Supreme Court outlawing the use of the death penalty against under-18-year-olds, the UN Human Rights Committee reiterated its call on the USA to withdraw this reservation to the ICCPR. The USA has not done so – clearly the USA sees the reservation as going beyond the issue of its now banned practice of executing individuals for crimes committed when they were children. At the UPR session on the USA at the UN Human Rights Council in November 2010, a number of

governments called on the USA to withdraw this reservation and other RUDs attached to the ICCPR and other treaties. In its formal response in March 2011 in Geneva, the USA rejected such calls.

Adherence to international standards, President Obama has said, “strengthens those who do, and isolates those who don’t.”<sup>269</sup> The USA’s growing isolation on the death penalty is likely to continue as long as it remains blind to the international vision of a future without judicial killing, including as contained within article 6 of the ICCPR, the abolitionist spirit of which the UN Human Rights Committee confirmed three decades ago. The USA’s promise to promote “human rights and fundamental freedoms of all persons within the United States”<sup>270</sup> still excludes at least one category of individuals – condemned prisoners, currently numbering more than 3,000 men and women. Until the USA changes its view of international human rights law on this issue, including by withdrawing its reservations to international treaties, the timing of abolition there will be determined at a pace set by “evolving standards of decency” at a national rather than international level.

A decade and a half after Justice Harry Blackmun announced his conclusion that the USA’s experiment with capital punishment had failed and that he would “no longer tinker with the machinery of death”, Justice John Paul Stevens described the retention of the death penalty in the USA as the “product of habit and inattention” by legislatures across the country.

The USA’s death penalty is a habit that appears harder to break than in many other countries. One reason why it retains a punishment abandoned in law or practice by a majority of countries is that its judges are waiting for legislators to act and legislators are waiting for the public to act, while most members of the public are daily confronted by issues in their lives they perhaps consider more pressing than the death penalty.

At his Senate confirmation hearings in 1970 after being nominated to the US Supreme Court by President Richard Nixon, Harry Blackmun said that he considered the death penalty to be “basically a legislative discretionary matter”. Two years after taking his seat on the Court, he voted against *Furman v. Georgia*, the decision that overturned the country’s existing death penalty statutes. He noted,

“Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment – and they are forceful – the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty”.

He concluded that while he personally might “rejoice” at the Court’s ruling in *Furman*, he found it “difficult to accept or justify as a matter of history, of law, or of constitutional pronouncement”. He nevertheless wrote:

“I yield to no-one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood’s training and life’s experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of reverence for life... Were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency... I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents.”

Four years later Justice Blackmun, while pointing back to these words, voted with the majority in *Gregg v. Georgia* to uphold the death penalty under revised statutes passed by a number of states following the *Furman* ruling. Among those voting with him was Justice Stevens, who had joined the Court in 1975, appointed to it by President Gerald Ford. After more than three decades on the Court, in the 2008 *Baze v. Rees* ruling on lethal injection protocols, Justice Stevens announced that he had concluded that the death penalty was a cruel waste of time and resources.

In his own 1994 opinion against capital punishment, Justice Blackmun had written of his optimism that the Supreme Court would eventually conclude that “the effort to eliminate arbitrariness while preserving fairness” in the death penalty is “so plainly doomed to failure” that the punishment should be abolished. He was right when he wrote that he might not live to see that day; he died in 1999, the year that executions in the USA reached their peak in the contemporary era.

Since 1999, however, the space for progress against the death penalty has opened up as this policy’s flaws become plain to all who look and learn. In recent years, the number of executions has declined, abolitionist activity has intensified in state legislatures, the Supreme Court has excluded certain categories of offender and crime from the scope of the death penalty,<sup>271</sup> annual death sentencing rates have declined to about a third of their levels a decade and a half ago, and executive clemency seems to have become a greater possibility than it once was, at least in some states.<sup>272</sup> The decisions to abolish the death penalty in New Jersey, New Mexico and Illinois are a sign, hopefully of more progress to come.

But despite these recent positive developments, the rate of change has been glacial. Even if the current pace were to be maintained, three states legislating to abolish the death penalty in the last four years of a now 35-year experiment with judicial killing could suggest waiting for several more decades before the remaining 34 states, federal government and US military do the same thing, unless the US Supreme Court were to intervene to this end earlier.

Moreover, not everything has necessarily headed in the right direction during this period, nor should it be expected to automatically, especially if resort to “tough-on-crime” politics comes at the expense of human rights considerations. A federal legislative initiative that continues to have a negative impact on justice is the Antiterrorism and Effective Death Penalty Act (AEDPA), signed into law by President Bill Clinton on 24 April 1996. “I have long sought to streamline federal appeals for convicted criminals sentenced to the death penalty”, President Clinton said at the signing; “For too long, and in too many cases, endless death row appeals have stood in the way of justice being served.” He added that “from now on, criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences.”<sup>273</sup>

The AEDPA placed unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts’ ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited “successive” appeals except in very narrow circumstances. The US Supreme Court has said that under the AEDPA federal courts must operate a “highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt”.<sup>274</sup> Even before the AEDPA was passed, when federal courts addressed claims of, for example, inadequate defence representation, “judicial scrutiny of counsel’s performance [had to] be highly deferential”.<sup>275</sup> The AEDPA added another layer of deference, so now federal judicial review has to be “doubly deferential”.<sup>276</sup>

Marcel Wayne Williams is one death row prisoner whose case has fallen foul of the AEDPA. He was sentenced to death in 1997 for a murder committed in 1994. His lawyers did not contest his guilt, as part of their strategy to persuade the jury to pass a sentence of life imprisonment without the possibility of parole rather than a death sentence. However, at the sentencing phase they failed to present any of the compelling mitigating evidence relating to their client's background of poverty, deprivation and abuse. The relatively inexperienced trial lawyers apparently did not know how to present the evidence or that they could present it through an expert witness. Then, the lawyer appointed to represent Marcel Williams after his trial for his state-level appeals also failed to investigate or present the mitigating evidence – or to seek funds and expert help to do such an investigation.

In 2007, after the death sentence had been upheld in the state courts, a federal judge ruled that “by clear and convincing evidence” the performance of the trial lawyers had been constitutionally inadequate because of their failure to present this mitigating evidence. After conducting a three-day evidentiary hearing, the US District Court judge summarized this evidence as follows: “Marcel Wayne Williams was subject to every category of traumatic experience that is generally used to describe childhood trauma. He was sexually abused by multiple perpetrators. He was physically abused by his mother and stepfather, who were his primary care[givers]. He was psychologically abused by both of his primary care[givers]. He was subjected to gross neglect in all categories of neglect: medical, nutritional, educational. He was a witness to violence in the home and in his neighbourhood throughout his childhood. As an adolescent, he was violently gang-raped in prison”.<sup>277</sup> The judge concluded that had the jurors heard such evidence it was likely that they would have returned a life rather than a death sentence. He ordered the state to give Marcel Williams a new sentencing hearing or change his sentence to life imprisonment without parole.

The state appealed, and in 2009 a three-judge panel of the US Court of Appeals for the Eighth Circuit reversed the District Court's ruling on procedural grounds. The panel emphasised that because the Arkansas courts had reviewed the claim of inadequate legal representation, “we must apply the deferential standards for reviewing state court determinations mandated by AEDPA”. Under the strictures of the AEDPA, the Eighth Circuit ruled, the District Court had been wrong to grant an evidentiary hearing in the Marcel Williams case, and so “we must decline to consider the evidence presented at that hearing”. The Eighth Circuit said that the District Court had overturned the death sentence “on an evidentiary record never presented to the state courts”, and that, based on the record in state courts, their upholding of the death sentence had not been unreasonable.<sup>278</sup> In 2010, the US Supreme Court declined to take the case, over the dissent of two Justices, who argued that the Eighth Circuit's opinion came “at an unacceptable cost to the interests of justice”.<sup>279</sup> Marcel Williams was facing execution on 14 July 2011. On 23 June, the Arkansas Supreme Court granted a stay of execution pending the outcome of a lawsuit relating to the state's lethal injection law and procedures.

Perhaps the passage of the AEDPA into law can be seen as a product of its time – the year that it was passed saw a peak in death sentencing in the USA – 315 death sentences were handed down in that year and since then the annual number of death sentences has declined to around 100. But not everything relating to capital justice is heading in the right direction today. For example, the US government may be about to open a new chapter in the country's ugly history of judicial killing by applying the death penalty after unfair trials at its detention facility at Guantánamo Bay in Cuba.<sup>280</sup> And on the US mainland, because public and political sentiments on the death penalty are so susceptible to being influenced by high-profile violent crimes, there may be setbacks along the way to abolition unless politicians resist the temptation to react to such crimes with support for the death penalty.

The murder of Kimberly Cates and serious wounding of her young daughter on 4 October 2009 in their home in Mont Vernon, New Hampshire, was just such a high-profile crime. Although two youths (18 and 19 years old at the time of the crime) were convicted as the primary actors and received sentences of life imprisonment without the possibility of parole, for some, their punishment – then the maximum under state law – was not enough.<sup>281</sup> They included a resident of Concord, New Hampshire, whose view was published in the *Concord Monitor* in March 2011, on the eve of the sentencing of the second defendant, Christopher Gribble, whose plea of insanity had been rejected by the jury:

“Christopher Gribble, who has admitted to being part of a deadly attack on a Mount Vernon woman and her 11-year-old daughter, deserves death. We need to do a favour to Kimberly Cates’s husband and little girl. She has been through enough and shouldn’t have to be terrorized by these men’s presence. This isn’t revenge; it’s justice. It wouldn’t cost much to buy a rope, find a tree and old-fashioned hangings are back – free entertainment and a lot less than paying to keep them in prison”.<sup>282</sup>

The Speaker of the New Hampshire House of Representatives, along with a number of other legislators, responded to the murder of Kimberly Cates by introducing a bill to expand New Hampshire’s death penalty to make murders committed during “home invasions” (burglaries) punishable by the death penalty. The legislation, known as “The Kimberly L. Cates Law”, passed both houses in June 2011. Governor John Lynch signed the bill into law on 28 June.<sup>283</sup>

The backward step of expanding the death penalty – a move entirely inconsistent with the spirit of the ICCPR and other international instruments – was even more pronounced in New Hampshire given that a decade earlier its legislature had voted to abolish the death penalty altogether. That bill was vetoed by the then Governor Jeanne Shaheen (who has since become a US Senator), “in the best interests of the people of this state”.<sup>284</sup> The same thing happened in 2009 in Connecticut, where the then Governor vetoed an abolitionist bill passed by both chambers, stating that the death penalty was a legitimate response to certain crimes that “are revolting to our humanity and civilized society”.<sup>285</sup> In 2011, the legislature in Connecticut was set to pass another abolitionist bill, when two Senators who were going to vote for it changed their minds at the eleventh hour after meeting with a crime survivor, a prominent doctor whose wife and two daughters were murdered in their home in 2007 and who has campaigned for capital punishment since then.<sup>286</sup> As noted in Section 2, more than 80 family members of murder victims had called on the Connecticut legislature to abolish the death penalty.

On 31 January 2011, just over three years after New Jersey abolished the death penalty, a bill was introduced in the state legislature to bring it back, including for the murder of police officers and children under the age of 14.<sup>287</sup> It seems unlikely that any such bill will succeed in the immediate future in the state, but undoubtedly it will strike a chord with some voters, if a recent letter to the state’s *Courier Post* newspaper is anything to go by:

“Ever since former Gov. Jon Corzine so valiantly signed away New Jersey’s death penalty, there have been many, many useless murders. In the April 8 *Courier-Post* on the front page is the conviction of a man who tortured and killed 2 people and he is getting two 30-year sentences. This man should be killed, but alas, New Jersey has no death penalty.

The time has come for Gov. Chris Christie to right the wrong that Corzine did and reinstitute the death penalty in New Jersey. And even more importantly – see that executions are carried out.

There are 10 known criminals on New Jersey’s death row who had their death sentences commuted to life in prison. Now, let’s get that death penalty back in New Jersey and execute these terrible criminals who have taken innocent lives.

Start with Megan Kanka’s killer. That killer has lived off New Jersey taxpayers’ money for far too long.”<sup>288</sup>

In New Mexico, less than two years after it abolished the death penalty, the current governor said she wants it back. In her State of the State address in January 2011 Governor Susana Martinez said:

“When a monster rapes and murders a child or a criminal kills a police officer, the death penalty should be an option for the jury. That’s why I am calling on the legislature to repeal the repeal – and reinstate the death penalty.”

As noted in Section 2, the notion of a “life for a life” appears to be a large contributor to public support for the death penalty in the USA and, while such retributive sentiment may well exist in other countries, the degree of political and judicial endorsement for such sentiments in the USA has left the death penalty more firmly embedded there than elsewhere.

In his refusal to join the majority in the *Gregg v. Georgia* ruling in 1976 which gave the green light for executions to resume, Justice Marshall took issue with the majority’s explanation for the retributive justification for the death penalty. They had asserted:

“The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve’, then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law.”

Justice Marshall responded that this assertion was “wholly inadequate to justify the death penalty” and that “it simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands.” Yet, 35 years on, the same assertion voiced in the *Gregg* opinion can still be heard. The bill passed by the New Hampshire legislature in June 2011 to expand the state’s death penalty law opens with the assertion that “the purposes of the criminal justice system include providing an organized means for achieving justice so that individuals do not need or feel compelled to seek justice on their own”.<sup>290</sup>

“That leaves the issue of societal vengeance. Of course, this is a complicated and multifaceted issue. On the one hand, there has been a historical and even biblical rationale that the proper penalty for wrongly taking the life of another is to forfeit one’s own life. On the other hand, it is hard to justify our country being the world’s champion of human rights if it is so at odds with much of the rest of the world on the issue of capital punishment”

Former California state judge and federal prosecutor,  
June 2011<sup>289</sup>

Applying a human rights approach – with recognition of the right to life as “basic to all

human rights”<sup>291</sup> and the death penalty as incompatible with respect for human dignity – offers a way out of the ritual of retributive killing. In recent decades, country after country has discovered that the death penalty is unnecessary for society to address serious violent crimes.

The USA's international isolation on the death penalty has become more and more acute. It is even impacting the scramble by authorities in the USA as they try to fix their lethal injection protocols to take account of the shortage of one of the ingredients they had become used to employing in their death chambers. The USA now faces not just opposition from other governments to its continuing use of the death penalty, but also from pharmaceutical companies that manufacture drugs for patient care – not for killing prisoners.<sup>292</sup> The death penalty has surely become an embarrassment to any official that seeks to promote the USA as a progressive force for human rights.

In a reply in March 2011 to the states that had written to him about their problems in the face of the sodium thiopental shortage (see introduction), US Attorney General Eric Holder revealed that the federal authorities were facing the same problem as the states. The US government, he wrote, did not have “any reserves of sodium thiopental for lethal injections” and was therefore facing the “same dilemma as many States”. He said that the lack of sodium thiopental was a “serious concern that the Federal Government is currently analyzing”, including whether there would need to be any changes to “current Federal death penalty procedures”. He concluded the letter by stating that he was “optimistic” that “workable alternatives are available that will allow us to carry out our duties”.<sup>293</sup>

A dilemma is a situation requiring a choice between two equally undesirable alternatives. But this does not have to be such a choice – between killing condemned prisoners with one method or drug or killing them with another. If the federal government, or any of the death penalty states, were to adopt a human rights perspective, they would quickly recognize that the right choice would be not to continue their failed experiment but to pull the plug on it.

In his statement at the UN Human Rights Council on 18 March 2011, the US State Department Legal Adviser added a note for abolitionists: “To those who desire as a matter of policy to end capital punishment in the United States – and I count myself among those — I note the decision made by the government of Illinois on March 9 to abolish that state’s death penalty.”

If the federal government, or any of the death penalty states, were to adopt a human rights perspective, they would quickly recognize that the right choice would be not to continue their failed experiment but to pull the plug on it

While Amnesty International welcomes the Legal Adviser’s opposition to the death penalty, the organization urges all officials across the USA not just to watch the space for change open up but to seize the opportunity it presents to build the foundations of abolition in it.

## ENDNOTES

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<sup>1</sup> Horne outraged at delay of Beatty execution. Puts blame on US Justice Department for last-minute technicality complaint. Arizona Attorney General news release, 25 May 2011, [http://www.azag.gov/press\\_releases/may/2011/BEATY%20EXECUTION%205-25-11.html](http://www.azag.gov/press_releases/may/2011/BEATY%20EXECUTION%205-25-11.html)

<sup>2</sup> *State of Arizona v Donald Edward Beaty*, Notice of substitution of drug, Arizona Supreme Court, 24 May 2011.

<sup>3</sup> By then Arizona was one of 11 states to which Lundbeck had written (to the Governors and Departments of Correction), the others being Alabama, Florida, Georgia, Louisiana, Mississippi, Ohio, Oklahoma, South Carolina, Texas and Virginia. Lundbeck's position regarding the misuse of pentobarbital in execution of prisoners, <http://www.lundbeck.com/media/pentobarbital.asp>

<sup>4</sup> *Ibid.* "we have emphasized to the states that the use of pentobarbital outside of the approved labelling has not been established. As such, Lundbeck cannot assure the associated safety and efficacy profiles in such instances. For this reason, we are concerned about its use in prison executions."

<sup>5</sup> Charles Ryan, Execution drug acquired legally. Arizona Republic, 24 April 2011, <http://www.azcentral.com/arizonarepublic/opinions/articles/2011/04/24/20110424sunlets245.html>

<sup>6</sup> *Dickens v. Brewer*, Emergency motion for temporary restraining order or preliminary injunction. In the US District Court for the District of Arizona, 24 May 2011.

<sup>7</sup> Horne outraged at delay of Beaty execution. *op. cit.*

<sup>8</sup> See Amnesty International Urgent Action update, Arizona execution cancelled, 6 April 2011, <http://www.amnesty.org/en/library/info/AMR51/026/2011/en>. Also, *Beaty et al v Food and Drug Administration et al*, Complaint for declaratory, injunctive, and other relief. In the US District Court for the District of Columbia, 2 February 2011. In late June 2011, lawyers sought to join an additional 18 death row inmates as plaintiffs in the lawsuit (see endnote 184).

<sup>9</sup> Horne: Lethal injection lawsuit is frivolous. Arizona Attorney General news release, 4 February 2011, [http://www.azag.gov/press\\_releases/feb/2011/Lethal%20Injection%20Lawsuit%20Is%20Frivolous.html](http://www.azag.gov/press_releases/feb/2011/Lethal%20Injection%20Lawsuit%20Is%20Frivolous.html)

<sup>10</sup> And cited by the Illinois and New Jersey Governors when signing abolitionist bills into law in their states in recent years. See also *Baze v. Rees*, US Supreme Court, 16 April 2008, Justice Stevens concurring ("The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived"). Also, e.g., Smart on Crime: Reconsidering the death penalty in a time of economic crisis, Death Penalty Information Center, October 2009, <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

<sup>11</sup> *Landrigan v. Brewer*, US Court of Appeals for the Ninth Circuit, Judges Wardlaw, Fletcher, Pregerson and Berzon, concurring in the denial of rehearing en banc, 26 October 2010.

<sup>12</sup> See Struck by lightning: The continuing arbitrariness of the death penalty thirty-five years after its reinstatement in 1976, Death Penalty Information Center, July 2011, <http://www.deathpenaltyinfo.org/documents/StruckByLightning.pdf>. See also, for example, USA: Arbitrary, discriminatory, and cruel: an *aide-mémoire* to 25 years of judicial killing, 17 January 2002, <http://www.amnesty.org/en/library/info/AMR51/003/2002/en>; USA : The experiment that failed: A reflection on 30 years of executions, 16 January 2007, <http://www.amnesty.org/en/library/info/AMR51/011/2007/en>

<sup>13</sup> *Dickens et al v. Brewer et al*. US Court of Appeals for the Ninth Circuit, 9 February 2011.

<sup>14</sup> In its brief to the Supreme Court, the Bush administration explained that its interest in intervening was because "the federal government administers the same series of three drugs as Kentucky" and also because several inmates on federal death row prisoners were pursuing litigation against the federal lethal injection procedures. *Baze v. Rees*, Brief for the United States as *amicus curiae* supporting respondents, In the US Supreme Court, December 2007.

<sup>15</sup> Letter to Attorney General Eric Holder from the Attorneys General of Alabama, Colorado, Delaware, Florida, Idaho, Mississippi, Missouri, Nevada, Oregon, Tennessee, Utah, Washington, and Wyoming. 25

January 2011.

<sup>16</sup> Letter from Attorney General Eric Holder to James McPherson, Executive Director, National Association of Attorneys General, 4 March 2011.

<sup>17</sup> Media advisory, Office of Commission of Alabama Department of Corrections, 26 April 2011.

<sup>18</sup> *Williams v. Thomas*, US District Court for the Middle District of Alabama, Memorandum opinion and order, 16 May 2011. The US Court of Appeals for the Eleventh Circuit upheld this ruling on 19 May, and the US Supreme Court refused to intervene. The first 24 executions in Alabama after the *Gregg* ruling in 1976 were conducted by electrocution. After adopting lethal injection in 2002, its next 27 executions were carried out using sodium thiopental as the first drug of its three-drug lethal injection protocol.

<sup>19</sup> Lundbeck's position regarding the misuse of pentobarbital in execution of prisoners, 4 April 2011, [http://www.lundbeck.com/Media/Facts\\_and\\_background/Lundbecks\\_position\\_regarding\\_the\\_misuse\\_of\\_Pentobarbital.pdf](http://www.lundbeck.com/Media/Facts_and_background/Lundbecks_position_regarding_the_misuse_of_Pentobarbital.pdf).

<sup>20</sup> At the time of writing, the execution of Robert Jackson was scheduled to take place in Delaware between 12.01am and 3am on 29 July 2011.

<sup>21</sup> Gary Haugen waived appeals against his 2007 conviction and death sentence and was scheduled to be executed on 16 August 2011. On 29 June 2011, the Oregon Supreme Court issued an order to the judge who set the execution date, either to vacate the death warrant and conduct a competency hearing or come before the Oregon Supreme Court to defend his decision to set the date without a hearing despite evidence of Haugen's incompetence for execution. The matter was pending at the time of writing.

<sup>22</sup> See Section 5.

<sup>23</sup> Two states turn over execution drug to US. The Wall Street Journal, 2 April 2011.

<sup>24</sup> But see, for example, Amnesty International, Execution by lethal injection: A quarter century of state poisoning, October 2007, <http://www.amnesty.org/en/library/info/ACT50/007/2007>

<sup>25</sup> Pfeifer, Paul E. Retire Ohio's death penalty. The Plain Dealer, 26 January 2011.

<sup>26</sup> Horne: Lethal injection lawsuit is frivolous, 4 February 2011, *op. cit.*

<sup>27</sup> Readout of Commerce Secretary Gary Locke's Meeting with German Federal Minister of Economics and Technology Philipp Rösler. US Department of Commerce, 7 June 2011, <http://www.commerce.gov/news/press-releases/2011/06/07/readout-commerce-secretary-gary-locke%E2%80%99s-meeting-german-federal-minist>

<sup>28</sup> German minister denies US request for executions drugs. Der Spiegel, 9 June 2011, <http://www.spiegel.de/international/world/0,1518,767613,00.html#ref=nlint>

<sup>29</sup> "We will continue to explore ways to restrict supply of pentobarbital to prisons and urge states in the US to refrain from using pentobarbital for the execution of prisoners as it contradicts everything we stand for as a company. The Danish government represented by the Danish Foreign Minister has decided to support our efforts, and we are collaborating with the Danish Embassy in the US, which in turn has reached out in an effort to influence the states misusing our product." Lundbeck's position regarding the misuse of pentobarbital in execution of prisoners, <http://www.lundbeck.com/Media/pentobarbital.asp>

<sup>30</sup> Death penalty – import of sodium thiopental from the UK. Letter from Ian Bond, Political Counsellor, Foreign and Security Policy Group, British Embassy, Washington, DC, to Elizabeth Dibble, Deputy Assistant Secretary of State, Bureau of European and Eurasian Affairs, Department of State, 8 April 2011.

<sup>31</sup> Sourcebook of Criminal Justice Statistics 2003, Table 2.55, page 147, see

<http://www.albany.edu/sourcebook/pdf/t255.pdf>

<sup>32</sup> *Furman v. Georgia*, Justice Brennan concurring.

<sup>33</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Marshall dissenting.

<sup>34</sup> Inmates stay too long on death row, Letter to the Editor, Arizona Republic, 30 May 2011, <http://www.azcentral.com/arizonarepublic/opinions/articles/2011/05/30/20110530monlets301.html>

<sup>35</sup> *Baze v. Rees*, Justice Stevens concurring. See also, A learning curve, towards a 'more perfect world', 8 October 2010, <http://www.amnesty.org/en/library/info/AMR51/095/2010/en>

<sup>36</sup> USA: The execution of mentally ill offenders, January 2006, <http://www.amnesty.org/en/library/info/AMR51/003/2006/en>

<sup>37</sup> UN Doc: A/HRC/16/11/Add.1, 8 March 2011. Report of the Working Group on the Universal Periodic Review. United States of America.

<sup>38</sup> Response of the United States of America to recommendations of the United Nations Human Rights Council, 9 November 2010, <http://www.state.gov/s/l/releases/remarks/150677.htm>

<sup>39</sup> The USA signed the ICCPR on 5 October 1977 (committing itself under international law to do nothing to defeat the object and purpose of the treaty pending its decision to ratify) and ratified it on 8 June 1992.

<sup>40</sup> CCPR General Comment No. 6, The right to life (Article 6), 1982.

<sup>41</sup> UN Doc. CCPR/C/81/Add.4. Initial report of the USA to the UN Human Rights Committee, para. 139. 1994.

<sup>42</sup> UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006. Consideration of reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: United States of America, para. 29.

<sup>43</sup> *Baze v. Rees*, Brief for the United States as *amicus curiae* supporting respondents, In the US Supreme Court, December 2007.

<sup>44</sup> Harold Hongju Koh, Legal Adviser, US Department of State, Statement upon adoption of Universal Periodic Review Report, United Nations Human Rights Council, Geneva, 18 March 2011, <http://geneva.usmission.gov/2011/03/18/us-upr-adoption/>

<sup>45</sup> USA: Indecent and internationally illegal: The death penalty against child offenders, September 2002, <http://www.amnesty.org/en/library/info/AMR51/143/2002/en>

<sup>46</sup> *Domingues v. State*, Brief for the United States as *amicus curiae*, On petition for writ of certiorari to the Supreme Court of Nevada, In the US Supreme Court, October 1999.

<sup>47</sup> For example, see <http://www.state.gov/g/drl/rls/hrrpt/2005/61688.htm>

<sup>48</sup> This specific line has been dropped from the State Department reports since 2008.

<sup>49</sup> "The International Covenant on Civil and Political Rights very explicitly says that the death penalty can be administered in accordance with exacting procedures. Now it turns out there is a group of nations that have moved to a different policy, particularly in Europe, but that has not changed the international standard... [I]n the United States, the Supreme Court has struck down the death penalty against persons with intellectual disabilities, against children, it's limited the means for carrying out executions, it's demanded higher procedures. But I think what you're talking about at the moment is a cultural difference of policy opinion that is continuing after some period of time." Press Conference by the US Delegation to the UPR (Transcript), Geneva, Switzerland, 5 November 2010 <http://geneva.usmission.gov/2010/11/05/upr-press-conf/>

<sup>50</sup> “Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering”. UN Safeguards guaranteeing protection of the rights of those facing the death penalty, ¶19.

<sup>51</sup> Media witness Bob Bennett, in live report featured on 12 News, 29 March 2011.

<sup>52</sup> Rachel Stockman, 12 News, 29 March 2011.

<sup>53</sup> County Attorney Bill Montgomery quoted in ‘Arizona executes man for deadly 1989 armed robbery’. The Arizona Republic, 29 March 2011.

<sup>54</sup> For examples, see [http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions#\\_ednref3](http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions#_ednref3)

<sup>55</sup> *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting against the denial of *certiorari*.

<sup>56</sup> When the US Supreme Court overruled serious concern of lower federal courts about the conduct and the lack of transparency on the part of the State of Arizona in relation to the lethal injection drugs it had obtained to kill Jeffrey Landrigan in October 2010, a number of readers of the Arizona Republic newspaper added their own opinions, among which were the following (sic):

- “JUST KILLM ALREADY!!! did he have concerns when he took a life? no he did not. im tired of supporting these dirt bags on death row. i mean really how long must tax payers foot the bill for keeping the scum alive and feeding them. i say they get one appeal. if they lose it then march them out and put them to death. and none of this mamby pamby ijection crap. they should die exactly how thier victim died. if the shot them then they get shot ,if they strangled them then thats how they died. Americas courts seems to care about the criminal then the victims and thier familes.”
- “Aren't these just the drugs used to knock him out? How about a rubber hammer? It's undoubtedly more compassion than he showed for his victim.”
- “I think murderers should be killed the same way they killed their victims.”
- “Nothing unusual about a little pain when you are being put to death. How humane do we need to be with a convicted murderer? We should have an express line and place them all in a group shower, then suck the air out of the room, or fill it with CO2. Quick, simple, minimal pain.”
- “Electrocution is better. It's so cool when their head goes up in flames.”

Readers' comments following article, ‘US Supreme Court clears way for Arizona execution’, The Arizona Republic, 26 October 2010, <http://www.azcentral.com/news/articles/2010/10/25/20101025arizona-execution-temporary-halt.html#comments>

<sup>57</sup> Garland officer's killer executed in Huntsville, Dallas Morning News, 8 January 2010.

<sup>58</sup> Ohio makes execution history. Associated Press, 9 December 2009.

<sup>59</sup> ‘I did not kill them’, condemned man says. The Tennessean, 4 February 2009.

<sup>60</sup> Killer executed after Perry rejects panel's advice, Houston Chronicle, 19 November 2009.

<sup>61</sup> *Thompson v. Quarterman*, Memorandum and opinion, US District Court for the Southern District of Texas, 29 November 2007.

<sup>62</sup> See generally, USA: Death by discrimination - the continuing role of race in capital cases, April 2003, <http://www.amnesty.org/en/library/info/AMR51/046/2003>.

<sup>63</sup> *Powell v. Allen*, Petition for a writ of *certiorari*, In the Supreme Court of the United States, October Term 2010.

<sup>64</sup> Alabama adopted its lethal injection protocol in July 2002. Inmates on death row at the time had 30 days to choose to stay with electrocution as their execution method. There was a two-year statute of limitations on challenges to the constitutionality of lethal injection from 31 July 2002. In 2011, Eddie Powell's lawyers appealed for a stay of execution, challenging the switch to pentobarbital, and the secrecy of the state's lethal injection protocol, but were denied on the basis that the statute of limitations had expired seven years earlier and the switch to pentobarbital was not a substantive enough change to overcome this. *Powell v. Thomas*, Memorandum opinion and order, US District Court, Middle District of Alabama, 9 June 2011. Upheld by US Court of Appeals for 11<sup>th</sup> Circuit, 15 June 2011.

<sup>65</sup> Death sentence handed down in Dothan murder case. Dothan Eagle, 10 June 2011, <http://www2.dothaneagle.com/news/2011/jun/10/death-sentence-handed-down-dothan-murder-case-ar-1955989/>. The following week, also in Alabama, another capital defendant, Bart Johnson, was sentenced to death for killing a police officer during a traffic stop. Passing the death sentence recommended the previous month by the jury, the judge said to the defendant, "From the moments that elapsed from the time he first pulled you over, you had time to contemplate your actions. And your solution was the taking of a human life." Bart Johnson sentenced to death. Shelby County Reporter, 16 June 2011, <http://www.shelbycountyreporter.com/2011/06/16/bart-johnson-sentenced-to-death/>

<sup>66</sup> Hang 'em: Executions in 30 days, not 25 years. Letter to the Editor, Knoxville News Sentinel, 8 April 2011, <http://www.knoxnews.com/news/2011/apr/08/letters-hang-em-executions-30-days-not-25-years/> (visited 11 April 2011).

<sup>67</sup> *Furman v. Georgia* (1972), Justice Brennan concurring.

<sup>68</sup> *Ibid.*

<sup>69</sup> For a copy of letter, see <http://www.cga.ct.gov/2011/JUDdata/Tmy/2011SB-01035-R000307-Abolition%20Day,%20Campaign%20to%20End%20the%20Death%20Penalty,%20CT,%20Victims%27%20Families%20Sign%20on%20Letter,%2081%20signatories-TMY.PDF>

<sup>70</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Marshall dissenting. The research he cited was Sarat & Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wis.L.Rev. 171.

<sup>71</sup> See <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>

<sup>72</sup> A learning curve, towards a 'more perfect world', 8 October 2010, <http://www.amnesty.org/en/library/info/AMR51/095/2010/en>

<sup>73</sup> *Knight v. Florida* (1999), Justice Breyer dissenting from denial of *certiorari* (case citations omitted).

<sup>74</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan concurring.

<sup>75</sup> Amnesty International, *People can change. Will Texas?* May 2010, <http://www.amnesty.org/en/library/info/AMR51/048/2010/en>

<sup>76</sup> See "longest time on death row prior to execution", Texas death row facts, <http://www.tdcj.state.tx.us/stat/drowfacts.htm>

<sup>77</sup> UN General Assembly resolution on moratorium on the use of the death penalty, adopted 18 December 2007. Also resolution adopted in 2008 and 2010.

<sup>78</sup> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>79</sup> Remarks to the press on the release of the 2009 country reports on human rights practices. Secretary of State Hillary Clinton, US Department of State, 11 March 2010.

<sup>80</sup> United States written response to questions asked by the Committee Against Torture, 28 April 2006, <http://www.state.gov/g/drl/rls/68554.htm>

<sup>81</sup> Washington State says new execution method was carried out 'humanely', The Seattle Times, 10 September 2010.

<sup>82</sup> State of Washington, Department of Corrections, Policy, Capital Punishment, DOC 490.200, 8 March 2010.

<sup>83</sup> Execution. ORC 2949.22; 2949.25, State of Ohio, Department of Rehabilitation and Correction, 30 November 2009. This supercedes the three-drug protocol of 14 May 2009, which had the same wording.

<sup>84</sup> Arizona Department of Corrections, Department Order Manual, Chapter 700, Order 710, Execution procedures.

<sup>85</sup> Garland, David. Peculiar institution: America's death penalty in an age of abolition. The Belknap Press of Harvard University Press (2010), pages 59-60.

<sup>86</sup> *Wellons v. Hall*, 19 January 2010. The Justices were faced with a case in which, shortly before or just after sentencing Marcus Wellons to death in Georgia, members of the jury had presented the judge with a chocolate penis and a bailiff with chocolate shaped as female breasts. What had prompted such "gifts", the Supreme Court noted, had not been ascertained and attempts to do so by the condemned man's lawyers had been stymied by a "procedural morass".

<sup>87</sup> 2010 country reports on human rights practices, Preface, US Department of State, 8 April 2011.

<sup>88</sup> UN General Assembly resolution on moratorium on the use of the death penalty, adopted 18 December 2007. Also resolution adopted in 2008 and 2010. This is not to say that those countries that have abolished the death penalty do not have further to go to bring sentencing, prison conditions, and prisoner treatment into compliance with international standards, or indeed that the only problem in the US criminal justice and prison systems is its use of the death penalty. Abolishing the death penalty is one step, not a final one.

<sup>89</sup> New drug doesn't worry condemned man. Columbus Dispatch, 22 February 2011.

<sup>90</sup> USA: The experiment that failed. A reflection on 30 years of executions, AI Index: AMR 51/011/2007, <http://www.amnesty.org/en/library/info/AMR51/011/2007/en>

<sup>91</sup> Condemned inmates who have died since 1978, California Department of Corrections and Rehabilitation, as of 7 March 2011, [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf)

<sup>92</sup> 1978 Ballot pamphlet 35, quoted in 'Executing the will of the voters?: A roadmap to mend or end the California legislature's multi-billion-dollar death penalty debacle. By Judge Arthur L. Alarcón and Paula M. Mitchell. Special Issue of the Loyola of Los Angeles Law Review, Volume 44, pages 41-224, June 2011.

<sup>93</sup> Final report, California Commission on the Fair Administration of Justice, page 116, available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>

<sup>94</sup> The Commission was not expressly asked to consider whether the death penalty should be abolished, but eight of the 22 commissioners nevertheless concluded that it should be. The eight gave a variety of reasons for their view that the death penalty should be abolished, including its costs, racial and geographic disparities, its disproportionate use against poor defendants, the risk of error, and the fact that it has been abandoned by a majority of countries.

<sup>95</sup> US District Court Judge Jeremy Fogel said that the execution of Morales could go forward only if they implemented one of two modifications to the lethal injection procedure – either the state could use only

sodium thiopental or another barbiturate (rather than the three-drug method), or it could procure the assistance of qualified personnel to independently verify that the prisoner was unconscious prior to the administration of the pancuronium bromide and potassium chloride. However, the execution did not proceed with the execution as scheduled just after midnight on 21 February 2006. Instead, later that day, back in District Court, the state advised that it considered the one-drug method was the most suitable method by which to execute Morales. Judge Fogel issued an order placing the conditions that had to be met before the execution could proceed. The state declined to comply and the execution did not go ahead. Judge Fogel subsequently made his finding that the lethal injection protocol was unconstitutional as administered in practice, leading to the revisions that the state adopted in 2010.

<sup>96</sup> *Morales v. Hickman*, Defendants' opposition to motion for temporary restraining order and motion for expedited discovery and production of documents. In the US District Court for the Northern District of California, 26 January 2006.

<sup>97</sup> *Morales v. Tilton*, Memorandum of intended decision; request for response from defendants, US District Court for the Northern District of California, 15 December 2006.

<sup>98</sup> *Morales v. Hickman*, Order denying conditionally plaintiff's motion for preliminary injunction, US District Court for the Northern District of California, 14 February 2006. The six executions cited by District Court Judge Jeremy Fogel were those of Jaturun Siripongs (1999), Manuel Babbitt (1999), Darrell Rich (2000), Stephen Anderson (2002), Stanley Williams (2005) and Clarence Allen (2006).

<sup>99</sup> *Morales v. Tilton*, Memorandum of intended decision; request for response from defendants, US District Court for the Northern District of California, 15 December 2006.

<sup>100</sup> *Morales v. Cate*, Joint proposed schedule for completing discovery; order; General Order 45 attestation. In the US District Court for the Northern District of California, 16 May 2011.

<sup>101</sup> *Callins v. Collins, op. cit.*, Justice Blackmun dissenting.

<sup>102</sup> Quotes from [www.thinkexist.com](http://www.thinkexist.com)

<sup>103</sup> *Getsy v. Mitchell*, US Court of Appeals for the Sixth Circuit, 25 July 2007, Judge Martin dissenting.

<sup>104</sup> In January 2011, the Ohio authorities were contacted by the Denmark-based pharmaceutical company Lundbeck Inc, which make a formulation of pentobarbital that is branded as Nembutal and prescribed for insomnia and sedation. The company's letter stated: "In the wake of the decision of Hospira to cease production of sodium thiopental, which is used in the execution of prisoners, Lundbeck has become aware that the State of Ohio has now decided to use Lundbeck's product Nembutal® (pentobarbital sodium injection USP) for this purpose. Lundbeck is adamantly opposed to the use of Nembutal, or any other product for that matter, for the purpose of capital punishment... [W]e urge you to discontinue the use of Nembutal in the execution of prisoners in your state because it contradicts everything we are in business to do – provide therapies that improve people's lives."

<sup>105</sup> *Cooley et al v. Kasich et al.* Defendants' motion for summary judgment in defendants' favor on amended complaint of Plaintiff Kenneth W. Smith. In the US District Court for the Southern District of Ohio, 27 May 2011.

<sup>106</sup> Banner, Stuart. *The death penalty: An American history*, Harvard University Press (2002), page 297.

<sup>107</sup> Within the first three years of lethal injections beginning in the USA, the claim that the technique provided a guarantee of quick, clean executions was being challenged. In the eighth lethal injection to be carried out, for example, on 13 March 1985, a Texas lethal injection team probed for nearly 45 minutes for a suitable vein in which to inject the lethal cocktail into Stephen Morin.

<sup>108</sup> *Moeller v Weber*, Defendant's motion to dismiss or for summary judgment and supporting brief, In the US District Court for the District of South Dakota, 20 June 2011.

<sup>109</sup> For a version of those events, see Poison penalty: Bill Wiseman drafted the law allowing lethal injections, then lived to regret it. Washington Post, 7 December 2003, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A42135-2003Dec6&notFound=true>

<sup>110</sup> Subject: Lethal injection/sodium thiopental. From [redacted]@oag.ok.gov, Monday, August 02, 2010 6.15am.

<sup>111</sup> As part of their research aimed at revising California's lethal injection protocol following District Judge Jeremy Fogel's finding in 2006 that the state's existing protocol was unconstitutional in practice, two California correctional officials went to Oklahoma in August 2007 where they witnessed the execution of Frank Welch in Oklahoma's death chamber. See *Morales v. Cate*, Amended answer to fourth amended complaint, In the US District Court for the Northern District of California, 21 March 2011.

<sup>112</sup> USA: Old habits die hard. The death penalty in Oklahoma, April 2001, <http://www.amnesty.org/en/library/info/AMR51/055/2001/en>

<sup>113</sup> The bill will take effect on 1 November 2011.

<sup>114</sup> House Bill 1991.

<sup>115</sup> Execution Procedure, signed by Rick Thaler, Director, Correctional Institutions Division, Texas Department of Criminal Justice, 15 March 2011. See also Texas decides on substitute execution drug. The Texas Tribune, 16 March 2011.

<sup>116</sup> Letter to Steven McCraw, Director, Texas Department of Public Safety, 30 March 2011. Letter to US Attorney General Eric Holder, 30 March 2011. Both letters were written on behalf of Texas death row inmates Cleve Foster and Humberto Leal. The latter's execution, scheduled for 5 April 2011, was stayed by the US Supreme Court. At the time of writing, the latter, a Mexican national denied his consular rights under international law after arrest, has an execution date of 7 July 2011.

<sup>117</sup> *State v. Mata*, Nebraska Supreme Court, 8 February 2008.

<sup>118</sup> In 1999, more than a decade ago, a US Supreme Court Justice expressed concern at the "astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures". He suggested that "where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." *Knight v. Florida, Moore v. Nebraska*, Justice Breyer dissenting from denial of certiorari, 8 November 1999.

<sup>119</sup> *Moore v. Kinney*, US Court of Appeals for the Eighth Circuit, 10 February 2003.

<sup>120</sup> *Roper v. Simmons* (2005).

<sup>121</sup> *Pinholster v. Woodford*, Order granting writ of habeas corpus. US District Court for the Central District of California, 25 March 2003.

<sup>122</sup> The District Court's ruling was overturned by a Ninth Circuit panel, by 2-1, in 2008. The Ninth Circuit Court then reheard the case *en banc*, and in 2009 voted by 8-3 to affirm the District Court ruling. The dissenting judge and one of the judges in the majority in the earlier panel ruling did not participate in the *en banc* decision. In other words, taking the two decisions together, nine of the Ninth Circuit judges voted to uphold the District Court ruling, while four voted against.

<sup>123</sup> *Pinholster v. Ayers*, Opinion. US Court of Appeals for the Ninth Circuit, 9 December 2009.

<sup>124</sup> *Cullen v. Pinholster*, US Supreme Court, 4 April 2011, Justice Sotomayor dissenting, joined in this part of her dissent by Justices Kagan and Ginsburg.

<sup>125</sup> Too soon and too many questions. The New York Times, 6 September 2008.

<sup>126</sup> History of capital punishment in Oregon, Oregon Department of Corrections, [http://www.oregon.gov/DOC/PUBAFF/cap\\_punishment/history.shtml](http://www.oregon.gov/DOC/PUBAFF/cap_punishment/history.shtml)

<sup>127</sup> Oregon Department of Corrections, Capital punishment frequently asked questions, 18 May 2011 version, [http://www.oregon.gov/DOC/PUBAFF/docs/pdf/faqs\\_051711.pdf](http://www.oregon.gov/DOC/PUBAFF/docs/pdf/faqs_051711.pdf)

<sup>128</sup> *Kennedy v. Louisiana*, US Supreme Court, 1 October 2008.

<sup>129</sup> *Roper v. Simmons* (2005), *Atkins v. Virginia* (2002), *Kennedy v. Louisiana* (2008).

<sup>130</sup> *Kennedy v. Louisiana*, Motion for leave to file brief and brief for the United States as amicus curiae supporting petition for rehearing, In the US Supreme Court, July 2008.

<sup>131</sup> *Baze v. Rees*, Brief for the United States as amicus curiae supporting respondents. In the US Supreme Court, December 2007.

<sup>132</sup> *Baze v. Rees*, Brief of the States of Texas, Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Mississippi, Missouri, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Utah and Wyoming, as amici curiae in support of respondents, In the US Supreme Court, December 2007.

<sup>133</sup> Donald A. McCartin, Second thoughts of a 'hanging judge', Op-ed, Los Angeles Times, 25 March 2011, <http://www.latimes.com/news/opinion/commentary/la-oe-mccartin-death-penalty-20110325.0,2340912.story>. A former District Attorney of Los Angeles County responded to the above opinion piece: "California's death penalty does not and cannot function the way its supporters want it to. It is also an incredibly costly penalty, and the money would be far better spent keeping kids in school, keeping teachers and counsellors in their schools and giving the juvenile justice system the resources it needs. Spending our tax dollars on actually preventing crimes, instead of pursuing death sentences after they've already been committed, will assure us we will have fewer victims". Gil Garcetti, California's death penalty doesn't deserve justice, 25 March 2011, <http://opinion.latimes.com/opinionla/2011/03/gil-garcetti-californias-death-penalty-doesnt-serve-justice.html>

<sup>134</sup> 'Executing the will of the voters?: A roadmap to mend or end the California legislature's multi-billion-dollar death penalty debacle. By Judge Arthur L. Alarcón and Paula M. Mitchell. Special Issue of the Loyola of Los Angeles Law Review, Volume 44, pages 41-224, June 2011.

<sup>135</sup> Hancock to introduce legislation to ban death penalty. Senator Loni Hancock, news release, 20 June 2011, [http://dist09.casen.govoffice.com/index.asp?Type=B\\_PR&SEC={42B6205A-0002-4B2A-8F1D-300E16EEB0E}&DE={0D64E233-68AB-44FA-84B4-31A0C672B8D3}](http://dist09.casen.govoffice.com/index.asp?Type=B_PR&SEC={42B6205A-0002-4B2A-8F1D-300E16EEB0E}&DE={0D64E233-68AB-44FA-84B4-31A0C672B8D3})

<sup>136</sup> In California, if any such legislation were to be passed by the legislature, it would have to be approved by the electorate.

<sup>137</sup> UN Doc. A/HRC/WG.6/9/USA/1, August 2010, para. 4. National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1. United States of America.

<sup>138</sup> Subject: Execution protocol drugs, From: Scott Kernan, To: John McAuliffe, 29 September 2010, 4.57pm. (AZ = Arizona; OCS = Office of Correctional Safety (a division of the California Department of Corrections and Rehabilitation; SQ = San Quentin State Prison (where California's death row is located). This email and other documents relating to the Arizona and California arrangements were obtained under the state's Public Records Act by the American Civil Liberties Union of Northern California. Available at [http://www.aclunc.org/issues/criminal\\_justice/death\\_penalty/index.shtml](http://www.aclunc.org/issues/criminal_justice/death_penalty/index.shtml)

<sup>139</sup> Amnesty International has no position on the legality of the drug transactions outlined in this section.

<sup>140</sup> Email from Scott Kernan to Anthony Chaus, 29 September 2010, 4.02pm.

<sup>141</sup> Email from Anthony Chaus to Scott Kernan, 29 September 2010, 4.08pm. The reply to this email was “Great, let you know”.

<sup>142</sup> Subject: Re: FW: Execution Protocol Drugs. From: Charles Flanagan, To: Scott Kernan, 29 September 2010, 4.40pm. Shortly after midday on 28 September 2010, the Security Operations Administrator at the ADC sent an email to an officer at San Quentin State Prison in California. The email read: “...you are the POC [point of contact] for Arizona Department of Corrections and the obtaining of Pancuronium Bromide. We are in need of this medication...We would like the medication delivered to Warden Carson McWilliams, ASPC-Florence...” Subject: ADC assistance. From: Therese Schroeder, To: Rudy Luna, 28 September 2010, 12.03pm.

<sup>143</sup> Email from Vincent Cullen, Warden San Quentin State Prison to Scott Kernan et al, Subject: Pancuronium bromide, 29 September 2010, 2.36pm

<sup>144</sup> Email from Therese Schroeder to Rudy Luna. Subject: ADC assistance. 28 September 2010, 12.03pm.

<sup>145</sup> Subject: FW: FW: Execution protocol drugs, Email from Scott Kernan to Anthony Chaus, 29 September 2010, 5.13pm. And email chain on 30 September 2010.

<sup>146</sup> Subject: Per our conversation. Email from Scott Kernan to Matt Cate and Benjamin Rice, 4 August 2010, 12.22pm.

<sup>147</sup> Subject: [blank]. From Scott Kernan, To: Matthew Cate and Benjamin Rice, 23 August 2010, 9.23am.

<sup>148</sup> Subject: RE: Purchase order #[redacted]. From: [Redacted], To: John McAuliffe, 24 August 2010, 11.52am.

<sup>149</sup> Subject: Re: Purchase Order #[redacted]. From: John McAuliffe, To: [Redacted], 24 August 2010, 12.09pm.

<sup>150</sup> *Furman v. Georgia* (1972), Justice Blackmun dissenting. See also Section 8 of this report.

<sup>151</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan concurring.

<sup>152</sup> Subject: Re: Purchase order # [redacted]. From Brian Duffy to Scott Kernan, 24 August 2010, 12.53pm.

<sup>153</sup> Subject: FW: [redacted]. From Brian Duffy to Scott Kernan, 24 August 2010, 12.55pm.

<sup>154</sup> In 2010, District Judge Jeremy Fogel noted that although he had cited deficiencies in the facilities in his 2006 findings on the state’s lethal injection protocol, he “did not order that new facilities be constructed”. Judge Fogel continued: “The person then serving as the warden at San Quentin, who later admitted that he had not read [Judge Fogel’s memorandum], apparently believed that such an order had been made”. *Morales v. Cate*, Order following remand, US District Court for the Northern District of California, 28 September 2010, note 3.

<sup>155</sup> *Morales v. Tilton*, Defendants’ opposition to Albert G. Brown’s motion to intervene and for stay of execution. In the US District Court for the Northern District of California, 17 September 2010.

<sup>156</sup> *Morales v. Cate*, Order granting motion for leave to intervene; and denying conditionally intervenor’s motion for a stay of execution, US District Court for the Northern District of California, 24 September 2010. Judge Fogel’s order gave the condemned man the option of choosing to be executed by sodium thiopental only or by the three-drug method. A CDCR email the day before, of which Judge Fogel was presumably unaware, discussed the amounts of pancuronium bromide and potassium chloride that California could provide to Arizona. The email noted that since the Brown execution “may end up 1 drug”, California could provide Arizona with 350mg of pancuronium bromide and 1400 mEq of

potassium chloride. Subject: Re: LI, From John McAuliffe to Scott Kernan, 23 September 2010, 11.38am.

<sup>157</sup> *Morales and Brown v. Cate*, Defendants' opposition to motion for stay of execution and appellee's brief or in the alternative opposition to petition for writ of mandamus, In the US Court of Appeals for the Ninth Circuit, 27 September 2010, note 3 (corrected brief).

<sup>158</sup> *Morales and Brown v. Cate*, US Court of Appeals for the Ninth Circuit, 28 September 2010.

<sup>159</sup> An email between CDCR officials on the morning of 29 September 2010, in the email chain relating to the Arizona mission, read: "21 grams would cover backup trays and training. Our minimum [from Arizona] would be 12 grams (2 trays for execution 2 for backup). We can use the 7 grams that expires on 1 Oct for training". Subject: Re: Execution protocol drugs. From: John McAuliffe to Scott Kernan, 29 September 2010, 10.14am.

<sup>160</sup> Governor Arnold Schwarzenegger issued a temporary reprieve on 27 September. See [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/Statement\\_of\\_Decision\\_Albert\\_Brown\\_9-27-10.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/Statement_of_Decision_Albert_Brown_9-27-10.pdf)

<sup>161</sup> *Morales v. Cate*, Order following remand, 28 September 2010, *op. cit.*

<sup>162</sup> Subject: Execution protocol drugs. From: Charles Flanagan, To: John McAuliffe, 28 September 2010, 5.39pm.

<sup>163</sup> See email chain (Subject: execution) from the morning of 30 September 2010 between California's Secretary of Corrections and an official from the state governor's office: (latter's) Q: "Did we ever obtain more sodium thiopental?" A: "Just arrived". Q: "From where?" A: "Az via UK". Q: How many doses? A: "2. expires in two years".

<sup>164</sup> Subject: Re: Execution protocol drugs. From: Scott Kernan, To: Charles Flanagan, 29 September 2010, 4.57pm.

<sup>165</sup> Email Re: Purchase order # [redacted], from John McAuliffe to Brian Duffy, 20 August 2010, 11.04am. From this email, it seems that the correctional authorities were not telling the hospitals why they wanted the drugs ("Going down the list... Same response so far with 23 called... Who are you? Why are you asking? And we do not give out that information to the public!").

<sup>166</sup> Email from John McAuliffe to Scott Kernan, 29 September 2010, 3.37pm.

<sup>167</sup> A learning curve, towards a 'more perfect world', 8 October 2010, <http://www.amnesty.org/en/library/info/AMR51/095/2010/en>

<sup>168</sup> "As we discussed on the phone today, we have followed the lead of Arkansas and purchased the drugs we need from a company in London." Subject: Execution protocol drugs. From: Charles Flanagan, To: John McAuliffe, 28 September 2010, 5.39pm. See also Letter re 'Thiopental Injection Purchase', to Dream Pharma from Wendy Kelley, Deputy Director for Health and Correctional Programs, Arkansas Department of Corrections, 10 September 2010.

<sup>169</sup> Subject: Execution protocol drugs. From: Charles Flanagan, To: John McAuliffe, 28 September 2010, 5.39pm.

<sup>170</sup> Letter to David Thomas, DCM, FDA Investigations, Food and Drug Administration, Phoenix, Arizona, from Charles L. Ryan, Director, Arizona Department of Corrections, 24 September 2010.

<sup>171</sup> *Landrigan v. Brewer*, Order granting motion for a temporary restraining order, US District Court for the District of Arizona, 25 October 2010.

<sup>172</sup> Terry Goddard urges appellate courts to allow execution, News release, Office of Attorney General Terry Goddard, 25 October 2010.

<sup>173</sup> <http://www.dreampharma.com/index.html>

<sup>174</sup> *Landrigan v. Brewer*, US Court of Appeals for the Ninth Circuit, Judges Wardlaw, Fletcher, Pregerson and Berzon, concurring in the denial of rehearing en banc, 26 October 2010.

<sup>175</sup> *Brewer v. Landrigan*, order vacating temporary restraining order, 26 October 2010.

<sup>176</sup> *Landrigan v. Brewer*, Order granting motion for a temporary restraining order, op. cit, note 4.

<sup>177</sup> See 'Warning: The growing danger of prescription drug diversion'. Statement for the record, Michele M. Leonhart, Administrator, Drug Enforcement Administration, before the Subcommittee on Commerce, Manufacturing and Trade, US House of Representatives, 14 April 2011.

<sup>178</sup> See 'Warning: The growing danger of prescription drug diversion'. *Op. cit.*

<sup>179</sup> See for example, *USA v. Kanner*, US Court of Appeals for the Eighth Circuit, 26 April 2010.

<sup>180</sup> Letter to [redacted] Office of Diversion Control, Drug Enforcement Administration, US Department of Justice, from Scott Kernan, Undersecretary, Operations, California Department of Corrections and Rehabilitation, 18 August 2010.

<sup>181</sup> An email sent by the CDCR Undersecretary for Operations to the Department's Associate Director of the Office of Fiscal Services relating to this purchase stated: "I am getting an invoice for the purchase of drugs from England. I will need to affect payment immediately. Its going to be around 40k [US\$40,000]. How do I make this happen quick[?]" Subject: [blank]. From: Scott Kernan, To: Timothy Gilpin, 13 October 2010, 8:46am.

<sup>182</sup> *Morales v. Cate*, Defendants' notice regarding acquisition of sodium thiopental, In the US District Court for the Northern District of California, 21 January 2011.

<sup>183</sup> Subject: Execution protocol drugs. From: Charles Flanagan, To: John McAuliffe, 28 September 2010, 5.39pm.

<sup>184</sup> *Beaty et al v. Food and Drug Administration et al*. Complaint for declaratory, injunctive and other relief, In the US District Court for the District of Columbia (DC), 2 February 2011. The plaintiffs were Donald Beaty, Eric King and Daniel Cook in Arizona, Steve Livaditis and Brett Pensinger in California and Stephen West in Tennessee. Steve Livaditis has since withdrawn from the lawsuit. By the end of May 2011, Donald Beaty and Eric King had been executed. On 28 June 2011, the lawyers sought to file an amended complaint in order to join additional plaintiffs. The latter were 13 Arizona death row inmates (Richard Djerf, David Gulbrandson, Charles Hedlund, George Kayer, Chad Lee, Ernesto Martinez, Angel Medrano, Robert Poyson, Pete Rogovich, Alfonso Salazar, Eldon Schurz, Todd Smith and Milo Stanley) and five men from California's death row (Kevin Cooper, Robert Fairbank, Martin Kipp, William Payton and James Scott).

<sup>185</sup> *Beaty et al v. FDA et al*, Plaintiffs' motion for summary judgment and declaratory relief, In the US District Court for DC, 21 March 2011.

<sup>186</sup> *Heckler v. Cheney*, 470 U.S. 821 (1985). The ruling overturned the decision of the US Court of Appeals for the DC Circuit which had held that the FDA's refusal to act had been "irrational" and that evidence that the lethal injection drugs in question "could lead to a cruel and protracted death was entitled to more searching consideration". The Court of Appeals ruling was by a 2-1 vote, with Judge Antonin Scalia dissenting. The following year Antonin Scalia was nominated by President Ronald Reagan to the US Supreme Court, where he remains one of the nine Justices.

<sup>187</sup> *Beaty et al v. Food & Drug Administration et al*, Defendants' motion to dismiss and/or for summary judgment, In the US District Court for the District of Columbia, 20 April 2011.

<sup>188</sup> Subject: Re: Prison unauthorized possession of Sodium Thiopental Schedule 3N – Have attached the news report. Email to Joseph Rannazzisi, 28 March 2011, 2:57pm.

<sup>189</sup> Email to Director of Procurement, Georgia Department of Corrections, from Dream Pharma, 15 July 2010, 1.40am.

<sup>190</sup> Email from Assistant Commissioner, Chief of Staff, Georgia Department of Corrections, 15 July 2010, 7.15am.

<sup>191</sup> DEA seizes Georgia's supply of lethal injection drug. *The Atlanta Journal-Constitution*, 16 March 2011.

<sup>192</sup> Letter, dated 24 February 2011, available at <http://www.deathpenaltyinfo.org/documents/GDCLetter.pdf>

<sup>193</sup> Affidavit of David B. Waisel, MD, 28 June 2011. Dr Waisel is practising anaesthesiologist and Associate Professor of Anaesthesia at Harvard Medical School.

<sup>194</sup> *Blankenship v. Owens et al*, Verified complaint. In the Superior Court of Fulton County, State of Georgia, 20 June 2011.

<sup>195</sup> Letter from Staffan Schüberg, President, Lundbeck Inc., to Brian Owens, Commission, Georgia Department of Corrections, 8 June 2011.

<sup>196</sup> Roy Blankenship was first sentenced to death in 1980 for a murder committed in 1978. His death sentence was overturned twice by the Georgia Supreme Court, but he was re-sentenced to death following each of these reversals, his final death sentence being handed down in 1986.

<sup>197</sup> E.g. "Mr Blankenship was seen to lunge from side to side, grimace in pain, and mouth words, and his eyes remained open throughout the execution process". Letter to Brian Owens, Commission, Georgia Department of Corrections, 24 June 2011; Letter to Hon. Carol W. Hunstein, Chief Justice, Supreme Court of Georgia, 24 June 2011.

<sup>198</sup> Affidavit of David B. Waisel, MD, 28 June 2011, *op. cit.*

<sup>199</sup> Letter from Samuel S. Olen, Attorney General of Georgia, to Honorable Carol W. Hunstein, Chief Justice, Supreme Court of Georgia, 27 June 2011.

<sup>200</sup> Requests for death warrants. Memorandum to Governor Steven L. Beshear, from J. Michael Brown, Secretary, Justice and Public Safety Cabinet, 25 August 2010, [http://governor.ky.gov/NR/rdonlyres/C5C50547-4F25-4343-A1A2-ED795B54EB31/0/20100825\\_LetterFromSecBrown.pdf](http://governor.ky.gov/NR/rdonlyres/C5C50547-4F25-4343-A1A2-ED795B54EB31/0/20100825_LetterFromSecBrown.pdf)

<sup>201</sup> Governor Beshear signs death warrant. Press release, Governor's communications office, 25 August 2010, <http://governor.ky.gov/pressrelease.htm?postinguid={56de643c-652f-48cd-b12b-87bc3a076e99}>

<sup>202</sup> Governor Beshear signs death warrant, Office of Kentucky Governor, news release, 25 August 2010, <http://www.governor.ky.gov/pressrelease.htm?PostingUID={56DE643C-652F-48CD-B12B-87BC3A076E99}>

<sup>203</sup> Memorandum re: Search for sodium thiopental. To: Ladonna Thompson, Commissioner, Department of Corrections, From: J. Michael Brown, Secretary, Justice and Public Safety Cabinet, 3 February 2011.

<sup>204</sup> See <http://www.correcthealth.org/>

<sup>205</sup> Memorandum re: Sodium thiopental. To: J. Michael Brown, Secretary, Justice and Public Safety Cabinet. From: Ladonna Thompson, Commissioner, Department of Corrections, 18 February 2011. The payment was placed through a separate company, Wilson's Pharmacy, in Georgia.

<sup>206</sup> The bottle's label indicated that the sodium thiopental was manufactured by Sandoz a company in Austria and marketed by Link Pharmaceuticals in the UK. *Bowling, Baze, Moore and Wilson v. Kentucky Department of Corrections and Commonwealth of Kentucky*, CR 65.06 motion to compel compliance

with injunction prohibiting Corrections from taking steps to implement its execution regulations/protocol. Commonwealth of Kentucky Franklin Circuit Court, 23 February 2011 (with attachments).

<sup>207</sup> Kentucky State Penitentiary. Inventory as of February 14, 2011.

<sup>208</sup> Memorandum re: Sodium thiopental. To: J. Michael Brown, Secretary, Justice and Public Safety Cabinet. From: Ladonna Thompson, Commissioner, Department of Corrections, 18 February 2011.

<sup>209</sup> Letter from Commonwealth of Kentucky Department of Public Advocacy, 22 March 2011.

<sup>210</sup> TN turns over supply of lethal injection drug. Associated Press, 2 April 2011. KY hands over its lethal injection drug to DEA. Associated Press, 1 April 2011.

<sup>211</sup> South Carolina requests DEA review of its execution drugs. Wall Street Journal, 15 April 2011.

<sup>212</sup> Letter, "Subject: Thiopental Injection purchase", to US Customs Department from John P. Solomon, Director of Health Services, South Carolina Department of Corrections, 29 October 2010 ("The SCDC has been unable to locate this drug in the United States. In order to carry out its statutory obligation in capital punishment cases, SCDC has purchased Thiopental from a provider in Great Britain").

<sup>213</sup> Commonwealth of Kentucky Department of Public Advocacy, Letter to US Attorney General Eric Holder, 22 March 2011. A PBS interview with the President of CorrectHealth is available at <http://www.pbs.org/now/shows/228/musso-execution.mp3>

<sup>214</sup> For a copy of the complaint, filed by the Southern Center for Human Rights, see [http://www.schr.org/files/post/Musso%20Complaint\\_Final%20Without%20Attachments\\_0.pdf](http://www.schr.org/files/post/Musso%20Complaint_Final%20Without%20Attachments_0.pdf)

<sup>215</sup> Email to Kayem Pharmaceutical from Steve Urosevich, Nebraska Department of Corrections. Re: Thiopental Sodium, 11 November 2010, 6.37pm.

<sup>216</sup> Letter from Todd Cato, District Director, Food and Drug Administration, Southwest Import District, Dallas, Texas, 7 January 2011.

<sup>217</sup> NDCS prepared to carry out court-ordered executions. News release, Office of Director Robert P. Houston, Nebraska Department of Correctional Services, 21 January 2011, <http://www.corrections.nebraska.gov/pdf/archivednews/NDCS%20Prepared%20to%20Carry%20Out%20Court-Ordered%20Executions.pdf>. The press release stated that testing by an independent laboratory confirmed a sample of the batch to be sodium thiopental.

<sup>218</sup> Notes of discussion with Bob Houston, Director Nebraska Department of Correction regarding acquisition of sodium thiopental, 8 February 2011.

<sup>219</sup> NDCS prepared to carry out court-ordered executions. NDCS News release, 21 January 2011, op. cit

<sup>220</sup> State requests execution date for Moore, Nebraska Attorney General news release, 24 January 2011, [http://www.ago.ne.gov/news/pressreleases/012411\\_AG\\_Bruning\\_Execution\\_Date\\_Requested.pdf](http://www.ago.ne.gov/news/pressreleases/012411_AG_Bruning_Execution_Date_Requested.pdf)

<sup>221</sup> Letter from Alan E. Peterson to Attorney General Holder, 28 March 2011.

<sup>222</sup> State obtains permit to import lethal injection drug. Lincoln Journal Star, 29 June 2011. Nebraska seeking execution drug. Omaha World-Herald, 30 June 2011.

<sup>223</sup> See Amnesty International update, 17 September 2010, <http://www.amnesty.org/en/library/info/AMR51/086/2010/en>

<sup>224</sup> *Moeller v. Weber*, Amended complaint. In the US District Court for the District of South Dakota, 16 March 2011.

<sup>225</sup> South Dakota acquires lethal injection drug, News release, 6 April 2011, <http://atg.sd.gov/News/NewsReleases/NewsReleasesView/tabid/441/itemID/2644/moduleID/597/Default.a>

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<sup>226</sup> *Moeller v Weber*, Defendant's motion to dismiss or for summary judgment and supporting brief, In the US District Court for the District of South Dakota, 20 June 2011. Affidavit of Warden Douglas Weber; Kayem invoice; FDA letter; filed as exhibits 4, 16 and 17.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Cook v. Brewer*, Defendants'-Appellees' response to petition for panel rehearing and suggestion for rehearing en banc, In the US Court of Appeals for the Ninth Circuit, 21 March 2011.

<sup>229</sup> Affidavit of Carroll Pickett, 25 January 2011.

<sup>230</sup> Affidavit by Dale A. Baich, 25 January 2011.

<sup>231</sup> Affidavit of Randy Loney, 24 January 2011.

<sup>232</sup> *Cook v. Brewer*, Defendants'-Appellees' answering brief. In the US Court of Appeals for the Ninth Circuit, 31 March 2011.

<sup>233</sup> *Cook v. Brewer*, US Court of Appeals for the Ninth Circuit, 16 March 2011.

<sup>234</sup> For example, see 'Pentobarbital use in the United States: Survey results'. Lundbeck's report on the use of pentobarbital by healthcare professionals in the USA, available at [www.lundbeck.com](http://www.lundbeck.com)

<sup>235</sup> Export Control (Amendment) (No 3) Order 2010, coming into force 30 November 2010.

<sup>236</sup> See US Department of State, at <http://www.state.gov/g/drl/hr/index.htm>

<sup>237</sup> *Baze v. Rees*, Brief for the United States as amicus curiae supporting respondents, In the US Supreme Court, December 2007.

<sup>238</sup> Descriptions of executions regularly illustrate the point. For example, local media reports of the execution in Alabama on 31 March 2011 of William Boyd included the following: "After Boyd closed his eyes, a correctional officer came over to him and said, 'Boyd, Boyd,' pinched his arm, and brushed his left eye brow to check to make sure Boyd was unconscious before the lethal injection started. The large bald man's breathing slowed and eventually was undetectable." Without the word "lethal", it would be easy to mistake such descriptions as depicting some sort of therapeutic surgical intervention. 'William Glen Boyd executed on Alabama's death row for 1986 murders of Anniston couple', Birmingham News, 31 March 2011.

<sup>239</sup> *Broom v. Strickland*. Affidavit of Romell Broom, In the US District Court for the Southern District of Ohio, 17 September 2009.

<sup>240</sup> *Broom v. Strickland*, Defendants' memorandum in reply to Broom's memorandum in opposition to defendants' motion to dismiss. In the US District Court for the Southern District of Ohio, 23 November 2009.

<sup>241</sup> In 1999, for example, David Long, a Texas death row inmate with a long history of mental illness, attempted suicide by drug overdose two days before his scheduled execution. He was treated in intensive care in hospital, before being flown back to the Texas death chamber, accompanied by a full medical team to ensure his safe arrival, and executed. USA: Failing the future. Death penalty developments, March 1998 – March 2000. April 2000, <http://www.amnesty.org/en/library/info/AMR51/003/2000/en>

<sup>242</sup> See also USA: Cruel, inhuman, degrading: 40th execution of the year approaches, 24 September 2010, <http://www.amnesty.org/en/library/info/AMR51/091/2010/en>

<sup>243</sup> See, for example, <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions>

<sup>244</sup> *Brown v. Beck*, Order. US District Court for the Eastern District of North Carolina, 7 April 2006.

<sup>245</sup> Letter, dated 31 March 2010, available at <http://www.deathpenaltyinfo.org/files/Hospira%27s%20letter%20saying%20does%27t%20want%20its%20chemicals%20used%20for%20executions.pdf>

<sup>246</sup> Letter from Ellen M. Heslen, General Counsel to the Governor of Kentucky, to Juliana Reed, Vice President, Government Affairs, Hospira, Lake Forest, Illinois, 23 August 2010, [http://governor.ky.gov/NR/rdonlyres/38824AF7-C3A4-4F0D-94B9-C87FEF2AFCC2/0/20100825\\_CorrespondenceToHospira.pdf](http://governor.ky.gov/NR/rdonlyres/38824AF7-C3A4-4F0D-94B9-C87FEF2AFCC2/0/20100825_CorrespondenceToHospira.pdf)

<sup>247</sup> Hospira statement regarding Pentothal™ (sodium thiopental) market exit, Hospira news release, 21 January 2011, <http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle&ID=1518610&highlight>

<sup>248</sup> Letter, dated 25 January 2011, available at <http://www.deathpenaltyinfo.org/documents/LundbeckLethInj.pdf>

<sup>249</sup> Lundbeck U-turn in execution drug row. Copenhagen Post, 8 June 2011, <http://www.cphpost.dk/business/business/119-business/51774-lundbeck-u-turn-in-execution-drug-row.html>. This article is also available on the official website of the government of Denmark, <http://www.denmark.dk/en/servicemenu/News/BusinessNews/LundbeckUturnInExecutionDrugRow>. See also Lundbeck won't pull controversial drug, Wall Street Journal, 29 June 2011.

<sup>250</sup> Kayem Pharmaceutical Pvt. Ltd., Special announcement, <http://www.kayempharma.com/Announcement.html>

<sup>251</sup> *West and Irick v. Ray*, Order granting declaratory judgment, In the Chancery Court of Davidson County, Tennessee, 22 November 2010.

<sup>252</sup> *West and Irick v. Schofield*, Order, In the Chancery Court of Davidson County, Tennessee, 2 March 2011.

<sup>253</sup> *West v. Ray*, Order granting declaratory judgment, In the Chancery Court of Davidson County, Tennessee, 22 November 2010.

<sup>254</sup> *Morales v. Cate*, Amended answer to fourth amended complaint. In the US District Court for the Northern District of California, 21 March 2011.

<sup>255</sup> Norman S. Fletcher, 'Stevens leaving legacy of judicial care'. Atlanta Journal Constitution, 21 June 2010. The author is a former Chief Justice of the Georgia Supreme Court.

<sup>256</sup> Extraneous factors in judicial decisions. Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso. Proceedings of the National Academy of Sciences, 2011 (forthcoming), advance online publication at <http://solum.typepad.com/files/danziger-levav-avnaim-pnas-2011.pdf>

<sup>257</sup> Nor is the organization suggesting that US federal judges lack independence or that the system of appointing them is undemocratic. See USA : The experiment that failed: A reflection on 30 years of executions, 16 January 2007, <http://www.amnesty.org/en/library/info/AMR51/011/2007/en>

<sup>258</sup> *Morales v. Tilton*, Memorandum of intended decision; request for response from defendants, US District Court for the Northern District of California, 15 December 2006.

<sup>259</sup> In the 2007 decision to reinstate the death sentence and in the 2010 decision to overturn the stay, the five in the majority were Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy. The four in the minority in 2007 were Justices Stevens, Souter, Ginsburg and Breyer and in 2010 were Justices Ginsburg, Breyer, Sotomayor, and Kagan.

<sup>260</sup> See Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/086/2009/en>

<sup>261</sup> The four were Justices Stevens, Ginsburg, Breyer and Sotomayor. This was Justice Sotomayor's first vote in a death penalty case, having been nominated as an Associate Justice by President Obama in May 2009 and having taken her seat on the Court on 8 August.

<sup>262</sup> *Uttecht v. Brown*. Brief for the United States as amicus curiae supporting petitioner. In the US Supreme Court, February 2007.

<sup>263</sup> *Brown v. Vail*, US Court of Appeals for the Ninth Circuit, 7 September 2010, Judge Reinhardt dissenting.

<sup>264</sup> Report of the Council to the Membership of The American Law Institute on the matter of the death penalty, 15 April 2009.

<sup>265</sup> See Justice Stevens: An open mind on a changed court, NPR, 4 October 2010, <http://www.npr.org/templates/story/story.php?storyId=130198344>.

<sup>266</sup> *Callins v. Collins*, op. cit., Justice Blackmun dissenting.

<sup>267</sup> Justice Powell was asked in 1991 by his biographer if he would change his vote in any case. He said, "Yes, *McCleskey v. Kemp*." (1987, on racial discrimination and the death penalty, see *Death by discrimination - the continuing role of race in capital cases*, April 2003, <http://www.amnesty.org/en/library/info/AMR51/046/2003/en>). He went on to say, "I would vote the other way in any capital case." Even in *Furman v. Georgia*, his biographer asked, "Yes" and "I have come to think that capital punishment should be abolished." See J. Jeffries, *Justice Lewis F. Powell, Jr.*, page 451 (Scribners 1994).

<sup>268</sup> E.g. "This case is not about whether the death penalty makes sense morally or as a matter of policy: the former inquiry is a matter not of law but of conscience; the latter is a question not for the judiciary but for the legislature and the voters", *Morales v. Tilton*, December 2006. Also, *Morales and Brown v. Cate et al*, Order re partial motion to dismiss, 10 December 2010; and *Morales and Brown v. Cate et al*, Order following remand, 28 September 2010.

<sup>269</sup> Nobel lecture, Oslo, 10 December 2009.

<sup>270</sup> US human rights commitments and pledges, US Department of State, 27 April 2009.

<sup>271</sup> *Atkins v. Virginia* (2002), excluding people with 'mental retardation'; *Roper v. Simmons* (2005), excluding people who were under 18 years old at the time of the crime; *Kennedy v. Louisiana* (2008), excluding the death penalty for the non-homicidal rape of a child.

<sup>272</sup> From 1977 to 1998, for example, there were 36 executive commutations on humanitarian grounds. From 1999 to June 2011 there were 232. Taking out the blanket or multiple commutations implemented by governors in New Mexico (1986), Ohio (1991), New Jersey (2007), and Illinois (2003 and 2011), the figure for 1977 to 1998 is 23 and the figure for 1999 to 2011 is 38. For full list of such commutations, see <http://www.deathpenaltyinfo.org/clemency>

<sup>273</sup> President William J. Clinton, Remarks on signing the Anti-terrorism and Effective Death Penalty Act of 1996, 24 April 1996.

<sup>274</sup> *Woodford v. Visciotti*, 537 U.S. 19 (2002).

<sup>275</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>276</sup> See *Knowles v. Mirzayance*, US Supreme Court (2009).

<sup>277</sup> *Williams v. Norris*, Opinion, US District Court, Eastern District of Arkansas, 11 April 2007.

<sup>278</sup> *Williams v. Norris*, US Court of Appeals for the Eighth Circuit, 17 August 2009.

<sup>279</sup> *Williams v. Hobbs*, 6 December 2010, Justice Sotomayor dissenting from denial of *certiorari*, joined

by Justice Ginsburg.

<sup>280</sup> See USA: Aiming for execution, denying fair trial: Government wants death penalty option at upcoming military commission trials in Guantánamo, 3 June 2011, <http://www.amnesty.org/en/library/info/AMR51/049/2011/en>

<sup>281</sup> At the time of the 2009 crime, six types of murder were punishable by the death penalty in New Hampshire: murder of a law enforcement officer or judge (in connection with their official duty); murder for hire; murder committed as part of a rape; or kidnapping; or certain drug offences; and murder committed by an individual already serving a sentence of life imprisonment without the possibility of parole. New Hampshire Criminal Code, 630:1.

<sup>282</sup> Gribble deserves death penalty. Letter to the Editor, Concord Monitor, 24 March 2011.

<sup>283</sup> Governor Lynch Statement on Signing of HB 147, 28 June 2011, <http://www.governor.nh.gov/media/news/2011/062811-hb147.htm>

<sup>284</sup> See Amnesty International Urgent Action update, 23 May 2000, <http://www.amnesty.org/en/library/info/AMR51/077/2000/en>

<sup>285</sup> Governor Rell vetoes HB6578, An act concerning the death penalty for a capital felony, 5 June 2009, <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204>

<sup>286</sup> Governor Rell had also cited him in her veto statement in 2009. One of the defendants in this high-profile murder case is on death row in Connecticut and another is facing trial in September 2011. See, for example, Home invasion case against influences Connecticut policy as other victims' relatives seek to be heard, Associated Press, 30 May 2011; Her plea counted less, New Haven Independent, 20 May 2011; Senators change minds on death penalty, The Day, 12 May 2011, <http://www.theday.com/article/20110512/NWS12/305129297>

<sup>287</sup> Senate Bill No. 2674.

<sup>288</sup> Letter to the Editor, Courier Post, 12 April 2011, <http://www.courierpostonline.com/apps/pbcs.dll/article?AID=2011104120306>. Megan Kanka was aged seven when she was killed in New Jersey. The man convicted of her murder, Jesse Timmendequas, is serving life imprisonment without the possibility of parole after his death sentence was commuted by Governor Jon Corzine in December 2007 as part of abolishing the death penalty in the state.

<sup>289</sup> James P. Gray, Essay: Facing facts on the death penalty. Special Issue of the Loyola of Los Angeles Law Review, Volume 44, pages 255-264. James P. Gray is a retired trial court judge of the Orange County Superior Court (1983–2009) and a former federal prosecutor in Los Angeles.

<sup>290</sup> HB 147, [http://www.gencourt.state.nh.us/house/members/m\\_billtext.aspx?billnumber=HB0147.html](http://www.gencourt.state.nh.us/house/members/m_billtext.aspx?billnumber=HB0147.html)

<sup>291</sup> UN Human Rights Committee, General Comment 14, 1984.

<sup>292</sup> Interventions by other governments on the death penalty in the USA might be general or specific. On 28 June 2011, for example, the Government of Mexico filed an *amicus curiae* brief in the US Supreme Court seeking a stay of execution for Mexican national, Humberto Leal García, denied his consular rights after arrest, and scheduled to be put to death in Texas on 7 July 2011, in violation of international law and an order of the International Court of Justice. See Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/052/2011/en>

<sup>293</sup> Letter from Attorney General Eric Holder to James McPherson, Executive Director, National Association of Attorneys General, 4 March 2011.