

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALIZA COVER,

Petitioner-Respondent-
Cross-Appellant,

vs.

IDAHO BOARD OF CORRECTION, IDAHO
DEPARTMENT OF CORRECTION, and
JEFFREY R. RAY, Public Information
Officer,

Respondents-Appellants-
Cross-Respondents.

Supreme Court No. 47004-2019

Ada County District Court
CV01-18-03877

**MOTION OF IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR
LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ALIZA
COVER**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the
County of Ada, Hon. Lynn Norton

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Pursuant to Rule 8 of the Idaho Rules of Appellate Procedure, the Idaho Association of Criminal Defense Lawyers (“IACDL”) respectfully requests leave to submit a brief as *amicus curiae* in support of Petitioner Aliza Cover. IACDL does not seek to participate in oral argument in this matter.

IACDL has contacted counsel for all parties, none of whom object to the filing of this brief.

A copy of IACDL’s proposed brief is attached. IACDL has a specific and unique interest in this case that is not fully represented by the parties or other *amici* and that IACDL believes may be helpful to the Court in considering the issues presented.

IACDL is a non-profit voluntary organization of lawyers and the only organization of lawyers in the state of Idaho whose members work exclusively on the criminal defense side of the justice system. Membership in the IACDL includes public defenders from around the state, in addition to private counsel, Federal Public Defenders, and defense investigators. The organization’s focus continues to be the advancement of the practice of criminal defense, including as it relates to capital punishment.

IACDL has members that represent capital defendants who may face execution by lethal injection. Those defense lawyers have a unique interest in obtaining information about the protocols and specific details of Idaho’s methods of execution because such information can bear directly on the constitutionality of the proposed sentence. Access to such information is critical to the criminal defense bar in order to ensure that its clients are adequately represented and counseled. IACDL’s proposed *amicus curiae* brief details these specific interests and explains

why the relief sought by Professor Cover will aid in ensuring that the constitutional rights of capital defendants are protected.

For these reasons, IACDL respectfully requests that leave to file its brief be granted.

RESPECTFULLY SUBMITTED this 28th day of February 2020.

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ATTACHMENT

Proposed Brief of Idaho Association of Criminal Defense Lawyers
as *Amicus Curiae* in Support of Petitioner Aliza Cover

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Idaho Association of Criminal Defense Lawyers (“IACDL”) is a non-profit voluntary organization of lawyers, and the only organization of lawyers in the state of Idaho, whose members work exclusively in criminal defense. IACDL’s objective is to promote the integrity and fairness of the judicial system:

The objective and purpose of the Idaho Association of Criminal Defense Lawyers is to promote study and research in the field of criminal law and related subjects; to disseminate by lecture, seminars, and publications the knowledge of the law relating to criminal defense practice and procedure; to promote the proper administration of justice, to foster, maintain, and encourage the integrity and independence of the judicial system and the expertise of the defense lawyer in criminal cases; to hold periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby to protect individual rights and improve the criminal law, its practices and procedures.¹

Membership in the IACDL includes public defenders from around the state, in addition to private counsel, Federal Public Defenders, and defense investigators. IACDL focuses on the advancement of the practice of criminal defense, including as it relates to capital punishment. IACDL has a specific and unique interest in this case that differs from the parties and other amici due to its members’ representation of capital defendants who may face execution by lethal injection and the need for criminal defense attorneys and criminal defendants to have access to Idaho’s lethal injection drug protocols. For these reasons, the IACDL has a particular interest in the outcome of the litigation.

¹ See <http://www.idacdl.org/> (last visited Feb. 20, 2020).

STATEMENT OF THE CASE

Associate Professor Aliza Cover of the University of the Idaho School of Law requested disclosure of public records regarding Idaho's lethal injection protocol in conjunction with scholarly research about Idaho's historic lethal injection protocol and the protocol it intends to implement in the future. *See* Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records ("Petition") (R, pp. 16–27.). The disclosures would have included Idaho's source of lethal injection drugs, the identification of the manufacturers and/or distributors, and lot numbers and expirations dates of the drugs themselves, as well as purchase orders, receipts, source paperwork, and communications with suppliers. Respondents denied her request for this information, claiming that certain records, if disclosed, could jeopardize the ability of the department to carry out executions. Professor Cover then petitioned the court for a writ of mandamus to compel disclosure under the Idaho Public Records Act. *See* Findings of Fact, Conclusions of Law ("Findings"), at 1 (R, p. 1824.)

After a trial, the district court ordered the disclosure of the "overwhelming majority" of the withheld public records. (R, p. 1896.) For instance, it ruled that IDOC must disclose a record identifying the supplier of the drugs used in the execution of Richard Leavitt in 2012. (R, pp. 1887-1888.) But the court also permitted IDOC to withhold some records and information, including a document that would have identified the supplier of the drugs in the execution of Paul Rhoades in 2011. (R, p. 1890.) And it allowed IDOC to withhold a "cash log" and other records related to medical supplies used in executions. (R, pp. 1833-34, 1881.)

ARGUMENT

The IACDL has a particular interest in ensuring transparency of lethal injection procedures for the benefit of condemned prisoners, the judiciary, and the public. Such transparency is a necessary component of the job of defense counsel, who must inform clients, juries, and the courts, as honestly as possible, of the facts—even if that entails how a person may be executed. Without necessary information about the lethal injection protocol, attorneys tasked with representation in the most important of cases—those involving death—cannot fulfill their duties to their clients or advise the public at large about those procedures. Worse, the public at large, who composes the jury pool in capital cases, will have no knowledge of what a death sentence entails.

Lethal injection is a more complex method of execution than hanging, firing squad, gas chamber, or electrocution, and the drugs used to effectuate the execution affect the condemned prisoner's experience of dying to much greater extent than other means. The type of rope, model of gun, or bullet casing has little effect on a prisoner's experience of dying, but the type or dose of sedative can make the difference between a relatively painless, arguably humane death and an excruciating experience akin to death by fire. Given the complexity and sensitivity of lethal injection and the need for precision in its administration, it is unsurprising that executions by lethal injection are more likely to be botched than any other method. In a study of executions in the United States between 1900 and 2010, researchers found that 7.12% of lethal injections were botched, compared to an average of 3% for other methods. Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. CRIM. L. & CRIMINOLOGY 443, 455 (2017).

Until recently, states that followed a standard lethal injection protocol used a sequence of three drugs: (1) sodium thiopental (sedative); (2) pancuronium bromide (paralytic); and (3) potassium chloride (toxin). *See* Mary D. Fan, *The Supply-Side Attack on Lethal Injection & The Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 438 (2015). Following the Supreme Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), affirming the constitutionality of lethal injection, however, the European Union in 2011 banned the export of eight drugs for use in lethal injection, including two of the three drugs used in the standard three-drug protocol. *See* James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L. J. 1215, 1242 (2015).

The waning availability of traditional lethal injection drugs has caused states to resort to new—and often untested—lethal injection protocols. As states experiment with these unfamiliar and potentially unsafe protocols, they frequently employ unregulated and sometimes illegal methods of compounding or obtaining the necessary drugs, eliminating any assurance of quality control or safety standard compliance. *See* Heather Booth, *Better the Devil You Know*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 395, 410–13 (2018). Combining questionable drugs with unreliable protocols makes for a dangerous cocktail that increases the risk of serious harm to individuals facing lethal injection. A criminal defense bar lacking knowledge of these drugs, protocols, and prospective harms can do nothing to inform their clients and the public of the repercussions of capital charges.

Unsurprisingly, and of significant public concern, botched executions utilizing untested protocols and unregulated drugs have become common. *See* Mennemeier, *supra* at 455–57. In 2014 and 2015 alone, new protocols led to five botched executions, four of which involved a

controversial replacement sedative, midazolam. Fan, *supra* at 443. Dennis McGuire took fifteen minutes to die while appearing to struggle and gasp; Clayton Lockett writhed, twitched, and mumbled until his final breath; Joseph Wood gasped and struggled for an hour and died two hours later. *Id.* at 443–44; Mennemeier, *supra* at 457. In 2015, Oklahoma executed Charles Warner using a protocol involving midazolam. Mennemeier, *supra* at 457. During the forty-three minutes it took Warner to die, he told executioners “[m]y body is on fire . . . [i]t feels like acid . . . no one should go through this.” *Id.* (emphasis added).

The efficacy of the drugs used in these shaky new protocols bears directly on the protocol’s constitutionality. Factors such as the type of drugs, the dosage, the expiration date, evidence that the drugs were properly manufactured and stored, and the combination of drugs all contribute to the execution’s efficacy and the degree of pain inflicted on the condemned prisoner. *Id.* at 477. But because of the lack of transparency in the lethal injection process, little information can be gleaned by the public and the defense bar about these protocols to assess whether they comply with a prisoner’s constitutional rights.

Given the growing controversy surrounding lethal injection drug manufacturers, the often-dubious sources of the lethal injection drugs, and general disorganization of lethal injection drug protocol development, states are now withholding more information about their protocols than ever. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 95–96 (2007).

Without insight into the drug protocol, and by extension the method of execution, defense attorneys are unable to adequately represent and counsel their clients. This lack of transparency in turn imposes an additional burden on the criminal justice system, forcing lawyers to resort to

lengthy and complex discovery battles and emergency motions to stay executions to properly assess the constitutionality of protocols disclosed at the last minute. But most importantly, this lack of transparency poisons the heart of the Eighth Amendment inquiry. The Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (alteration in original) (citation omitted). When states obscure the details and nature of lethal injection from the public, our society’s standards of decency cannot evolve, leaving our society’s notions of cruel and unusual punishment in arrested development—an outcome contrary to the Eighth Amendment’s core purpose. Accordingly, the IACDL requests disclosure of all material details to the execution of a person in Idaho.

I. TRANSPARENCY IS FUNDAMENTAL TO CAPITAL DEFENSE ATTORNEYS’ ABILITIES TO EFFECTIVELY REPRESENT THEIR CLIENTS.

Details of Idaho’s intended lethal injection protocol is vital to defense attorneys’ ability both to effectively evaluate the constitutionality of their clients’ impending executions and to counsel their clients regarding the execution process. Due to the significant variations in duration of drug action, side effects, and overall effectiveness of the drugs, shielding lethal injection protocols from public disclosure is akin to hiding the method of execution. *See Mennemeier, supra* at 474–75. Although states may disclose this information at the eleventh hour, delayed disclosure leaves insufficient time to develop a robust challenge to the drugs and protocol and properly assert an Eighth Amendment challenge. *Fan, supra* at 450. Complete nondisclosure of the protocol robs condemned prisoners of the ability to do so because their

attorneys cannot provide relevant information without transparency of the methods of execution in Idaho.

A. Nondisclosure of Lethal Injection Protocols Impairs Defense Attorneys' Abilities to Challenge the Constitutionality of the Execution Method.

The Eighth Amendment prohibits “punishments that involve the unnecessary and wanton infliction of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society.” *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004). To successfully challenge a state’s method of execution under the Eighth Amendment, a condemned prisoner must make two showings. First, he must show that the method presents a “substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.” *Rhoades v. Reinke*, 830 F. Supp. 2d 1046, 1052 (D. Idaho 2011) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 & n.9 (1994)). “[T]he conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers.” *Id.* at 1051 (emphasis omitted) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

Second, the condemned prisoner must proffer alternatives that “effectively address a ‘substantial risk of serious harm.’ To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.” *Id.* at 1069 (quoting *Baze*, 553 U.S. at 49–51). The State’s refusal to change its method in the face of a viable alternative then constitutes cruel and unusual punishment under the Eighth Amendment.” *See id.*

To engage in either prong of the Eighth Amendment analysis, attorneys representing condemned inmates must have sufficient knowledge of the drugs involved and the planned

protocol. Otherwise, they cannot assess whether the method presents a substantial risk of serious harm because they do not know the drugs involved or the method of administration. Nor can they present viable alternatives to a protocol cloaked under a veil of confidentiality. Miniscule variations in a lethal injection protocol can be dispositive of a condemned prisoner's Eighth Amendment challenge:

[I]f an inmate is not properly anesthetized by the sodium pentothal at the start of the execution, he will experience significant pain and suffering from the subsequent administration of the pancuronium bromide and potassium chloride. If the sodium pentothal is administered properly, there is no risk of pain during the execution. Therefore, the manner in which the sodium pentothal is administered is of critical importance when weighing a State's three-drug lethal injection protocol against the Eighth Amendment.

Rhoades v. Reinke, 830 F. Supp. 2d 1046, 1052 (D. Idaho 2011).

The Eighth Amendment inquiry is highly-fact intensive. Without full disclosure of the facts surrounding lethal injection protocols, defense attorneys cannot properly assess and present viable Eighth Amendment challenges. Instead, any such challenges will be rerouted to the end of post-conviction litigation. Promoting a transparent lethal injection protocol will better serve the courts and counsel by ensuring understanding of the law from the start.

Granting all capital defense counsel access to Idaho's lethal injection protocol ensures that they are provided the means to raise the necessary claim on their client's behalf before having to resort to methods that could cause perceived delays to the post-conviction judicial system. Providing condemned prisoners with lethal injection protocols will help ensure that capital defense attorneys in Idaho have fully complied with their ethical and constitutional duties to do all they can to ensure their clients' sentences are carried out in a constitutional manner.

B. Nondisclosure of Lethal Injection Protocols Robs Criminal Defense Attorneys of Their Ability to Effectively Counsel Their Clients.

The role of a lawyer is not just one of advocate, but also one of counselor. Criminal defense attorneys carry a unique burden that few others must bear—they must try to persuade jurors not to execute their clients, and if they cannot do so, they must counsel their clients about their impending experience of death. Counsel should be able to inform their clients that although the condemned may suffer, they will suffer as little as possible; that while they will be deprived of their life as punishment for their crimes, they will be treated with dignity and respect in their final moments; that their execution will be carried out in a manner consistent with the strictures of the Constitution and the moral standards of a just and humane society; and that society has done all it can to ensure this is so. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality)). When the State of Idaho shields lethal injection protocols, criminal defense lawyers are unable to make these assurances to their clients and unable to counsel them in arguably their darkest hour. Nor can the public be assured that the condemned received effective assistance of counsel.

II. TRANSPARENCY WILL ALLEVIATE THE BURDEN ON THE JUDICIARY TO REFEREE ACCESS-TO-INFORMATION DISPUTES.

When lethal injection protocols are shielded from public disclosure, criminal defense attorneys must resort to litigation to gain access to the information based on constitutional obligations to their clients. This places a burden on the judiciary that otherwise would not exist if lethal injection protocols were publicly available. Idaho's continuing reliance on the Public Records Act as justification for nondisclosure of lethal injection protocols forces defense attorneys into litigation in those cases involving the ultimate penalty, burdening the courts with emergency motions and discovery disputes that could otherwise be avoided.

Restricted access to lethal injection protocols results in many sentencing-phase and pre-execution discovery disputes, emergency motions, subsequent motions to reconsider, and lengthy appeals. These disputes expose courts to extensive briefing and voluminous evidentiary records; courts then must hold hearings to weigh the arguments and evidence and determine whether access is appropriate. *See, e.g.,* Liam J. Montgomery, *The Unrealized Promise of Section 1983 Method-of-Execution Challenges*, 94 VA. L. REV. 1987, 2014–15 (2008); The Honorable Jeremy Fogel, *In the Eye of the Storm: A Judge’s Experience in Lethal-Injection Litigation*, 35 FORDHAM URBAN L. J. 735, 742 (2008); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation & Lethal Injection & What it Says About Us*, 63 OHIO ST. L. J. 63, 102–03 (2002). Access disputes unnecessarily burden trial courts, appellate courts, defense attorneys, prosecutors, the Idaho Board of Correction, the Idaho Department of Correction, and other state agencies with responsibility for lethal injection protocols when resources could be better spent on the significant constitutional issues raised by putting a person to death.

Additionally, courts, including the United States Supreme Court, have recently criticized attorneys representing death-sentenced prisoners of waiting until the eleventh hour to bring method of execution challenges. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1133–34 (2019) (noting that the state’s “interests have been frustrated” by the imposition of delays when the defendant “committed his crimes more than two decades ago,” and stating that “[t]he people of [the State], the surviving victims of [the defendant’s] crimes, and others like them deserve better”). A lack of transparency about the state’s method of execution only adds to that delay. A condemned prisoner has a constitutional right to ensure that his execution will comply with the

Eighth Amendment. If the details of how he will be executed—including the nature and source of the drugs to be used—are hidden, then time-consuming litigation involving stays and discovery requests will be the consequence. Requiring transparency about the state’s method of execution would assist defense counsel and, ultimately, the courts in resolving such challenges more expeditiously.

III. TRANSPARENCY PROMOTES AN INFORMED SOCIETY AND SHAPES EVOLVING STANDARDS OF DECENCY.

The Supreme Court requires “accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.” *Gregg v. Georgia*, 428 U.S. at 190. While those with conscious scruples will be excused from jury service, the duty of serving as members of a jury, and the notion that society itself defines the standard by which we measure the constitutionality of methods of execution, requires that prospective jury members have access to the information about the means execution in order to decide whether they can serve as a juror and vote for death. Thus, it is in society’s best interest for the citizens entrusted with these decisions to be fully informed about the process of execution. Public disclosure of all aspects of lethal injection protocols, including drug sources, allows for informed decision-making by judges, juries, and the public at large about whether execution is proportional to the offense and whether the method of execution comports with society’s standards of morality and decency.

The Eighth Amendment’s protection against excessive or cruel and unusual punishments flows from the basic “precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U.S. 349, 367 (1910). “Whether this requirement has been fulfilled is determined not by the standards when the Eighth

Amendment was adopted in 1791 but by the norms that currently prevail.” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (citation omitted). The Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* (citation omitted).

“This is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Id.* See also *State v. Creech*, 670 P.2d 463, 482 (Idaho 1983) (“[I]mposition of the death penalty on a defendant must find validation in the responsible moral and social values of the community that condemns him. An essential medium of those values is the jury.”). In this analysis, transparency as to the lethal injection protocol is material to “a meaningful opportunity to present a complete defense” during the penalty phase of any capital case. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted).

Evolving standards of decency must “embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.” *Kennedy*, 554 U.S. at 420. Without public information, the State’s methods of lethal injection could substantially raise the risk of inflicting unnecessary pain without public understanding of the protocols’ quality and safety, their reliability, and how often they are tested. Evolving standards of decency led society away from less humane methods of execution. See *Wood v. Ryan*, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, J., dissenting), *judgment vacated*, 573 U.S. 976 (2014). How else could citizens decide what facts “might serve as a basis for a sentence less than death[?]” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Individual capital juries need a full understanding of the efficacy and effects of lethal injection drugs to evaluate whether the death penalty is proportional to the offense. *See Weems*, 217 U.S. at 367. These jurors may be asked to make decide upon lethal injection in the context of “future dangerousness,” which is an inherent part of “the sentencing phase proceeding.” *Riggins v. Nevada*, 504 U.S. 127, 144 (1992). An informed jury pool benefits both the defense and the prosecution as they endeavor to decide whether death is appropriate given the effects of lethal injection. Thus, public disclosure of all details surrounding lethal injection protocols benefits society by enabling it to examine evolving standards of decency and ensures that state-sanctioned methods of lethal punishment comport with the strictures of the Eighth Amendment and the values we share as a society.

CONCLUSION

For the foregoing reasons, IACDL respectfully requests that the Court carefully weigh the interests identified above, including criminal defense attorneys’ abilities to effectively represent and counsel their clients, the promotion of judicial economy, and the importance of an informed society in shaping the evolving standards of decency contemplated by the Eighth Amendment. For these reasons, IACDL joins in the relief requested by Petitioner Aliza Cover.

RESPECTFULLY SUBMITTED this 28th day of February 2020.

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