

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALIZA COVER,

Petitioner-Respondent-  
Cross-Appellant,

Supreme Court No. 47004-2019

Ada County District Court No.  
CV01-18-03877

v.

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

Respondents-Appellants-Cross  
-Respondents.

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***AMICUS CURIAE BRIEF OF PROFESSOR AUSTIN SARAT***

Appeal from the District Court of the Fourth Judicial District for Ada County.

Honorable Lynn Norton, District Judge presiding.

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## INTERESTS OF *AMICUS CURIAE*

*Amicus Curiae* is a college professor who has researched and extensively written about capital punishment, with a focus on botched executions. His research shows how public access to information about executions has been critically important to the evolution of the methods for carrying out executions and the public's attitudes about the death penalty. He is submitting this brief because of the concern over recent efforts to deny public access to information about the drugs used in lethal injection executions, and the likelihood that this unfortunate trend will undermine public accountability for execution practices that has existed throughout U.S. history.

Permitting the March 21, 2019 decision of the District Court of the Fourth Judicial District of the State of Idaho (“district court”) allowing the Idaho Board of Corrections (“IBOC”) and the Idaho Department of Corrections (“IDOC”) to withhold Exhibit 40, Page 655 of the IBOC record, which identified the source and other information about the lethal injection drugs used in the Paul Ezra Rhoades execution in 2011, insulates execution officials’ conduct from review. Without this court’s intervention, officials will take less and less care in their consideration, purchase, and use of the quality of drugs acquired for executions, knowing that inmates will not be able to prove that officials used harmful drugs in their execution.

Austin Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science and Associate Provost and Associate Dean of the Faculty at Amherst College. Over the last twenty years, he has studied capital punishment in America extensively and authored or edited many books on issues relating to capital punishment. These include: *When the State Kills: Capital Punishment and the American Condition* (2001); *Is the Death Penalty Dying?: European*

*and American Perspectives* (2011) (with Jürgen Martschukat); *When Law Fails: Making Sense of the Miscarriages of Justice* (2009) (with Charles Ogletree); *State of Violence: War, Capital Punishment, and Letting Die* (2009) (with Jennifer Culbert); *The Cultural Life of Capital Punishment: Comparative Perspectives* (2005) (with Christian Boulanger), *Gruesome Spectacles: Botched Executions and America's Death Penalty* (2014), and *The Death Penalty on the Ballot* (2019) among others. As part of his ongoing research on capital punishment, Professor Sarat has studied media coverage of executions, the public's access to information about executions, and the significance of that coverage and access in the debate about various execution methods and procedures. Attached as Exhibit A to this brief is Professor Sarat's curriculum vitae further highlighting his expertise in capital punishment.

#### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Executions in the United States have been historically characterized by transparency and public participation. Public access to all aspects of executions has thus been instrumental to the process of public oversight in America. This is especially important now, as over seven percent of all lethal injection executions in this country are botched—more than with any other method of execution in the nation's history, including hanging, the electric chair, and even the gas chamber. Yet, lethal injections are regarded as more “civilized” and “humane” than the methods that preceded it. Justice Sotomayor's recent remark strikes a chord: “What cruel irony that the method that appears most humane may turn out to be our most cruel experiment yet.” *Arthur v. Dunn*, 137 S. Ct. 725, 733 (2017) (Sotomayor, J. Dissenting from the denial of certiorari), *reh'g denied* (U.S. Apr. 24, 2017).

It is thus critical that information about executions remain as transparent as ever. In allowing the IBOC and IDOC to conceal information about the drugs used in Rhoades' execution, the district court undermined the public accountability for execution practices that has existed throughout U.S. history. This Court should review the district court's decision and reaffirm Idaho's strong legislative and judicial preference for transparency of public records rather than concealment without cause, especially where, as here, concealment disposes of necessary protections against negligence and recklessness in carrying out executions and following execution protocols.

## **ARGUMENT**

### **I. Public Access to Records Concerning Executions Has Facilitated Meaningful Public Oversight of Capital Punishment Policy and Death Penalty Protocols, Resulting in More Humane Execution Methods**

The ability of lawmakers, courts, and administrators to adapt legal injection procedures and protocols in response to improperly conducted executions depends significantly on the press' continued ability to report publicly on the details of each execution proceeding. Public access to botched executions in particular has played a central role in the reform of killing methods throughout American history—from hanging to electrocution, from the gas chamber to lethal injections. Public access is key to promoting humane executions consistent with modern understandings and sensibilities.

Executions in the United States long have been characterized by transparency and public participation. Historically, the local sheriff served as executioner, and scaffolds were usually built anew in the town square or another public setting capable of accommodating crowds who

could observe the execution from beginning to end. Accounts by eyewitnesses tended to report on the pain and suffering inflicted on the condemned. After death, the hanging rope and the wooden gallows frequently were cut up and given or sold to the public as souvenirs.

Throughout the 19th and 20th centuries, the development of humanitarian sentiment among the public and constant advances in medical fields lessened societal tolerance for pain in any circumstance, even during a judicially-sanctioned killing. Growing public unease with displays of pain and suffering put pressure on states to remove the appearance of suffering and the spectacle of a violent death from the execution process. Concurrently, the late 19th-century and early 20th-century press was, for the first time, providing mass-produced reports of executions as a substitute for public attendance. The history of executions since the demise of public hangings is, for the most part, a history of press witness accounts of executions.

Newspaper headlines from this period tell of a remarkable transformation in America's use of the death penalty.

For instance, in February 1930, Arizona executed Eva Dugan by hanging at the gallows, but the hanging did not go as planned. As the *Prescott Evening Courier* reported, "As the trap clanged and she dropped more than six feet, the noose tightened, severing her head, and the body catapulted to the floor."<sup>1</sup> *The Phoenix Gazette* dramatically stated that Dugan was "beheaded by the state of Arizona" and described "a black masked head lying about 10 feet from the pit, a

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<sup>1</sup> *Eva, Unshaken, Goes to Death*, PRESCOTT EVENING COURIER, Feb. 21, 1930, at 1.



pallid chin protruding from the black hood.”<sup>2</sup> Seventy people witnessed her execution; five fainted.<sup>3</sup>

Following the widespread reporting of Dugan’s gruesome beheading, the Arizona legislature began debating whether to eliminate hanging as an execution method. In March 1931, the Arizona House of Representative passed a bill replacing hanging with the gas chamber,<sup>4</sup> and in 1933, Arizona amended its constitution and adopted the gas chamber as its execution method.<sup>5</sup>

Arizona, like other that states utilized the gas chamber, purchased its device from Eaton Metal Products Co., which held a patent on lethal gas chambers.<sup>6</sup> Newspapers tracked the diffusion of gas chambers across the country and Eaton’s efforts to perform proper maintenance on its devices.<sup>7</sup> In April 1992, Arizona executed Donald Eugene Harding using cyanide gas. In the months preceding the execution, newspapers chronicled the Department of Corrections’ failure to obtain an emissions permit to operate the gas chamber, which had been unused since

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<sup>2</sup> *Eva Dugan Dies on Gallows*, PHX. GAZETTE, Feb. 21, 1930, at 1.

<sup>3</sup> L. KAU GILLESPIE, EXECUTED WOMEN IN THE 20TH AND 21ST CENTURIES 4 (2009).

<sup>4</sup> MARLIN SHIPMAN, THE PENALTY IS DEATH: U.S. NEWSPAPER COVERAGE OF WOMEN’S EXECUTIONS (2002).

<sup>5</sup> AUSTIN D. SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY, p. 97 (2014).

<sup>6</sup> Associated Press, *Eight States Are Now Using Gas Chambers for Executions*, SARASOTA HERALD-TRIB., Jan. 2, 195, at 17.

<sup>7</sup> See Robert W. Burdick, *There’s Not Much Work for a Gas Chamber Inspector*, SARASOTA HERALD-TRIB., Dec. 3, 1982, at 6C.

1963.<sup>8</sup> At Harding’s execution, witnesses watched through a window while Harding, seated in a black steel chair in the center of a whitewashed airtight room, was restrained by nylon straps.<sup>9</sup> When the executioner pulled the lever releasing the deadly gases, Harding struggled against the straps, turned red, and began convulsing.<sup>10</sup> He gasped, stuttered, and continued to strain against the straps for more than 10 minutes.<sup>11</sup> Reporters described the scene as “inhumane” and noted that “[w]e put animals to sleep more humanely.”<sup>12</sup>

Once again, press reporting on these events led to significant public controversy. In November 1992, less than a year after Harding’s execution, Arizona amended its constitution to require lethal injections.<sup>13</sup>

Arizona is not an outlier. Florida provides another recent example of the contributions of journalistic accounts to legislative change. In Florida, controversy surrounding electrocution came to a head with the botched executions of Jesse Joseph Tafero in 1990, Pedro Medina in 1998, and Allen Lee Davis in 1999. In response to the botched electrocution of Allen Lee Davis, his defense attorney was paraphrased in the *St. Petersburg Times* as claiming: “Corrections officials had once again botched an execution by failing to deliver enough voltage needed to kill

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<sup>8</sup> See *Lawyers Scramble for Stay of State Execution*, PRESCOTT COURIER, Jun. 5, 1991, at 1A.

<sup>9</sup> Sarat, *supra* note 5, at 112.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Neil Bibler, *State Executes Harding Today, Obscene Gestures in Final Statement*, PRESCOTT COURIER, Apr. 6, 1992, at 1A.

<sup>13</sup> See Ariz. Const. art. XXII § 22.

a prisoner, especially one of Davis's large size, quickly, and painlessly.<sup>14</sup> Newspapers treated the Davis execution as yet another chapter in Florida's problematic history of Florida's electric chair. Abolitionists and proponents of the death penalty alike called on Florida to replace its execution method. Several months after the botched Medina execution, Florida enacted legislation providing that if "electrocution is held to be unconstitutional ... all persons sentenced to death for a capital crime shall be executed by lethal injection."<sup>15</sup>

Though lethal injections "*appear* more humane and *visually* palatable relative to other methods,"<sup>16</sup> since the widespread adoption of lethal injections in the United States, executions are now more than twice as likely to be botched than when other techniques were used.<sup>17</sup> Seven percent of lethal injections have been botched—compared with three percent of all executions from 1890 to 2010, making the public's continued access to information surrounding executions ever more important.<sup>18</sup>

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<sup>14</sup> Sydney Freedberg, *Bloody Execution Lead to Stay for 2nd Inmate*, ST. PETERSBURG TIMES, July 9, 1999.

<sup>15</sup> Fla. Stat. § 922.105 (1999).

<sup>16</sup> DEBORAH DENNO, *The Future of Execution Methods*, in THE FUTURE OF AMERICA'S DEATH PENALTY, AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 483, 490 (Charles S. Lanier et al. eds. 2009).

<sup>17</sup> Sarat, *supra* note 5, at p.5 and Appendix A.

<sup>18</sup> *Id.*

## II. The Decision of the Fourth Judicial District is Likely to Result in Fewer Safeguards for Executions

In its March 21, 2019 Findings of Fact, Conclusions of Law, the district court decided that the IBOC and IDOC could withhold Exhibit 40, Page 655 of the IBOC record, which identified the source and other information about the lethal injection drugs used in the Rhoades execution in 2011. Without much evidence supporting its conclusion, it did so seemingly on the sole premise that that if the supplier's identification were released, the supplier would be subject to protests and the IBOC/IDOC might have difficulty in obtaining lethal injection drugs. Its ruling cuts against the Idaho Public Records Act, which ensures that government records are accessible to the public, has a "very broad scope," and must be interpreted in favor of access. *Dalton v. Idaho Dairy Products Commission*, 107 Idaho 6, 11 (1984). There was no question that Exhibit 40, Page 655 was a public record. The only statutory restriction in Idaho related to the withholding such public records is Idaho Code 74-105(a)(i), which provides that such records may only be withheld when "the public interest in confidentiality, public safety, security, and habilitation **clearly outweigh** the public interest in disclosure[.]" (Emphasis added.) In reaching its conclusion, the district court sidestepped the importance of and deference to the public disclosure of such records and elevated confidentiality over disclosure.

Based on the *amicus curiae's* historic review of the public reactions to execution methods in the United States, the circumstances here do not warrant concealment. The district court's sanctioning of the withholding of this information prevents the type of public examination that previously has enabled policy makers to adapt the lethal injection process and ensure it is

humanely administered. Such toleration of IBOC's refusal to disclose the information concerning the source and quality of the injection drugs prevents the press and the public from accessing the kind of detailed information about the death penalty's administration that has been historically available and has been central to promoting change to policy and protocol. Were the drugs in the Rhoades execution safe to use? Would they have been approved for use? Were the drugs obtained from a reputable supplier? These are questions to which the public will not receive answers if the information continues to be concealed.

Execution officials, knowing they can withhold such information, may choose to obtain drugs from an illicit supplier and not verify whether the drugs obtained are safe, simply because it is easier to do so, which will likely have the effect of inflicting inhumane suffering on death penalty recipients. This is precisely why this State requires the broad disclosure of such public records.

### **CONCLUSION**

The Idaho Public Records Act ensures that government records are available to the public, has a very broad scope, and must be interpreted in favor of access. Yet, the district court permitted withholding of public records regarding drugs used in the Rhoades execution without satisfying the heightened burden for concealment. Such ill-conceived decisions without evidentiary basis threaten the public accountability for execution practices.

The *amicus curiae* therefore urges the Court to order disclosure of the public record surrounding the drugs used in Rhoades' execution – which disclosure is amply supported by Idaho's statutory authority – to ensure that execution officials heed their obligation to use safe

and approved drugs that can significantly reduce the risk of unnecessarily painful and prolonged execution.

Respectfully submitted on this 27th day of February, 2020,

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