

# LIFE “OR” DEATH

*Marlee Russell\**

*This Comment argues that the death penalty violates the Mississippi Constitution because of the state’s prohibition of cruel “or” unusual punishments. By using the word “or” instead of “and,” Mississippi guarantees its citizens broader protections than the Eighth Amendment does. The different language should cause punishments, specifically the death penalty, to be evaluated under a separate standard for each prong of this constitutional protection.*

|  |     |
|--|-----|
| INTRODUCTION .....   | 618 |
| I. BACKGROUND .....  | 619 |
| A. Article 3, Section 28 of the Mississippi Constitution ...         | 619 |
| B. Federal Standards for the Death Penalty .....                     | 620 |
| C. Jordan v. State .....   | 622 |
| II. LETHAL INJECTION CONSTITUTES TORTURE .....                       | 623 |
| A. Current Lethal Injection Procedures and Standards ..              | 623 |
| B. Issues with Midazolam .....                                       | 626 |
| C. Definition of “Cruel” .....                                       | 630 |
| III. LETHAL INJECTION VIOLATES THE MISSISSIPPI<br>CONSTITUTION ..... | 632 |
| A. Disjunctive vs. Conjunctive Interpretation.....                   | 632 |
| B. State and Federal Standards Should Be Different.....              | 634 |
| IV. THE REMAINING METHODS OF EXECUTION ARE<br>UNCONSTITUTIONAL ..... | 636 |
| A. Nitrogen Hypoxia .....  | 637 |
| B. Electrocution.....  | 639 |
| C. Firing Squad .....  | 641 |
| V. CREATING A NEW STANDARD .....                                     | 643 |
| A. Cruel .....   | 643 |

---

\* Staff Editor, *Mississippi Law Journal*; J.D., University of Mississippi School of Law. The author wishes to thank Professor William W. Berry III for his guidance on the development of this Comment and her family for all their support during this process.

|                                   |     |
|-----------------------------------|-----|
| <i>B. Unusual</i> .....           | 646 |
| CONCLUSION .....                  | 650 |
| APPENDIX: FIFTY STATE SURVEY..... | 652 |

## INTRODUCTION

Under the Eighth Amendment, the U.S. Supreme Court does not shield its citizens from state-sanctioned death via any execution method. The Mississippi Constitution differs from the language of the Eighth Amendment and guarantees its citizens sentencing free from “[c]ruel or unusual punishment[s].”<sup>1</sup> The language of the Mississippi Constitution guarantees a higher level of protection for its citizens than the U.S. Constitution by prohibiting “cruel *or* unusual” punishments instead of “cruel *and* unusual” punishments. The U.S. Supreme Court determines when a punishment is “cruel and unusual,”<sup>2</sup> but the language of the Mississippi Constitution shields its citizens from different types of punishment by requiring only one part of “cruel or unusual” to make a punishment unconstitutional.

The death penalty should be held unconstitutional under the language of the state constitution. Evaluating each element of the “cruel or unusual” standard allows for a new argument surrounding the death penalty. Lethal injection faces many issues and causes severe pain and suffering before inmates die from the drug cocktail. The drugs are widely unavailable, and this shortage increases the already high likelihood of maladministration. Even if the protocol is followed perfectly, the inmate could still experience significant pain before death. Lethal injection is cruel. The remaining methods of execution—nitrogen hypoxia, electrocution, and firing squad—have not been used in so many years that their use would be unusual and thus unconstitutional.

Part I of this Comment provides necessary background information to properly frame the issue. Part II argues that lethal injection is torture. Part III shows how lethal injection violates the Mississippi Constitution. Part IV proves that the remaining methods of execution in Mississippi also violate the state

---

<sup>1</sup> MISS. CONST. art. 3, § 28.

<sup>2</sup> See *Gregg v. Georgia*, 428 U.S. 153, 162-63, 169, 186-87 (1976).

constitution. Part V creates a new standard for evaluating if a punishment is “cruel or unusual.”

## I. BACKGROUND

### A. *Article 3, Section 28 of the Mississippi Constitution*

The Mississippi Supreme Court does not evaluate the death penalty under the disjunctive “or” language of the Mississippi Constitution.<sup>3</sup> Instead, the court evaluates the constitutionality of punishments under the language of the Eighth Amendment of the U.S. Constitution. Under the Eighth Amendment standard, Mississippi does not find the death penalty or its methods to violate the state constitution.<sup>4</sup> In *Bennett v. State*, the petitioner argued that the use of lethal injection would violate his Eighth Amendment rights.<sup>5</sup> The Mississippi Supreme Court applied the standard given by the U.S. Supreme Court when evaluating a lethal injection challenge. The petitioner could have raised this argument under the state constitution instead of a federal constitutional amendment. Since a key difference exists between the two constitutions, there needs to be a separation of analysis for evaluating punishments and methods.

Rather than adopting the same language of the Eighth Amendment, Mississippi made the decision to differentiate its protections. During the Mississippi Constitutional Convention of 1890, the delegates created the document that still governs Mississippi today.<sup>6</sup> The original language of the Mississippi Constitution reads, “Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.”<sup>7</sup> The choice of language differs from that of the federal constitution. The use of the word “and” causes the statement to be conjunctive—both words on either side of “and” must be present for it to satisfy “cruel and unusual

---

<sup>3</sup> William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1230 (2020).

<sup>4</sup> *Bennett v. State*, 990 So. 2d 155, 160 (Miss. 2008).

<sup>5</sup> *Id.*

<sup>6</sup> John Ray Skates, *About the Mississippi Constitution of 1890*, MISS. HIST. NOW (Sept. 2000), <https://www.mshistorynow.mdah.ms.gov/issue/mississippi-constitution-of-1890> [<https://perma.cc/3HWF-4NTP>]. This document has been amended many times over the years, but a new constitution has never been drafted. *Id.*

<sup>7</sup> MISS. CONST. art. 3, § 28.

punishment.” If the punishment is only cruel or is only unusual, it does not violate the federal constitution. Mississippi instead used “or,” changing the interpretation from conjunctive to disjunctive—only one word on either side of “or” must be present for it to satisfy “cruel or unusual punishment.” If the punishment is only cruel, it violates the state constitution, and if the punishment is only unusual, it violates the state constitution. This difference in the language and its interpretation is often overlooked, as demonstrated by Mississippi petitioners presenting arguments based on the Eighth Amendment instead of the Mississippi Constitution. Evaluating the death penalty under the conjunctive language instead of the disjunctive language stated in the state constitution disadvantages citizens. Mississippi and several other “or” states simply adopt the Eighth Amendment test when these states should be creating new standards that reflect their state constitutions.

### *B. Federal Standards for the Death Penalty*

The federal standard for the death penalty creates a high bar to prove that a method of execution violates the Eighth Amendment. In 1976, the U.S. Supreme Court reinstated the death penalty in *Gregg v. Georgia*.<sup>8</sup> In that opinion, the Court stated that the Eighth Amendment “forbids the use of punishment that is ‘excessive’ either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime.”<sup>9</sup> The Court did not find the death penalty to violate this standard even though it had previously placed a ban on the death penalty four years prior in *Furman v. Georgia*<sup>10</sup> due to the punishment being disproportionately applied to minority groups.<sup>11</sup> In order for states to use the death penalty in sentencing, they must use the guidelines set forth in *Gregg*. The Supreme Court established the “evolving standards of decency” as the test for Eighth Amendment violations.<sup>12</sup> The “evolving standards of decency” are meant to reflect what society and individual states

---

<sup>8</sup> 428 U.S. 153, 207 (1976).

<sup>9</sup> *Id.* at 154.

<sup>10</sup> 408 U.S. 238, 239-40 (1972).

<sup>11</sup> *Id.* at 249-50 (Douglas, J., concurring).

<sup>12</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

consider as acceptable forms of punishment. As history shows, these standards will change over time; as society changes, the ideas surrounding punishment will likely change as well.<sup>13</sup>

Along with guidelines for a state’s use of the death penalty, the Supreme Court also establishes standards for the use of lethal injection. Most current executions are completed by lethal injection,<sup>14</sup> and the standards given by the Supreme Court reflect its popular use. In *Baze v. Rees*, the Court reviewed the use of the drugs in lethal injection and held them to be constitutional.<sup>15</sup> In *Baze*, petitioners from Kentucky argued that the drug cocktail of sodium thiopental, pancuronium bromide, and potassium chloride violates the Eighth Amendment.<sup>16</sup> To be considered “cruel and unusual punishment, [the] execution method must present a ‘substantial’ or ‘objectively intolerable’ risk of serious harm.”<sup>17</sup> If a state does not adopt an approved alternative procedure when it is “feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain,” then the state is violating the Eighth Amendment.<sup>18</sup> If a state does follow the same procedures as

---

<sup>13</sup> The opinion in *Trop* states, “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* The exact meaning of the “evolving standards of decency” has been debated for many years and in many different types of cases. Some of the most important are displayed in cases in which the Supreme Court places categorical bans on death sentences. *Roper v. Simmons* prohibits minors from receiving the death penalty. *See* 543 U.S. 551, 578 (2005). *Atkins v. Virginia* prevents those with mental disabilities from receiving the death penalty. *See* 536 U.S. 304, 320-21 (2002). *Coker v. Georgia* held that those convicted of rape cannot be sentenced to death. *See* 433 U.S. 584, 600 (1977). Overall, these cases show that with time, society progresses and matures in what they believe to be acceptable. What society deemed appropriate fifty years ago should not hold as a steadfast law forever. Instead, the “evolving standards of decency” allows for the laws surrounding the Eighth Amendment to grow and change with society over time.

<sup>14</sup> *See Execution Database (2012-2021)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2012&filters%5Byear%5D=2013&filters%5Byear%5D=2015&filters%5Byear%5D=2014&filters%5Byear%5D=2016&filters%5Byear%5D=2017&filters%5Byear%5D=2018&filters%5Byear%5D=2019&filters%5Byear%5D=2020&filters%5Byear%5D=2021> [https://perma.cc/EH73-6DJH] (last visited Sept. 19, 2023). From 2012 to the end of 2021, 263 executions were performed, and lethal injection constituted 257, or roughly 98%, of all executions. *Id.*

<sup>15</sup> 553 U.S. 35, 62-63 (2008).

<sup>16</sup> *Id.* at 35.

<sup>17</sup> *Id.* at 35-36.

<sup>18</sup> *Id.* at 36.

Kentucky, then it is very unlikely for the lethal injection protocol to be found unconstitutional under the Eighth Amendment.

In *Baze*, petitioners also argued that the risk of maladministration of the drugs, and thus a higher risk of pain, constituted a cruel and unusual punishment.<sup>19</sup> However, the Court noted this risk does not create an “unnecessary risk’ of pain” and thus upheld the usage of the drug cocktail, stating that “the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”<sup>20</sup> Since this case, many petitioners have attempted to have lethal injection declared as unconstitutional under these standards, but none have succeeded. The Court has never deemed any method unconstitutional, and all future arguments on the issue of these drugs will surely fail under the federal standard created in *Baze*.

### C. Jordan v. State

In a 2017 case, *Jordan v. State*, the Mississippi Supreme Court evaluated a petitioner’s death penalty claim under only the “unusual” standard.<sup>21</sup> In *Jordan*, the inmate challenged the timing of his future execution. At the time of filing, forty years had passed since Jordan’s initial sentencing. As of November 2023, Jordan is seventy-seven years old and still on death row.<sup>22</sup> The Mississippi Supreme Court denied Jordan’s petition to vacate his death sentence, stating that although the amount of time Jordan had been on death row *was* unusual, the punishment itself *was not* unusual.<sup>23</sup>

While this case does not evaluate the cruelty of lethal injection, it presents the possibility of the Mississippi Supreme Court interpreting arguments under the state constitution’s language instead of evaluating it under the Eighth Amendment. The Eighth Amendment provides the minimum protections offered to citizens,

---

<sup>19</sup> *Id.* at 36-37.

<sup>20</sup> *Id.* at 47.

<sup>21</sup> 224 So. 3d 1252, 1253 (Miss. 2017), *cert. denied sub nom.* Jordan v. Mississippi, 138 S. Ct. 2567 (2018).

<sup>22</sup> Lici Beveridge, *Understanding Mississippi’s Death Row as State Seeks Execution Dates for Two*, CLARION-LEDGER, <https://www.clarionledger.com/story/news/2023/11/26/mississippi-death-row-facts-whos-on-death-row-ages-races/71548368007/> [https://perma.cc/SU99-R69X] (Nov. 26, 2023, 12:47 PM).

<sup>23</sup> *Jordan*, 224 So. 3d at 1253.

but Mississippi should change its standard to reflect the broader rights given to its people.<sup>24</sup>

By expanding the grounds on which a death penalty argument can be heard, petitioners are enabled to create new arguments surrounding protocols, methods, risks, and administration of the death penalty as well as other non-lethal punishments in the state. *Jordan* has yet to be cited as a source in subsequent cases surrounding the interpretation of the Mississippi Constitution. If the Mississippi Supreme Court analyzes the current death penalty statute under this disjunctive distinction, it should abolish the death penalty altogether.

## II. LETHAL INJECTION CONSTITUTES TORTURE

### A. *Current Lethal Injection Procedures and Standards*

Under today’s standards, no method of the death penalty violates the U.S. Constitution, including lethal injection.<sup>25</sup> Lethal injection is the primary method of execution in every state that still allows the death penalty as a punishment.<sup>26</sup> The Mississippi Code provides the state’s permitted methods of execution in Section 99-19-51(1):

At the discretion of the Commissioner, the Deputy Commissioner for Finance and Administration and the Deputy Commissioner for Institutions of the Mississippi Department of Corrections, the manner of inflicting the punishment of death shall be by one of the following: (a) intravenous injection of a substance or substances in a lethal quantity into the body; (b) nitrogen hypoxia; (c) electrocution; or (d) firing squad, until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted

---

<sup>24</sup> *Jordan* was appealed to the U.S. Supreme Court, but the Court denied certiorari. See *Jordan v. Mississippi*, 138 S. Ct. 2567, 2567 (2018). Justice Breyer dissented from the denial of certiorari, giving a detailed analysis of Mississippi’s lethal injection standards and methods. See *id.* at 2570-71 (Breyer, J., dissenting).

<sup>25</sup> *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> [https://perma.cc/ZJ6B-73ZS] (last visited Sept. 19, 2023).

<sup>26</sup> *Lethal Injection*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection> [https://perma.cc/VYU5-UVR5] (last visited Sept. 19, 2023).

standards of medical practice. Upon receipt of the warrant of execution from the Mississippi Supreme Court, the Commissioner of Corrections shall, within seven (7) days, provide written notice to the condemned person of the manner of execution. It is the policy of the State of Mississippi that intravenous injection of a substance or substances in a lethal quantity into the body shall be the preferred method of execution.<sup>27</sup>

Prior to its amendment in 2022, Section 99-19-51 more clearly established lethal injection as the default execution method and even provided a specific protocol for its administration:

The manner of inflicting the punishment of death shall be by the sequential intravenous administration of a lethal quantity of the following combination of substances: (a) an appropriate anesthetic or sedative; (b) a chemical paralytic agent; and (c) potassium chloride, or other similarly effective substance, until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice. As used in this section, the term “appropriate anesthetic or sedative” means any substance that, if properly administered in a sufficient quantity, is likely to render the condemned inmate unconscious, so that the execution process should not entail a substantial risk of severe pain.<sup>28</sup>

Although the current version of Section 99-19-51 no longer outlines a specific lethal injection protocol, it is unlikely that Mississippi’s protocol will change drastically in the near future.

In *Bennett v. State*, the Mississippi Supreme Court upheld Mississippi’s lethal injection method.<sup>29</sup> The Mississippi Supreme Court looked to a then-recent Fifth Circuit decision, which found that since “Mississippi’s lethal injection protocol appears to be substantially similar to Kentucky’s protocol that was examined in *Baze*,” the protocol does not violate the state constitution.<sup>30</sup> The exact names or quantities of the drugs to be used during an

---

<sup>27</sup> MISS. CODE ANN. § 99-19-51(1) (West, Westlaw through 2023 Reg. Sess.).

<sup>28</sup> H.R. 638, 2017 Leg., Reg. Sess. (Miss. 2017).

<sup>29</sup> 990 So. 2d 155, 155, 161 (Miss. 2008).

<sup>30</sup> *Id.* at 161 (quoting *Walker v. Epps*, 287 F. App’x 371, 376 (5th Cir. 2008)).



execution do not have to be specified, and the statute prevents that information from being released.<sup>31</sup> Because of resistance from anti-death penalty groups, the anesthetic drugs used in lethal injections are typically unavailable. For example, when the pharmaceutical company supplying sodium thiopental, an anesthetic, to the United States learned of the administration of the drug in executions, anti-death penalty groups persuaded the company to stop supplying the drug for that purpose.<sup>32</sup>

Each administration of lethal injection relies on the supply of drugs available to the executioner on the execution date. For a 2021 execution in Mississippi, the Corrections Commissioner stated that the Mississippi Department of Corrections (“MDOC”) had obtained the drugs, but he declined to provide any information about how they were acquired, stating, “I’m not supposed to talk about the drugs too much.”<sup>33</sup> Transparency in this process is illegal; secrecy laws can lead to mishaps and failures in the protocols, especially due to limited drug access.<sup>34</sup> After a maladministration of lethal injection drugs, Charles Warner’s last words were, “My body is on fire.”<sup>35</sup>

---

<sup>31</sup> See MISS. CODE ANN. § 99-19-51(2), (3)(c) (“The identities of the State Executioner and his deputies, all members of the execution team, a supplier of lethal injection chemicals, and those witnesses listed in Section 99-19-55(2) who attend as members of the victim’s family or designated by the condemned person shall at all times remain confidential, and the information is exempt from disclosure under the provisions of the Mississippi Public Records Act of 1983.”).

<sup>32</sup> See Dallas Jones, Note, *Poor Execution: Putting an End to Gruesome Death Penalties in Oklahoma*, 54 TULSA L. REV. 149, 161-62 (2018).

<sup>33</sup> Emily Wagster Pettus, *Prison Chief: Mississippi Preps for 1st Execution Since 2012*, ASSOCIATED PRESS (Oct. 29, 2021, 12:36 PM), <https://apnews.com/article/executions-mississippi-ff9ccd61bd74b1cc89153e7d5a2e147b> [<https://perma.cc/FZ3U-GJ4E>].

<sup>34</sup> Mississippi did provide the list of drugs used in David Neal Cox’s execution in a release after his death. The statement reads, “Cox died [from] a mixture of three chemicals—midazolam, vecuronium bromide, and potassium chloride . . .” Off. of Comm’ns, *David Neal Cox Executed*, MISS. DEP’T CORR. (Nov. 17, 2021), [https://www.mdoc.ms.gov/sites/default/files/News\\_Articles/Execution%20release%20to%20web%20site.pdf](https://www.mdoc.ms.gov/sites/default/files/News_Articles/Execution%20release%20to%20web%20site.pdf) [<https://perma.cc/GK24-P8DN>]. The supplier of these drugs has not been revealed and cannot be due to the secrecy laws in place.

<sup>35</sup> Andrew Buncombe, *Charles Warner Execution: Oklahoma Inmate’s Last Words Are “My Body Is on Fire” as State Carries Out First Death Penalty in Nine Months*, INDEPENDENT (Jan. 16, 2015, 4:22 AM), <https://www.independent.co.uk/news/world/americas/charles-warner-execution-my-body-fire-9981842.html> [<https://perma.cc/DSC2-GVMU>]. In this case, the executioner used potassium acetate instead of potassium chloride. Potassium acetate is a potassium

Since the entire process of obtaining the lethal injection drugs is kept secret, there is little to no way to ensure that the administration of the drugs follows the constitutional and statutory requirements. States are willing to go to extreme levels to obtain these hard-to-find drugs, including illegally importing them from other countries. During shortage issues with anesthetic drugs, “Arizona and Texas attempted to import lethal injection drugs in violation of federal law . . . .”<sup>36</sup> The U.S. Food and Drug Administration intercepted these drugs and halted the shipment.<sup>37</sup> The drug supplier, Harris Pharma, was based in India, and the manufacturing building was not equipped to produce drugs.<sup>38</sup> Harris Pharma also sold drugs to Nebraska previously; however, the sodium thiopental was intercepted by a shipping company.<sup>39</sup> The United States heavily regulates drug usage, yet many states mandate that the information surrounding lethal injection drugs be kept secret. Mississippi cannot reveal where they obtained their drugs for the 2021 execution and only released limited information after the inmate was dead. These laws do not permit independent sources to check the legitimacy of the drugs before administration, and this can lead to a higher risk of maladministration or the wrong drug use altogether.

### B. Issues with Midazolam

The Mississippi lethal injection protocol designates midazolam as the anesthetic or sedative and is the first of three drugs used

---

salt that is used as a deicer or fire extinguishing agent. It is not commonly used in the medical field. Potassium chloride is a common hospital drug used in lethal injection and to prevent low levels of potassium in the blood. See *Lethal Injections: Potassium Chloride vs. Potassium Acetate*, OKLAHOMAN (Oct. 11, 2015, 12:00 AM), <https://www.oklahoman.com/article/5452431/lethal-injections-potassium-chloride-vs-potassium-acetate> [https://perma.cc/V246-HH9Q].

<sup>36</sup> *Arizona, Texas Attempted to Import Illegal Lethal Injection Drugs Linked to Indian Supplier with Troubling History*, DEATH PENALTY INFO. CTR. (Oct. 23, 2015), <https://deathpenaltyinfo.org/news/arizona-texas-attempted-to-import-illegal-lethal-injection-drugs-linked-to-indian-supplier-with-troubling-history> [https://perma.cc/T7QZ-5VR8].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

during the process.<sup>40</sup> Sodium thiopental, an anesthetic, became unavailable when the drug company that made it learned of its use; as a response, executioners eventually turned to midazolam instead. When states switched to midazolam, a drug meant to sedate prisoners before their execution, it resulted in several botched executions and heavy litigation to end or prohibit the use.<sup>41</sup> Midazolam “produce[s] sleepiness or drowsiness and relieve[s] anxiety before surgery or certain procedures.”<sup>42</sup> While midazolam may be used as an anesthetic, hospitals typically use sodium thiopental for patients before surgery because of how quickly it induces unconsciousness.<sup>43</sup>

With documented botched executions like Clayton D. Lockett in Oklahoma,<sup>44</sup> Joseph R. Wood in Arizona,<sup>45</sup> and Dennis McGuire in Ohio,<sup>46</sup> the U.S. Supreme Court reviewed the use of the drug in *Glossip v. Gross*.<sup>47</sup> Under the *Glossip* test, the petitioner must offer an alternative drug that substantially reduces the risk of serious harm in order to prevent the use of midazolam during execution.<sup>48</sup> The Supreme Court makes this part of the test near impossible to

---

<sup>40</sup> See *State-by-State Execution Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols> [<https://perma.cc/6HQ4-ENFU>] (last visited Dec. 9, 2023).

<sup>41</sup> Jones, *supra* note 32, at 161-63.

<sup>42</sup> *Midazolam (Injection Route)*, MAYO CLINIC, <https://www.mayoclinic.org/drugs-supplements/midazolam-injection-route/description/drg-20064813> [<https://perma.cc/VC74-8CAF>] (Sept. 1, 2023).

<sup>43</sup> Lisa Lindhorst, *Ending the Unconstitutional Torture of Three-Drug Lethal Injections: A Rebuke of Glossip v. Gross*, 73 NAT'L LAW. GUILD REV. 36, 39-40 (2016).

<sup>44</sup> See Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was a 'Bloody Mess'*, GUARDIAN (Dec. 13, 2014, 11:04 AM), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess> [<https://perma.cc/QTE4-88FM>]. Lockett's execution was experimental; the drug midazolam had never been used before in an execution. During the procedure, Lockett was declared unconscious but began to wake up as the remaining drugs were administered. Witnesses fled from the room, and the curtains were drawn. *Id.* His execution resulted in a stay of execution for another man scheduled that night. Jones, *supra* note 32, at 150.

<sup>45</sup> See Michael L. Radelet, *Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/botched-executions> [<https://perma.cc/QMD2-NUDJ>] (Dec. 6, 2022). Mr. Wood “gasped for one hour and 40 minutes” before he died. *Id.*

<sup>46</sup> See *id.* (noting Mr. McGuire gasped for air, made choking noises, and appeared to writhe in pain for 25 minutes before dying).

<sup>47</sup> 576 U.S. 863 (2015).

<sup>48</sup> *Id.* at 876-78.

prove. Because of heavy regulation and strict statutes, alternative drugs cannot be tested before an actual execution, and the effectiveness of the drug during lethal injection cannot be known. It is unlikely that an inmate would be able to locate a better, alternative drug that substantially reduces the risk of pain. Locating an alternative drug would require extensive amounts of time and money, which can be scarce resources for inmates. Any given state, or the federal government, is better equipped to locate an alternative drug than a singular inmate petitioning to be spared a potentially brutal death. Nonetheless, the Supreme Court continually upholds midazolam's use, despite the documented botched executions and uncertainties with the effectiveness of midazolam.

A common misconception is that lethal injection is painless to the individual receiving it.<sup>49</sup> Those unfamiliar with the execution methods may believe that the inmate becomes fully unconscious before death, eliminating the risk of pain from the lethal drugs. Lethal injection may be compared to euthanasia of animals by some who are uneducated on the issues. Petitioner Clarence Hill filed a claim challenging the three-drug protocol in Florida.<sup>50</sup> On his behalf, three veterinarians submitted an amicus brief to the U.S. Supreme Court comparing the protocol for the euthanasia of animals with the protocol for lethal injection.<sup>51</sup> Their brief contained three main areas of concern: the effectiveness and type of anesthetic used, the training level of the individuals administering drugs, and issues with the use of pancuronium bromide.<sup>52</sup> For each aspect of euthanasia of animals, the animals receive a higher level of care than inmates in assuring that there is no risk of the subject feeling pain throughout the procedure.<sup>53</sup>

---

<sup>49</sup> See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 63-65 (2007).

<sup>50</sup> See *Hill v. McDonough*, 547 U.S. 573, 578 (2006).

<sup>51</sup> Jones, *supra* note 32, at 167.

<sup>52</sup> *Id.* at 167-68.

<sup>53</sup> *Id.* at 168-69. When beginning euthanasia, the veterinarian must determine if a "surgical plane of anesthesia has been reached and maintained." *Id.* at 167. This is done by a multi-step process to "ensure loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." *Id.* The anesthetic used is always long-acting and potent. The American Veterinary Medical Association (the "AVMA") does not allow midazolam to be used as it is a short-acting drug and could cause the animal to feel pain during the procedure. *Id.* at 168. The AVMA would never allow a short-acting anesthetic

The truth of lethal injection is the opposite, and this can be shown by recent autopsies of those who received lethal injection, particularly in the recipient’s lungs.<sup>54</sup> These autopsies show that “[l]ethal injection causes severe pain and severe respiratory distress with associated sensations of drowning, asphyxiation, panic, and terror.”<sup>55</sup> Inmates may be suffering during the administration of the drugs, but due to the paralytic nature of the drug cocktail, their pain may not be fully realized until their body is studied. Our country prohibits torture as a form of punishment, yet these autopsy results are comparable to victims of waterboarding.<sup>56</sup> Autopsies are not the only evidence of cruelty; witnesses to lethal injection executions have testified to the individual’s physical reactions to pain.<sup>57</sup> During administration of the drugs, Stephen McCoy reacted so violently to the lethal drug that a male witness fainted.<sup>58</sup>

Executioners botch 7.12% of all lethal injection executions nationally;<sup>59</sup> this rate varies by state, with Oklahoma having the

---

during the euthanasia of an animal. To administer the euthanasia drugs, the individuals are specifically trained to do so, which is not required under most lethal injection statutes. *Id.* During the procedure, the veterinary staff constantly check to ensure the animal has not regained consciousness in any way. Statutes do not require any person to ensure that the individual receiving lethal injection is fully unconscious and not subject to the risk of pain. *Id.* Finally, the veterinarians explain why the AVMA disallows the use of pancuronium bromide. When this drug is used, it “masks consciousness,” making it impossible for the individual administering the drugs to know if the subject is still under anesthesia. *Id.* at 169. The drug can cause severe pain while the person appears calm and unconscious. The subject becomes paralyzed, unable to display any reaction to pain. Because of this, the AVMA does not allow it to be used in euthanasia due to the inhumane impacts of the drug. In each of these areas, animals being euthanized receive a higher level of care and concern than state-mandated executions of humans. *Id.* at 167-70.

<sup>54</sup> *Lethal Injections Cause Suffocation and Severe Pain, Autopsies Show*, EQUAL JUST. INITIATIVE (Sept. 22, 2020), <https://eji.org/news/lethal-injections-cause-suffocation-and-severe-pain-autopsies-show/> [<https://perma.cc/E6KA-97FR>]. In reviewing 200 autopsy reports, the autopsies show “evidence of pulmonary edema in 84% of the cases. Pulmonary edema occurs when the lungs fill up with fluid, and it can induce the feeling of suffocation or drowning.” *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Radelet, *supra* note 45.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citing AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY (2014)).

highest percentage of 22.4%.<sup>60</sup> With such a high chance of the protocol going awry, the odds of suffering increase. Even with a perfectly executed administration, people suffer.<sup>61</sup> Medical professionals do not actively participate in lethal injection as it would be a violation of their oath to protect and treat patients.<sup>62</sup> Due to the limited medical background of those performing lethal injection, it often takes a prolonged amount of time to even locate a vein to administer the drugs.<sup>63</sup>

### C. Definition of “Cruel”

“Cruel” is commonly defined as “disposed to inflict pain or suffering[;] devoid of humane feelings.”<sup>64</sup> *The Law Dictionary* defines “cruelty” as “[t]he intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; or, as applied to the latter, the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage.”<sup>65</sup> Many lethal injection cases serve as examples of these definitions. Pain and suffering during lethal injection are unavoidable. The U.S. Supreme Court does not recognize a need to avoid all pain during lethal injection, but a substantial risk of severe pain.

The Supreme Court vacated John Grant’s stay of execution on October 28, 2021; the stay had previously been granted due to concerns with midazolam.<sup>66</sup> Grant’s execution was the first

---

<sup>60</sup> Austin Sarat, *Oklahoma Botched Yet Another Execution*, SLATE (Nov. 1, 2021, 9:28 AM), <https://slate.com/news-and-politics/2021/11/oklahoma-botches-another-execution-using-lethal-injection-drugs.html> [<https://perma.cc/4RBR-UA43>].

<sup>61</sup> Jones, *supra* note 32, at 158-59.

<sup>62</sup> Denno, *supra* note 49, at 79-83.

<sup>63</sup> See, e.g., Radelet, *supra* note 45. Some examples of times inmates had to suffer while waiting for the execution staff to locate a vein include Rickey Rector (over fifty minutes), Michael Elkins (over fifty minutes), Bennie Demps (thirty-three minutes), John Hightower (forty minutes), Romell Broom (over two hours), Clayton Lockett (sixty minutes), and Doyle Hamm (over two and a half hours). *Id.*

<sup>64</sup> *Cruel*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cruel> [<https://perma.cc/H2YD-EM6H>] (last visited Sept. 19, 2023).

<sup>65</sup> *Cruelty*, LAW DICTIONARY, <https://thelawdictionary.org/cruelty/> [<https://perma.cc/V5XX-F58Q>] (last visited Sept. 19, 2023).

<sup>66</sup> See Jason Hanna & Raja Razek, *Oklahoma Puts First Inmate to Death Since 2015, but Witness Reports He Convulsed and Vomited During Execution*, CNN, <https://www.cnn.com/2021/10/28/us/oklahoma-execution-john-marion-grant/index.html> [<https://perma.cc/YUD2-52KL>] (Oct. 30, 2021, 8:09 AM).

execution in Oklahoma since January 2015 due to Clayton Lockett’s botched execution. After Grant received the midazolam, he began to have convulsions and vomited, eventually becoming unconscious and dying.<sup>67</sup> The Supreme Court approved this execution and the subsequent suffering, knowing the issues midazolam causes during the procedure. By allowing executions to use midazolam, the Supreme Court’s standard permits the possibility of severe, intense, and excruciating pain felt by the inmate before their death. The Supreme Court allowed John Grant to suffer at the hands of his executioner because the risk of subjecting him to cruelty was not “substantial” enough.<sup>68</sup> Since Mississippi follows the Supreme Court’s standards, all executions in the state will continue with midazolam, despite the inevitable pain.

During administration of lethal injection drugs, the inmate could be suffering extreme amounts of pain without anyone knowing due to the paralytic nature. The anesthetic used is short term; depending on the chemistry of the inmate, the skill of the staff members, and the amount of time between injection of the drugs, an inmate could be conscious for the life-ending drugs entering their body. One could appear fully peaceful but could be suffering greatly unbeknownst to anyone in the room. It is a tremendous risk to not know whether someone is conscious as life-ending drugs are put into their body. The paralytic drug prevents any form of physical reaction, causing the inmate to silently suffer immense amounts of pain. The U.S. Supreme Court does not find this risk to be substantial and accepts the level of pain. The standard created for lethal injection drugs by the Supreme Court disregards human suffering, and Mississippi should diverge from its interpretation of what levels of pain the government is willing to inflict on its citizens.

---

<sup>67</sup> *Id.*

<sup>68</sup> *See* Baze v. Rees, 553 U.S. 35, 50 (2008) (“[A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a ‘substantial risk of serious harm.’”).

### III. LETHAL INJECTION VIOLATES THE MISSISSIPPI CONSTITUTION

#### A. *Disjunctive vs. Conjunctive Interpretation*

During lethal injection challenges, the Mississippi Supreme Court primarily uses the conjunctive Eighth Amendment language to evaluate the constitutionality rather than using the disjunctive language of the state constitution.<sup>69</sup> The court's lack of distinction between the two documents warrants concern. On a basic level, "and" and "or" have two different meanings. The word "and" conjoins two ideas in a sentence. To be complete, both parts of the sentence are necessary. In contract law, statutes, and case law, "and" has a specific meaning. This word can be a point of contention in contract cases—if a party completes only one item on a list that uses "and," then the contractual agreement has not been completed and may constitute a breach. This is the same for statutory language—if a statute, using the word "and," requires a specific number of elements to be present and any element is lacking, the requirements under statute are not fulfilled. This understanding has been interpreted to mean the same for the Eighth Amendment in that a punishment must be both cruel *and* unusual to be unconstitutional.

Mississippi puts forth different language in its constitution yet uses the same interpretation of the Eighth Amendment. A basic grammatical understanding of conjunctions reveals the difference between "and" and "or." In all areas of law, "or" signals that only one element must be present to satisfy the contract, statute, or rule. In contract law, the use of "or" means that a party must complete only one option under the contract to avoid a breach. A statute may give a list of potential elements to an offense; if "or" is used, then only one element in the list must be satisfied to classify as an offense. With this basic-level legal understanding of the difference between "and" and "or," the interpretation of the two constitutions should be separate and dissimilar.

A survey into the different interpretations of the same language in state constitutions can be helpful in determining how

---

<sup>69</sup> See *Batiste v. State*, 121 So. 3d 808, 872-73 (Miss. 2013).



the phrase is applied.<sup>70</sup> Fifteen states use “or” instead of “and” in their state constitutions; twelve states with this language adopt the Eighth Amendment approach.<sup>71</sup> California, Michigan, and Minnesota have created a separate test for the constitutionality of punishments due to the “or” language of their constitutions. These states recognize that the use of “or” creates a higher standard of protection.<sup>72</sup>

Washington’s constitutional language prohibits “cruel” punishments but does not have the “unusual” requirement.<sup>73</sup> Washington has created its own standard for evaluating if a punishment is proportionate to the crime.<sup>74</sup> In 2018, Washington placed a categorical ban on the death penalty and juvenile life without parole sentences due to their unconstitutional nature.<sup>75</sup> When evaluating the petitioner’s claim in *State v. Gregory*,<sup>76</sup> the Washington Supreme Court analyzes the difference between the federal and state constitutions. The court concludes that “the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment.”<sup>77</sup> By asserting this difference between state and federal protections, Washington extended greater protections to its constituents. The death penalty was then banned because of this distinction, showing the weight of a separate state standard from the federal rules.

---

<sup>70</sup> See Berry, *supra* note 3, at 1206.

<sup>71</sup> *Id.* at 1227-32.

<sup>72</sup> *Id.* at 1232-35. For example, California established three criteria to examine the constitutionality of a punishment: “(1) the nature of the offense and defendant’s background, with particular regard to the degree of danger both present to society; (2) the punishment for more serious offenses; or (3) punishment for similar offenses in other jurisdictions.” *Id.* at 1233 & n.232.

<sup>73</sup> WASH. CONST. art. I, § 14 (“Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.”); see also *State v. Witherspoon*, 329 P.3d 888, 894 (Wash. 2014) (en banc) (“The Eighth Amendment bars cruel and unusual punishment while article I, section 14 bars cruel punishment.”).

<sup>74</sup> “[T]he Washington Constitution examines: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.” Berry, *supra* note 3, at 1238 (citing *State v. Fain*, 617 P.2d 720, 726 (Wash. 1980) (en banc) (reversing a grossly disproportionate sentence)).

<sup>75</sup> *State v. Gregory*, 427 P.3d 621, 642 (Wash. 2018); *State v. Bassett*, 428 P.3d 343, 355 (Wash. 2018).

<sup>76</sup> 427 P.3d 621.

<sup>77</sup> *Id.* at 631 (quoting *State v. Roberts*, 14 P.3d 713, 733 (Wash. 2000)).

Unlike Washington, most states with “or” language follow the Eighth Amendment. Yet states should protect the rights given to their citizens by the specific language of their constitutions. Even though the Mississippi Supreme Court does not explicitly state that the state constitution gives further protection than the Eighth Amendment, it does acknowledge the distinction in *Jordan v. State*.<sup>78</sup> In *Jordan*, the petitioner argued that since he received the death penalty sentence over forty years prior to his petition, the punishment would be unusual due to the lapse of time.<sup>79</sup> The court did not agree with this argument, but the opinion does emphasize the difference between the federal and state language.<sup>80</sup> The opinion reads, “Jordan also lodges his claim under Article 3, Section 28 of the Mississippi Constitution, which prohibits cruel *or* unusual [punishment].”<sup>81</sup> While the opinion does not go in depth about the different language of the two constitutions, the Mississippi Supreme Court does acknowledge a difference exists by analyzing the petitioner’s argument without addressing whether the lapse of time was also “cruel.” This case could be a beginning stage for Mississippi to evaluate its constitutional language and extend more protection to its constituents, making room for a new standard.

### B. State and Federal Standards Should Be Different

Mississippi currently uses the standard established in *Baze v. Rees*<sup>82</sup> to determine if a lethal injection method is unconstitutional. First, for a state’s lethal injection method to be unconstitutional, the method must present a “substantial” or “objectively intolerable” risk of harm.<sup>83</sup> States have to adopt a proffered alternative procedure only when it is “feasible, readily implemented, and . . . significantly reduce[s] substantial risk of severe pain.”<sup>84</sup> Simply because there is a risk the procedure will not be followed—resulting in a prolonged or severely painful execution—does not make it

---

<sup>78</sup> 224 So. 3d 1252 (Miss. 2017).

<sup>79</sup> *Id.* at 1253.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (emphasis in original).

<sup>82</sup> 553 U.S. 35 (2008).

<sup>83</sup> *Id.* at 50.

<sup>84</sup> *Id.* at 52.

unconstitutional.<sup>85</sup> Second, petitioners must prove that the maladministration of a lethal injection protocol would constitute cruel and unusual punishment.<sup>86</sup> The drugs used by the state of Kentucky (sodium thiopental, pancuronium bromide, and potassium chloride) do not cause a substantial risk of harm in their intravenous administration.<sup>87</sup> This test makes it incredibly difficult, or even impossible, to prove that lethal injection is unconstitutional. No death penalty or lethal injection challenge has succeeded in Mississippi under this standard.

Mississippi needs to create a separate standard to evaluate “cruel or unusual” claims because the state constitution affords its citizens that protection.<sup>88</sup> These standards must be different. If not, all states could simply adopt the federal constitution as their own instead of creating an individualized document that is specific to what the state and its people want. Since Mississippi possesses an interest in maintaining its own rights and protections for its citizens, the state should change its standard for evaluating punishments to reflect the individual language of the state constitution rather than that of the federal government.

Understanding the literal interpretation of the constitutional language allows for “cruel” and “unusual” to be analyzed separately. By taking this approach, lethal injection should be held unconstitutional. The Mississippi Supreme Court has already established that the punishment of lethal injection is not unusual in *Jordan v. State*.<sup>89</sup> As previously discussed in this Comment, lethal injection is torturous and cruel.<sup>90</sup> The extent of pain experienced by an inmate can never truly be known due to the type of drugs used in executions. An unacceptable risk is present during each administration of drugs, yet the U.S. Supreme Court and, in turn, Mississippi continue to allow the use of this execution method. The care given to animals at the end of their lives is more humane than the current execution method standards for people. Due to its

---

<sup>85</sup> *See id.* at 49-50.

<sup>86</sup> *See id.* at 37.

<sup>87</sup> *Id.* at 53.

<sup>88</sup> MISS. CONST. art. 3, § 28.

<sup>89</sup> 224 So. 3d 1252, 1253 (Miss. 2017).

<sup>90</sup> *See* discussion *supra* Part II.

torturous and cruel nature, lethal injection should be declared unconstitutional and banned in Mississippi.

#### IV. THE REMAINING METHODS OF EXECUTION ARE UNCONSTITUTIONAL

Under the cruel standard, lethal injection should be held unconstitutional. However, prohibiting this method does not end the death penalty in the state; Mississippi will instead turn to the other methods of execution listed in the Mississippi Code.<sup>91</sup> Since the state constitution also protects against unusual punishment, the remaining methods and their constitutionality must be evaluated. The other methods include nitrogen hypoxia, electrocution, and firing squad.<sup>92</sup> However, none of these methods have been used by the state of Mississippi since 1989.<sup>93</sup> “Unusual” has been defined by John F. Stinneford as “[a]ctions that [are] contrary to long usage.”<sup>94</sup> Stinneford provides an overview of the word “unusual” over time and what it means for individual states. He says:

If a given practice falls out of usage in a given jurisdiction over a long period of time, then it becomes “unusual” in that jurisdiction, even if it remains “usual” in others. Thus, over time, the precise scope of the prohibition on “cruel and unusual punishments” is likely to diverge in the various jurisdictions that employ this standard.<sup>95</sup>

Given this definition, each of these methods is unusual. When determining if a punishment is unusual, the new standard should be focused on Mississippi data, but data from other states can also be helpful when Mississippi lacks sufficient information about a particular method of execution. Since 1976, Mississippi has

---

<sup>91</sup> See MISS. CODE ANN. § 99-19-51(1) (West, Westlaw through 2023 Reg. Sess.).

<sup>92</sup> *Id.*

<sup>93</sup> See *Execution Database (Mississippi)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Mississippi> [https://perma.cc/9W3D-XUNH] (last visited Sept. 19, 2023).

<sup>94</sup> See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1770 (2008).

<sup>95</sup> *Id.* at 1823.

executed twenty-three inmates.<sup>96</sup> During an evaluation of the unusualness of a punishment, the rarity of its use holds important value. Several states are *de facto* abolition states.<sup>97</sup> Some of these states have a disjunctive state constitution and still have inmates on death row, but many years have passed since the state performed an execution.<sup>98</sup> Should one of these states schedule one, its use would likely be unconstitutional due to the amount of time without an execution.<sup>99</sup> The Mississippi Supreme Court said in *Jordan v. State* that lethal injection was not unusual in 2017 since the punishment itself was not unusual.<sup>100</sup> However, any other methods of execution likely would be struck down as unconstitutional due to the amount of time that has passed since their last usages, which reflects society’s perception of these methods as a whole.

#### A. Nitrogen Hypoxia

Mississippi used nitrogen hypoxia—more commonly known as lethal gas—from 1954 to 1989, last being utilized thirty-four years ago.<sup>101</sup> All nitrogen hypoxia executions happen in an airtight gas chamber. The Death Penalty Information Center describes the process of executing an inmate with lethal gas:

---

<sup>96</sup> See *Mississippi*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/mississippi> [<https://perma.cc/DZ9U-LC8A>] (last visited Sept. 19, 2023).

<sup>97</sup> See William W. Berry III, *Unusual State Capital Punishments*, 72 FLA. L. REV. 1, 24-30 (2020) (California, Colorado, Idaho, Kansas, Kentucky, Montana, Nebraska, Oregon, Pennsylvania, South Dakota, Utah, and Wyoming).

<sup>98</sup> *Id.* at 24-32.

<sup>99</sup> See discussion *infra* Section V.B. As of 2023, the years that have passed in each *de facto* state since last execution are: California – seventeen years; Colorado – twenty-six years; Idaho – eleven years; Kansas – no deaths since reinstatement in 1976; Kentucky – fifteen years; Montana – seventeen years; Nebraska – five years (reinstated in 2016); Oregon – twenty-six years; Pennsylvania – twenty-four years; South Dakota – four years (possibly no longer considered a *de facto* state); Utah – thirteen years; and Wyoming – thirty-one years. See *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> [<https://perma.cc/TQ94-K5VG>] (last visited Sept. 19, 2023); see also Berry, *supra* note 97, at 23-31; *infra* Appendix: Fifty State Survey.

<sup>100</sup> 224 So. 3d 1252, 1253 (Miss. 2017).

<sup>101</sup> See *Execution Database (Mississippi)*, *supra* note 93.

For execution by this method, the condemned person is strapped to a chair in an airtight chamber. Below the chair rests a pail of sulfuric acid. A long stethoscope is typically affixed to the prisoner so that a doctor outside the chamber can pronounce death. Once everyone has left the chamber, the room is sealed. The warden then gives a signal to the executioner who flicks a lever that releases crystals of sodium cyanide into the pail. This causes a chemical reaction that releases hydrogen cyanide gas. The prisoner is instructed to breathe deeply to speed up the process. Most prisoners, however, try to hold their breath, and some struggle.

The prisoner does not lose consciousness immediately. . . . The prisoner dies from hypoxia, the cutting-off of oxygen to the brain. At postmortem, an exhaust fan sucks the poison air out of the chamber, and the corpse is sprayed with ammonia to neutralize any remaining traces of cyanide. About a half an hour later, orderlies enter the chamber, wearing gas masks and rubber gloves. Their training manual advises them to ruffle the victim's hair to release any trapped cyanide gas before removing the deceased.<sup>102</sup>

In 1954, Mississippi installed a gas chamber in the Mississippi State Penitentiary to be used for all executions at that time.<sup>103</sup> A total of thirty-five inmates were executed with the gas chamber.<sup>104</sup> It was removed as an execution option in 1998<sup>105</sup> but was reintroduced by House Bill 638 in 2017.<sup>106</sup> The last person in the United States to be executed by lethal gas was Walter LaGrand in 1999.<sup>107</sup> Twenty-four years have passed since the last use in our

---

<sup>102</sup> *Description of Each Execution Method*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method> [<https://perma.cc/A5GQ-X6VT>] (last visited Sept. 19, 2023) (citing Jacob Weisberg, *This Is Your Death*, NEW REPUBLIC, July 1, 1991, at 23).

<sup>103</sup> *Death Penalty in Mississippi*, MISS. DEP'T CORR., <https://www.mdcr.ms.gov/general-public/death-row/death-penalty-mississippi> [<https://perma.cc/EX6P-4M4X>] (last visited Sept. 19, 2023).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> H.R. 638, 2017 Leg., Reg. Sess. (Miss. 2017).

<sup>107</sup> *Execution Database (Gas)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bmethod%5D=Gas> [<https://perma.cc/T3SQ-7HZW>] (last visited Sept. 19, 2023).

country, yet one state is preparing to start using gas chambers again, claiming a need due to the lack of lethal injection drugs.<sup>108</sup> Mississippi likely no longer maintains a functioning gas chamber; so much time has passed since the last execution via lethal gas that entirely new facilities would likely need to be incorporated into the Mississippi State Penitentiary again. The use of lethal gas is an unusual punishment due to the amount of time that has passed without its usage and lack of executions since 1976.<sup>109</sup> In 1998, the Mississippi Legislature removed lethal gas as a form of execution<sup>110</sup> and replaced it with lethal injection, which was first used in 2002.<sup>111</sup>

### B. *Electrocution*

Death by electric chair was introduced in Mississippi in 1940.<sup>112</sup> New York was the first state to build an electric chair, and many states followed suit to utilize a more “humane method of execution than hanging.”<sup>113</sup> The Death Penalty Information Center describes the process of electrocution:

For execution by the electric chair, the person is usually shaved and strapped to a chair with belts that cross his chest, groin, legs, and arms. A metal skullcap-shaped electrode is attached to the scalp and forehead over a sponge moistened with saline. The sponge must not be too wet or the saline short-circuits the electric current, and not too dry, as it would then have a very high resistance. An additional electrode is moistened with conductive jelly (Electro-Creme) and attached to a portion of the prisoner’s leg that has been shaved to reduce resistance to electricity. The prisoner is then blindfolded. After the execution

---

<sup>108</sup> See Ed Pilkington, *Arizona ‘Refurbishes’ Its Gas Chamber to Prepare for Executions, Documents Reveal*, GUARDIAN (May 28, 2021, 1:00 PM), <https://www.theguardian.com/us-news/2021/may/28/arizona-gas-chamber-executions-documents> [<https://perma.cc/TH2K-FPSM>].

<sup>109</sup> Only four people in Mississippi have died from the gas chamber since 1976. See *Execution Database (Mississippi)*, *supra* note 93.

<sup>110</sup> Jimmie E. Gates, *Bill: Execution by Gas, Firing Squad Would Be Allowed*, CLARION-LEDGER, <https://www.clarionledger.com/story/news/politics/2017/02/01/bill-execution-gas-firing-squad-would-allowed/97334596/> [<https://perma.cc/XGU8-DJLQ>] (Feb. 1, 2017, 6:50 PM).

<sup>111</sup> See *Execution Database (Mississippi)*, *supra* note 93.

<sup>112</sup> *Mississippi*, *supra* note 96.

<sup>113</sup> *Description of Each Execution Method*, *supra* note 102.

team has withdrawn to the observation room, the warden signals the executioner, who pulls a handle to connect the power supply. A jolt of between 500 and 2000 volts, which lasts for about 30 seconds, is given. The current surges and is then turned off, at which time the body is seen to relax. The doctors wait a few seconds for the body to cool down and then check to see if the inmate's heart is still beating. If it is, another jolt is applied. This process continues until the prisoner is dead.<sup>114</sup>

While the electric chair became the primary method of execution in 1940, no executions have been completed by this method since 1952.<sup>115</sup> Other states are offering the electric chair again,<sup>116</sup> but it has not been used in Mississippi in seventy-one years. While states, such as Tennessee, offer the electric chair as an execution method,<sup>117</sup> other states, such as Nebraska and Georgia, have held the electric chair as unconstitutional.<sup>118</sup> The chair itself is now a piece of history on display at the Mississippi Law Enforcement Training Academy.<sup>119</sup> Only one inmate on Mississippi's death row, Richard G. Jordan, was alive when the state last used the electric chair for an execution.<sup>120</sup> Since so much

---

<sup>114</sup> *Id.* (citing Weisberg, *supra* note 102; Harold Hillman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION 745 (1993)).

<sup>115</sup> See *Death Penalty in Mississippi*, *supra* note 103.

<sup>116</sup> South Carolina authorized the use of the electric chair and firing squad in 2021, citing frustrations in the inability to obtain lethal injection drugs. See *South Carolina Legislature Authorizes Use of Electric Chair and Firing Squad as State Reaches 10 Years Without an Execution*, DEATH PENALTY INFO. CTR. (May 6, 2021), <https://deathpenaltyinfo.org/news/south-carolina-legislature-authorizes-use-of-electric-chair-and-firing-squad-as-state-reaches-10-years-without-an-execution> [https://perma.cc/QW2J-FLMX]; see also Jeffrey Collins, *New Law Makes Inmates Choose Electric Chair or Firing Squad*, ASSOCIATED PRESS (May 17, 2021, 5:02 PM), <https://apnews.com/article/sc-state-wire-government-and-politics-d5fb523db482da233e1f081a63a80cf4> [https://perma.cc/F86L-UZEW].

<sup>117</sup> Tennessee allows inmates to choose their method of execution. Some inmates choose electric chair over lethal injection due to the risks associated with lethal injection. See Debra Cassens Weiss, *Some Tennessee Death-Row Inmates Opt for Electric Chair over Lethal Injections*, ABA JOURNAL (Feb. 20, 2020, 12:29 PM), <https://www.abajournal.com/news/article/some-tennessee-death-row-inmates-opt-for-electric-chair-over-lethal-injections> [https://perma.cc/EE78-5GHF].

<sup>118</sup> See *State v. Mata*, 745 N.W.2d 229, 279 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001).

<sup>119</sup> *Death Penalty in Mississippi*, *supra* note 103.

<sup>120</sup> *Death Row Inmates*, MISS. DEPT CORR., <https://www.mdoc.ms.gov/general-public/death-row-inmates> [https://perma.cc/LLS7-CZ9P]. He was six years old when the last execution by the electric chair occurred. *Offender Data Sheet (Richard G. Jordan)*,



time has passed since its usage in Mississippi and it is scarcely used at a national level, using the electric chair would be unusual and unconstitutional.

### C. Firing Squad

Since 1976, only three executions by firing squad have occurred in the United States, all in Utah.<sup>121</sup> The Death Penalty Information Center describes the protocol for execution by firing squad:

For execution by [firing squad], the prisoner is typically bound to a chair with leather straps across his waist and head, in front of an oval-shaped canvas wall. The chair is surrounded by sandbags to absorb the prisoner’s blood. A black hood is pulled over the prisoner’s head. A doctor locates the prisoner’s heart with a stethoscope and pins a circular white cloth target over it. Standing in an enclosure 20 feet away, five shooters are armed with .30 caliber rifles loaded with single rounds. One of the shooters is given blank rounds. Each of the shooters aims his rifle through a slot in the canvas and fires at the prisoner. The prisoner dies as a result of blood loss caused by rupture of the heart or a large blood vessel, or tearing of the lungs. The person shot loses consciousness when shock causes a fall in the supply of blood to the brain. If the shooters miss the heart, by accident or intention, the prisoner bleeds to death slowly.<sup>122</sup>

Utah is famously known as the only state to have used the firing squad since 1976, but this is not the state’s primary method of execution.<sup>123</sup> Utah’s primary method of execution is lethal

---

MISS. DEP’T CORR.,  
[https://www.mdoc.ms.gov/sites/default/files/Inmate\\_Files/Jordan%2C%20Richard%20G%20%281%29.pdf](https://www.mdoc.ms.gov/sites/default/files/Inmate_Files/Jordan%2C%20Richard%20G%20%281%29.pdf) [<https://perma.cc/AVN6-Q8KL>].

<sup>121</sup> See *Execution Database (Firing Squad)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bmethod%5D=Firing%20Squad> [<https://perma.cc/QKE9-AJLD>] (last visited Sept. 20, 2023).

<sup>122</sup> *Description of Each Execution Method*, *supra* note 102 (citing Weisberg, *supra* note 102; Hillman, *supra* note 114).

<sup>123</sup> See *Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NPR (Apr. 5, 2015, 7:15 PM), <https://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one> [<https://perma.cc/XD5Z-BLVP>].

injection; firing squad is only an available option if the state is unable to obtain the drugs for lethal injection.<sup>124</sup> Utah removed the firing squad as an execution method in 2004, but it was reintroduced in 2015 due to concerns surrounding a shortage of drugs for lethal injection.<sup>125</sup>

Although the state most known for using firing squads no longer utilizes them, at least since 2010, a firing squad has never executed anyone in Mississippi.<sup>126</sup> Its complete lack of history in the state makes this method the most unusual. The last firing squad execution in the country happened thirteen years ago.<sup>127</sup> Legal challenges are currently working their way through the court system over South Carolina's law that requires inmates to choose between the firing squad and the electric chair for the death penalty, claiming either option is torture.<sup>128</sup> Since 1976, firing squads have seldom been used in the United States and never in Mississippi; thus, its use is unusual and unconstitutional.

\* \* \*

Under the definition of "unusual" described previously,<sup>129</sup> nitrogen hypoxia, electrocution, and firing squad are all unconstitutional. In a case involving lethal injection, the Mississippi Supreme Court ruled the death penalty does not violate the Mississippi Constitution because the punishment itself is not unusual.<sup>130</sup> However, the Mississippi Supreme Court should hold all the remaining methods of execution in Mississippi

---

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* Although Utah had eliminated the firing squad as an execution method during those years, Ronnie Lee Gardner was executed by this method in 2010. Because he was sentenced prior to 2004, he had the option to select the firing squad as the method of his execution. *Id.*

<sup>126</sup> See *Execution Database (Firing Squad)*, *supra* note 121; *Death Penalty in Mississippi*, *supra* note 103.

<sup>127</sup> See *Execution Database (Firing Squad)*, *supra* note 121.

<sup>128</sup> Jeffrey Collins, *Electric Chair, Firing Squad's Legality at S. Carolina Court*, ASSOCIATED PRESS (Jan. 5, 2023, 1:31 PM), <https://apnews.com/article/south-carolina-state-government-crime-legal-proceedings-59293e90af056a4849e04dc196c46ac2> [<https://perma.cc/ENU5-99TU>]; Victoria Hansen, *Death Row Inmates Sue After They're Asked to Pick Firing Squad or Electric Chair*, NPR (May 20, 2021, 2:09 PM), <https://www.npr.org/2021/05/20/998600135/south-carolina-reinstates-firing-squad-but-not-without-legal-challenges> [<https://perma.cc/KH3N-VY6U>].

<sup>129</sup> See *supra* text accompanying notes 94-95.

<sup>130</sup> See *Jordan v. State*, 224 So. 3d 1252, 1253 (Miss. 2017).

unconstitutional because the punishments themselves are unusual. Great amounts of time have passed since the state utilized any of these methods, showing that Mississippi has moved on from them as a sign of progress in how we treat inmates sentenced to death. Gas chambers and electric chairs are technologies of the past, and the firing squad has never been used in Mississippi. These remaining methods are unusual and therefore unconstitutional.

## V. CREATING A NEW STANDARD

Mississippi should adopt a new standard to evaluate if punishments violate the state constitution. As required by Article 3, Section 28 of the Mississippi Constitution, there will be two parts to this test—“cruel” and “unusual.” If a punishment is either, then the punishment is unconstitutional. The Mississippi Supreme Court has not provided a definition for either one of these words, so the new standard will rely upon common understanding of language, the standards of other states, and legal scholarship.

### A. *Cruel*

To determine whether a punishment is cruel, the state should evaluate the procedure itself, risk of maladministration, and application of the punishment. Since Mississippi only uses lethal injection as of now, the cruel standard will be applied to lethal injection only, instead of the other listed possible execution methods. The remaining methods of execution will later be considered under the “unusual” standard.

Mississippi’s lethal injection protocol includes a three-drug mixture.<sup>131</sup> According to the Death Penalty Information Center:

In the multi-drug executions, states start with a sedative, previously sodium thiopental but more recently drugs such as midazolam, which is supposed to put the prisoner to sleep. Next, a paralytic drug, typically vecuronium bromide or pancuronium bromide, is injected, which paralyzes the entire muscle system and stops the prisoner’s breathing. Finally, the flow of potassium chloride stops the heart. Death results from

---

<sup>131</sup> *State-by-State Execution Protocols*, *supra* note 40.

anesthetic overdose and respiratory and cardiac arrest while the condemned person is unconscious.<sup>132</sup>

In line with the standard lethal injection protocol, the Mississippi Department of Corrections used midazolam, vecuronium bromide, and potassium chloride in the 2021 execution of David Neal Cox.<sup>133</sup>

For the two most recent executions in Mississippi, MDOC began with midazolam.<sup>134</sup> As described previously, midazolam is not guaranteed to work as an anesthetic, and inmates may or may not be paralyzed once they receive the drug.<sup>135</sup> During executions with midazolam, the inmate can wake up after receiving the second drug.<sup>136</sup> While the U.S. Supreme Court does not have an issue with the use of midazolam, its usage in Mississippi should cease because of its cruelty. Whether the midazolam worked to render the inmate fully unconscious cannot be determined; the only way an executioner knows for certain the effectiveness of the drug is to begin administering the rest of the lethal drugs and seeing the reaction from the inmate. However, due to the paralytic nature of vecuronium bromide and pancuronium bromide, the inmate could appear to be fully unconscious but feel incredible amounts of pain as the drugs enter their body. Since there is no way to ensure unconsciousness during the procedure, the use of these drugs allow room for unacceptable levels of pain. If a protocol results in a risk of severe physical pain and suffering, both the protocol and the punishment are cruel.

---

<sup>132</sup> *Description of Each Execution Method*, *supra* note 102 (citing Weisberg, *supra* note 102; William Ecenbarger, *Killing by the Book*, PHILA. INQUIRER MAG., Jan. 23, 1994, at 10).

<sup>133</sup> *Off. of Commc'ns*, *supra* note 34.

<sup>134</sup> *State-by-State Execution Protocols*, *supra* note 40.

<sup>135</sup> *See* discussion *supra* Section II.B.

<sup>136</sup> Robyn Parks began to spasm, gasp, and gag until he finally died eleven minutes after the drugs were administered. Radelet, *supra* note 45. Scott Carpenter gasped, shook, and spasmed for three minutes until his body stopped moving, dying eleven minutes after the injection. *Id.* Justin May “gasped, coughed and reared against his heavy leather restraints . . . before his body froze” and he died. *Id.* Dennis McGuire suffered for twenty-five minutes. His stomach heaved; he made snorting, gurgling, and choking sounds. *Id.* In the lawsuit after his death, his family stated it appeared as though he was suffocating. *Id.* Ronald Smith, Jr. struggled for breath for thirteen minutes after receiving midazolam. *Id.* During the procedure, he “clenched his fists and raised his head.” *Id.*

Despite all the guidelines that may be provided within a state’s lethal injection protocol, maladministration can still happen. Since doctors cannot participate in executions due to medical ethics, the protocol is often “performed by inexperienced technicians or orderlies.”<sup>137</sup> One example of a common administration issue is the insertion of the IV into a suitable vein. In some cases, it can take the execution team hours to insert the IV.<sup>138</sup> Some documented locations for IV insertion from other states include the groin, feet, elbows, and even neck.<sup>139</sup> While the nineteen lethal injection executions done by the state have not presented significant evidence of administration issues, other states that use lethal injection, such as Oklahoma, face these issues on a large scale. Oklahoma was the first state to adopt lethal injection and, along with many other states, currently faces huge drug administration issues, as well as issues with midazolam itself.<sup>140</sup> Mississippi has executed just two people in the past ten years,<sup>141</sup> so the lack of botched executions does not mean the risk of maladministration does not exist. By looking to other states with similar procedures, it is clear that the only way to ensure an inmate does not suffer from a mistake done by the execution staff is to avoid using lethal injection executions altogether.

Along with the actual process of administering the drugs and the protocols establishing it, the application of the death penalty should be considered when determining when a punishment is cruel. In 1972, the U.S. Supreme Court found the death penalty to

---

<sup>137</sup> *Description of Each Execution Method*, *supra* note 102.

<sup>138</sup> *See supra* note 63 and accompanying text.

<sup>139</sup> *See Radelet*, *supra* note 45.

<sup>140</sup> *See generally* Austin Sarat et al., *The Fate of Lethal Injection: Decomposition of the Paradigm and Its Consequences* (Apr. 28, 2021) (unpublished article) (on file with SSRN).

Between 2010 and 2020, newspapers and independent witnesses used [“botched”] to describe twenty-eight of the lethal injections, or 8.4 percent. This label was used to describe only 3.7 percent of barbiturate combination executions. However, newspapers or witnesses labelled 7.3 percent of barbiturate overdose executions as botched, about twice the rate as barbiturate combinations. In sedative combination executions, the rate skyrocketed to 22.4 percent.

*Id.* at 30.

<sup>141</sup> *Death Penalty in Mississippi*, *supra* note 103.

violate the Eighth Amendment in *Furman v. Georgia*.<sup>142</sup> In his concurrence, Justice Douglas stated, “[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”<sup>143</sup> This discriminatory application of the death penalty began again when it was reinstated just four years later,<sup>144</sup> and it continues to this day. “While black and Hispanic people represent just 31 percent of the U.S. population, they represent 53 percent of death row inmates, at 41.9 percent and 11.3 percent, respectively.”<sup>145</sup> This discriminatory application of the death penalty causes the sentence to be cruel, even if the punishment itself is not considered to violate the Eighth Amendment. No citizen’s life or freedom should depend on the biases or opinions of a judge, prosecutor, or jury; sentencing safeguards must protect from this type of application. The Mississippi Supreme Court should declare a punishment unconstitutional if it is applied discriminatorily, even if the punishment itself does not violate the U.S. Constitution.

### B. Unusual

When evaluating the constitutionality of a punishment under the Mississippi Constitution, a method can be declared unconstitutional if it violates either the cruel *or* unusual prohibitions under Article 3, Section 28. The Mississippi Supreme Court provides a brief analysis of the “unusual” prohibition in *Jordan v. State*.<sup>146</sup> This analysis states, “[T]he punishment Jordan asks this Court to vacate—his death sentence—is not itself unusual.”<sup>147</sup> The court provides no further discussion on what “unusual” means, so this standard must be developed outside of what the court states. To determine if a punishment is “unusual,”

---

<sup>142</sup> 408 U.S. 238, 239-40 (1972).

<sup>143</sup> *Id.* at 256-57 (Douglas, J., concurring).

<sup>144</sup> See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

<sup>145</sup> Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, CTR. FOR AM. PROGRESS (May 10, 2019), <https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/> [https://perma.cc/J3BG-TKQS].

<sup>146</sup> 224 So. 3d 1252, 1253 (Miss. 2017).

<sup>147</sup> *Id.*

the Mississippi Supreme Court should consider the death penalty method’s current use in the state, the passage of time since the last use of the method, and how society might view the use of the method.

Mississippi allows for nitrogen hypoxia, electrocution, and firing squad to be available as alternative methods of execution to lethal injection.<sup>148</sup> As previously discussed in this Comment, none of these methods constitute a regular or common use in Mississippi; a large amount of time has passed since any of these methods were used, except for the firing squad which has never been used by the state.<sup>149</sup> A better consideration into what makes a punishment “unusual” would be if the method of execution is currently being used in Mississippi. Executions are completed by lethal injection only; none of the remaining methods are being used in the state and are not scheduled for future use.

The Mississippi Supreme Court should include the amount of time that has passed since the method was last used in the state when determining if the method violates the state constitution. This Comment has already evaluated the amount of time passed since each alternative method was last used in the state previously. In summary, all of the executions since 1989 have been completed by lethal injection. It has been over thirty years since any of the other methods were used. Due to the amount of time passed, attempting to use nitrogen hypoxia, electrocution, or firing squad should be held unusual and unconstitutional.

The Mississippi Supreme Court should also consider the public opinion about the method of execution when determining if it violates the state constitution. While the use itself and the passage of time since its last use are important factors, societal beliefs about the method can offer a greater insight as to why the use stopped in the first place. Mississippi utilized hanging, the electric chair, and the gas chamber to execute people previously.<sup>150</sup> All these methods worked with a lower rate of botched executions, so the reason for

---

<sup>148</sup> See MISS. CODE ANN. § 99-19-51(1) (West, Westlaw through 2023 Reg. Sess.).

<sup>149</sup> See discussion *supra* Part IV.

<sup>150</sup> See Jimmie E. Gates, *Firing Squad Possible Means of Execution in Mississippi*, CLARION-LEDGER, <https://www.clarionledger.com/story/news/politics/2017/03/28/execution-bill-heads-governor/99732410/> [https://perma.cc/2QWE-WRJ8] (Mar. 29, 2017, 7:51 AM).

the switch to lethal injection must rely more on efficiency or rate of success.<sup>151</sup>

Mississippi's history with hangings is very ugly and a reflection of racist tendencies of the past; it includes lynching and the belief that one race had superiority over others. Hangings no longer happen, especially not in a state-sanctioned death. Should someone be put to death by hanging in the twenty-first century, likely everyone involved in the process would face heavy backlash for their actions. Thoughts and opinions of people have evolved, and a death by hanging feels barbaric and from the past. Hanging has not been a method of execution in Mississippi since 1940 when the electric chair replaced it.<sup>152</sup>

The electric chair also has a troubled past. Referred to as "Old Sparky," Mississippi had the first ever portable electric chair, and it traveled around the state for executions.<sup>153</sup> Execution staff shave inmates' heads before an electrocution,<sup>154</sup> and witnesses have testified to the smell of burnt flesh after completion of the execution.<sup>155</sup> Now a piece of history in the state, the use of the electric chair causes great concern in our more modern world. Obvious pain and suffering are on display during the execution, resulting in convulsions, blood, and a near impossible image for a developed society to imagine.<sup>156</sup> The use of the electric chair stopped as soon as the state found a more "humane" execution method. With time, society shifts to what it believes is the least painful execution method. This is a reflection of what we believe: state-sanctioned death should not look like a brutal image of the past when new methods, involving less visible torture, are available.

Death by nitrogen hypoxia occurred for thirty-five years in the state but was removed as an option in 1998, replaced by lethal

---

<sup>151</sup> See Radelet, *supra* note 45.

<sup>152</sup> *Death Penalty in Mississippi*, *supra* note 103.

<sup>153</sup> Lewis O. Powell IV, *Death on Wheels—Jackson, Mississippi*, S. SPIRIT GUIDE (July 23, 2021), <https://www.southernspiritguide.org/death-on-wheels-jackson-mississippi/> [<https://perma.cc/4B8S-4HNM>]; see also *Death on Wheels – Mississippi's Travelling Executioner*, CRIMESCRIBE (Sept. 28, 2015), <https://crimescribe.com/2015/09/28/death-on-wheels-mississippi-travelling-executioner/> [<https://perma.cc/MF2K-76N3>].

<sup>154</sup> See discussion *supra* Section IV.B.

<sup>155</sup> See Radelet, *supra* note 45.

<sup>156</sup> *Id.*



injection.<sup>157</sup> By removing the gas chamber as an option, the legislators showed their commitment to no longer making inmates die this way. If not for lethal injection drug concerns, nitrogen hypoxia may not have been reintroduced as an option after its removal.<sup>158</sup> Mississippi no longer uses the gas chamber, and no other country uses gas as a method of execution.<sup>159</sup> Images of gas chambers are often linked to the Holocaust; similar to the history of hangings, a state-sanctioned death by nitrogen hypoxia would represent ideologies from the past. Death by gas chamber is unusual not only due to its lack of use, but also because society has evolved from executions by lethal gas and the pain that comes with it.

Although Mississippi has executed inmates with the other methods, no executions have been performed by firing squad in Mississippi.<sup>160</sup> Its use in the state would require new facilities to be built and new protocols to be drafted. Utah is the only state to use firing squads for executions, with only three other states having it as an option.<sup>161</sup> However, no inmate has been executed by firing squad in over a decade.<sup>162</sup> The protocol for firing squads suggests apprehension to the idea. Robert Dunham, executive director of the Death Penalty Information Center, described the process:

“The prisoner is strapped into a chair, has a hood put over his or her face and a target placed on his or her chest above the heart. There are sandbags around the chair in case there are either stray bullets or ricochet. Done properly, the sharpshooters should be able to hit the target. And if there are five sharpshooters, four have live ammunition, one has a blank[.] . . . The idea is that that provides them with

---

<sup>157</sup> See discussion *supra* Section IV.A.

<sup>158</sup> Execution by gas chamber was reintroduced in 2017. See Gates, *supra* note 150.

<sup>159</sup> Deborah W. Denno, *Gas Chamber*, BRITANNICA, <https://www.britannica.com/topic/gas-chamber> [https://perma.cc/872U-8R4F] (Oct. 20, 2023).

<sup>160</sup> See discussion *supra* Section IV.C.

<sup>161</sup> Laurel Wamsley, *With Lethal Injections Harder to Come By, Some States Are Turning to Firing Squads*, NPR (May 19, 2021, 5:00 AM), <https://www.npr.org/2021/05/19/997632625/with-lethal-injections-harder-to-come-by-some-states-are-turning-to-firing-squad> [https://perma.cc/75NS-RHP7].

<sup>162</sup> *Id.*

psychological deniability so that they don't have assurance that they actually killed somebody."<sup>163</sup>

The process itself suggests discomfort with the idea of knowing which shooter fatally killed the inmate. If no hesitation about this method existed, there could be one sharpshooter with high accuracy, which would cut down on costs and protocol altogether.

If Mississippi scheduled an execution by nitrogen hypoxia, electrocution, or firing squad, that execution would be unconstitutional because the method is unusual due to its lack of usage in the state, the amount of time that has passed since its last use, and how society views the method now.

#### CONCLUSION

When drafting the Mississippi Constitution, the founders of the state chose to diverge from the standard given by the federal government. Mississippi's decision to use differing language is significant. Rather than creating a test or standard specific to its own constituents' rights and protections, the Mississippi Supreme Court has adopted the federal standards for the Eighth Amendment. Moving forward, Mississippi must create its own procedures and standards when evaluating death penalty claims.

Mississippi needs to interpret the language of its constitution as a disjunctive phrase—separating “cruel” from “unusual”—rather than adopting the federal interpretation of a conjunctive phrase. By doing this, the state would be able to evaluate each part of “cruel” and “unusual” separately, giving its citizens the protections guaranteed to them in the state constitution and ending the death penalty.

Part I of this Comment discussed state and federal death penalty jurisprudence under Article 3, Section 28 of the Mississippi Constitution and under the Eighth Amendment. Part II explained why lethal injection is torture by evaluating inmates' deaths, their autopsies, and the pain they experience from the drugs used. Part III argued that lethal injection violates the Mississippi Constitution because of the disjunctive language of the constitutional protection and the need for a separate state standard when determining if a

---

<sup>163</sup> *Id.*

punishment is unconstitutional. Part IV examined the remaining methods of execution allowed under Mississippi law and how they also violate the state constitution due to their rare use and the passage of time. Finally, Part V suggested a new standard for declaring whether a method of execution violates the state constitution by separately evaluating if the punishment is cruel and if it is unusual.

## APPENDIX: FIFTY STATE SURVEY

| State                  | Execution State <sup>164</sup> | Method of Execution                | Last Date of Execution <sup>165</sup>   |
|------------------------|--------------------------------|------------------------------------|---|
| Alabama <sup>166</sup> | Yes                            | Lethal injection;<br>Electrocution | November 16, 2023                       |
| Alaska <sup>167</sup>  | No                             | N/A                                | Abolished before established as a state |

<sup>164</sup> Katharina Buchholz, *Which States Have the Death Penalty?*, STATISTA (May 16, 2023), <https://www.statista.com/chart/20053/death-penalty-by-us-state/> [<https://perma.cc/TT5K-655G>]. The following nine states are execution states that have currently halted all executions: Arizona, California, Montana, Nevada, Ohio, Oregon, Pennsylvania, South Carolina, and Tennessee. *Id.*

<sup>165</sup> Information on most recent executions is current as of December 17, 2023. For executions after 1976, see *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> [<https://perma.cc/WC3V-UHBZ>] (last visited Dec. 16, 2023). For executions prior to 1976, see *Executions in the U.S. 1608-2002: The ESPY File – Executions by State*, DEATH PENALTY INFO. CTR. [hereinafter *The ESPY File*], <https://deathpenaltyinfo.org/documents/ESPYstate.pdf> [<https://perma.cc/NX4B-557X>] (last visited Dec. 16, 2023).

<sup>166</sup> *Alabama*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alabama> [<https://perma.cc/W54U-YQKF>] (last visited Sept. 20, 2023).

<sup>167</sup> *Alaska*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alaska> [<https://perma.cc/YF9G-LEVE>] (last visited Sept. 20, 2023).

| State                     | Execution State <sup>164</sup> | Method of Execution  | Last Date of Execution <sup>165</sup> |
|---------------------------|--------------------------------|--|---------------------------------------|
| Arizona <sup>168</sup>    | Yes                            | Lethal injection (one-drug protocol); <sup>169</sup> Gas chamber (if sentenced before November 1992) | November 16, 2022                     |
| Arkansas <sup>170</sup>   | Yes                            | Lethal injection; Electrocution (if crime was committed prior to July 1983)                          | April 27, 2017 <sup>171</sup>         |
| California <sup>172</sup> | Yes <sup>173</sup>             | Lethal injection; Gas chamber  | January 17, 2006                      |

<sup>168</sup> *Arizona*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arizona> [<https://perma.cc/S273-X3QF>] (last visited Sept. 20, 2023).

<sup>169</sup> Arizona and six other death penalty states use one drug for their lethal injection protocols—a lethal dose of anesthetic—instead of the usual three-drug protocol. See *Overview of Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols> [<https://perma.cc/NFP4-L6S7>] (last visited Sept. 20, 2023).

<sup>170</sup> *Arkansas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arkansas> [<https://perma.cc/26MC-CGHY>] (last visited Sept. 20, 2023).

<sup>171</sup> More recently, the federal government completed an execution in the state on July 14, 2020. Ariane de Vogue et al., *Daniel Lewis Lee Executed After Supreme Court Clears the Way for First Federal Execution in 17 Years*, CNN, <https://www.cnn.com/2020/07/14/politics/daniel-lewis-lee-supreme-court-rule-execution/index.html> [<https://perma.cc/A98P-SY3W>] (July 14, 2020, 12:11 PM).

<sup>172</sup> *California*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california> [<https://perma.cc/JZ8U-JX7U>] (last visited Sept. 20, 2023).

<sup>173</sup> Governor Gavin Newsom issued an executive order on March 13, 2019, halting all executions. *California Governor Announces Moratorium on Executions*, DEATH PENALTY

| State                      | Execution State <sup>164</sup> | Method of Execution                  | Last Date of Execution <sup>165</sup> |
|----------------------------|--------------------------------|--------------------------------------|---------------------------------------|
| Colorado <sup>174</sup>    | No                             | N/A                                  | October 13, 1997                      |
| Connecticut <sup>175</sup> | No                             | N/A                                  | May 13, 2005                          |
| Delaware <sup>176</sup>    | No                             | N/A                                  | April 20, 2012                        |
| Florida <sup>177</sup>     | Yes                            | Lethal injection;<br>Electrocution   | October 3, 2023                       |
| Georgia <sup>178</sup>     | Yes                            | Lethal injection (one-drug protocol) | January 29, 2020 <sup>179</sup>       |

---

INFO. CTR. (Mar. 13, 2019), <https://deathpenaltyinfo.org/news/california-governor-announces-moratorium-on-executions> [<https://perma.cc/4MLT-BS6P>].

<sup>174</sup> *Colorado*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/colorado> [<https://perma.cc/9VY3-8FER>] (last visited Dec. 17, 2023).

<sup>175</sup> *Connecticut*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/connecticut> [<https://perma.cc/NL7G-RGZP>] (last visited Dec. 17, 2023).

<sup>176</sup> *Delaware*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/delaware> [<https://perma.cc/DZ95-ZG94>] (last visited Dec. 17, 2023).

<sup>177</sup> *Florida*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida> [<https://perma.cc/QNC3-CYKM>] (last visited Sept. 20, 2023).

<sup>178</sup> *Georgia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/georgia> [<https://perma.cc/6SP9-GZNP>] (last visited Sept. 20, 2023); *Overview of Lethal Injection Protocols*, *supra* note 169.

<sup>179</sup> More recently, the federal government completed an execution in the state on September 22, 2020. Off. of Pub. Affs., *Statement by Department of Justice Spokesperson Kerri Kupec on the Execution of William Emmett Lecroy Jr.*, U.S. DEP'T JUST., <https://www.justice.gov/opa/pr/statement-department-justice-spokesperson-kerri-kupec-execution-william-emmett-lecroy-jr> [<https://perma.cc/9ENA-XN7A>] (Sept. 22, 2020).

| State                   | Execution State <sup>164</sup> | Method of Execution                  | Last Date of Execution <sup>165</sup>   |
|-------------------------|--------------------------------|--------------------------------------|---|
| Hawaii <sup>180</sup>   | No                             | N/A                                  | Abolished before established as a state |
| Idaho <sup>181</sup>    | Yes                            | Lethal injection (one-drug protocol) | June 12, 2012                           |
| Illinois <sup>182</sup> | No                             | N/A                                  | March 17, 1999                          |
| Indiana <sup>183</sup>  | Yes                            | Lethal injection                     | December 11, 2009                       |
| Iowa <sup>184</sup>     | No                             | N/A                                  | March 15, 1963 <sup>185</sup>           |
| Kansas <sup>186</sup>   | Yes                            | Lethal injection                     | June 22, 1965                           |

<sup>180</sup> *Hawaii*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/hawaii> [<https://perma.cc/C8L6-AWY4>] (last visited Sept. 20, 2023).

<sup>181</sup> *Idaho*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/idaho> [<https://perma.cc/27HN-NRBR>] (last visited Sept. 20, 2023); *Overview of Lethal Injection Protocols*, *supra* note 169.

<sup>182</sup> *Illinois*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/illinois> [<https://perma.cc/N72C-SZTL>] (last visited Dec. 17, 2023).

<sup>183</sup> *Indiana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/indiana> [<https://perma.cc/3Z6C-LEKA>] (last visited Sept. 20, 2023).

<sup>184</sup> *Iowa*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/iowa> [<https://perma.cc/6KEH-HZUJ>] (last visited Sept. 20, 2023).

<sup>185</sup> Although Iowa abolished the death penalty in 1965, *id.*, the federal government completed an execution in the state on July 17, 2020. Hailey Fuchs, *For Third Time This Week, the Federal Government Carries Out an Execution*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/dustin-honken-federal-execution.html> [Perma.cc link unavailable].

<sup>186</sup> *Kansas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas> [<https://perma.cc/SG5R-NMDK>] (last visited Sept. 20, 2023); *see also* Nancy Burghart, *Capital Punishment Information*, KAN. DEP'T CORR., <https://www.doc.ks.gov/newsroom/capital> [<https://perma.cc/PA4R-C2D2>] (July 20, 2021, 2:57 PM).

| State                        | Execution State <sup>164</sup> | Method of Execution  | Last Date of Execution <sup>165</sup> |
|------------------------------|--------------------------------|--|---------------------------------------|
| Kentucky <sup>187</sup>      | Yes                            | Lethal injection;<br>Electrocution<br>(if sentenced prior to March 1998) | November 21, 2008                     |
| Louisiana <sup>188</sup>     | Yes                            | Lethal injection   | January 7, 2010                       |
| Maine <sup>189</sup>         | No                             | N/A  | November 20, 1885                     |
| Maryland <sup>190</sup>      | No                             | N/A  | December 5, 2005 <sup>191</sup>       |
| Massachusetts <sup>192</sup> | No                             | N/A  | May 9, 1947                           |

<sup>187</sup> *Kentucky*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kentucky> [<https://perma.cc/V6J6-7N3X>] (last visited Sept. 20, 2023).

<sup>188</sup> *Louisiana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/louisiana> [<https://perma.cc/T66T-B99E>] (last visited Sept. 20, 2023).

<sup>189</sup> *Maine*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maine> [<https://perma.cc/QWQ6-HZW9>] (last visited Dec. 17, 2023).

<sup>190</sup> *Maryland*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland> [<https://perma.cc/3DE6-C8H5>] (last visited Sept. 20, 2023).

<sup>191</sup> Although Maryland abolished the death penalty in 2013, *id.*, the federal government completed an execution in the state on January 16, 2021. See Mallika Kallingal & Christina Carrega, *Dustin Higgs Executed Less than a Week Before Inauguration Day*, CNN, <https://www.cnn.com/2021/01/16/us/dustin-higgs-executed/index.html> [<https://perma.cc/NQ88-AD3M>] (Jan. 16, 2021, 2:59 AM).

<sup>192</sup> *Massachusetts*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/massachusetts> [<https://perma.cc/MS7E-P6X4>] (last visited Dec. 17, 2023).



| State                      | Execution State <sup>164</sup> | Method of Execution                               | Last Date of Execution <sup>165</sup> |
|----------------------------|--------------------------------|---|---------------------------------------|
| Michigan <sup>193</sup>    | No                             | N/A   | September 24, 1830 <sup>194</sup>     |
| Minnesota <sup>195</sup>   | No                             | N/A   | February 13, 1906                     |
| Mississippi <sup>196</sup> | Yes                            | Lethal injection                                  | December 14, 2022                     |
| Missouri <sup>197</sup>    | Yes                            | Lethal injection (one-drug protocol); Gas chamber | August 1, 2023                        |
| Montana <sup>198</sup>     | Yes                            | Lethal injection                                  | October 11, 2006                      |
| Nebraska <sup>199</sup>    | Yes                            | Lethal injection                                  | August 14, 2018                       |

<sup>193</sup> *Michigan*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/michigan> [<https://perma.cc/8BGZ-KNUL>] (last visited Dec. 17, 2023).

<sup>194</sup> This execution occurred while Michigan was still a territory. *Michigan Legal Milestones: 41. First to Abolish the Death Penalty*, ST. BAR MICH. (Nov. 6, 2018), [https://www.michbar.org/programs/milestone/milestones\\_firsttoabolish](https://www.michbar.org/programs/milestone/milestones_firsttoabolish) [<https://perma.cc/MJ6V-CCP8>]. Although Michigan abolished the death penalty soon after becoming a state, *id.*, the federal government completed an execution in the state in 1938. See *Michigan*, *supra* note 193.

<sup>195</sup> *Minnesota*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/minnesota> [<https://perma.cc/YA4K-B7RM>] (last visited Sept. 20, 2023).

<sup>196</sup> *Mississippi*, *supra* note 96. Although other methods—nitrogen hypoxia, electrocution, and firing squad—are allowed under Mississippi law, none of these methods has been used since 1989. See discussion *supra* Part IV.

<sup>197</sup> *Missouri*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/missouri> [<https://perma.cc/9XU8-EGAV>] (last visited Sept. 20, 2023); *Overview of Lethal Injection Protocols*, *supra* note 169.

<sup>198</sup> *Montana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana> [<https://perma.cc/C9LQ-FR2Y>] (last visited Sept. 20, 2023).

<sup>199</sup> *Nebraska*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska> [<https://perma.cc/6XEW-4Z22>] (last visited Sept. 20, 2023).

| State                         | Execution State <sup>164</sup> | Method of Execution | Last Date of Execution <sup>165</sup> |
|-------------------------------|--------------------------------|---------------------|---------------------------------------|
| Nevada <sup>200</sup>         | Yes                            | Lethal injection    | April 26, 2006                        |
| New Hampshire <sup>201</sup>  | No                             | N/A                 | July 14, 1939                         |
| New Jersey <sup>202</sup>     | No                             | N/A                 | January 22, 1963                      |
| New Mexico <sup>203</sup>     | No                             | N/A                 | November 6, 2001                      |
| New York <sup>204</sup>       | No                             | N/A                 | August 15, 1963 <sup>205</sup>        |
| North Carolina <sup>206</sup> | Yes                            | Lethal injection    | August 18, 2006                       |
| North Dakota <sup>207</sup>   | No                             | N/A                 | October 17, 1905                      |

<sup>200</sup> Nevada, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nevada> [<https://perma.cc/7S3S-AGUU>] (last visited Sept. 20, 2023).

<sup>201</sup> New Hampshire, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-hampshire> [<https://perma.cc/D5SN-C5MW>] (last visited Dec. 17, 2023).

<sup>202</sup> New Jersey, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-jersey> [<https://perma.cc/5HJN-8EK5>] (last visited Dec. 17, 2023).

<sup>203</sup> New Mexico, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-mexico> [<https://perma.cc/AC68-UTZ3>] (last visited Dec. 17, 2023).

<sup>204</sup> New York, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-york> [<https://perma.cc/DMT9-HTD3>] (last visited Dec. 17, 2023).

<sup>205</sup> Although the “Espy File” states that New York’s last execution occurred on June 15, 1963, see *The ESPY File*, *supra* note 165, the correct date appears to be August 15, 1963. See *The Last Execution*, N.Y. TIMES, Mar. 7, 1995, at B5.

<sup>206</sup> North Carolina, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina> [<https://perma.cc/GE33-37XF>] (last visited Sept. 20, 2023).

<sup>207</sup> North Dakota, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-dakota> [<https://perma.cc/KZ9P-SCFM>] (last visited Dec. 17, 2023).

| State                         | Execution State <sup>164</sup> | Method of Execution                  | Last Date of Execution <sup>165</sup> |
|-------------------------------|--------------------------------|--------------------------------------|---------------------------------------|
| Ohio <sup>208</sup>           | Yes                            | Lethal injection (one-drug protocol) | July 18, 2018                         |
| Oklahoma <sup>209</sup>       | Yes                            | Lethal injection                     | November 30, 2023                     |
| Oregon <sup>210</sup>         | Yes                            | Lethal injection                     | May 16, 1997                          |
| Pennsylvania <sup>211</sup>   | Yes                            | Lethal injection                     | July 6, 1999                          |
| Rhode Island <sup>212</sup>   | No                             | N/A                                  | February 14, 1845 <sup>213</sup>      |
| South Carolina <sup>214</sup> | Yes                            | Lethal injection;<br>Electrocution   | May 6, 2011                           |

<sup>208</sup> *Ohio*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/ohio> [<https://perma.cc/4HWQ-QBVW>] (last visited Sept. 20, 2023); *Overview of Lethal Injection Protocols*, *supra* note 169.

<sup>209</sup> *Oklahoma*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oklahoma> [<https://perma.cc/ZE64-596C>] (last visited Sept. 20, 2023).

<sup>210</sup> *Oregon*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oregon> [<https://perma.cc/PC99-H4LL>] (last visited Sept. 20, 2023).

<sup>211</sup> *Pennsylvania*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/pennsylvania> [<https://perma.cc/463P-RPH3>] (last visited Sept. 20, 2023).

<sup>212</sup> *Rhode Island*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/rhode-island> [<https://perma.cc/WGL6-5EKW>] (last visited Sept. 20, 2023).

<sup>213</sup> Although the “Espy File” states that Rhode Island’s last execution occurred on February 13, 1845, see *The ESPY File*, *supra* note 165, the correct date appears to be February 14, 1845. See *Rhode Island*, *supra* note 212.

<sup>214</sup> *South Carolina*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/south-carolina> [<https://perma.cc/Q5ES-HEK8>] (last visited Sept. 20, 2023).

| State                       | Execution State <sup>164</sup> | Method of Execution  | Last Date of Execution <sup>165</sup> |
|-----------------------------|--------------------------------|--|---------------------------------------|
| South Dakota <sup>215</sup> | Yes                            | Lethal injection (one-drug protocol)   | November 4, 2019                      |
| Tennessee <sup>216</sup>    | Yes                            | Lethal injection;<br>Electrocution (if crime was committed prior to December 1998) | February 20, 2020                     |
| Texas <sup>217</sup>        | Yes                            | Lethal injection (one-drug protocol)   | November 16, 2023                     |
| Utah <sup>218</sup>         | Yes                            | Lethal injection;<br>Firing squad (if selected prior to May 2004)                  | June 18, 2010                         |
| Vermont <sup>219</sup>      | No                             | N/A  | December 8, 1954                      |

<sup>215</sup> *South Dakota*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/south-dakota> [<https://perma.cc/Q9E7-R8CZ>] (last visited Sept. 20, 2023); *Overview of Lethal Injection Protocols*, *supra* note 169.

<sup>216</sup> *Tennessee*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee> [<https://perma.cc/H43P-WSBL>] (last visited Sept. 20, 2023).

<sup>217</sup> *Texas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas> [<https://perma.cc/P822-JW6J>] (last visited Sept. 20, 2023); *Overview of Lethal Injection Protocols*, *supra* note 169.

<sup>218</sup> *Utah*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/utah> [<https://perma.cc/T5KZ-SKMH>] (last visited Sept. 20, 2023).

<sup>219</sup> *Vermont*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/vermont> [<https://perma.cc/9Y3B-QWUU>] (last visited Dec. 17, 2023).

| State                        | Execution State <sup>164</sup> | Method of Execution | Last Date of Execution <sup>165</sup> |
|------------------------------|--------------------------------|---------------------|---------------------------------------|
| Virginia <sup>220</sup>      | No                             | N/A                 | July 6, 2017 <sup>221</sup>           |
| Washington <sup>222</sup>    | No <sup>223</sup>              | N/A                 | September 10, 2010                    |
| West Virginia <sup>224</sup> | No                             | N/A                 | April 3, 1959                         |
| Wisconsin <sup>225</sup>     | No                             | N/A                 | August 21, 1851                       |
| Wyoming <sup>226</sup>       | Yes                            | Lethal injection    | January 22, 1992                      |

<sup>220</sup> *Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia> [<https://perma.cc/YNW7-7YFM>] (last visited Dec. 17, 2023).

<sup>221</sup> More recently, the federal government executed an inmate in Virginia on January 14, 2021. *Federal Government Executes Corey Johnson, Who Was Likely Intellectually Disabled, Without Any Judicial Review of His Eligibility for the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 14, 2021), <https://deathpenaltyinfo.org/news/federal-government-prepares-to-execute-corey-johnson-who-is-likely-intellectually-disabled-without-any-judicial-review-of-his-eligibility-for-the-death-penalty> [<https://perma.cc/WBJ4-MH5N>].

<sup>222</sup> *Washington*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/washington> [<https://perma.cc/TVN2-LVEG>] (last visited Sept. 20, 2023).

<sup>223</sup> The Washington Supreme Court declared the state’s death penalty statute unconstitutional in 2018. *Id.*

<sup>224</sup> *West Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/west-virginia> [<https://perma.cc/V7B6-9UW7>] (last visited Dec. 17, 2023).

<sup>225</sup> *Wisconsin*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wisconsin> [<https://perma.cc/HAK3-QPYS>] (last visited Dec. 16, 2023).

<sup>226</sup> *Wyoming*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wyoming> [<https://perma.cc/K5XD-JC88>] (last visited Sept. 20, 2023).

