

## **Response to Defendant's Motion to Strike the Death Penalty as Cruel and Unusual Punishment and a Violation of International Law**

The death penalty has not been deemed cruel and unusual punishment, even if defendant spends several years in confinement and is executed by lethal injection; the State need not disclose execution protocols; international law is not applicable.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. The death penalty has not been deemed cruel and unusual punishment, even if a defendant spends several years in confinement.**

Defendant argues that the death penalty is cruel and unusual punishment, particularly because of the “living conditions on death row” and “the length of time he would be on death row before the appeals process would be completed.” The Arizona Supreme Court has rejected the argument that the death penalty is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. *See, e.g., State v. Carreon*, 210 Ariz. 54, 75, 107 P.3d 900, 921 (2005). In addition, the court has specifically rejected defendant's argument that executing an inmate after several years on death row would constitute cruel and unusual punishment::

In *Lackey v. Texas*, the Supreme Court declined to review the same issue, although Justice Stevens filed a memorandum noting his belief that this concern should be further explored. 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995). . . . Since then, so-called “*Lackey* claims” have found little support in the courts that have addressed them. *See McKenzie v. Day*, 57 F.3d 1461, 1466-67 (9<sup>th</sup> Cir. 1995) (delay in carrying out execution benefits inmates, allowing them to extend their lives and perhaps obtain commutations, reversals, or, rarely, complete exoneration); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272, 1288 (1996) (“If an Eighth Amendment challenge based on delay were to prevail, then the procedures designed

to promote fair adjudication in death penalty cases would in themselves be used to ultimately defeat their own purpose.”). . . .

We perceive no constitutional violation. There is no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution.

*State v. Schackart*, 190 Ariz. 238, 259, 947 P.2d 315, 336 (1997).

In *Wilcher v. State*, 863 So.2d 776, 834 (Miss. 2003), defendant filed a *Lackey* claim asserting that he had been “subjected to ‘cruel and inhuman’ treatment” because he had been “kept in maximum confinement on Mississippi’s Death Row under conditions including lock-down and isolation for at least 23 hours out of the day,” and he had been “subjected to numerous execution dates during those 19-20 years.” The court found that there is “no law of the United States or of this state to support Wilcher’s claim.” *Id.* See also *Moore v. State*, 771 N.E.2d 46, 54 (Ind. 2002) (20 years not cruel and unusual).

Defendant has cited foreign case law, such as *Pratt & Morgan v. Attorney General for Jamaica*, 3 S.L.R. 995, 2 A.C. 1, 4 All E.R. 769 (Privy Council 1993), to support his argument that a long period on death row should be considered inhuman punishment. However, United States courts have disagreed:

With all due respect to our colleagues abroad, we do not believe this view will prevail in the United States. We are not confronted with a situation where the State of Montana has set up a scheme to prolong the period of incarceration, or re-scheduled the execution repeatedly in order to torture McKenzie. The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances.

*McKenzie v. Day*, 57 F.3d 1461, 1466-1467 (9<sup>th</sup> Cir. 1995); accord, *White v. Johnson*, 79 F.3d 432, 439 (5<sup>th</sup> Cir. 1996); *People v. Frye*, 18 Cal.4<sup>th</sup> 894, 1030-1031, 959 P.2d 183, 262-263, 77 Cal.Rptr.2d 25, 105 (1998). In addition, there is no evidence that defendant here will receive inhumane treatment while incarcerated or that he will remain on death row for an inappropriate amount of time.

## **II. The Arizona Supreme Court has held that execution by lethal injection is constitutional.**

A.R.S. § 13-704(A) states: "The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections." Defendant argues that execution by lethal injection using certain chemicals causes pain and should be declared unconstitutional by this Court. However, the Arizona Supreme Court has repeatedly found that lethal injection is a constitutional method of execution.

In *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995), the court stated:

Hinchey argues that death by lethal injection violates the Eighth Amendment to the United States Constitution because if carried out incorrectly, the procedure could be painful, and if carried out correctly, "he will be aware of the onset of loss of consciousness and will suffer shortness of breath and suffocation not unlike death by lethal gas." . . . We have found no legal authority to support this argument. The state cites authority holding that lethal injection is not cruel and unusual punishment, . . . and argues that medical experts urge that death by lethal injection is the most humane of any method of execution. . . . The state has the better argument. We hold that death by lethal injection is not cruel and unusual punishment. . . .

The court relied on *Hinchey* in *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999), and stated: “Appellant asserts that execution by lethal injection is cruel and unusual punishment. This court has previously determined lethal injection to be constitutional.” And the court has continued to uphold the constitutionality of lethal injection. See, e.g., *State v. Cromwell*, 211 Ariz. 181, 119 P.3d 448, 459-460 (2005); *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193, 1219 (2005); *State v. Carreon*, 210 Ariz. 54, 76, 107 P.3d 900, 922 (2005); *State v. Canez*, 202 Ariz. 133, 165, 42 P.3d 564, 596 (2002). Likewise, courts in other jurisdictions have upheld execution by lethal injection. See, e.g., *State v. Piper*, 709 N.W.2d 783, 796 (S.D. 2006); *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005); *McConnell v. State*, 102 P.3d 606, 615 (Nev. 2004).

In *Hill v. McDonough*, 126 S.Ct. 2096 (2006), the United States Supreme Court held that an inmate’s claim that Florida’s lethal injection protocol was cruel and unusual punishment could proceed under 42 U.S.C. § 1983 and was not foreclosed by previous habeas petitions. The issue addressed was not the constitutionality of lethal injection but whether the 11<sup>th</sup> Circuit had denied Hill a forum. The Supreme Court stated that the equities and merits of the underlying action were not before it.

Precedents already set by the United States Supreme Court and the Arizona Supreme Court must be followed until overruled. “When later opinions of the Supreme Court show our constitutional interpretations to be incorrect, we must overrule them and bring our decisions into conformity with Supreme Court precedent.” *State v. Davis*, 206 Ariz. 377, 384, 79 P.3d 64, 71, n.4 (2003).

Unless and until the United States Supreme Court holds otherwise, this Court must follow the conclusion of the Arizona Supreme Court that execution by lethal injection is constitutional.

**III. Rule 15.1, Ariz.R.Crim.P., does not require the prosecutor to disclose internal procedures that the Department of Corrections follows when an inmate is executed.**

Defendant argues that the prosecutor should provide him with the “protocol” used by the Department of Corrections (DOC) when executing inmates, including qualifications of personnel, methods of mixing and administering drugs, and how the execution method was developed. He states that this information must be disclosed under Rule 15.1(b)(8), Ariz.R.Crim.P., because it is information that “would tend to reduce the defendant’s punishment.” Defendant misinterprets that rule, which is intended to cover exculpatory or impeachment evidence. See Comment to former Rule 15.1(a) regarding *Brady* obligations. The information defendant seeks would not tend to reduce his punishment to a punishment less than death. It would have no bearing at all on the sentence defendant receives.

The prosecutor does not have the DOC protocols requested and does not know whether such information exists. The prosecutor’s obligations under Rule 15.1(f) extend to information in the possession or control of persons who have participated in the investigation of the case and are under the prosecutor’s direction or control. DOC has not participated in the investigation of this case, nor does the prosecutor have any control over or interest in the DOC’s execution

procedures. Even if defendant sought an order under Rule 15.1(g), it is unlikely that defendant could show substantial need, because the information is not material to this case. “The drafters of this subsection recognized the possibility that in exceptional cases, such as those in which a private party or governmental agency not subject to the prosecutor’s control possesses evidence material to the case, additional materials may exist that should be discoverable by the defendant.” *Carpenter v. Superior Court*, 176 Ariz. 486, 489, 862 P.2d 246, 249 (App. 1993). Information in internal records, such as DOC personnel records, “is not discoverable unless it could lead to admissible evidence or would be admissible itself.” *State v. Cano*, 154 Ariz. 447, 448, 743 P.2d 956, 957 (App. 1987).

This is not an action brought by a death row inmate against DOC to challenge the lethal injection protocols. This case is to determine the guilt or innocence of the defendant and the appropriate sentence if defendant is convicted. Any lethal injection protocols maintained by DOC are not relevant to those determinations. In addition, defendant has not served his motion on DOC, denying that agency the opportunity to object to this request for its internal documents.

Rule 15.1(b) does not require the prosecutor to disclose any DOC procedures for administering lethal injection. Nor has defendant met the requirements for disclosure under Rule 15.1(g). The information sought is not material to this case, and the court should deny defendant’s request for an order to release the DOC “protocols.”

#### **IV. International laws and treaties do not prohibit death sentences imposed under United States law.**

Defendant argues that the death penalty violates international norms, numerous human rights conventions and covenants, and the doctrine of *jus cogens* (a norm that permits no derogation). In *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), the appellant alleged that international standards made imposition of the death penalty for civilian crimes inappropriate. The court stated that “American law is to the contrary,” and found the claim “meritless.” *Id.* at 602, 886 P.2d at 1358.

In *Buell v. Mitchell*, 274 F.3d 337, 370 (6<sup>th</sup> Cir. 2001), the court discussed in detail international law challenges to Ohio’s death penalty statute and found them “wholly meritless.” For example, the court explained that the International Covenant on Civil and Political Rights (ICCPR) specifically recognized the existence of the death penalty, and the United States reserved the right to impose capital punishment when that treaty was ratified. The court also stated that “we cannot conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of *jus cogens*.” *Id.* at 373. Whether international law prevents a state from carrying out the death penalty “is a question that is reserved to the executive and legislative branches of the United States government.” *Id.* at 376. *See also People v. Perry*, 38 Cal.4<sup>th</sup> 302, 322, 132 P.3d 235, 248, 42 Cal.Rptr.3d 30, 46 (2006) (ICCPR permits use of the death penalty); *State v. Allen*, 360 N.C. 297, 318, 626 S.E.2d 271, 287 (2006) (same).

Courts in several other jurisdictions have agreed that international law does not prohibit death sentences in the United States. See, e.g., *People v. Hillhouse*, 27 Cal.4<sup>th</sup> 469, 511, 40 P.3d 754, 782, 117 Cal.Rptr.2d 45, 78 (2002) (“International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements”); *State v. Odom*, 137 S.W.3d 572, 599 (Tenn. 2004) (“The authorities appear to be universal that no customary or international law or international treaty prohibits a state from imposing the death penalty as a punishment for certain crimes”); *State v. Kley-pas*, 272 Kan. 894, 1056, 40 P.3d 139, 255 (2001) (international law does not prohibit Kansas from invoking the death penalty); *Sorto v. State*, 173 S.W.3d 469, 490 (Tex.Crim.App. 2005) (treaties do not prohibit the United States from imposing capital punishment). Defendant here has failed to cite any controlling authority to support his position that international law prohibits Arizona from sentencing him to death.

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