No. 14-7955

IN THE

Supreme Court of the United States

RICHARD E. GLOSSIP, *et al.*,

Petitioners,

v.

KEVIN J. GROSS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous briefs as *amicus curiae* each year, in the United States Supreme Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and

1. Each party has consented to the filing of this *amicus curiae* brief in support of petitioners. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

the criminal justice system as a whole. NACDL has a particular interest in this case due to its opposition to the death penalty and its members' representation of capital defendants who may face execution by lethal injection.

SUMMARY OF ARGUMENT

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is opposed to the death penalty in all cases, regardless of the method of execution. NACDL recognizes, however, that it is inevitable that individuals convicted of capital crimes will continue to be executed by lethal injection, at least for the time being.

Given that reality, NACDL believes the drug protocol adopted by the State of Oklahoma violates the Eighth Amendment's prohibition against cruel and unusual punishment. The protocol at issue, which relies on the use of midazolam for the prevention of pain, was devised in unseemly haste, based on incomplete information derived largely from an Internet search, by officials lacking any expertise regarding the drugs involved and facing political pressure to find some way to carry out executions that were already scheduled. Petitioners are entitled under our Constitution to expect that their executions will be carried out in as humane a manner as possible, but the actions of the State of Oklahoma have made that impossible. NACDL urges this Court to reverse the decision below and hold that the State of Oklahoma's execution drug protocol is unconstitutional.

ARGUMENT

I. NACDL Opposes the Death Penalty in All Cases, Regardless of the Method of Execution

Amicus curiae NACDL is unalterably opposed to the death penalty in all circumstances, no matter how the sentence of death is carried out. NACDL respectfully submits that the death penalty is unjust, uncivilized, and inconsistent with the inherent fallibility of the American criminal justice system, and therefore unconstitutional. *See, e.g., Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) ("the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'") (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)); *Gregg v. Georgia*, 428 U.S. 227, 241 (1976) (Marshall, J., dissenting) ("The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments."); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.").

NACDL remains hopeful that as the American people learn more about the realities of racial disparity, arbitrary

application, and mistaken convictions,[2] the movement away from capital punishment will gain momentum. The percentage of Americans who support the death penalty has declined in recent years,[3] while a number of states – one per year during the period 2008-2012 – have banned it altogether.[4]

At the same time, NACDL recognizes that capital punishment is, at least for the time being, an inescapable reality of our criminal justice system. Over 1,400 individuals have been executed since the death penalty was reinstated in 1976.[5] *See Gregg v. Georgia*, 428 U.S. 153 (1976). The number of executions has fallen in recent years, but despite the decline, 35 people were put to death in 2014 and 72 were newly sentenced to death.[6] A majority of Americans continue to favor the death penalty, and a

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2. Since 1973, over 140 people have been released from death row based on evidence of their innocence. Death Penalty Information Center, Facts About the Death Penalty (Feb. 11, 2015), available at http://www.deathpenaltyinfo.org (hereinafter "DPIC Fact Sheet").

3. Gallup, Death Penalty, http://www.gallup.com/poll/1606/Death-Penalty.aspx.

4. Ethan Bronner, Use of Death Sentences Continues to Fall in U.S., N.Y. Times, Dec. 20, 2012, at A24. Most recently, Pennsylvania imposed a moratorium on executions, as have a number of other states in recent years. Pennsylvania: Governor Halts Executions, N.Y. Times, Feb. 13, 2015, at A14; Ian Lovett, Executions Are Suspended by Governor in Washington, N.Y. Times, Feb. 13, 2014, at A12.

5. DPIC Fact Sheet, *supra* note 2.

6. Timothy Williams, States Execute Fewest Convicts in 20 Years, Report Finds, N.Y. Times, Dec. 18, 2014, at A22.

majority of states continue to carry death penalty statutes on their books. While NACDL continues to hope and advocate for a moratorium on executions and abolition of capital punishment, and believes this country is moving toward those objectives, we cannot realistically expect that there will be no more executions in the United States.

As of October 1, 2014, over 3,000 individuals were being held under sentence of death by 35 different states and the federal government.[7] Many of those individuals are, of course, still in various stages of appeal and post-conviction proceedings. Many are represented by dedicated and zealous lawyers – whether public defenders, private defense attorneys, pro bono attorneys, or capital punishment resource centers – who will continue to advocate for their clients as long as any forum for that advocacy remains available to them. At least some will eventually see their death sentences overturned or commuted. But inevitably, some of those 3,000 men and women will reach the end of their road. All avenues for appeal, petitions for writ of habeas corpus, and requests for clemency will be exhausted, execution dates will be set, and stays of execution denied.

II. The Role of the Capital Defense Lawyer Whose Client Is Facing Execution

Atticus Finch famously taught us that "You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk

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7. Death Penalty Information Center, Death Row Inmates by State, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.

around in it."[8] Through the sometimes long and always difficult journeys to Death Row that they have shared with their clients, these lawyers have told the stories of the men and women charged with capital offenses – often stories of mental illness, violence, and abuse. They have truly walked in the skins of those convicted of often-heinous crimes, and have done their utmost to communicate and share that experience with juries and judges. Once their efforts have failed and their clients are facing execution, what is left for them to do?

Cases like that of Richard Glossip and his fellow petitioners call upon us, their lawyers, at a minimum to assure those who are facing imminent imposition of the sentence of death that their constitutional rights will be protected. Each of them will shortly become, in the words of Justice Blackmun, "no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction." *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari). In those moments, we should be able to tell them that while they may suffer,[9] they will suffer as little as possible; that the state that has chosen to deprive them of life as punishment for their crimes has assured itself that the process will be humane; that they will, at a minimum, be treated with dignity and respect for their humanity in their final moments; that their execution will be carried out in a manner that meets the legal standards of our Constitution and the moral standards of a just and

8. Harper Lee, To Kill a Mockingbird 39 (Grand Central Publishing 1982) (1960).

9. "It is clear . . . that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze v. Rees*, 553 U.S. 35, 47 (2008).

compassionate society.[10] *See, e.g., Gregg*, 428 U.S. at 173 (Stewart, Powell, and Stevens, JJ.) ("A penalty . . . must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'") (citation omitted); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("[p]unishments are cruel when they involve torture or a lingering death"); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (torture and unnecessary cruelty are forbidden by the Constitution).

But as discussed below, the State of Oklahoma has made it impossible for us to provide any of those assurances to these petitioners or to their fellow inmates on Oklahoma's Death Row.

III. The Conduct of the State of Oklahoma Is Inconsistent With the Values of our Society and our Constitution

The record in this case demonstrates the following:

- The initial drug protocol that Oklahoma adopted in March 2014 was decided upon by lawyers and correctional officials. They devised this particular combination of drugs without consulting with

10. Just as compassion "need not be exiled from the province of judging," *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting), so it need not be exiled from the practice of law. *See also* Clarence Darrow, The Story of My Life 450 (Charles Scribner's Sons 1932) ("I have followed my instincts and feelings and sought to rescue the suffering when I could."); Anthony T. Kronman, Tribute to Burke Marshall, 113 Yale L.J. 807, 809 (Jan. 2004) (we must invoke "the promise of the law" on behalf of "those whose humanity fails to register in the eyes of others").

pharmacologists, medical professionals, or anyone else with expertise concerning the drugs involved.

- Under pressure from the offices of the Governor and the state Attorney General to avoid any delay in carrying out the scheduled execution of Clayton Lockett, the former General Counsel of the state's corrections department came up with the choice of midazolam largely by surfing the Internet – "Wiki leaks, or whatever it is," as he put it.

- In continuing to pursue the use of midazolam, the State of Oklahoma is choosing to disregard the fact that at this point, at least three men – Dennis McGuire in Ohio, Joseph Wood in Arizona, and Mr. Lockett in Oklahoma – have suffered protracted and possibly torturous deaths when midazolam was used as part of their execution protocol. And given the use of paralytics, it is certainly possible that Charles Warner in Oklahoma, as well as the men who were executed in Florida using a protocol that included midazolam, have endured the same experience, but with the additional horror of not being able to communicate their suffering.

In short, the record establishes that the State of Oklahoma engaged in an unseemly scramble, in the interest of political expediency, to find some method of execution it could apply quickly, regardless of what turned out to be the horrific consequences to Mr. Lockett. Moreover, and even more inexplicably, the State of Oklahoma continues to pursue its right to administer this same drug protocol to the petitioners now before this Court – despite the risk that they will suffer the same

agonizing death as others who have been subjected to execution by a protocol that relies on midazolam for the prevention of pain. At this point, and given the extensive evidence regarding midazolam that has been submitted by petitioners in this proceeding, there is no reason for the State of Oklahoma to refuse to adopt a drug protocol that, like the protocol in *Baze*, all sides can agree is humane if administered correctly.

This record hardly presents a picture of a humane criminal justice system. Nor does it allow defense attorneys to vindicate the constitutional rights of those facing execution by reassuring them that they will not have to endure excessive pain. While NACDL hopes that none of the capital defendants its members represent will ever reach the lethal injection chamber, we must expect that some of them will. Accordingly, NACDL urges this Court, consistent with the humanity and compassion that we believe to be inherent in the strictures of the Eighth Amendment and the values we share as a society, to reverse the holding of the Tenth Circuit Court of Appeals and hold that Oklahoma's execution drug protocol is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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