

WHEN EXECUTIONS DON'T KILL: THE STORIES OF EIGHT PEOPLE WHO SURVIVED THEIR DATE WITH DEATH

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ABSTRACT

This Article focuses on the eight people who have survived execution attempts in the last 100 years. Some of them faced a second attempt to carry out the sentence. Others escaped that fate only to die in prison; one reached an agreement with the state to allow them to remain in prison for the rest of their life, and the fate of another is up in the air.

By examining what went wrong in their executions and the accounts of those events offered by defense lawyers, state officials, and judges, this Article suggests that these executions fall into distinct genres. Each calls on us to make sense of failed executions and the experiences of the people who survive them. Execution survivors highlight the human fallibility and imperfection that undergird the justice system, reveal fissures in the apparatus of sovereignty, and demonstrate the lengths to which governments will go to repair those fissures. The people whose cases are discussed in this Article offer an alternative death penalty story that highlights the states' shortcomings and centers the perspectives of the people it would have us forget.

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INTRODUCTION

Thomas Eugene Creech (“Creech”) should not be alive today. On February 28, 2024, this 73-year-old man was scheduled for execution at the Idaho Maximum Security prison.¹ However, things did not go as planned, and he survived his date with death—saved not by a last-minute stay of execution, but by the executioners’ inability to carry out the sentence.²

That morning, a medical team examined him and expressed confidence in their ability to obtain intravenous access.³ Later that day, Creech was escorted to the execution chamber while his wife and the victim’s family watched from the witness room.⁴ The execution team repeatedly probed his arms, hands, and legs searching for a viable vein.⁵ As they worked, Creech had what he believed to be his final thought: “I’m dead. This is my day to die.”⁶ But after forty minutes, officials called off the execution.⁷

Following the failed execution, Creech’s legal team claimed that “this is what happens when unknown individuals with unknown training are assigned to carry out an execution.”⁸ They faulted not only the execution team, but also the State and the courts for ignoring previous warnings that the attempt would fail.⁹ In a statement issued shortly after the aborted execution,

¹ Liam Buckler, *Inside The 8 Excruciating Botched Attempts to Execute 73-year-old Serial Killer Thomas Creech*, MIRROR (Mar. 3, 2024), <https://www.mirror.co.uk/news/us-news/inside-8-excruciating-botched-attempts-32239497> [<https://perma.cc/KL45-YMHR>].

² *Id.*

³ @thinklibertyID, X, (Feb. 29, 2024, 6:33 PM), <https://x.com/thinklibertyID/status/1763346751912874045> [<https://perma.cc/S235-4JMZ>].

⁴ Zoe Tuttle & Kara Valentine, *IDOC: Thomas Creech Not Executed, Medical Team Could Not Find Vein for IV*, 11ALIVE (Feb. 28, 2024 9:00 AM EST), <https://www.11alive.com/article/news/crime/thomas-creech-to-be-executed-today/277-ae66cb64-e85e-44ac-ad8f-0e2135085055> [<https://perma.cc/A3JC-USEB>].

⁵ Dave Maylon, *‘This is a Divine Intervention’: Idaho Death Row Inmate Describes Nightmare of Brutal Botched Execution*, KNEWZ (June 17, 2024), <https://knewz.com/idaho-death-row-inmate-describes-botched-execution> [<https://perma.cc/LB66-UK48>].

⁶ Emilia Randall, *Idaho Death Row Inmate Thomas Creech Reflects on Failed Execution*, THE MIRROR US (June 14, 2024), <https://www.themirror.com/news/idaho-death-row-inmate-thomas-538653> [<https://perma.cc/7ECJ-S6F2>].

⁷ In an interview with KTVB7 News, Creech recalled the team making ten distinct attempts at intravenous access. However, in the official report released by the Idaho Department of Corrections, there were eight distinct attempts at intravenous access. See Buckler, *supra* note 1; Morgan Romero, *Idaho Death Row Inmate Thomas Creech Reflects on Failed Execution, Family of Victim Speaks out for First Time*, KTVB7 (June 13, 2024), <https://www.ktvb.com/article/news/investigations/7-investigates/thomas-creech-idaho-longest-serving-death-row-inmate-reflects-failed-execution-7-investigates-interview/277-db8f4e6c-c961-4a3a-8c5f-10d3891996cf> [<https://perma.cc/A3B5-JVJG>].

⁸ Julie Luchetta & Katie Kloppenburg, *Idaho Stopped Creech Execution after It Failed 8 Attempts to Insert IV for Lethal Injection*, BOISE ST. PUB. RADIO (Feb. 28, 2024), <https://www.boisestatepublicradio.org/2024-02-28/idaho-thomas-creech-death-penalty-executed> [<https://perma.cc/S24M-JL5P>].

⁹ *Id.*

Creech’s counsel wrote: “This is precisely the kind of mishap we warned the State and the Courts could happen when attempting to execute one of the country’s oldest death-row inmates in circumstances completely shielded in secrecy despite a well-known history of getting drugs from shady sources.”¹⁰ In motions to the U.S. Supreme Court filed the day before the attempted execution, the State called Creech’s concerns “patently absurd,” to which his counsel responded that the truly “absurd” position was Idaho’s continued effort to execute “this harmless old man,” who by this point had “surely . . . suffered enough.”¹¹

State officials offered a very different account of the night’s events, and, so far, judges have dismissed Creech’s claim that the Fifth and Eighth Amendments protect him from a second execution.¹² That he lived to tell the tale of his own execution, and the terror it entailed, has failed to carry any weight with the courts.¹³

Creech is the latest member of a small club of “execution survivors” and the only one who is still alive. The other survivors’ experiences bear striking similarities to his, but there is no single “survivor” narrative. Some endured a second execution; others escaped that fate only to die in prison; one agreed never to disclose the details of his attempted execution in exchange for the State’s promise not to attempt execution again by the same method; and Creech’s fate hangs in the balance.

The stories of execution survivors are generally folded into scholarship about botched executions. Scholars have tried to understand why botched executions occur and what they mean for capital punishment’s legitimacy,¹⁴ but that is not the focus of this discussion. Rather than chronicle the many botched executions that resulted in unusual and painful deaths, this Article examines the few lucky—or unlucky—men who entered a death chamber expecting to die yet lived to tell the tale. These people survive not only as corporeal beings but as “ghosts” whose near-death experiences pose distinctive challenges in both the legal and political domains.

We trace what happened to these men during and after their failed executions, paying particular attention to the political and legal discourse

¹⁰ *Id.*

¹¹ *Id.*

¹² Ruth Brown, *Judge Dismisses Creech’s Post-conviction Claims on Cruel and Unusual Punishment*, IDAHO REPORTS (Sep. 5, 2024), <https://blog.idahoreports.idahoptv.org/2024/09/05/judge-dismisses-creechs-post-conviction-claims-on-cruel-and-unusual-punishment> [<https://perma.cc/SFQ7-7JPY>].

¹³ Creech v. Idaho, 558 P.3d 723 (2024).

¹⁴ For a broader discussion of botched executions and their legacy, see AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY (2014); and *Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/botched-executions> (last updated Oct. 26, 2025) [<https://perma.cc/FT4G-YY5W>].

through which judges and other public officials frame the execution survivor's experience. This Article is the first to bring their shared accounts together in one place.¹⁵ It defines what constitutes a failed execution, how such failures differ from botched executions, and examines the stories of the men who survived these aberrations within the state's vision of justice.

For our purposes, an "execution survivor" is a person who enters the death chamber (or the place where the state prepares to carry out the execution), is subjected to some part of the execution method (for example, being seated in an electric chair or having executioners try to access a vein during a lethal injection), and then exits alive—having lived to tell the tale.¹⁶

¹⁵ Denno is the closest anyone has come to accomplishing this task before us. She discusses Willie Francis and the six modern lethal injection cases. See Deborah W. Denno, *Six U.S. Execution Methods and the Disastrous Quest for Humaneness*, in THE ELGAR COMPANION TO CAPITAL PUNISHMENT AND SOCIETY 144-66 (Benjamin Fleury-Steiner & Austin D. Sarat, eds., 2024). Notably, this Article is the first work to include James David Autry as someone who survived an execution since 1900.

¹⁶ There are a number of historic "fringe" cases that might seem to challenge our definition. In recognition of those cases and seeing them as a useful explanation for our rationale, we discuss a couple here.

In Louisiana, Lonnie Eaton was convicted of the 1917 murder of white planter Charles McQuiller and sentenced to hang on February 4, 1921. *Must Hang Despite Forgetful Sheriff; Louisiana Attorney General Rules Governor Can Set New Date for Negro's Death. Many Attorneys Disagree Movement Started to Commute Sentence of Murderer Authorities Forgot to Hang.*, N.Y. TIMES, Feb. 10 1921 at 14 [hereinafter *Must Hang*]. The next day, Ouachita Parish Sheriff T.A. Grant, the man in charge of completing the execution, realized that he had forgotten to hang Eaton. *Forgets to Hang Condemned Man: Sheriff's Omission Gives Louisiana Officials Queer Problem*, WASH. POST, Feb. 9, 1921 at 1. This error was unprecedented, so unsure of how to proceed, he called Louisiana Attorney General A.V. Coco. *Id.* Coco admitted that this was a question to which he did not know the answer. *Must Hang, supra* note 16. Eaton's attorney argued that "because the negro's life had once been placed in jeopardy when the Governor fixed the date for execution, and that date had arrived without a reprieve being granted, he could not now be legally hanged but was legally dead and must be granted his freedom." *Id.* Coco determined that "the death sentence was in effect until the terms of the sentence were carried out." *Finds Negro Legally Alive: Louisiana Prosecutor Rules Sheriff's Neglect Won't Stop Hanging*, WASH. POST, Feb. 10, 1921. In so doing, he established the precedent that a death sentence is not complete until the condemned has died. Despite Eaton's unique situation, he does not qualify as a survivor because he never entered the death chamber and never encountered the machinery of death nor exited the chamber to tell the tale.

In Arkansas, F.G. Bullen was convicted of the 1922 slaying of his neighbor Ira H. Culp, a crime he committed in tandem with two brothers, Duncan and Ben Robinson. 158 ARKANSAS REPORTS: CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF ARKANSAS, AT THE . . . , 157 (1923). The three men were convicted and sentenced to die on the same day, along with a fourth man, Will DeBord. THE AMERICAN MERCURY, NOVEMBER 1931 299 (Mencken, H.L., ed. 1931). Before the executions, the men's coffins were placed outside rather than inside the death chamber. *Id.* Bullen was placed in the electric chair, jolted with a shock, then placed in his coffin. KAREN FARRINGTON, THE WORLD'S WORST PRISONS: INSIDE STORIES FROM THE MOST DANGEROUS JAILS ON EARTH (2019).

Unbeknownst to the crowd of onlookers, the current was not lethal. *Id.* According to witness accounts, onlookers heard scratching come from the wooden coffin in which Bullen's body had been placed. *Id.* When the warden lifted the cover off the box, he realized the 61-year-old was still alive. *Id.* Quickly, Bullen was returned to the chair and administered an additional five minutes of shocks. *Id.* This time, the chair finished the job, and his lifeless body was placed in the box for good. *Id.* We exclude Bullen because he never "lived to tell the tale" of his failed execution.

Applying those criteria, *eight people* have shared the experience of surviving state-sanctioned executions in the United States since 1945. They are: Willie Francis, James David Autry, Romell Broom, Alva Earl Campbell Jr., Doyle Lee Hamm, Alan Eugene Miller, Kenneth Eugene Smith, and the latest, Thomas Eugene Creech. Treated as no more than remainders, their stories stand as an embarrassment to the killing state and to those responsible for failed executions.

On a few occasions, accounts of individual execution survivors have been provided by scholars and journalists,¹⁷ but they generally are folded into work on botched executions. That is how Austin Sarat treated execution failures in his book, *Gruesome Spectacles: Botched Executions and America's Death Penalty*. The book documents the history of botched executions from 1890 to 2010. Sarat and his co-authors discovered that, over the course of 120 years, 276 of 8,776 executions (3.15%) went wrong in some way.¹⁸ Lethal injection had the highest rate of being botched among all methods of execution.¹⁹

“Botched executions,” Sarat argues, “occur when there is a break-down in, or departure from, the ‘protocol’ for a particular method of execution.”²⁰ Botched executions are “those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.”²¹ Examples of such problems include inmates catching fire while being electrocuted, being strangled during hangings (instead of having their necks broken), and being administered the wrong doses of lethal injection drugs.²²

Sarat argues that these problems are not anomalies but are inherent to the death penalty itself.²³ He explores how public perceptions, legal justifications, and evolving execution methods have shaped the narrative of capital punishment while failing to eliminate cruelty.²⁴ Sarat mentions the failed executions of Willie Francis and Romell Broom, both of which

¹⁷ See Deborah Denno, *When Willie Francis Died: The ‘Disturbing’ Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk*, in *DEATH PENALTY STORIES 1-94* (Carol Steiker & Jordan Steiker, eds., 2009); Elizabeth Bruenig, *Dead Man Living: What Happened When Alabama Tried and Failed to kill Alan Eugene Miller*, *THE ATLANTIC* (Oct. 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/alabama-inmate-execution-alan-miller/671620> [https://perma.cc/3U6G-C3S4?type=standard]; Elizabeth Stamper, *Capital Punishment in Context: Kenneth Smith and the Eight Amendment*, 29 *PUB. INTEREST L. RPTR.* 338 (2025).

¹⁸ SARAT, *supra* note 14, at 11-13.

¹⁹ *Id.* at 170.

²⁰ *Id.* at 11-13.

²¹ *Id.*

²² For these three specific botches as well as a host of other examples see SARAT, *supra* note 14 (Appendix B).

²³ *Id.* at 11-13.

²⁴ *Id.* at 32-33.

occurred within his 1890–2010 timeframe.²⁵ He highlights the space between life and death Francis resided in while waiting to learn whether he would be subjected to a second execution, and notes that after Broom’s “unsuccessful execution” an empty hearse drove out of the prison gates.²⁶ As the group of survivors has expanded to eight, these experiences—and the legal contortions that follow them—have continued.

Corinna Barret Lain’s article *The Politics of Botched Executions* focuses on the botched executions of the year 2014.²⁷ She delves into the politics of botched executions, focusing on political rhetoric and damage to the legitimacy of capital punishment that stems from them.²⁸ Notably, Lain does not discuss failed executions. In describing official responses to botched executions, she highlights the recurring impulse to claim that nothing went wrong.²⁹ Lain’s work invites readers to examine the nature of the political and legal rhetoric that accompanies failed, as well as botched, executions.³⁰

Deborah Denno’s *Six U.S. Execution Methods and the Disastrous Quest for Humaneness* offers one of the most comprehensive discussions of failed executions to date. Like this Article, Denno distinguishes failed executions from botched executions and argues that “a valuable measure of lethal injection’s increasing botch rate is the number of executions that inmates have survived.”³¹ Denno explicitly references the cases of Willie Francis, Romell Broom, Alva Campbell, Doyle Lee Hamm, Alan Eugene Miller, Kenneth Eugene Smith, and Thomas Eugene Creech. Her work, however, focuses primarily on the history and uses of various execution methods.³²

Another important contribution to the literature on botched executions is Reprieve’s 2024 study, *Lethal Injection in the Modern Era: Cruel, Unusual, and Racist*. The study analyzed 1,407 executions between 1976 and 2023, including 5 “halted” lethal injection attempts, finding that black individuals face a significantly higher likelihood of having their execution botched.³³ Additionally, the probability of a botched execution increases

²⁵ *Id.* at 17-18, 121-22.

²⁶ *Id.* at 123.

²⁷ Corinna Barrett Lain, *The Politics of Botched Executions*, 49 RICH. L. REV. 825 (2015).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Denno, *supra* note 15.

³² *Id.*

³³ REPRIEVE, *LETHAL INJECTION IN THE MODERN ERA: CRUEL, UNUSUAL AND RACIST* (Apr. 2024), https://reprieve.org/wp-content/uploads/sites/2/2024/04/2024_04_17_PUB-Botched-lethal-injection-report-FINAL.pdf [<https://perma.cc/W834-8QS2>].

with the age of the condemned person, with a 6% rise in odds for each additional year of life.³⁴

Reprieve’s study documents prolonged executions and state-specific disparities. Despite being introduced as a “quick and painless” method of execution, Reprieve found that lethal injection has been used in some of the longest executions in U.S. history.³⁵ Specifically, over one-third of botched lethal injection executions lasted more than forty-five minutes, with over a quarter exceeding one hour.³⁶ Failed executions have gone on for more than two hours.³⁷

In *Retribution, Punishment, and Death*, Professor Mary Ellen Gale notes that while death sentences are typically unique in their immediacy and totality—unlike a fine which could be paid in installments, death is total and final—the failed executions of Willie Francis and James David Autry were neither “total” nor “final.”³⁸ Gale also notes that “the eighth and fourteenth amendments” do not require “instancy of infliction, once the physical process of killing has actually begun.”³⁹

Professor William W. Berry III’s article *Individualized Executions* contains a section entitled *The Failure of Lethal Injection*, which includes the incomplete executions of Alva Earl Campbell and Doyle Lee Hamm, while asserting that “failed executions are not new.”⁴⁰

In *Lethal Injection and the False Promise of Humane Execution*, Sarat documents the history of this country’s currently preferred method of execution: lethal injection.⁴¹ This method has been involved in the most failed executions.⁴² His book is an expansive exploration of that method, which charts its genesis, development, and current challenges.⁴³ In recent years, the lethal injection story has become a story of both botched and failed executions. It is a story of repeated lapses, errors, and callous disregard for the condemned, some of whom lived to describe their torment.

Unlike victims of botched executions, whose pain and perspective are permanently inaccessible after the completion of their death sentence,

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ Among others, *Reprieve* specifically mentions Doyle Lee Hamm, Alan Miller, Kenneth Smith, and Joe Nathan James, “Lethal injection in the modern era: Cruel, unusual and racist.” *See* REPRIEVE, *supra* note 33 at 5.

³⁸ Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1022-3 n.145 (1984-1985).

³⁹ *Id.*

⁴⁰ William W. Berry III, *Individualized Executions*, 52 U.C. DAVIS L. REV. 1779, 1786 (2018-19).

⁴¹ AUSTIN SARAT, *LETHAL INJECTION AND THE FALSE PROMISE OF HUMANE EXECUTION* (2022).

⁴² *Id.*

⁴³ *Id.*

survivors of failed executions become “dead men”⁴⁴ who are not only walking, but able to speak about their experiences. Their presence disrupts the death penalty system, and their experiences invite the following inquiries: How do public officials and judges make sense of those experiences? What cultural and legal resources and strategies do they use to do so? When does an execution begin and end? What constitutes cruel and unusual punishment? When does double jeopardy apply? How can we measure the trauma associated with surviving an execution attempt?

I. WILLIE FRANCIS: THE “PIONEER” OF MODERN EXECUTION SURVIVORS

“I know how it feels to have the shock go through me and think I am dead but find out I am not. I do not like to talk about it at all, but if it will help other people to understand each other, I want to tell everything.”

– Willie Francis⁴⁵

On May 3rd, 1946, Willie Francis⁴⁶ walked his “last mile” down to the death chamber at the Louisiana State Penitentiary.⁴⁷ His destination was the infamous “Gruesome Gertie,” Louisiana’s electric chair.⁴⁸ In the days preceding Francis’s execution, Gruesome Gertie was transported to the penitentiary at Angola and prepared for its job.⁴⁹ The Captain of the Penitentiary, Ephie Foster, and an inmate, Vincent Venezia, took charge of the preparations.⁵⁰ Venezia was tasked with setting up the death chamber and strapping Francis into the electric chair.⁵¹

⁴⁴ For an example of this phrase, see HELEN PREJEAN, *DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE* (1984).

⁴⁵ WILLIE FRANCIS, *My Trip to the Chair*, in *DEMANDS OF THE DEAD: EXECUTIONS, STORYTELLING, AND ACTIVISM IN THE UNITED STATES* 33 (Katy Ryan, ed. 2012).

⁴⁶ Willie Francis, a young black teenager, was sentenced to death for the murder of a white shopkeeper, Andrew Thomas, in St. Martinville, Louisiana. Francis, who was fifteen years old and illiterate at the time of the alleged crime, confessed to the murder in writing. He was found guilty by an all-white jury after a brief two-day trial, despite the absence of eyewitnesses or physical evidence. Following his failed execution, scholars have seriously questioned Francis’s guilt and highlighted the racial injustice embedded in Louisiana’s criminal justice system. Arthur S. Miller & Jeffrey H. Bowman, *“Slow Dance on the Killing Ground”: The Willie Francis Case Revisited*, 32 *DEPAUL L. REV.* 1 (1982); GILBERT KING, *THE EXECUTION OF WILLIE FRANCIS: RACE, MURDER, AND THE SEARCH FOR JUSTICE IN THE AMERICAN SOUTH* (2009). See also FRANCIS, *supra* note 45; Denno, *supra* note 17, at 1-94.

⁴⁷ The term “last mile” is a common phrase used to describe an inmate’s walk to the death chamber. See Denno, *supra* note 17, at 77.

⁴⁸ *Id.* at 42.

⁴⁹ *Id.* at 42-43.

⁵⁰ *Id.*

⁵¹ *Id.* at 43.

On the day of the execution, Venezia turned on the electrical generator, and Foster flipped the switch to start the flow of electricity to Gruesome Gertie. Within seconds, the chair shook violently and Francis rocked from side to side, his lips puffing out from the mask that was covering his face.⁵² Foster flipped the switch a second time. Francis continued to struggle against his restraints and yelled, “I’m not dying!”⁵³ Foster and Venezia finally turned off the electric current.⁵⁴ When Francis was released from the electric chair, Foster was livid, screaming at him, “I missed you this time, but I’ll get you next week if I have to use an iron bar!”⁵⁵

Following a short medical examination, the coroner declared that there was “nothing wrong with Willie.”⁵⁶ While Willie Francis limped back to his cell, he had done what no one before him ever had: survived his encounter with the electric chair. But Francis had little time to take it all in because that same day Louisiana Governor Jimmie Davis set his new execution date: May 9th, 1946.⁵⁷

Struck by the harrowing circumstances of the case and moved by the appeals of Francis’s father, a local lawyer named Bertrand DeBlanc agreed to take the case.⁵⁸ DeBlanc worked to stop Francis from having to take a second trip to the electric chair.⁵⁹ He brought the case to the Louisiana Supreme Court, the Louisiana Board of Pardons, and ultimately the United States Supreme Court.⁶⁰

On November 18, 1946, DeBlanc’s co-counsel, J. Skelly Wright, who would later become a distinguished federal judge, presented their arguments before the nation’s highest court, contending that the Fourteenth Amendment’s Due Process Clause incorporates the Fifth and Eighth Amendments, making them applicable to the states.⁶¹ He argued that the Fifth Amendment’s protection against double jeopardy would be violated if Francis were again placed in the electric chair, and that forcing him to endure another execution attempt would constitute “cruel and unusual punishment” in violation of the Eighth Amendment.⁶² By a 5-4 margin, the Court rejected those arguments and permitted Louisiana to proceed with a second execution

⁵² *Id.* at 47.

⁵³ *Id.* at 44.

⁵⁴ *Id.* at 44.

⁵⁵ *Id.*

⁵⁶ *Id.* at 44.

⁵⁷ *Id.* at 45.

⁵⁸ Denno, *supra* note 17, at 49-96.

⁵⁹ Arthur S. Miller & Jeffrey H. Bowman, “*Slow Dance on the Killing Ground*”: *The Willie Francis Case Revisited*, 32 DEPAUL L. REV. 1, 10 (1982).

⁶⁰ *Id.* at 10-11.

⁶¹ Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

⁶² Miller and Bowman, *supra* note 59, at 12.

attempt.⁶³ Writing for the majority, Justice Stanley Reed acknowledged the Court's "unique situation" and the absence of precedent to guide its decision.⁶⁴

Justice Reed reasoned that "the cruelty against which the Constitution protects a convicted man is cruelty 'inherent' in the method of punishment, not the 'necessary suffering' involved in any method employed to extinguish life humanely."⁶⁵ Almost eighty years after those words were written, there is still something puzzling about including "necessary suffering" and "humanely" in the same sentence. Nonetheless, the premise that the state may impose some measure of "suffering" incident to an execution has framed discourse about the Eighth Amendment ever since, and it continues to inform how courts interpret the experiences of execution survivors.

As Reed understood the circumstances, Francis was the victim of an accident. As he put it:

The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain, nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.⁶⁶

In his brief opinion, Justice Reed used the word "accident" six times.⁶⁷ "Laws," he concluded, "cannot prevent accidents, nor can a law equally protect all against them."⁶⁸ In doing so, Reed pushed Willie Francis to the margins of his analysis, saying nothing about what the condemned man actually experienced or the terror of living to recount his own execution.⁶⁹ Reed set the terms through which other courts would come to understand failed executions: what mattered was what the executioner did, or did not do, not what happened to the execution survivor.

In a strongly worded dissent, Justice Harold Burton, joined by Justices William Douglas, Frank Murphy, and Wiley Rutledge, argued that the Eighth Amendment's prohibition of cruel and unusual punishment was born from "fundamental instincts of civilized man."⁷⁰ He wrote that:

⁶³ *Francis*, 329 U.S. at 459.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 464.

⁶⁷ *Id.* at 459.

⁶⁸ *Id.* at 465.

⁶⁹ *Id.* at 459.

⁷⁰ *Id.* at 473.

Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally death shall result between the hours of 12:00 o'clock noon and 3:00 o'clock p.m., (when) Willie Francis was strapped in the electric chair and an attempt was made to electrocute him, but, because of some defect in the apparatus devised and used for electrocutions, the contrivance failed to function, and, after an unsuccessful attempt to electrocute Francis, he was removed from the chair.⁷¹

Burton dismissed Reed's emphasis on the accidental quality of the failed execution. "Lack of intent that the first application be less than fatal," he said, "is not material. The intent of the executioner cannot lessen the torture or excuse the result."⁷²

In a lengthy footnote, Burton quotes from the affidavits of people who witnessed Louisiana's failed effort to kill Francis.⁷³ One affidavit read:

I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying, and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out "Take it off. Let me breathe." Then they took the hood from his eyes and unstrapped him . . . This boy really got a shock when they turned that machine on.⁷⁴

Another witness detailed that:

The officials in charge of the electrocution were adjusting the mechanisms, and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch, and at the same time said: "Good-bye, Willie." At that very moment, Willie Francis's lips puffed out, and his body squirmed and tensed, and he jumped, so that the chair rocked on the floor. Then the condemned man said: "Take it off. Let me breathe." Then the switch was turned off.⁷⁵

Still, it is remarkable that Burton relegated Francis's suffering to a footnote.⁷⁶ He had other concerns. In his view, accident or not, "it was the statutory duty of the state officials to make sure that there was no failure."⁷⁷

⁷¹ *Id.* at 474.

⁷² *Id.* at 459.

⁷³ *Id.* at 480 n.2 (Burton, J., dissenting).

⁷⁴ *Id.* (Burton, J., dissenting) ("Affidavit of official witness Ignace Doucet, dated May 30, 1946").

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 459.

Additionally, he declared, “Where life is to be taken, there must be no avoidable error of law or uncertainty of fact.”⁷⁸

The deciding vote in the *Francis* was cast by Justice Felix Frankfurter, who though personally opposed to the death penalty was an ardent believer in judicial restraint.⁷⁹ Frankfurter wrote separately to take issue with the majority’s suggestion that it had “decided” that the Fourteenth Amendment guaranteed Francis the federal protections of the Fifth and Eighth Amendments, which are not defined by the specifically enumerated guarantees of the Bill of Rights.⁸⁰ Frankfurter flatly disagreed.⁸¹ Despite what his vote meant for Francis, Frankfurter still imagined a future case that might produce a different result.⁸² The prospect of another failed execution and another execution survivor left this most erudite of jurists so unsettled that he included a double negative in a disclaimer: “The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions.”⁸³

In another unprecedented chapter in Supreme Court history, Frankfurter’s involvement in Francis’s case did not end when the Court handed down its decision.⁸⁴ While he firmly believed that nothing in the Constitution and Bill of Rights could save Francis, he was convinced that subjecting him to a second execution would be “very disturbing.”⁸⁵ Frankfurter sought to use his influence to convince Louisiana Governor Jimmie Davis to commute Francis’s sentence to life imprisonment.⁸⁶ This appeal came to naught.

After the Supreme Court’s decision, DeBlanc continued to fight for Francis.⁸⁷ He requested a rehearing before the Supreme Court, as well as a retrial of his client’s original criminal case.⁸⁸ Along the way, he uncovered

⁷⁸ *Id.*

⁷⁹ For a broader discussion of Justice Frankfurter’s jurisprudence, see KING, *supra* note 46. See also Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343 (2013).

⁸⁰ See *Francis*, 329 U.S. at 468 (Frankfurter, J., concurring).

⁸¹ See *Id.* at 459 (Frankfurter, J., concurring) (“Until July 28, 1868, when the Fourteenth Amendment was ratified, the Constitution of the United States left the States free to carry out their own notions of criminal justice, except insofar as they were limited by Article I, § 10 of the Constitution which declares: “No State shall . . . pass any Bill of Attainder, [or] ex post facto Law” The Fourteenth Amendment placed no specific restraints upon the States in the formulation or the administration of their criminal law.”).

⁸² See *Francis*, 329 U.S. at 459 (Frankfurter, J., concurring).

⁸³ *Id.*

⁸⁴ KING, *supra* note 46, at 296.

⁸⁵ Denno, *supra* note 17, at 71-72.

⁸⁶ *Id.*

⁸⁷ *Id.* at 72-73.

⁸⁸ *Id.* at 73.

a crucial fact that the Supreme Court did not know when it first heard the case: the two executioners, Foster and Venezia, were drunk while setting up the equipment for Francis's execution.⁸⁹ This suggested that the failure of the first execution was not an accident or "an innocent misadventure."⁹⁰ Instead, it was a clear case of state incompetence. Nevertheless, both the United States Supreme Court and the Louisiana Supreme Court denied DeBlanc's petitions for a rehearing.⁹¹ Louisiana Governor Jimmie Davis set Francis's second execution date for May 9, 1947.⁹²

On his execution day, Francis—a practicing Catholic—followed his religious tradition by abstaining from meat on Fridays thereby giving up his favorite food, fried chicken, as his final meal in favor of fried fish.⁹³ At 12:02 p.m., after finishing his meal, Francis made his second trip down the "last mile" and walked towards Gruesome Gertie. When asked if he had any final words, Francis replied, "Nothing at all," perhaps acknowledging the grim absurdity of repeating the rituals of a second execution.⁹⁴ After a year of fighting for his life, Francis had said all he could. At 12:05 p.m., 2,700 volts of electrical current surged through his body.⁹⁵ A second current was applied as "insurance."⁹⁶ At 12:10 p.m., a doctor declared Willie Francis dead.⁹⁷

Without the extraordinary event of his failed execution, Willie Francis's story would have vanished, but to this day, the terms with which the Supreme

⁸⁹ *Id.* at 74.

⁹⁰ Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 470 (1947).

⁹¹ Denno, *supra* note 17, at 74-75.

⁹² *Id.* at 75.

⁹³ *Id.* at 78 n.58.

⁹⁴ *Id.* at 79.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* The extraordinary events of Willie Francis's two executions brought to light many of the ordinary details of his life and case. Since his death, Willie's sentence has since been scrutinized, his guilt seriously questioned, and the criminal justice system that condemned him has been heavily criticized for its profound shortcomings. His case exemplifies the stark racial imbalance of the death penalty system in which Black defendants are disproportionately targeted, denied fair trials, and rendered voiceless in the face of systemic injustice. These miscarriages of justice often led to the execution of Black men without due process, with their stories ultimately erased from public memory. Without the extraordinary event of his execution, Willie too would have vanished, one of countless Black men condemned by a system that weaponized justice to perpetuate racial oppression. Like many of the cases that followed, Willie's story highlights the trouble failed executions cause. The extraordinary circumstances surrounding the physical failures of an execution often expose the deeper, systemic failures of the criminal justice system. These moments shine a light on lives that previously received attention only because of the morbid fascination that death row evokes within the American imagination. Failed executions uncover hidden truths, turning over stones that might otherwise remain undisturbed and surfacing stories that otherwise might never have been told. They challenge law to find vocabulary adequate to comprehend the experiences of those who live to tell their near-death experiences in the execution chamber.

Court framed and responded to his case remain as a touchstone for judicial responses to execution survivors.⁹⁸

II. JAMES DAVID AUTRY: A DIFFERENT KIND OF FAILURE

“It’s not real—all that real—to the public if they don’t see an execution.”

—James David Autry⁹⁹

At 11:00 p.m. on October 4, 1983, James David Autry¹⁰⁰ was moved from a holding cell in Texas’s Huntsville Prison to the place where he was scheduled to die.¹⁰¹ “The Walls,” as the death chamber was colloquially known, was built in 1848, but only one other man, Charles Brooks Jr., had met his end there by lethal injection.¹⁰²

At the start of his execution, prison guards strapped Autry down on a gurney.¹⁰³ The execution team carefully inserted an intravenous line into his arm from which a saline solution began to drip.¹⁰⁴ With the line secured, the team waited for the warden’s signal to release the lethal cocktail of drugs designed to stop Autry’s heart.¹⁰⁵ Meanwhile, Autry’s legal team was still fighting to stop the execution. Alvin Bronstein, the executive director of the ACLU’s National Prison Project, completed a last-minute request for a stay of execution.¹⁰⁶ His two-page petition arrived at the Supreme Court a mere fifty-one minutes before Autry’s scheduled death.¹⁰⁷

⁹⁸ Denno, *supra* note 17, at 84-85.

⁹⁹ *Prime Time Death*, N.Y. TIMES, Mar. 13, 1984.

¹⁰⁰ Autry was sentenced to death for the murder of forty-three-year-old housewife, Shirley Drouet, at a Sak-N-Pak convenience store in Port Arthur, Texas, in 1980. Another man, forty-three-year-old Catholic Priest, Joseph Broussard was killed in the attack and a third man, Anthanasios Svarnas, a thirty-year-old Greek seaman, was gravely injured. Caz Loves Cakes, *Death Row Dinners | James David Autry and the murders of Shirley Drouet & Joseph Broussard*, YOUTUBE 5:40-7:10 (Oct. 26, 2023) <https://www.youtube.com/watch?v=2zOudLhdHW4> [<https://perma.cc/TXG5-GJCJ>].

¹⁰¹ Patrick J. Kiger, *10 Last Minute Stays of Execution*, HOW STUFF WORKS., (Mar. 12, 2013) <https://people.howstuffworks.com/10-last-minute-stays-execution.htm> [<https://perma.cc/WB6L-BL5U>].

¹⁰² Donald R. Walker, *History of Texas State Penitentiary at Huntsville*, TEXAS STATE HIST. ASS’N (July 1, 1995). <https://www.tshaonline.org/handbook/entries/texas-state-penitentiary-at-huntsville> [<https://perma.cc/2N9P-M7W3>]. For information about Brooks’ execution—the first execution by lethal injection in American history see *First Execution by lethal injection*, HISTORY (Feb. 9, 2010), <https://www.history.com/this-day-in-history/december-7/first-execution-by-lethal-injection> [<https://perma.cc/R9R9-DD6D>].

¹⁰³ Michael S. Serrill, *Law: Thirty-One Minutes from Death*, TIME MAG., (Oct. 17, 1983), <https://time.com/archive/6697892/law-thirty-one-minutes-from-death> [<https://perma.cc/5YCQ-Y6QW>].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

In response, Justice Bryon White granted Autry a stay of execution.¹⁰⁸ He based his decision on Bronstein’s claim that Autry had been denied a “proportionality review,” an issue the Court was already scheduled to consider in *Pulley v. Harris*.¹⁰⁹ Proportionality review involves courts comparing sentences in a capital case to the penalties doled out for similar crimes. *Pulley* presented the question of whether the Eighth Amendment required state appellate courts to carry out such reviews in all capital cases.¹¹⁰

Texas courts greenlighted Autry’s death anyway, leaving questions raised by *Pulley* unresolved.¹¹¹ Unlike other execution survivors, Autry was not saved because of a problem with the method of execution but because of a failure of courts to do what the Constitution possibly required. His execution was, in that sense, botched before the I.V.s were ever inserted in his arm. Texas Governor Mark White called the stay that saved Autry’s life “ridiculous,”¹¹² lamenting that “these matters have to be resolved at the last moment.”¹¹³ He went on to say that “It’s regrettable we cannot handle the judicial appeals without waiting until the last 20 minutes before the execution was to be carried out.”¹¹⁴

On January 23, 1984, the Supreme Court ruled that proportionality reviews were not constitutionally required, seemingly extinguishing Autry’s hope of staving off death.¹¹⁵ He was assigned another execution date of March 14, 1984, but continued his legal fight.¹¹⁶ Prior to his scheduled execution, Autry filed two federal habeas corpus petitions.¹¹⁷ Both failed, but the novelty of an incomplete execution inspired his legal team to draft a third habeas petition.¹¹⁸ In that petition, Autry’s counsel asserted that Autry’s original trial counsel, Charles Carver, had been ineffective.¹¹⁹ Their claim was based on the fact that Carver had not conducted a mental competency

¹⁰⁸ *Reprieve for Murderer*, SOUTH CHINA MORNING POST, Oct. 8, 1983.

¹⁰⁹ Serrill, *supra* note 103. While the case (*Pulley v. Harris*, 465 U.S. 37 (1984)) is not explicitly mentioned by name, Serrill writes that the “Supreme Court has agreed to hear an appeal from California this term to determine if proportionality reviews are constitutionally necessary in every state that has capital punishment.” *Pulley* was that case. In *Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984), it is similarly made clear that *Pulley* was the reason Justice White granted a last-minute stay.

¹¹⁰ *Pulley v. Harris*, 465 U.S. 37, 37 (1984).

¹¹¹ Kiger, *supra* note 101.

¹¹² *Death-Chamber Reprieve Termed ‘Ridiculous,’* L.A. TIMES, Oct 6, 1983.

¹¹³ Sharon Herbaugh, *Autry Showed no Emotion when Told*, CORPUS CHRISTI TIMES, Oct. 5, 1983, at 4.

¹¹⁴ *Id.*

¹¹⁵ *Pulley*, 465 U.S. at 37.

¹¹⁶ *National News Briefs*, UNITED PRESS INT’L, Feb. 21, 1984.

¹¹⁷ *Autry v. Estelle*, 464 U.S. 925 (1983); *Autry v. Estelle*, 706 F.2d 1394 (5th Cir. 1983).

¹¹⁸ *Autry v. McKaskle*, 727 F.2d 358, 360 (5th Cir. 1984).

¹¹⁹ *Id.*

test for Autry, even after his client said that he would prefer the death penalty to life in prison.¹²⁰ Second, Autry's lawyers argued that the conduct of the aborted execution amounted to the kind of "psychological torture" prohibited by the Eighth Amendment.¹²¹ Autry, they said, was "placed on the gurney an entire hour prior to the time when respondent had a legal entitlement to end his life . . . and . . . was misled into believing that a stay had in fact not been obtained and that his death was therefore imminent."¹²² Autry himself reported "almost [having] a heart attack" while strapped to the gurney.¹²³

The Fifth Circuit rejected both claims, calling the Eighth Amendment claim "frivolous."¹²⁴ While avoiding terms like "failed" or "aborted," the court characterized what happened to Autry as a "near execution," refusing to admit the execution itself had begun and subsequently dodging responsibility for it.¹²⁵ They echoed the District Court's claim that the "petitioner's suffering is attributable to his own counsel's manufactured time constraints."¹²⁶ The Fifth Circuit insisted that it was the responsibility of Autry's counsel to warn their client that a stay was potentially in the works.¹²⁷

Furthermore, the court declared that there was no evidence of any "distress . . . other than inevitable pain accompanying [the] last-minute stay."¹²⁸ It accepted the State's contention that "Autry was treated with the dignity due any person under the circumstances" and there were no "unnecessarily demeaning or degrading acts by the state."¹²⁹ The court refused to require the state to ensure that all loose ends were tied up before starting the execution. It found that "the state is not chargeable with any confusion or uncertainty or hesitancy that preceded Autry's removal from the gurney. It follows that the state did not deprive Autry of any constitutionally secured right in its manner of starting and aborting the execution process."¹³⁰

Subsequently, Autry tried a different tactic. Having already endured the horror of a first execution attempt, he requested that the state televise his

¹²⁰ *Id.* at 362.

¹²¹ *Id.* at 361.

¹²² *Id.* at 360.

¹²³ Paul Taylor, *Texas Murderer Is Executed by Injection*, WASH. POST (Mar. 13, 1984), www.washingtonpost.com/archive/politics/1984/03/14/texas-murderer-is-executed-by-injection/ad12a121-09f4-47c4-b7ad-f917044ff04c [<https://perma.cc/63R3-D8WN>].

¹²⁴ *McKaskle*, 727 F.2d at 363.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

March execution.¹³¹ At first, it seemed as though Autry was going to get his way. Texas' Attorney General Jim Mattox supported televising the execution; "If executions serve as a deterrent," he said, "then there's a very logical argument that they should be done publicly."¹³² However, concerns about the detrimental effect of televising an execution were expressed by death penalty supporters as well as opponents. In a poll of forty-four Texas television stations, twenty-six responded that they would not show Autry's execution if given the opportunity, twelve said they would air the lethal injection, and six were undecided.¹³³ The question seemed already settled when the Board of Corrections decided not to televise the execution.¹³⁴ Following this rejection, Autry joined forces with reporter Don Kobos of KTRK-TV¹³⁵ to file a lawsuit in a Houston federal court that claimed their constitutional rights were violated by the State's refusal to videotape the execution.¹³⁶ Their efforts were unsuccessful.¹³⁷

In one final bid, Autry petitioned the Supreme Court for a writ of certiorari and a stay.¹³⁸ The Court refused to grant it.¹³⁹ Justices Brennan and Marshall each filed a dissent. Brennan asserted that "the particular circumstances of this case only serve to reinforce my conviction that the imposition of the death penalty . . . amounts to an inexcusable affront to 'the dignity of man.'"¹⁴⁰ He highlighted the fact that "Mr. Autry has already endured the profound torment of lying strapped to a gurney for over an hour

¹³¹ Times Wire Services, *Texas Panel to Consider Autry Execution Telecast*, L.A. TIMES, Mar. 12, 1984, at 4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ United Press International, *Texas officials reject inmate's request that his execution be aired*, BOSTON GLOBE, Mar. 13, 1984, at 20.

¹³⁵ Don Kobos worked in the news business for over forty years. See Les Johns, *Deacon Sports Xtra: Kobos Continues Lasting Legacy in Broadcast Field*, WAKE FOREST ATHLETICS, Mar. 23, 2021. After earning a master's degree in history and speech communications from his alma mater, Wake Forest University, Kobos worked at WRAL (Raleigh news and weather) from 1978 to 1982. See Don Kobos, *General assignment & Investigative Reporter, Assist. News Dir.*, LINKEDIN, <https://www.linkedin.com/in/don-kobos-a3193410> [<https://perma.cc/4XHR-P9M5>]. From there, he moved to Texas where his story intertwined with Autry. Kobos was working as an investigative reporter covering "General Assignments" for KTRK-TV, Texas' local ABC broadcast. *Id.* Kobos' specialty at the time was sports (having worked as a broadcaster at Wake Forest) and it is unclear how he became acquainted with Autry.

¹³⁶ Olive Talley, *Texas Authorities Monday Rejected Convicted Killer James 'Cowboy' Autry's...*, UNITED PRESS INT'L (Mar. 12, 1984), <https://www.upi.com/Archives/1984/03/12/Texas-authorities-Monday-rejected-convicted-killer-James-Cowboy-Autrys/2414080547693> [<https://perma.cc/QG7H-8KKG>].

¹³⁷ John Kaplan, *Why Shouldn't We Televise Executions?*, L.A. Times, Mar. 16, 1984, at D7.

¹³⁸ *Autry v. McKaskle*, 465 U.S. 1090 (1984) (Brennan, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

with an intravenous needle in his arm, waiting to be put to death.”¹⁴¹ Justice Marshall added that, contrary to the Court’s sometimes slow pace in death penalty cases, “in this case, where the constitutional validity of a death sentence is challenged on a variety of substantial grounds, the Court is dramatically expediting its normal deliberative process to clear the way for an impending execution.”¹⁴²

After Autry’s experience, Texas officials pledged to wait until all of an inmate’s appeals had been exhausted before starting any subsequent execution.¹⁴³ This change in procedure was a direct response to what happened and seemed to be an admission of error on the State’s behalf.¹⁴⁴ Regardless of the cause of the shift, this time, when Autry entered The Walls, no last-minute legal interventions awaited him.¹⁴⁵ As the drugs took effect, Autry’s body began to shake.¹⁴⁶ Witnesses reported that he cried out in pain as the drugs began to flow, and onlookers watched him struggle against his restraints before he was pronounced dead.¹⁴⁷

While Autry’s case did not inspire the same interest as Willie Francis’s, some likened the state’s failed execution to the “false executions” used as torture tactics during the Vietnam War.¹⁴⁸ However it is characterized, Autry’s case is an anomaly amidst an already anomalous group of execution survivors. Saved by a legal uncertainty rather than a technological failure, he returned from the brink of extermination only to face it again. This time, there was no talk of accidents or necessary suffering, just the grim reality of a near-death experience and the deferral of its completion.

III. ROMELL BROOM: WHEN DOES AN EXECUTION BEGIN?

“To this day, I can’t understand the reason for what happened to me. Do I have a life, until I die?”

– Romell Broom.¹⁴⁹

¹⁴¹ *Id.*

¹⁴² *Autry v. McKaskle*, 465 U.S. 1085 (1984) (Marshall, J., dissenting).

¹⁴³ Wayne King, *Texas Executions Seen Advanced By Ruling*, N.Y. TIMES, Feb. 8, 1984.

¹⁴⁴ *Id.*

¹⁴⁵ Bruce Nichols, *Killer Dies Smiling*, UNITED PRESS INT’L, Mar. 14, 1984, at 4.

¹⁴⁶ There is some disagreement in how Autry’s (successful) execution is described. Autry reportedly laid placidly for six minutes as the drugs took effect before being pronounced dead. *See id.* Conversely, John P. Rutledge cites Autry’s execution as an example of times when technicians accidentally miss veins and instead inject lethal drugs into the condemned man’s muscles causing them a “tremendous amount of pain.” *See* John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283, 145 (1998) at 300. Whether or not his actual execution should be characterized as a botch is unclear.

¹⁴⁷ Rutledge, *supra* note 146.

¹⁴⁸ John Kaplan, *Administering Capital Punishment*, 36 FLA. L. REV. 177 (1984).

¹⁴⁹ Excerpt from “Until I die,” a poem by Romell Broom that can be found in the book by Romell Broom and Clare Nonhebel, *Survivor on Death Row: One Life*, independently published on Mar. 17, 2019.

It would be more than two decades after Autry’s failed execution before another person lived through his own execution. That person was Romell Broom.¹⁵⁰ On September 14, 2009, he was transferred to Ohio’s death house at the Southern Ohio Correctional Facility in Lucasville.¹⁵¹ When he arrived, a nurse and phlebotomist assessed his veins in anticipation of his execution, which was scheduled for the following afternoon.¹⁵²

They determined that while Broom’s left arm might not be usable, his right arm had sufficient vein access so that the execution could proceed.¹⁵³ Edwin Voorhies Jr., regional director of the Ohio Department of Rehabilitation and Corrections (“ODRC”) Office of Prisons, was informed of these findings and assured that no issues would arise.¹⁵⁴ The following day, at 1:59 p.m., the prison warden, Phillip Kerns, read Broom his death warrant and, at 2:00 p.m., two executioners (referred to as “Member 9” and “Member 21”) entered the cell where Broom was being held.¹⁵⁵ Tasked with connecting the catheter that would carry the lethal cocktail into Broom’s veins, the two executioners began attempting to insert the I.V. into the fifty-three-year-old’s veins.¹⁵⁶

Member 9 made three consecutive attempts on Broom’s left arm—a curious decision given the prison phlebotomist’s previous report that doing so would likely be unsuccessful.¹⁵⁷ At the same time, Member 21 made three attempts on Broom’s right arm.¹⁵⁸ Neither executioner was able to secure the I.V. line; after a series of attempts, they temporarily paused their efforts.¹⁵⁹

When they resumed their work, Member 21 made two additional attempts, which caused Broom to cry out in pain.¹⁶⁰ Momentarily, Member 21 accessed a vein, but the I.V. quickly slipped out, and blood began to trickle

To view the poem on its own see *Romell Broom*, MOURNING OUR LOSSES, <https://www.mourningourlosses.org/memorials/romell-broom> [<https://perma.cc/9ZCU-N7A7>].

¹⁵⁰ *Daughter’s Rape, Killing in 1984 Haunts Parents*, COLUMBUS DISPATCH (Sep. 13, 2009), <https://www.dispatch.com/story/news/2009/09/13/daughter-s-rape-killing-in/23306134007> [<https://perma.cc/L7G9-W8B9>].

¹⁵¹ *Broom v. Jenkins*, No. 1:10-cv-2058, 2019 WL 1299846 *2 (N.D. Ohio, Mar. 21, 2019).

¹⁵² *Id.*

¹⁵³ For a complete description of the execution attempt, see *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; AMNESTY INTERNATIONAL, OHIO EXECUTION ATTEMPT FAILS: NEW DATE SET (2009), <https://www.amnesty.org/fr/wp-content/uploads/2021/06/amr511042009en.pdf> [<https://perma.cc/Y4VW-SJH2>].

¹⁵⁷ *Broom*, 2023 WL 1299846, at *2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

down Broom's arm.¹⁶¹ Member 9 exited the cell, sweating profusely.¹⁶² When a security guard asked if she was okay, the executioner simply replied, "No."¹⁶³

Soon after, Member 17 replaced Member 9 and joined Member 21.¹⁶⁴ They continued to prod and prick Broom's now bloodied body.¹⁶⁵ After forty-five minutes, ODRC Director Terry Collins temporarily halted the execution and convened a meeting with the execution team.¹⁶⁶ He asked for an update, and the executioners admitted they were concerned but maintained that there was still a reasonable chance of obtaining I.V. access.¹⁶⁷ When the meeting ended, they resumed their efforts.¹⁶⁸

At this point, Member 9 rejoined Members 17 and 21, and all three executioners simultaneously attempted to insert an I.V. into Broom's now-peppered veins.¹⁶⁹ When they again failed, the prison warden asked the Lucasville physician to assess Broom's condition. Despite the warden's explicit instructions only to assess Broom's veins and not to participate in the procedure, the physician attempted to insert an I.V. into Broom's foot and struck bone.¹⁷⁰ The team then took a second break, conceding that even if they secured access, Broom's veins likely could not hold the line long enough to complete the execution.¹⁷¹ Two hours after it began, Governor Ted Strickland authorized officials to stop Broom's execution.¹⁷² Sometime later, Collins thanked Broom for his positive demeanor throughout the ordeal.¹⁷³ Broom was then taken to the prison infirmary for close observation; he had eighteen distinct needle punctures in his arms and legs.¹⁷⁴

Like Willie Francis, Broom's execution could not be completed because of a technical failure in the means of execution. Broom's execution became the first of what would be a series of failed lethal-injection executions. Afterward, Collins indicated that Ohio would "reassess the

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at *3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Stephen Majors, *Governor Delays Execution After Suitable Vein Can't Be Found*, CHILlicothe GAZETTE (Sep. 16, 2009), <https://ejl.org/files/dp-chillicothe-gazette-governor-delays-execution-09-16-09.pdf> [<https://perma.cc/7P3G-3TZS>].

¹⁷⁴ *Broom*, 2023 WL 1299846.

[lethal injection] process,” yet he and Governor Ted Strickland insisted that the failure did not shake their confidence in the State’s capital punishment system.¹⁷⁵ “I have confidence in the process,” noted Collins, “I have confidence in my team.”¹⁷⁶ Similarly, Strickland stated that “Obviously yesterday demonstrated that we have a problem with this particular set of circumstances . . . [but] . . . that does not mean there will be a review of the larger issue of lethal injection.”¹⁷⁷ Documents released by the prison blamed Broom’s history of drug use for the prison staff’s inability to access a vein¹⁷⁸—an attribution that strikingly deflected responsibility.¹⁷⁹

After the failed attempt, Broom’s legal team filed a series of motions seeking to prevent a second execution.¹⁸⁰ They alleged civil-rights violations and argued that a second attempt would be unconstitutional: “Once you try and fail, you do not have the right to try again,” remarked Tim Sweeney, one of Broom’s lawyers.¹⁸¹ Broom also joined a federal lawsuit challenging Ohio’s lethal-injection procedure.¹⁸²

Broom’s case reached the Ohio Supreme Court, which considered whether the Fifth, Eighth, and Fourteenth Amendments barred the state from subjecting Broom to a second execution.¹⁸³ His lawyers contended that, for “double-jeopardy purposes, the attempt to execute him began with the reading of the death warrant or at the very latest with the first insertion of a needle.”¹⁸⁴ Relying heavily on *Louisiana ex rel. Francis v. Resweber*, the Ohio Supreme Court held that “the insertion of IV lines is merely a ‘preparatory’ step to the execution.”¹⁸⁵ The court reasoned that because Broom’s punishment had not actually begun, a second execution attempt

¹⁷⁵ Alan Johnson, *Effort to Kill Inmate Halted; 2 Hours of Needle Sticks Fail; Strickland Steps In*, COLUMBUS DISPATCH (Sep. 16, 2009), <https://ejournal.org/files/dp-columbus-dispatch-effort-to-kill-inmate-halted-09-16-09.pdf> [<https://perma.cc/5KWL-8X37>]; Stephen Majors, *Governor Delays Execution After Suitable Vein Can’t Be Found*, CHILLICOTHE GAZETTE, (Sep. 16, 2009), <https://ejournal.org/files/dp-chillicothe-gazette-governor-delays-execution-09-16-09.pdf> [<https://perma.cc/7P3G-3TZS>].

¹⁷⁶ *Id.*

¹⁷⁷ Andrew Welsh-Huggins, Stephens Majors & JoAnne Viviano, *Ohio Inmate “Traumatized” After Failed Execution*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sep. 16, 2009.

¹⁷⁸ *Id.*

¹⁷⁹ Jenny-Brooke Condon, *Denialism and the Death Penalty*, 97 WASH. U. L. REV. 1397, 1443-44 (2020).

¹⁸⁰ SARAT, *supra* note 14, at 140.

¹⁸¹ Martha Mueller Neff, *Death Row Inmate Romell Broom Receives 10-Day Reprieve from Second Execution Attempt*, CLEVELAND (Sep. 19, 2009), https://www.cleveland.com/metro/2009/09/death_row_inmate_romell_broom.html [<https://perma.cc/NSD8-KKFC>].

¹⁸² Alan Johnson, *Freeze on Lethal Injections Is Sought; Courts Are Asked for a Moratorium After IV Problems*, COLUMBUS DISPATCH, Sep. 29, 2009, at A1.

¹⁸³ *State v. Broom*, 146 Ohio St. 3d 60, 2016-Ohio-1028, 51 N.E.3d 620.

¹⁸⁴ *Id.* at ¶ 22.

¹⁸⁵ *Id.* at ¶ 24.

would not constitute double jeopardy.¹⁸⁶ This reasoning was remarkable, but also a revealing dodge. Much like the “accidents” referred in *Francis*, the court’s hairsplitting over when an execution begins ignored the reality of what Broom endured. It effectively rewrote the past and created a legal distinction that further foreclosed acknowledging the reality and significance of a failed execution.

Additionally, the Ohio Supreme Court held there was no violation of the Eighth Amendment in Broom’s case as there was “no per se prohibition against a second execution attempt based on the Cruel and Unusual Punishments Clause.”¹⁸⁷ While they agreed that the execution team deviated from the state’s lethal injection protocol, the court determined that “deviation from a protocol is not an automatic constitutional violation.”¹⁸⁸ Nor were they convinced that Broom “established that the state is likely to violate its execution protocol in the future.”¹⁸⁹ Rejecting all of Broom’s arguments, the Ohio Supreme Court cleared the way for a second execution. The United States Supreme Court subsequently refused to hear Broom’s case.¹⁹⁰

While the Ohio Supreme Court treated Broom’s lethal injection failure as an isolated incident, scholarly research into the failed execution and into Ohio’s death penalty history demonstrates that it was anything but. Deborah Denno notes Ohio’s “striking record of ineptitude in the execution or attempted execution of inmates, [with] the Romell Broom case being the most egregious example.”¹⁹¹ The dissenters on the Ohio Supreme Court agreed with that assessment.¹⁹² They noted that “Broom[’s] execution attempt was not the first time the medical execution team had difficulty inserting an I.V. catheter.”¹⁹³ Not only did they document a history of error, but also commented on the clear cause: incompetence. They declared that it was “disingenuous to dismiss Broom’s petition on the grounds that it is ‘unclear’ why the execution team was unable to establish I.V. access.”¹⁹⁴ They concluded that: “If the state cannot explain why the Broom execution went wrong, then the state cannot guarantee that the outcome will be different next time.”¹⁹⁵

¹⁸⁶ *Id.* at ¶ 47.

¹⁸⁷ *Id.* at ¶ 46.

¹⁸⁸ *Id.* at ¶ 49.

¹⁸⁹ *Id.*

¹⁹⁰ See *Broom v. Ohio*, 580 U.S. 1038 (2016).

¹⁹¹ Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1331-1382 (2014).

¹⁹² *Broom*, 146 Ohio St. 3d. (French, J., dissenting).

¹⁹³ *Id.* at ¶ 72.

¹⁹⁴ *Id.* at ¶ 78.

¹⁹⁵ *Id.* at ¶ 79.

One of the dissenting justices, William O’Neill, rejected “using the Francis case in defense of our tortured American history involving the death penalty.”¹⁹⁶ He noted the “fractured” nature of the *Francis* decision and the ways in which the constitutional understandings of the death penalty had evolved since 1945.¹⁹⁷ In a succinct and devastating conclusion, O’Neil wrote, “I believe as a moral and constitutional matter that subjecting Broom to a second execution attempt after even one extremely painful and unsuccessful attempt is precisely the sort of ‘lingering death’ that the United States Supreme Court recognized as cruel.”¹⁹⁸ But the court majority was unpersuaded.¹⁹⁹

In the end, Romell Broom never made it back to the execution chamber. The state rescheduled Broom’s execution for June 17, 2020, but Governor Mike DeWine later issued a reprieve, citing problems in securing execution drugs.²⁰⁰ On December 28, 2020, Broom died of COVID-19 complications.²⁰¹ At the time of his death, he was sixty-four years old and had spent more than half of his life on death row.²⁰²

IV. ALVA CAMPBELL: WHICH IS WORSE, LIVING OR DYING?

“[W]e had a home and were fed, but that was it. Our family life was more about existing than living.”

– Gwen Campbell (sister of Alva Earl Campbell Jr.)²⁰³

¹⁹⁶ *Id.* at ¶ 93 (O’Neill, J., dissenting).

¹⁹⁷ *Id.* at ¶ 96.

¹⁹⁸ *Id.* at ¶ 98.

¹⁹⁹ *Broom*, 146 Ohio St. 3d.

²⁰⁰ Office of the Governor, State of Ohio, Warrant of Reprieve for Romell Broom, Apr. 14, 2020, https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=884107.pdf&subdirectory=1987-1674%5CDocketItems&source=DL_Clerk [<https://perma.cc/QM4L-VZCH>] (signed by Gov. Mike DeWine); *News Brief—Governor DeWine Puts Off Three More Ohio Executions, Citing Drug Unavailability*, DEATH PENALTY INFO. CTR., (Apr. 14, 2020), <https://deathpenaltyinfo.org/news-brief-governor-dewine-puts-off-three-more-ohio-executions-citing-drug-unavailability> [<https://perma.cc/N9P3-GNZ90>].

²⁰¹ Romell Broom, *Who Survived Botched Execution, Dies of COVID-19 on Ohio Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/romell-broom-who-survived-botched-execution-dies-of-covid-19-on-ohio-death-row> (last updated Mar. 14, 2025) [<https://perma.cc/L6K8-X56V>].

²⁰² *Id.*

²⁰³ *In re Alva E. Campbell, Jr., Application for Executive Clemency* 18 (2017) (Chillicothe Correctional Institution, # A354-963) at 18.

On November 15, 2017, Alva Earl Campbell Jr.²⁰⁴ waited for his execution to begin.²⁰⁵ His lethal injection was scheduled for 10 a.m. inside the Southern Ohio Correctional Facility in Lucasville, the same site as Romell Broom's failed execution.²⁰⁶ Outside, a small crowd assembled in the cold, some opposing Campbell's execution, others supporting it.²⁰⁷ Inside, as the execution team prepared for the procedure, JoEllen Smith, a spokesperson for the prison, assured reporters that Campbell's veins were "palpable and accessible," an important claim in light of his numerous health-related issues.²⁰⁸

Never the poster child of healthy living, Campbell's list of medical conditions continued to grow on death row.²⁰⁹ He suffered from a long list of maladies, including asthma, COPD, severe pneumonia, prostate cancer, and possibly lung cancer.²¹⁰ He required four doses of supplemental oxygen per day, used a walker, and had an exterior colostomy bag.²¹¹ Campbell was also allergic to midazolam—the sedative used in Ohio's lethal injection protocol—and his advanced age, history of drug use, and overall debilitation promised to make it exceedingly difficult for the execution team to carry out the intravenous injection required to execute him successfully.²¹² By the time his execution date arrived, he had unsuccessfully petitioned Ohio to use the firing squad rather than lethal injection to kill him.²¹³

²⁰⁴ Ray Paprocki, *From the Archives: Alva Campbell's Bloody Crime Spree*, COLUMBUS MONTHLY (Jan. 27, 2020, 7:00 AM), <https://www.columbusmonthly.com/story/lifestyle/2020/01/27/from-archives-alva-campbell-s/1823104007> [<https://perma.cc/ED8L-QFWP>].

²⁰⁵ Andrew Welsh-Huggins, *Ohio Calls Off Execution After Failing to Find Inmate's Vein*, ASSOCIATED PRESS STATE & LOCAL WIRE, reprinted in CANADIAN PRESS (Nov. 16, 2017, 5:17 AM EST).

²⁰⁶ Liliana Segura, *Cruel and Unusual: A Second Failed Execution in Ohio*, THE INTERCEPT (Nov. 19, 2017, 10:34 AM), <https://theintercept.com/2017/11/19/cruel-and-unusual-a-second-failed-execution-in-ohio> [<https://perma.cc/3MKV-4WMW>]; @LilianaSegura, X (Nov. 15, 2017, 10:05 AM), <https://x.com/LilianaSegura/status/930813954707853312> [<https://perma.cc/44AB-USTZ>].

²⁰⁷ Segura, *supra* note 206.

²⁰⁸ *The Latest: Ohio Sets New Execution Day After Failed Try*, ASSOCIATED PRESS, reprinted in CANADIAN PRESS (Nov. 15, 2017, 4:22 PM EST).

²⁰⁹ Hannah Riley, *Alva Campbell Jr.'s Execution Halted Midway Through*, HUFFINGTON POST (Nov. 15, 2017, 2:49 PM), https://www.huffpost.com/entry/alva-campbell-jrs-execution-halted-midway-through_b_5a0c96c3e4b06d8966cf3451 [<https://perma.cc/N2VE-JN2R>].

²¹⁰ *Alva Campbell, Terminally Ill Prisoner Who Survived Botched Execution Attempt, Dies on Ohio Death Row*, DEATH PENALTY INFO. CTR. (Mar. 3, 2018), <https://deathpenaltyinfo.org/alva-campbell-terminally-ill-prisoner-who-survived-botched-execution-attempt-dies-on-ohio-death-row> [<https://perma.cc/U69A-WB9S>].

²¹¹ Tracy Connor, *Alva Campbell, Inmate Who Survived Execution Try, Dies in Ohio Prison*, NBC NEWS (Mar. 3, 2018, 8:11 PM), <https://www.nbcnews.com/news/us-news/alva-campbell-inmate-who-survived-execution-try-dies-ohio-prison-n852961> [<https://perma.cc/4529-24FG>]; *Id.*

²¹² *In re Campbell*, 874 F.3d 454 (6th Cir. 2017).

²¹³ Welsh-Huggins, *supra* note 205.

The execution began on schedule, but things quickly went awry.²¹⁴ The medical team, surveying Campbell's body with an ultraviolet light, predictably struggled to find a vein suitable for sustaining the I.V..²¹⁵ Campbell was pricked at least four times, twice in one arm, once in the other, and once on his right shin.²¹⁶ At one moment, he threw his head back and cried out in pain.²¹⁷ Initially, the shin placement seemed to hold, and Campbell shook the hands of the executioners, signaling that he expected to meet his end shortly.²¹⁸ A few moments later, the shin placement too proved unviable.²¹⁹ After thirty minutes, Department of Corrections director Gary Mohr asked Governor John Kasich for permission to call off Campbell's execution.²²⁰

Around noon, two hours after the execution was supposed to take place, the crowd in the parking lot watched a black hearse exit the prison without Campbell's body.²²¹ Campbell was still alive, traveling in another vehicle on an unexpected return to the Chillicothe Correctional Center, where he was taken back to the cell he believed he had left forever.²²²

Following the failed attempt, Governor John Kasich promptly rescheduled Campbell's execution for June 5, 2019.²²³ When asked if Campbell's incomplete execution meant the state's protocols should be revised or reassessed, the Governor replied simply, "No."²²⁴ And when Campbell's lawyer, David Stebbins, was asked whether he believed his client would survive long enough to return to the execution chamber, he answered: "I have no idea."²²⁵

²¹⁴ Segura, *supra* note 206.

²¹⁵ Marty Schladen, *Execution Attempt Falls Apart on Gurney*, COLUMBUS DISPATCH (Nov. 15, 2017, 6:53 PM), https://www.dispatch.com/story/news/columns/the-daily-briefing/2017/11/15/execution-attempt-falls-apart-on/17029668007/?sltsgmt=0154_B [<https://perma.cc/AP8Y-Q47D>].

²¹⁶ Segura, *supra* note 206; *Id.*

²¹⁷ Schladen, *supra* note 215.

²¹⁸ Liam Stack, *Execution in Ohio is Halted After No Usable Vein Can Be Found*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/us/ohio-execution-alva-campbell.html> [<https://perma.cc/HKQ2-3N8E>].

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Segura, *supra* note 206.

²²² *Id.*

²²³ Welsh-Huggins, *supra* note 205.

²²⁴ Marty Schladen, *Kasich Says No Change in Executions*, DAILY JEFFERSONIAN (Nov. 19, 2017, 11:01 PM), <https://www.daily-jeff.com/story/news/2017/11/20/kasich-says-no-change-in/17006715007/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epi=z11xx53e006300v11xx53b00xxxxd11xx65&gca-ft=111&gca-ds=sophi> [<https://perma.cc/W9DW-CNFU>].

²²⁵ Stebbins' pessimism came in light of the multiplicity of severe medical conditions his client suffered from. When asked if he thought Campbell would survive long enough to make another trip to

In the intervening years, scholars have invoked Campbell's case to illustrate some of the death penalty's most grievous flaws, particularly when the state seeks to execute inmates with serious health conditions.²²⁶ Reprieve's 2024 study cited Campbell as evidence that the older and more medically debilitated an inmate, the greater the likelihood an execution will be botched.²²⁷ Journalist and Supreme Court reporter Adam Liptak agreed, stating more bluntly: "It turns out that executing old men is not easy."²²⁸

As he awaited his rescheduled execution, Campbell took up the litigation first filed before his execution attempt.²²⁹ Raymond Tibbetts, who was next on Ohio's list of scheduled executions, joined the suit.²³⁰ Together, they argued that Ohio's lethal injection protocol posed an unconstitutional risk of harm and violated the Eighth Amendment.²³¹ The Sixth Circuit heard their case but rejected their claims on February 1, 2018, making no mention of Campbell's failed execution.²³² This proved to be Campbell's only legal action post-execution attempt; just four months after his profoundly distressing experience at Lucasville on March 3, 2018, the Cleveland native was found in critical condition in his cell.²³³ Prison officials rushed him to a nearby hospital, where he died from "natural causes."²³⁴ By the time he died, Campbell had spent forty-two of his sixty-nine years behind bars.²³⁵

The state made extensive efforts to keep him alive so they could be the ones to kill him, through the provision of daily oxygen supplements, a walker, and a wedge-shaped pillow to prevent him from suffocating during his attempted lethal injection.²³⁶ Those efforts signal the lengths to which a state will go to preserve its sovereign right to take life. The fact that the state of Ohio was unable to kill a fragile older man is a reminder of the limits of that power.

the chamber, Stebbins responded, "I have no idea," adding, "His vein problems aren't going away." See Schladen, *supra* note 215.

²²⁶ Berry, *supra* note 40, at 235–307.

²²⁷ REPRIEVE, *supra* note 33.

²²⁸ Adam Liptak, *Too Old to Be Executed? Supreme Court Considers an Aging Death Row*, N.Y. TIMES (Mar. 5, 2018), [nytimes.com/2018/03/05/us/politics/old-death-row-executions-supreme-court.html](https://www.nytimes.com/2018/03/05/us/politics/old-death-row-executions-supreme-court.html) [<https://perma.cc/WC4T-VKFA>].

²²⁹ *In re Ohio Execution Protocol Litig.*, 709 F. App'x 779 (6th Cir. 2017).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Connor, *supra* note 211.

²³⁴ Associated Press, *Alva Campbell Dies In Prison*, WCBE (Mar. 4, 2018), <https://www.wcbe.org/news/2018-03-04/alva-campbell-dies-in-prison> [<https://perma.cc/TE8P-JB4N>].

²³⁵ Connor, *supra* note 211; *Application for Executive Clemency*, *supra* note 203.

²³⁶ Segura, *supra* note 206.

V. DOYLE LEE HAMM: HOW TO AVOID A SECOND EXECUTION

“When I saw Doyle come through that back door in the visitation yard at Holman, I thought to myself, there’s a whole new definition of ‘dead man walking.’ I think the Governor of Alabama and the federal courts just created something we might call ‘wrongful execution.’”

– Bernard E. Harcourt²³⁷

On February 22, 2018, Alabama set out to put Doyle Lee Hamm²³⁸ to death.²³⁹ Working on each side of him, two members of the execution team made multiple incisions in his left and right legs and ankles and attempted to force I.V. lines into place, but they were unable to locate a vein.²⁴⁰ They then flipped Hamm onto his stomach and slapped the back of his legs to help in their quest to find a usable vein.²⁴¹ After that failed, the team attempted central venous access, a procedure that involves inserting a long, flexible tube.²⁴² The process is often difficult even for experienced healthcare providers, whose training and expertise far exceed that of the average execution team member.²⁴³

The team then made multiple attempts to insert a catheter into Hamm’s right groin, causing severe bleeding and disregarding a doctor’s warning that Hamm’s abnormal lymph nodes in that area made it unsuitable for access.²⁴⁴ Hamm watched as the execution team wiped blood from his legs and groin, even replacing a sanitary pad that had been completely soaked through.²⁴⁵ In litigation that followed, Hamm said that as he lay there, he hoped the execution team would succeed so he could die.²⁴⁶ At 11:27 p.m., a state

²³⁷ Bernard Harcourt, *Friday | Doyle Hamm is Limping, Soar, and Punctured, but Alive*, UPDATE | DOYLE LEE HAMM V. ALA. (Feb. 24, 2018), <https://blogs.law.columbia.edu/update-hamm-v-alabama/2018/02/24/friday-doyle-hamm-is-limping-soar-and-punctured-but-alive> [<https://perma.cc/EC94-HN3Z>].

²³⁸ Sam Roberts, *Doyle Hamm, Who Survived a Bungled Execution, Dies in Prison at 64*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/us/doyle-hamm-dead.html> [<https://perma.cc/TQ2X-CA7R>].

²³⁹ Petition for Writ of Habeas Corpus by Prisoner in State Custody Under Death Sentence at ¶ 1, Hamm v. Dunn, No. 5:18-cv-00348 (N.D. Ala 2018) [hereinafter Petition for Writ of Habeas Corpus].

²⁴⁰ *Id.* at ¶ 46-48.

²⁴¹ *Id.* at ¶ 44.

²⁴² *Id.* at ¶ 45. On the process of Central Line Insertion see Joseph Esherick, *Central Line Insertion and Associated Challenges*, HOSP. PROCS. CONSULTANTS (Jan. 30, 2023, 11:11 AM), <https://hospitalprocedures.org/central-line-insertion-and-associated-challenges> [<https://perma.cc/H4FS-84QE>].

²⁴³ Esherick, *supra* note 242.

²⁴⁴ Petition for Writ of Habeas Corpus, *supra* note 239, at ¶ 3.

²⁴⁵ Petition for Writ of Habeas Corpus, *supra* note 239, at ¶ 7.

²⁴⁶ *Id.*

official called off the execution.²⁴⁷ In their shocking and inappropriate dedication to carrying out Hamm's sentence, "I.V. execution personnel suggested continuing with central venous access in the groin or trying elsewhere on his lower extremities."²⁴⁸ At around 11:30 p.m., Hamm hobbled out of the execution chamber, unable to walk without assistance.

In a press conference directly following the failed execution, Department of Corrections Commissioner Jeff Dunn caught the media off guard with his description of the event: "I wouldn't necessarily characterize what we had tonight as a problem."²⁴⁹ In contrast, Hamm's lawyer, Bernard Harcourt, had known that an execution would not go smoothly for his client. Or to put it more accurately, he knew what an execution *attempt* would mean for his client, it was bound to fail.²⁵⁰

On October 2, 2017, before the execution attempt, Harcourt submitted a motion to the Supreme Court of Alabama, trying to stop it.²⁵¹ In September, fellow Columbia professor Dr. Mark Heath performed a medical examination on Hamm.²⁵² Heath found that due to Hamm's prolonged drug use and his cancer, he had severely compromised veins, and that as a result it "[was] unlikely that an execution [could] be accomplished without cruel and needless pain."²⁵³ Heath determined that there was only one vein, on Hamm's right hand, which could "potentially [be] access[ed] with a butterfly needle."²⁵⁴ However, "insertion of an intravenous catheter into this vein would be challenging and would have a high chance of rupturing the vein and being unsuccessful."²⁵⁵ With this testimony in hand, Harcourt felt confident that a judge would understand the "substantial likelihood that the Alabama

²⁴⁷ *Id.* at ¶ 49.

²⁴⁸ Doyle Hamm Request and Motion for an Order (Opposed) at 2, Hamm v. Dunn. No. 2:17-cv-02083-KOB (N.D. Ala. Feb. 23, 2018), ECF No. 86.

²⁴⁹ Roger Cohen, *Death Penalty Madness in Alabama*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/opinion/death-penalty-alabamadoyle-lee-hamm.html> [<https://perma.cc/9EA7-HNYR>].

²⁵⁰ Bernard E. Harcourt, *The Ghoulish Pursuit of Executing a Terminally Ill Inmate*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/opinion/executing-terminally-illmates.html> [<https://perma.cc/7AGT-CQ93>].

²⁵¹ Doyle Hamm's Response to the Attorney General's Reply Dated October 10, 2017, to this Court's Order Dated August 25, 2017, *Ex Parte* Hamm, No. 1881555 (Ala. 2017) [hereinafter Doyle Hamm's Response].

²⁵² *Id.* at ¶ 5.

²⁵³ *Id.*

²⁵⁴ Bernard Harcourt, *October 2, 2017 | Counsel Submits Medical Report to Alabama Supreme Court, UPDATE | DOYLE LEE HAMM V. ALA. 3* (Oct. 2, 2017), <https://blogs.law.columbia.edu/update-hamm-v-alabama/2017/10/02/october-2-2017-counsel-submits-medical-report-to-alabama-supreme-court> [<https://perma.cc/3C2J-XXJS>].

²⁵⁵ *Id.*

Department of Corrections (ADOC) [would] not be able to accomplish a successful execution in compliance with the Eighth Amendment.”²⁵⁶

Hamm’s legal team did not attempt to challenge the death penalty itself. Under the Supreme Court’s interpretation of the Eighth Amendment, when an inmate wishes to challenge the constitutionality of an execution method, they must “plead and prove a known and available alternative” method.²⁵⁷ Instead, Hamm’s counsel proposed medical aid in dying (“MAID”), a process often used by terminally ill patients to end their lives.²⁵⁸ It is a self-ingested medicine that can be taken orally.²⁵⁹

Chief Judge Karen Bowdre of the Northern District of Alabama, who presided over Hamm’s case, initially appeared receptive to MAID.²⁶⁰ Harcourt focused not only on the prospect of Hamm’s own physical suffering, but also on the implications a failed execution would have for Alabama’s capital punishment system.²⁶¹ He warned the court that “just a single failed execution” could undermine the state’s death penalty.²⁶² Attorney General Steve Marshall labelled Harcourt’s argument “nothing but a bald request for an undetermined delay of [Hamm’s] execution.”²⁶³ The Attorney General dismissed the alleged medical concerns that might complicate putting Hamm to death and reinforced the rationale for proceeding with the execution: “Hamm’s execution date should be set because he senselessly murdered Patrick Cunningham during a robbery in January 1987.”²⁶⁴ Shifting the narrative, Marshall sought to redirect the court’s focus to the physical suffering endured by Hamm’s victim. Judge Bowdre ultimately ruled that Hamm’s execution could proceed, but he said that the state could not attempt “peripheral venous access through the hands

²⁵⁶ Bernard E. Harcourt Collection on Doyle Lee Hamm, 1999–2023 (on file with Columbia Univ., Rare Book & Manuscript Libr.).

²⁵⁷ *Glossip v. Gross*, 576 U.S. 863, 880 (2015).

²⁵⁸ Doyle Hamm’s Response to Defendants’ Motion for Summary Judgment at 32, *Hamm v. Dunn*, No. 2:17-cv-02083-KOB (N.D. Ala. Jan. 16, 2018).

²⁵⁹ *Id.*

²⁶⁰ The discussion in this section stems from the unreleased manuscript of Bernard Harcourt. See Bernard E. Harcourt, *On God’s Time* (1999–2023) (unpublished manuscript) (on file with the Columbia Univ. Rare Book & Manuscript Library) (Bernard E. Harcourt collection on Doyle Lee Hamm) [hereinafter *On God’s Time*].

²⁶¹ Letter from Bernard E. Harcourt, Att’y-at-law, State of Ala., to Kay Ivey, Governor of the State of Ala., Request for a Commutation, or a Reprieve, for Doyle Lee Hamm 7, 11 (Feb. 6, 2018) (on file with Columbia Univ.) <https://blogs.law.columbia.edu/update-hamm-v-alabama/files/2018/02/Clemency-Petition-Final-02.06.2018-with-Appendices.pdf> [<https://perma.cc/GD2Z-YVGK>].

²⁶² *Id.* at 7.

²⁶³ State’s Reply to Hamm’s Resp. to the State’s Mot. to Set an Execution Date, *Ex parte Hamm*, 564 So.2d 469 (1990) (No. 1881555) [hereinafter *State’s Reply*].

²⁶⁴ *Id.*

or arms, but only through the legs or feet” during the execution.²⁶⁵ Alabama’s execution team ignored those conditions.²⁶⁶

As is often the case, Hamm’s legal team filed a last-minute application for a stay of execution with the United States Supreme Court.²⁶⁷ The Court denied the stay and the accompanying petition for certiorari, with Justices Ginsburg and Sotomayor dissenting.²⁶⁸ They noted that the “adversarial process should have tested the risk of ‘serious illness and needless suffering, presented by the insertion of intravenous catheters into Hamm’s leg or central veins.’”²⁶⁹ The Justices went on to say that although such a procedure “fits within the compass of the State’s execution protocol . . . (it) has, by all accounts before us, never been tried before in Alabama.”²⁷⁰ Justice Ginsburg’s dissent, joined by Justice Sotomayor, highlighted the unprecedented nature of the planned execution and the expanding discretion allowed by Alabama’s execution protocol, which the state appeared to be exploiting in its effort to carry out Hamm’s sentence.

Decades earlier, Hamm met Harcourt, a young attorney fresh out of Harvard Law School, who had recently moved South to do capital-defense work.²⁷¹ Wary of the revolving door of lawyers he already experienced, Hamm asked Harcourt how long he planned to stay in Alabama. “I’ll stick with you till the end, Doyle, I promise,” replied Harcourt.²⁷²

In 1999, Harcourt filed a Rule 32 Petition, a postconviction mechanism for challenging a conviction on grounds such as ineffective counsel or newly discovered evidence.²⁷³ He submitted substantial new mitigating evidence that had not been presented at Hamm’s trial. In reply, the Alabama Attorney General filed an eighty-nine-page memorandum with the circuit court, which was essentially the draft of a judicial opinion.²⁷⁴ The next business day, the circuit court signed it, without so much as removing the word “proposed” or

²⁶⁵ Bernard Harcourt, *Chief Judge Bowdre Prohibits IV Access Through Hands or Arms*, UPDATE, DOYLE LEE HAMM V. ALABAMA (Feb. 18, 2018), <https://blogs.law.columbia.edu/update-hamm-v-alabama/2018/02/18/chief-judge-bowdre-prohibits-iv-access-through-hands-or-arms> [<https://perma.cc/Q2UJ-UR88>].

²⁶⁶ Petition for Writ of Habeas Corpus, *supra* note 239, at ¶88-89.

²⁶⁷ Hamm v. Dunn, 138 S. Ct. 828 (2018).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 828-29 (Ginsberg, J., dissenting)

²⁷⁰ *Id.* at 829.

²⁷¹ On God’s Time, *supra* note 260.

²⁷² *Id.*

²⁷³ Petition for Relief from Sentence of Death Under Rule 32 of the Alabama Rules of Criminal Procedure, Hamm v. State, No. [unassigned], (Ala. Cir. Ct. Cullman Cnty., Mar. 5, 2018) (on file with Columbia Univ.).

²⁷⁴ Andrew Cohen, *The Death Penalty Case Where Prosecutors Wrote the Judge’s ‘Opinion’*, THE MARSHALL PROJECT (June 19, 2016), <https://www.themarshallproject.org/2016/06/19/the-death-penalty-case-where-prosecutors-wrote-the-judge-s-opinion#.hLVw2CXNb> [<https://perma.cc/VL3W-9JGH>].

making a single substantive change.²⁷⁵ That glaring oversight highlights a troubling reality: in some cases, courts appear to adopt the Attorney General’s position without conducting a meaningful, independent review.²⁷⁶

In the days following the failed execution, Hamm experienced significant physical distress, including urinating blood, a likely indication that the execution team had punctured his bladder.²⁷⁷ Harcourt and his team got to work, fearing that a second execution would result in a similarly painful experience for their client.²⁷⁸ On March 5, 2018, Hamm’s counsel filed a federal habeas corpus petition challenging a second execution attempt, by any means, as a violation of double jeopardy and the prohibition of cruel and unusual punishment.²⁷⁹

In words that seemed to echo Justice Stanley Reed’s attention to “accidents” in *Francis vs. Resweber*, Hamm’s counsel made clear that preventing a failed execution was Alabama’s responsibility. They declared:

The fact that the execution failed was not the consequence of any accident. No equipment for the lethal injection malfunctioned. Upon information and belief, no member of the execution team failed in his or her duties. Nothing impeded the state’s attempt to execute Doyle Hamm other than its refusal to take into account what counsel had documented for months leading up to February 22, 2018—namely, that to try to execute Doyle Hamm through intravenous lethal injection, rather than oral lethal injection, risked a cruel and unusual punishment in violation of the Eighth Amendment.²⁸⁰

On March 26, Hamm and Alabama entered into a confidential settlement agreement, effectively preventing any further execution attempts.²⁸¹ This marked the only case of a failed execution where the state agreed not to attempt a second execution using the same method. In exchange, Hamm agreed to drop all litigation and never seek monetary damages for what happened to him during the failed execution.²⁸² For the State of Alabama, however, the settlement agreement did not put an end to

²⁷⁵ Bernard Harcourt, *Background*, UPDATE, DOYLE LEE HAMM V. ALABAMA <https://blogs.law.columbia.edu/update-hamm-v-alabama/background> [<https://perma.cc/M8LS-WZGG>].

²⁷⁶ Cohen, *supra* note 274 (“In 2003, a study found that in 17 or 20 recent capital cases the judge had denied relief in orders written entirely by prosecutors.”).

²⁷⁷ On God’s Time, *supra* note 260.

²⁷⁸ *Id.*

²⁷⁹ Bernard Harcourt, *March 5, 2018 | Doyle Hamm Files Federal Habeas Corpus Petition in Birmingham*, UPDATE | DOYLE LEE HAMM V. ALABAMA (Mar. 5, 2018), <https://blogs.law.columbia.edu/update-hamm-v-alabama/2018/03/05/march-5-2018-doyle-hamm-files-federal-habeas-corpus-petition-in-birmingham> [<https://perma.cc/TZ3S-5NYC>] [hereinafter *Doyle Hamm Files Federal Habeas Corpus*].

²⁸⁰ Petition for Writ of Habeas Corpus by a Prisoner in State Custody Under Death Sentence at ¶6, *Hamm v. Dunn*, 5:18-cv-00348-KOB (N.D. Ala. Mar. 5, 2018).

²⁸¹ Bernard E. Harcourt Collection on Doyle Lee Hamm, *supra* note 256.

²⁸² *Id.*

all litigation stemming from Hamm's execution attempt. The *Montgomery Advertiser* and other Alabama media outlets filed a suit against the Alabama Department of Corrections, seeking to make its execution protocol public.²⁸³ After prolonged legal proceedings, the Department of Corrections released a heavily redacted version of the protocol in 2019.²⁸⁴

On November 28, 2021, Doyle Lee Hamm passed away from lymphoma. As Bernard Harcourt put it, Hamm was laid to rest “on God's time.”²⁸⁵

VI. ALAN EUGENE MILLER: THE SAGA OF THE LOST FORM

“They asked me what it's like. I told them you lay there and they stab you.”

– Alan Eugene Miller²⁸⁶

Less than a year after Hamm's death, Alabama planned to execute Alan Eugene Miller.²⁸⁷ At 10:00 p.m., on September 22, 2022, prison guards brought Miller into the execution chamber and strapped him to a gurney.²⁸⁸ One member of the execution team, dressed in medical scrubs, tied a tourniquet around Miller's right arm and slapped the inside of his elbow while another member repeatedly attempted to insert needles.²⁸⁹ Using an iPhone flashlight to aid their search, the team punctured Miller's hands before repeating the process on his left arm, again with no success.²⁹⁰ They placed a foam ball in Miller's hand and requested that he squeeze it to make a vein

²⁸³ *Advance Local Media, LLC v. Comm'r, Ala. Dep't of Corr.*, No. 18-10636, slip op. (11th Cir. Mar. 18, 2019).

²⁸⁴ Brian Lyman, *Doyle Hamm, Alabama Death Row Inmate who Survived Botched Execution Attempt, Dies at 64*, MONTGOMERY ADVERTISER (Nov. 29, 2021), <https://www.montgomeryadvertiser.com/story/news/2021/11/29/doyle-lee-hamm-alabama-death-row-inmate-survived-botched-execution-attempt-dies-64/8792325002> [<https://perma.cc/R8MU-BWCL>].

²⁸⁵ Bernard E. Harcourt Collection on Doyle Lee Hamm, *supra* note 256.

²⁸⁶ Lauren Gill, *“Agony” and “Suffering” as Alabama Experiments with Nitrogen Executions*, BOLTS (Oct. 8, 2024), <https://boltsmag.org/alabama-nitrogen-executions> [<https://perma.cc/X83R-9V4C>].

²⁸⁷ Miller was sentenced to death for a triple homicide he committed at two former workplaces on August 5, 1999. His victims were Lee Holdbrooks, thirty-two, Christopher Yancy, twenty-eight, and Terry Jarvis, thirty-nine. On April 19, 2000, Miller was sentenced to death by a 10-2 vote. *Three Slain as Gunman Opens Fire at Companies*, JEFFERSON CITY NEWS-TRIBUNE (MO.), Aug. 5, 1999, at 1.

²⁸⁸ For a broader discussion of Miller's failed execution, see Elizabeth Bruenig, *Dead Man Living: What Happened When Alabama Tried and Failed to Kill Alan Eugene Miller*, THE ATLANTIC (Oct. 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/alabama-inmate-execution-alan-miller/671620> [<https://perma.cc/3U6G-C3S4?type=standard>].

²⁸⁹ Evan Mealins, *Alabama Death Row Inmate Relays ‘Painful and Traumatic’ Hours before State Called off Sept. 22 Execution*, MONTGOMERY ADVERTISER (Oct. 7, 2022), <https://www.montgomeryadvertiser.com/story/news/2022/10/07/alabama-death-row-inmate-recounts-traumatic-hours-before-state-halted-his-execution/69547298007> [<https://perma.cc/E244-LL89>].

²⁹⁰ *Id.*

more visible; Miller refused.²⁹¹ After continued failures, the team turned to his feet.²⁹²

At one point, after striking a nerve in Miller’s foot, the team returned to his arms and also searched for venous access in his neck.²⁹³ As they did so, Miller shook against his restraints.²⁹⁴ After a loud knock on the execution-chamber window, the execution team left the room, and the guards raised the gurney from a horizontal to a vertical position.²⁹⁵ They left Miller suspended for twenty minutes, with his arm in intense pain as it bore much of his weight and blood leaking from eighteen puncture wounds, until finally he was told, “The execution has been postponed.”²⁹⁶

Four years earlier, in June 2018, following approval of nitrogen hypoxia as an alternative method of execution, Alabama amended its laws to provide death-sentenced inmates an opportunity to choose their manner of execution.²⁹⁷ As an inmate on death row, Miller received a form to declare his choice in writing.²⁹⁸ Miller elected nitrogen hypoxia because medical personnel often had trouble accessing his veins.²⁹⁹ The Alabama Department of Corrections (“ADOC”), however, lacked an organized system to distribute the forms and track which inmates returned them.³⁰⁰ Before his failed execution, on April 19, 2022, Alabama Attorney General Steve Marshall asked the state supreme court to schedule Miller’s execution by lethal injection.³⁰¹ Miller responded by alleging “that he completed and timely returned his nitrogen hypoxia election form.”³⁰² The state claimed it had no record of Miller’s form.³⁰³

Following Miller’s challenge, the prosecutors suggested that ADOC execute Miller by lethal gas.³⁰⁴ But when the federal district judge handling

²⁹¹ Bruenig, *supra* note 288.

²⁹² *Id.*

²⁹³ Mealins, *supra* note 289.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Miller v. Hamm, No. 2:22-CV-506-RAH, 2022 WL 4371904 (M.D. Ala. Sep. 21, 2022).

²⁹⁷ ALA. CODE tit. 15, ch. 18 § 82.1 (2024).

²⁹⁸ *Id.* (“A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by electrocution or nitrogen hypoxia.”).

²⁹⁹ Opposition to Emergency Application to Vacate Injunction of Execution at 6, Hamm v. Miller, 143 S. Ct. 50 (2022) (Mem) [hereinafter Opposition to Emergency Application].

³⁰⁰ *Id.* at 5.

³⁰¹ Emergency Application to Vacate Injunction of Execution, Hamm v. Miller, 143 S. Ct. 50 (2022) (Mem) [hereinafter Emergency Application].

³⁰² Opposition to Emergency Application, *supra* note 299, at 8.

³⁰³ Emergency Application, *supra* note 301, at 2.

³⁰⁴ *Alabama Drops Lethal Injection for Alan Miller, But May Attempt Execution With Nitrogen Gas*, DEATH PENALTY INFO. CTR. (Nov. 30 2022) <https://deathpenaltyinfo.org/alabama-drops-lethal-injection-for-alan-miller-but-may-attempt-execution-with-nitrogen-gas> [<https://perma.cc/Z8GM-E7WG>].

Miller's case asked if the state was ready to proceed with a nitrogen hypoxia execution, the ADOC declared that it could not do so yet.³⁰⁵ In the meantime, the Alabama Supreme Court set Miller's execution by lethal injection for September 22, 2022.³⁰⁶

Again, Miller challenged that plan. This time, a federal district court issued a preliminary injunction barring Alabama from executing Miller "by any method other than nitrogen hypoxia."³⁰⁷ A divided panel of the U.S. Court of Appeals for the Eleventh Circuit upheld the district court's decision on the afternoon of Miller's execution.³⁰⁸ The order effectively amounted to a stay of Miller's execution.³⁰⁹ But in a 5-4 decision, the Supreme Court vacated the injunction.³¹⁰ Soon thereafter, the execution began, leaving Alabama with approximately two and a half hours to carry it out before the midnight expiration of the death warrant.³¹¹ That interval proved insufficient, and the execution was called off.³¹²

The day after Miller's failed execution, his legal team asked the courts to order the preservation of evidence from the unsuccessful attempt.³¹³ The following week, the State of Alabama petitioned the state supreme court to set a new execution date.³¹⁴ Miller's counsel responded by filing a Second Amended Complaint in federal district court.³¹⁵ They argued that Miller's

³⁰⁵ *Alabama Drops Lethal Injection for Alan Miller, But May Attempt Execution With Nitrogen Gas*, *supra* note 304.

³⁰⁶ For a detailed description of Miller's postconviction / pre-failure legal filings, see Alexandra L. Klein, *The 2022 Alabama Executions and the Crisis of American Capital Punishment*, 24 NEV. L. REV. 1 (2023).

³⁰⁷ Opposition to Emergency Application, *supra* note 299, at 5.

³⁰⁸ *Alabama Federal Court Issues Injunction Halting Execution of Alan Miller*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/alabama-federal-court-issues-injunction-halting-execution-of-alan-miller> (last updated Mar. 14, 2025) [<https://perma.cc/AXZ3-VYNQ>].

³⁰⁹ *Alabama Prosecutors Float, Then Retreat From, Plan to Execute Alan Miller Using Untested Nitrogen Suffocation Procedure*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/alabama-prosecutors-float-then-retreat-from-plan-to-execute-alan-miller-using-untested-nitrogen-suffocation-procedure> (last updated Mar. 14, 2025) [<https://perma.cc/S2PR-FRAA>].

³¹⁰ Associated Press, *Supreme Court Says Alabama Can Carry Out Execution*, POLITICO (Sep. 22, 2022), <https://www.politico.com/news/2022/09/22/supreme-court-says-alabama-can-carry-out-execution-00058513> [<https://perma.cc/3NNN-MCQ8>].

³¹¹ Bruenig, *supra* note 288.

³¹² Tina Burnside & Dakin Andone, *Alabama Halts Execution at Last Minute of Inmate Who Disputed Method after Determining it could not be Completed by Midnight Deadline, Officials Day*, CNN (Sep. 23, 2022), <https://www.cnn.com/2022/09/23/us/alan-eugene-miller-execution-alabama-friday> [<https://perma.cc/9GDY-ME8C>].

³¹³ *Miller v. Hamm*, No. 2:22-cv-506-RAH [WO], 2022 U.S. Dist. LEXIS 191524, at *2 (M.D. Ala. Oct. 20, 2022).

³¹⁴ Kim Chandler, *Alabama Seeks New Execution Date for Miller*, CITY NEWS EVERYWHERE: TORONTO (Oct. 6, 2022), <https://toronto.citynews.ca/2022/10/06/alabama-seeks-new-execution-date-for-miller> [<https://perma.cc/NMJ9-RNHR>].

³¹⁵ *Miller*, 2022 U.S. Dist. LEXIS 191524, at *3.

case closely paralleled Hamm’s and that he, too, should be spared a second execution attempt.³¹⁶ They further contended that a second execution by lethal injection would violate the Eighth Amendment.³¹⁷ Lastly, Miller argued that a second execution would violate Alabama’s own prohibition on cruel and unusual punishment.³¹⁸

In a mixed ruling, the court said that Miller demonstrated “good cause” for some of his claims;³¹⁹ and that the State failed to see the nuance in Miller’s Eighth Amendment claim, which argued that a “*second* lethal injection execution of Miller after he allegedly experienced extreme pain and suffering during the *first* execution attempt on September 22, 2022” would violate his constitutional rights.³²⁰

Miller also filed a § 1983 lawsuit against the ADOC commissioner (John Hamm), the Holman prison warden, and the Alabama Attorney General (Steve Marshall).³²¹ He claimed that his failed September execution violated due process and equal protection of the law, and that a second lethal injection execution would be cruel and unusual.³²² He requested that any future execution attempt be by his preferred method of nitrogen hypoxia.³²³ In another mixed ruling, Federal District Court Judge R. Austin Huffaker held that a second lethal injection execution would pose an “objectively intolerable risk of harm” that “cruelly superadd[ed]” pain.³²⁴ However, he dismissed Miller’s other claims, which included requesting monetary damages and alleging that the decision to try and execute him with lethal injection rather than nitrogen hypoxia was unconstitutional.³²⁵

Huffaker’s decision marked the second time in less than five years that Alabama had been ordered to abandon a method of execution after a failed execution attempt.³²⁶ But whereas Doyle Lee Hamm died before the state implemented an alternative method, Miller had already made his preferred alternative clear. Moreover, by the time of Miller’s attempted execution,

³¹⁶ *Id.* at *3-4.

³¹⁷ *Id.* at *3.

³¹⁸ *Id.* at *4.

³¹⁹ *Id.* at *6.

³²⁰ *Id.* at *10.

³²¹ *Miller v. Hamm*, No. 2:22-cv-506 2022 U.S. Dist. LEXIS 170555 (M.D. Ala. Sep. 21, 2022).

³²² *Id.* at *4.

³²³ *Id.*

³²⁴ *Miller v. Marshall*, No. 2:24-cv-197-RAH, 2024 U.S. Dist. LEXIS 103534 at *13, 15 (M.D. Ala. June 11, 2024).

³²⁵ *Miller v. Hamm*, No. 2:22-cv-506-RAH [WO], 2022 U.S. Dist. LEXIS 191524, at *11 (M.D. Ala. Oct. 20, 2022).

³²⁶ *Alabama’s Second “Execution” of Kenny Smith Challenged as Unconstitutionally Cruel*, EQUAL JUST. INITIATIVE (Jan. 4, 2024), <https://eji.org/news/alabamas-second-execution-of-kenny-smith-challenged-as-unconstitutionally-cruel> [<https://perma.cc/YSR3-DWU4>].

nitrogen hypoxia had already been used in another Alabama execution. On January 25, 2024, fellow execution survivor Kenneth Eugene Smith became the first person executed by that method.³²⁷ Despite Attorney General Marshall's insistence that the execution was "textbook," witness accounts described a troubling scene that was anything but the picture of a humane and painless death.³²⁸ After Smith's experience, Miller sued Marshall and other state officials in an attempt to block his own second execution.³²⁹ In March, Alabama Governor Kay Ivey set a new death date, extending the window of time during which Miller could be lawfully killed to an unprecedented thirty-hour timeframe.³³⁰

Among Miller's three causes of action was a claim that his First Amendment free speech rights were at risk.³³¹ In the two years after his failed execution, Miller talked about his failed execution. He contended that Alabama wanted to go ahead with a second execution to "silence the [last remaining] witness[] to the entirety of the failed execution attempts who are not employed by the State."³³² He pointed out that his execution was scheduled ahead of 16 other death row inmates who had requested nitrogen hypoxia, and alleged that killing him would send the message that speaking out about system failures could result in an earlier death date. His other two claims about alleged violations of the Eighth and Fourteenth Amendments focused on what happened during Smith's nitrogen hypoxia execution.³³³

³²⁷ Kim Chandler, *What Happened at the Nation's First Nitrogen Gas Execution: An AP Eyewitness Account*, ASSOCIATED PRESS (Jan. 27, 2024), <https://apnews.com/article/death-penalty-nitrogen-gas-alabama-kenneth-smith-54848cb06ce32d4b462a77b1bb25e656> [<https://perma.cc/U2DX-TW8M>].

³²⁸ For a broader discussion of Smith's death, see Marty Roney, *Nitrogen Gas Execution: Kenneth Smith Convulses for Four Minutes in Alabama Death Chamber*, MONTGOMERY ADVERTISER (Jan. 25, 2024), <https://www.montgomeryadvertiser.com/story/news/local/alabama/2024/01/25/four-minutes-of-convulsions-kenneth-smith-executed-with-nitrogen-gas/72358038007/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epti=z117370e009100v117370b0073xxd117365&gca-ft=160&gca-ds=soph> [<https://perma.cc/UQ8X-BF7V>]. See also *United States: UN Experts Horrified by Kenneth Smith's Execution by Nitrogen in Alabama*, UNITED NATIONS PRESS RELEASES (Jan. 30, 2024), <https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-horrified-kenneth-smiths-execution-nitrogen-alabama> [<https://perma.cc/9ULK-LV5P>]; *Alabama Attorney General Steve Marshall Statement on the Execution of Murderer Kenneth Smith by Nitrogen Hypoxia*, ALABAMA ATT'Y GEN. OFF. (Jan. 25, 2024), <https://www.alabamaag.gov/alabama-attorney-general-steve-marshall-statement-on-the-execution-of-murderer-kenneth-smith-by-nitrogen-hypoxia> [<https://perma.cc/KR34-AMYM>].

³²⁹ *Miller v. Marshall*, No. 2:24-cv-197-RAH, 2024 U.S. Dist. LEXIS 103534 (M.D. Ala. June 11, 2024).

³³⁰ *Execution Set For Alabama Death Row Inmate Alan Eugene Miller*, ALA. DEP'T OF CORRECTIONS (Sep. 12, 2024), [https://doc.alabama.gov/NewsRelease.aspx?article=EXECUTION+SET+FOR+ALABAMA+DEATH+ROW+INMATE+ALAN+EUGENE+MILLER#:~:text=Accordingly%2C%20Governor%20Ivey%20has%20set,CF\)%20in%20Atmore%2C%20Alabama](https://doc.alabama.gov/NewsRelease.aspx?article=EXECUTION+SET+FOR+ALABAMA+DEATH+ROW+INMATE+ALAN+EUGENE+MILLER#:~:text=Accordingly%2C%20Governor%20Ivey%20has%20set,CF)%20in%20Atmore%2C%20Alabama) [<https://perma.cc/WZX3-38ZH>].

³³¹ *Miller*, 2024 U.S. Dist. LEXIS 103534, at *2.

³³² *Id.* at *4.

³³³ *Id.* at *4.

Miller described the witnesses' unsettling accounts of that event, alleging that the novel method proved to be unconstitutionally cruel as administered.³³⁴ Rather than identify a new method of execution, Miller proposed six amendments to Alabama's procedure, which he said would lessen the risk that he would suffer like Smith.³³⁵ The proposed amendments included giving the inmate a tranquilizing pill before the procedure and ensuring that a medical professional placed the mask on the condemned.³³⁶ The court granted the state's motion to dismiss these proposals but ordered Alabama to comply with the requests to amend its nitrogen hypoxia protocols.³³⁷

On September 26, 2024, Miller made his return to Alabama's death chamber.³³⁸ Rather than a needle in his arm, a mask was placed over Miller's head, through which nitrogen gas would be pumped into his lungs. According to witnesses, Miller shook against his restraints for two minutes after the gas began to flow, and he intermittently took gasping breaths until 6:38 p.m. when he was pronounced dead.³³⁹ In a press conference following the execution, the Correction's Commissioner, John Hamm, acknowledged Miller's involuntary movements but said they were "nothing that we did not expect."³⁴⁰ Governor Ivey ignored the barbarity of the execution and instead highlighted the importance of providing justice for the victims. She paid even less attention to what happened during the execution, releasing a statement that said,

Just as Alan Miller cowardly fled after he maliciously committed three calculated murders in 1999, he has attempted to escape justice for two decades . . . Tonight, justice was finally served for these three victims through the execution method elected by the inmate. His acts were not that

³³⁴ *Id.* at *6.

³³⁵ *Id.* at *7, 20.

³³⁶ *Id.* at *7, 21.

³³⁷ *Id.* at *22.

³³⁸ Michelle Watson & Jason Hanna, *Alabama has Executed Alan Eugene Miller, the Second Inmate Known to Die by Nitrogen Gas*, CNN (Sep. 26, 2024), <https://www.cnn.com/2024/09/26/us/alan-eugene-miller-alabama-execution> [<https://perma.cc/JR28-AY3U>].

³³⁹ *Justice or Torture: Alabama Execute Alan Eugene Miller by Nitrogen Hypoxia*, THE TIMES OF INDIA (Sep. 27, 2024), <https://timesofindia.indiatimes.com/world/us/justice-or-torture-alabama-execute-alan-eugene-miller-by-nitrogen-hypoxia/articleshow/113728449.cms> [<https://perma.cc/8LRU-WRL5>].

³⁴⁰ Ivana Hrynskiw, *Alabama Inmate Alan Miller Executed with Nitrogen Gas Thursday for 1999 Shootings*, ALABAMA.COM (Sep. 26, 2024), <https://www.al.com/news/2024/09/alabama-inmate-alan-miller-set-to-be-executed-with-nitrogen-gas-thursday-for-1999-shootings.html> [<https://perma.cc/DE4W-C2RA>].

of insanity, but pure evil. Three families were forever changed by his heinous crimes, and I pray that they can find comfort all these years later.³⁴¹

VII. KENNETH EUGENE SMITH: A HUMAN “GUINEA PIG”

“Having failed to kill Smith on its first attempt, Alabama has selected him as its “guinea pig” to test a method of execution never attempted before.”
– Supreme Court Justice Sonia Sotomayor³⁴²

On November 9, 2022, Kenneth Eugene Smith’s³⁴³ counsel made one last attempt to halt his scheduled execution by lethal injection.³⁴⁴ Relying on a doctor’s testimony, and with the failed execution of Alan Eugene Miller fresh in their minds, Smith’s lawyers argued that execution personnel would likely face similar difficulties with their client.³⁴⁵ They claimed that, like Miller, Smith’s “borderline obese” body would complicate the process of establishing the intravenous access needed for a lethal injection.³⁴⁶

Smith did not challenge Alabama’s lethal injection protocol but rather Alabama’s numerous deviations from it.³⁴⁷ He pointed to the cutdown procedure used in the terribly botched execution of Joe Nathan James and the attempt to insert a needle into Alan Miller’s neck during his failed execution.³⁴⁸ Judge Austin Huffaker Jr. found those claims “too speculative,” but did bar the state from using a “cutdown procedure, intramuscular sedation, or any other off-protocol tactics during Smith’s execution.”³⁴⁹ With these stipulations established, he authorized the execution to proceed. Yet, his order would not stop the legal wrangling.

³⁴¹ Ralph Chapoco, *Criminal Justice Alabama Executes Alan Eugene Miller in Fourth Execution of 2024*, ALABAMA REFLECTOR (Sep. 26, 2024), <https://alabamareflector.com/2024/09/26/alabama-executes-alan-eugene-miller-in-fourth-execution-of-2024> [<https://perma.cc/V5YL-HS4T>].

³⁴² *Smith v. Hamm*, 144 S. Ct. 414, 415 (2024) (Sotomayor, J., dissenting).

³⁴³ Smith was sentenced to death for his role in the murder-for-hire of Elizabeth Sennett in 1989. Smith was hired by Reverend Charles Sennett who paid Smith and his co-conspirator 1,000 dollars each to kill his wife. See *Kenneth Eugene Smith: Alabama Carries out First Nitrogen Gas Execution*, BBC (Jan. 26, 2024), <https://www.bbc.com/news/world-us-canada-68085513> [<https://perma.cc/B9T5-5ETG>].

³⁴⁴ See Klein, *supra* note 306, for a detailed discussion of Smith’s pre-failure postconviction filings.

³⁴⁵ Alexandra L. Klein, *The 2022 Alabama Executions and the Crisis of American Capital Punishment*, 24 NEV. L. REV. 1 (2023).

³⁴⁶ *Smith v. Hamm*, No. 2:22-CV-497-RAH, 2022 U.S. Dist. LEXIS 204052, at *18 (M.D. Ala. Nov. 9, 2022).

³⁴⁷ *Hamm*, 2022 U.S. Dist. LEXIS 204052, at *6, 10, 15-16.

³⁴⁸ *Id.* at *5.

³⁴⁹ *Id.* at *11.

At 7:45 p.m. on November 17, a motion to stay Smith’s execution was pending before the U.S. Court of Appeals for the Eleventh Circuit.³⁵⁰ At 7:57 p.m., Smith was placed in handcuffs and taken to be executed.³⁵¹ Two minutes later, the Eleventh Circuit issued a reprieve, but Smith was never informed.³⁵² At 10:00 p.m., the Execution I.V. team entered the chamber and attempted to set up an I.V. line. Around this time, the U.S. Supreme Court lifted the Eleventh Circuit’s stay.³⁵³ It is unclear whether the stay was lifted before or after the team began its work.

Smith alleged the team not only stabbed at his veins, but also into his muscles, and at one point injected an unknown substance—Smith’s lawyers believe it to have been a sedative or anesthetic—without telling him what it was.³⁵⁴ The team attempted to set a central line in Smith’s collarbone area.³⁵⁵ “Deputy Warden Wood, who was holding Mr. Smith’s head in both his hands, torqued it to the side, saying, ‘Kenny, this is for your own good.’”³⁵⁶ But this attempt also failed.

Smith began shaking from pain as the executioners inserted their needles.³⁵⁷ When the midnight deadline on his execution warrant approached, the execution was called off. After four hours strapped to the gurney, Smith exited the chamber “trembling, sweating, hyperventilating, dizzy, and could not lift his own arms to be handcuffed or walk unassisted.”³⁵⁸

After two consecutive failed executions, Alabama Governor Kay Ivey announced a temporary suspension of executions on November 21, 2022, and ordered a “top-to-bottom” review of the state’s capital punishment system.³⁵⁹ The review was conducted internally, with no public disclosures. Despite the failures and botches that led her to stop executions, Ivey refused to take

³⁵⁰ *Kenneth Smith Describes Alabama’s Failed Attempt to Execute Him*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025) <https://deathpenaltyinfo.org/kenneth-smith-describes-alabamas-failed-attempt-to-execute-him> [<https://perma.cc/V7TP-VQNB>].

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Smith v. Hamm*, No. 2:22-CV-497-RAH, 2022 U.S. Dist. LEXIS 204052, at *18 (M.D. Ala. Nov. 9, 2022).

³⁵⁷ *Kenneth Smith Describes Alabama’s Failed Attempt to Execute Him*, *supra* note 349.

³⁵⁸ Fiona Leishman, *Death Row Killer Kenneth Eugene Smith’s First Execution Survival—and His Haunting Nightmares*, THE MIRROR (Jan. 24, 2024), <https://www.themirror.com/news/us-news/death-row-killer-eugene-kenneth-303767> [<https://perma.cc/SRH9-2EQS>].

³⁵⁹ Statement, Gina Maiola, Gov. Ivey’s Communications Direct, Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims’ Sake (2022), <https://dpic-cdn.org/production/documents/Governor-Ivey-Execution-Pause-Statement.pdf> [<https://perma.cc/TDX9-X364>].

responsibility for Alabama's apparent mistakes. As she put it, "I don't buy for a second the narrative being pushed by activists that these issues are the fault of the folks at Corrections or anyone in law enforcement, for that matter. I believe that legal tactics and criminals hijacking the system are at play here."³⁶⁰

In a lawsuit filed after his failed execution, Smith's legal team laid out an expansive critique of Alabama's system of capital punishment.³⁶¹ Citing the botched execution of Joe Nathan James and Miller, they argued that Alabama's recent history made it clear that once the Department of Corrections is allowed to begin an execution (and perhaps even before federal courts allow it to do so):

[It] will attempt to carry out the execution and not stop until it becomes clear that they are likely to run out of time under the death warrant, and during that time, will do anything to obtain intravenous access, without regard to its own lethal injection protocol ("the Protocol") or the constitutional rights of the condemned.³⁶²

Smith's lawyers noted the experience of Doyle Lee Hamm and the confidentiality agreement reached with the State of Alabama. They questioned why the State was "moving on an expedited basis to reschedule Mr. Miller's execution just days after its botched execution attempt."³⁶³ The mention of Miller illustrates that Smith and Miller's cases became increasingly interconnected. In the final stages of his lawsuit, Smith's legal team proposed an alternative method of execution, as required under Eighth Amendment jurisprudence, arguing that nitrogen hypoxia presented a viable option that would significantly reduce the intolerable risk posed to Smith by lethal injection.³⁶⁴ But the courts were not convinced.³⁶⁵

Smith's case is one in a series of examples of "judicial abdication."³⁶⁶ Focusing on Alabama's four execution attempts in 2022, Professor Alexandra Klein uses that term to explain that courts have consistently "[raised] the bar" on legal challenges to lethal injection, such that it is now

³⁶⁰ *Id.*

³⁶¹ *Kenneth Eugene Smith v. Commissioner, Alabama Department of Corrections*, Case 24-10095, U.S. Court of Appeals, 11th Cir., Jan. 24, 2024.

³⁶² David Reutter, *Eleventh Circuit Won't Force Condemned Alabama Prisoner to Die by Method He Didn't Choose*, PRISON LEGAL NEWS (June 1, 2023), <https://www.prisonlegalnews.org/news/2023/jun/1/eleventh-circuit-wont-force-condemned-alabama-prisoner-die-method-he-didnt-choose> [<https://perma.cc/L7TT-QU5R>].

³⁶³ *Smith v. Hamm*, No. 2:22-CV-497-RAH, 2022 U.S. Dist. LEXIS 204052 (M.D. Ala. Nov. 9, 2022).

³⁶⁴ *Id.*

³⁶⁵ *Kenneth Eugene Smith v. Commissioner, Alabama Department of Corrections, et al*, No. 24-10095 (11th Cir. 2024).

³⁶⁶ Klein, *supra* note 306, at 49.

nearly impossible to win any of them.³⁶⁷ Furthermore, she points to the rhetoric of government officials such as Governor Ivey, who consistently shift blame from government officials and onto the condemned for execution failures. This rhetoric, she suggests, helps preserve the system of capital punishment.³⁶⁸

For two years, Alan Miller and Kenneth Smith were the only living survivors of attempted executions, both housed on Alabama’s Death Row in Holman.³⁶⁹ In 2024, despite the lack of publicly available results from its promised “top-to-bottom” internal review, Alabama declared its readiness to resume executions by nitrogen hypoxia, portraying the method as a humane way for an inmate to die.³⁷⁰ But Smith’s execution was anything but humane. Almost immediately, he thrashed and convulsed on the gurney.³⁷¹ Witnesses reported that he appeared to remain conscious throughout this period, followed by several minutes of heavy breathing.³⁷² His breathing then became imperceptible, and he was pronounced dead.

The United Nations Human Rights Office condemned Smith’s execution, warning that it may have violated international prohibitions on torture and cruel treatment.³⁷³ And, as Justice Sonya Sotomayor put it, Alabama had used Kenneth Eugene Smith as a “guinea pig” for a novel method of execution, and now the whole world was a witness.³⁷⁴

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ Ed Pilkington, *What is it Like to Survive an Execution by Lethal Injection*, THE GUARDIAN (Dec. 28, 2022), <https://www.theguardian.com/world/2022/dec/28/lethal-injection-surviving-execution-attempt-alabama> [https://perma.cc/GAM3-DLBN].

³⁷⁰ *Alabama Plans to Resume Executions After Series of Botches; Oklahoma Execution Scheduled for Same Day*, DEATH PENALTY INFO. CTR. (July 19, 2023), <https://deathpenaltyinfo.org/alabama-plans-to-resume-executions-after-series-of-botches-oklahoma-execution-scheduled-for-same-day> [https://perma.cc/TPQ5-WA2R].

³⁷¹ Leah Roemer, “*The World is Watching*”: *Witnesses Report Kenneth Smith Appeared Conscious, “Shook and Writhed” During First-Ever Nitrogen Hypoxia Execution*, DEATH PENALTY INFO. CTR. (July 26, 2024), <https://deathpenaltyinfo.org/the-world-is-watching-witnesses-report-kenneth-smith-appeared-conscious-shook-and-writhed-during-first-ever-nitrogen-hypoxia-execution> [https://perma.cc/55R5-7TKD].

³⁷² *Id.*

³⁷³ *United States: UN Experts Horrified by Kenneth Smith’s Execution by Nitrogen in Alabama*, OHCHR (Jan. 30, 2024), <https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-horrified-kenneth-smiths-execution-nitrogen-alabama> [https://perma.cc/ZE7F-FH9P].

³⁷⁴ *Smith v. Hamm*, No. 23–6562, 2024 WL 23A688 (U.S. Jan. 25, 2024) (Sotomayor, J., dissenting).

VIII. CREECH REVISITED. AMERICA'S ONLY LIVING EXECUTION SURVIVOR

"I don't know if it was wishful thinking or if I actually saw, but I thought I saw angels standing on each side of my bed . . . I think I started crying. I pointed up to the sky and told my wife I was sorry."

– Thomas Eugene Creech³⁷⁵

In their efforts to prevent Thomas Eugene Creech³⁷⁶ from facing a second execution, his lawyers have focused on the "state's mysteriously acquired pentobarbital" and its "well-known history of getting drugs from shady sources."³⁷⁷ They contend that attempting to execute Creech by any method, after a failed execution, would be torture and impose a lingering death.³⁷⁸ Drawing on jurisprudence from the cases of other execution survivors, they argued that a second execution would be a form of double jeopardy, and therefore unconstitutional.³⁷⁹

Not surprisingly, Idaho Department of Corrections Director Josh Tewalt offered a different account of those issues and of Creech's own failed execution. He argued that the execution team worked to "establish IV access consistent with the department's policy."³⁸⁰ Tewalt then took it one step further, declaring that while the team had some "access issues," the ultimate responsibility was a "vein quality issue."³⁸¹ He stated that he "think[s] it

³⁷⁵ Morgan Romero, *Idaho Death Row Inmate Thomas Creech Reflects on Failed Execution*, KTVB7 (June 13, 2024), <https://www.ktvb.com/article/news/investigations/7-investigates/thomas-creech-idaho-longest-serving-death-row-inmate-reflects-failed-execution-7-investigates-interview/277-db8f4e6c-c961-4a3a-8c5f-10d3891996cf> [<https://perma.cc/4G78-TNUZ>].

³⁷⁶ Creech was sentenced to death for slaying fellow inmate David Dale Jensen in 1981. Creech reportedly beat Jensen with a sock full of batteries until the 23-year-old collapsed on the ground where Creech stomped on his skull. Bill Hutchinson, *What to Know About the Pending Idaho Execution of Serial Killer Thomas Creech*, ABC NEWS (Feb. 26, 2024), <https://abcnews.go.com/US/pending-idaho-execution-serial-killer-thomas-creech/story?id=107542536#:~:text=Creech%2C%20Idaho's%20longest%2D-serving%20death,28%2C%202024%20in%20Idaho.&text=But%20in%20his%20latest%20appeal,up%20for%20a%20disciplinarity%20offense> [<https://perma.cc/6F5Y-ATJJ>].

³⁷⁷ Melissa Davlin, *State Calls Off Creech Execution*, IDAHO REPORTS (Feb. 28, 2024), <https://blog.idahoreports.idahoptv.org/2024/02/28/state-unsuccessful-in-attempt-to-execute-creech> [<https://perma.cc/XF6E-EBK6>].

³⁷⁸ *Creech v. State*, 588 P3d 723, 732 (Idaho, 2024).

³⁷⁹ *Id.* at 733.

³⁸⁰ Michelle Watson, *Judge Postpones Execution of Serial Killer Thomas Creech Months After he Survived a Botched Execution Attempt*, CNN (Nov. 9, 2024), <https://www.cnn.com/2024/11/09/us/thomas-creech-idaho-execution-stay#:~:text=Idaho%20death%2Drow%20inmate%20Thomas,pictured%20on%20January%209%2C%202009.&text=A%20federal%20judge%20granted%20Idaho,he%20survived%20a%20botched%20execution> [<https://perma.cc/PMK6-7WFS>].

³⁸¹ *Id.*

would be wrong to call it a failure,” and that “[t]hey did their level best in a professional way that was respectful of the process.”³⁸²

Idaho Governor Brad Little also did not see anything special or problematic about what happened to Creech. He admitted that the state “was prepared for the possibility that medical professionals would not be able to access the inmate’s veins, a circumstance that has occurred in execution procedures elsewhere in the country.”³⁸³ Surprisingly, the governor pointed to previous failed executions to show that the execution team had made the *right* decision. Little proclaimed that “[t]he competent and qualified medical professionals present and IDOC officials were cautious and did the right thing in not moving forward with the execution.”³⁸⁴

As of January 2026, it remained unclear whether Creech would face a second execution attempt. For now, the latest member of the survivors’ “club” lives in limbo—caught in a legal system that cannot decide how to classify him, or even how to reckon with what he endured. Creech reports nightmares that “terrorize” him, chest pains, and persistent fear that he may not live see the next day due to the ongoing issues resulting from the attempted execution.³⁸⁵ He is haunted by a recurring dream where he enters the chamber to find his wife on the execution table.³⁸⁶

Despite fifty years on death row, two death sentences, and an execution attempt, Thomas Creech is still in the same place he was when he first entered Idaho’s maximum-security prison. Following Creech’s failed execution, Idaho changed its execution protocols to allow for a central line catheter during lethal injection if a peripheral I.V. line is not successful. The state also designed and built a new “execution preparation room.”³⁸⁷ Then, in March 2025, Idaho lawmakers passed a bill designating the firing squad as the state’s primary method of execution, effective July 2026.³⁸⁸ Rep. Bruce Skaug, a Republican lawmaker, described the firing squad as an execution method that ensures “dignity for all.”³⁸⁹

³⁸² *Davlin, supra* note 377.

³⁸³ Clark Corbin, *Idaho Department of Correction Unable to Move Forward with Scheduled Execution of Thomas Creech*, *IDAHO CAPITAL SUN* (Feb. 28, 2024), <https://idahocapitalsun.com/2024/02/28/idaho-department-of-correction-unable-to-move-forward-with-scheduled-execution-of-thomas-creech> [https://perma.cc/29DW-894F].

³⁸⁴ *Id.*

³⁸⁵ Randall, *supra* note 6.

³⁸⁶ *Id.*

³⁸⁷ Kevin Fixler, ‘Dignity for All’: Idaho Bill Proposes Firing Squad as State’s Primary Execution Method, *IDAHO STATESMAN* (Jan. 21, 2025), <https://www.idahostatesman.com/news/northwest/idaho/article298915055.html> [https://perma.cc/8D9F-AF2X].

³⁸⁸ IDAHO CODE tit. 19 ch. 27, § 16 (2024).

³⁸⁹ Fixler, *supra* note 387.

Only time will tell if Creech suffers through a second execution, and what the method of killing will be. Will his death ultimately be by firing squad? Will he succumb to natural causes like Broom and Campbell? Or will he reach a settlement with Idaho, agreeing never to make another attempt on his life, like Doyle Lee Hamm?

CONCLUSION

Executions are, by definition, designed to kill. They are one mechanism through which the state exercises its sovereign prerogative—the authority to take life. When executions fail, that performance of sovereignty is disrupted, and explanations must be provided. Those explanations come from state officials responsible for carrying out death sentences, from lawyers who represent the condemned, and from courts that adjudicate the challenges survivors bring.

As we have seen, there is a standard genre for each of them. State officials generally insist that nothing went wrong, or they blame the condemned for using the legal process to sabotage the death penalty system. Their focus often rests on the suffering of the victims' families than on the suffering inflicted on the person the state has attempted to kill. In contrast, defense lawyers highlight the suffering and trauma their execution-surviving clients endure as they fight to prevent a second execution attempt. Courts have largely been unreceptive. They routinely reject methods-of-execution challenges and afford the government broad discretion in deciding when and how to put someone to death, even when it is the second time. Judges generally ignore the suffering of those who endure failed executions, focusing on whether the failure was intentional or accidental, or whether the execution had “begun” when the attempt went awry. But these categories cannot restore what has been broken.

Execution survivors remind us of the human fallibility and imperfection that haunts us all from cradle to grave. They reveal fissures in the apparatus of sovereignty and of the lengths to which governments will go to repair them. The cases discussed here offer an alternative death-penalty story: one that highlights failure and the embodied beings whom the state wishes to consign to the dustbin of history.

