Testimony Submitted to the Idaho State Senate Judiciary and Rules Committee

Hearings on H 658 – A Bill Exempting From Disclosure Information Relating to Executions

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(Written Testimony)

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Mr. Chairman, Members of the Committee: I want to thank the Committee for providing me this opportunity to testify on House Bill 658, concerning proposed changes in public access to information relating to executions in Idaho.

My name is Robert Dunham. I am the Executive Director of the Death Penalty Information Center.[1] DPIC is a national non-profit organization that provides information and analysis on issues related to capital punishment in the United States. The Center does not take a position for or against the death penalty, though we are critical of the way it is administered. We serve as a resource for those who are interested in capital punishment.[2]

One of the issues we have been following closely is transparency — or, more accurately, the lack of transparency — in the execution process in the United States. In November 2018, we published a major report on execution secrecy entitled, *Behind the Curtain: Secrecy and the Death Penalty in the United States*.[3] For your reference, I have submitted an electronic copy of the report along with my testimony. The report explains in depth why transparency in

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[2] Our website is one of the most widely used by those seeking information on the death penalty. The Library of Congress has chosen it as part of its archive on this issue. Justices of the United States Supreme Court and state supreme courts have cited the website as an authoritative source of death penalty information.

[3] Robin Konrad, BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES, Death Penalty Information Center (November 2018), https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf.

executions is so important — not just as a vital principle of our democracy, but as a guarantor of good governance.

In preparing our secrecy report, we found that since January 2011, legislatures in thirteen states had enacted new secrecy statutes that conceal vital information about the execution process and others, including Idaho, had invoked existing laws, regulations, policies, or execution protocols to justify their refusal to disclose such information. This retreat into secrecy has occurred at the same time that states have conducted some of the most problematic executions in American history.[4]

States moved to lethal injection from more overtly violent methods of execution in an attempt to make the execution process more humane. But instead, there have been frequent reports of prisoners who were still awake and apparently experiencing suffocation and excruciating pain after they were supposed to be insensate. These problems have intensified with the use of inappropriate execution drugs and drugs supplied by compounding pharmacies with questionable business practices. Numerous eyewitness reports tell of executions gone amiss, with problems including labored breathing, gasping, heaving, writhing, convulsing, vomiting, clenched hands, and prisoners saying that their body is burning. And the states' responses to these problems have undermined public confidence in capital punishment and in whether states can be trusted to competently carry it out.

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[4] Death Penalty Information Center, *Botched Executions*, https://deathpenaltyinfo.org/executions/botched-executions.

In a number of executions — most recently Oklahoma's execution of John Grant last October[5] — state officials denied that the execution was problematic, asserting that all had proceeded according to protocol. In some of these cases, however, the observations of neutral witnesses exposed those representations as verifiably false. Coupled with persistent questions about government misconduct and ineptitude in secret government efforts to obtain execution drugs, the misrepresentations about things eyewitnesses could see for themselves raised additional serious questions about what may have occurred elsewhere in the execution process that the public was unable to observe.

That includes questionable conduct in trying to obtain execution drugs, which has been disturbingly frequent. Here are just a few involving the purchase of Idaho's execution drug of choice: compounded pentobarbital. In 2013, Missouri sent a corrections official across state lines to Oklahoma with an envelope containing $11,000 in cash[6] to purchase pentobarbital from an anonymous compounding pharmacy, later identified as The Apothecary Shoppe.[7] The

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[5] Death Penalty Information Center, *Eyewitnesses Report John Grant Experienced Repeated 'Full-Body Convulsions' and Vomited During Execution; Oklahoma Says Execution was Carried Out 'Without Complication'*, October 29, 2021, https://deathpenaltyinfo.org/news/eyewitnesses-report-john-grant-experienced-repeated-full-body-convulsions-and-vomited-during-execution-oklahoma-says-execution-was-carried-out-without-complication.

[6] Death Penalty Information Center, *In Missouri, Testimony About Secret Cash Payments for Execution Drugs*, February 12, 2014, https://deathpenaltyinfo.org/news/in-missouri-testimony-about-secret-cash-payments-for-execution-drugs.

[7] Death Penalty Information Center, *Missouri Execution Drug Supplier Being Sold After Committing Nearly 2,000 Violations of Pharmacy Regulations*, April 25, 2016, https://deathpenaltyinfo.org/news/missouri-execution-drug-supplier-being-sold-after-committing-nearly-2-000-violations-of-pharmacy-regulations.

pharmacy, based in Tulsa, was not licensed to sell drugs in Missouri. Health inspectors found that the drug compounder had committed "significant" violations of pharmacy regulations, including engaging in questionable potency, disinfecting, and sterilization practices. State investigators witnessed improper refrigeration, storage, and sterilization practices at the pharmacy and caught the company producing drugs without legitimate medical need, improperly expanding drug expiration dates, and operating during periods in which its lab was not certified. The company admitted to 1,892 violations of pharmacy regulations, was told to recall its products and cease compounding new drugs until it complied with regulations, and its license and the license of its head pharmacist were placed on five years' probation.

After the media discovered the identity of The Apothecary Shoppe, Missouri carried out seventeen executions between 2014 and 2017 using supplies of pentobarbital it secretly obtained from a suburban St. Louis compounding pharmacy named Foundation Care.[8] The Food and Drug Administration had classified Foundation Care as "high risk" because of repeated serious health violations. Missouri reportedly paid Foundation Care more than $135,000 for execution drugs, and employed clandestine meetings, code names, and undocumented cash payments in an attempt to conceal the pharmacy's identity.

[8] Death Penalty Information Center, *Missouri Executed 17 Prisoners With Drugs Secretly Obtained From 'High-Risk' Pharmacy Cited for Hazardous Practices*, February 21, 2018, https://deathpenaltyinfo.org/news/missouri-executed-17-prisoners-with-drugs-secretly-obtained-from-high-risk-pharmacy-cited-for-hazardous-practices.

Foundation Care first came to the attention of FDA investigators after a doctor complained to the agency that a patient he was treating had developed "a 'life threatening' illness" after taking a drug that had been prepared by the pharmacy. At that time, the investigators found that the pharmacy had shipped drugs to patients without conducting tests for sterility and bacteria, and a lab sample revealed drugs that had been contaminated with bacteria. In 2013, the FDA designated Foundation Care as a "high-risk" compounding pharmacy. A second inspection of the company that year found "multiple examples" of practices that could lead to contamination and that Foundation Care had failed to "assure that drug products conform to appropriate standards of identity, strength, quality and purity." In a February 2014 letter to the Missouri Board of Pharmacy, the FDA warned that Foundation Care's practices "could lead to contamination of drugs, potentially putting patients at risk."

Employees of the company also alleged that Foundation Care had engaged in illegal practices and numerous manufacturing improprieties. Two former senior employees of the company—including the head of pharmacy operations—alleged in a lawsuit that Foundation Care violated government regulations by reselling drugs returned by patients, intentionally omitting the names of ingredients in drugs it prepared, and failing to notify other states about a $300,000 settlement with Kansas over allegations of Medicaid fraud. Another suit by a former employee alleged that she was fired after complaining to her supervisors and the Missouri Board of Pharmacy about "serious operational violations."

Texas also has secretly purchased compounded pentobarbital from questionable sources.[9] From 2015 to 2018, the Texas Department of Criminal Justice obtained execution drugs from the Greenpark Compounding Pharmacy, a Houston-based compounding pharmacy that the Texas State Board of Pharmacy had cited for 48 violations in the preceding eight years and whose license was on probation. The violations included stocking expired drugs, improper preparation of IV solutions, and inadequate sanitary practices.

Greenpark's license was put on probation in November 2016 after it botched a prescription for three children, sending one of them to the hospital for emergency care. Instead of providing the children lansoprazole, a drug to treat high levels of stomach acid, the pharmacy gave them lorazepam, an anti-anxiety drug similar to Xanax. A pharmacy technician was found to have forged quality-control documents relating to the incident. Of the 200 compounding pharmacies licensed in Texas, Greenpark was one of only eight whose license was on probation or revoked.

Greenpark's tainted safety history was discovered at the same time that medical experts noticed from the last words of executed prisoners that the drugs being used in the executions may have been outdated or impure. Five of the prisoners executed in Texas in 2018 indicated that they experienced burning after the pentobarbital was injected. In January 2018, as the state executed Anthony

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[9] Death Penalty Information Center, *Investigation Reveals Texas Obtained Possibly Tainted Execution Drugs from Pharmacy With Tainted Safety Record*, November 29, 2018, https://deathpenaltyinfo.org/news/investigation-reveals-texas-obtained-possibly-tainted-execution-drugs-from-pharmacy-with-tainted-safety-record.

Shore, he called out, “I can feel that it does burn. Burning!” Juan Castillo, Troy Clark, Christopher Young, and Danny Bible all said the drug burned or hurt during their executions. A sixth prisoner, William Rayford, was observed writhing and shaking on the gurney after the drug injection.

The last words of Rodney Berget, executed by South Dakota in October 2018 with pentobarbital believed to have been obtained from Texas, were “Is it supposed to feel like that?”[10] Dr. David Waisel, an anesthesiologist and Harvard Medical School professor, wrote in a 2016 affidavit, “Improper compounding and testing procedures may leave fine particles undetectable by the naked eye in the solution, or larger particles that would not be detected by an untrained eye. These particles can cause great irritation to the vein, resulting in extraordinary pain.”

Nor is Idaho beyond reproach for its conduct in obtaining execution drugs, as documents released only as a result of a court order have made very clear. Idaho prison officials have engaged in cloak and dagger practices, including twice sending corrections employees across state lines to make cash purchases of controlled substances intended for executions, actively concealing the intended use of the drugs, manipulating state records to cover up their activities, and

[10] Danielle Ferguson, 'Is it supposed to feel like that?': Berget execution transcript released, Argus Leader, November 13, 2018, https://www.argusleader.com/story/news/crime/2018/11/13/rodney-berget-execution-transcript-south-dakota-dealth-penalty/1990523002/.

acting in bad faith to stonewall public records requests for execution-related information.[11]

In 2011, the Idaho Department of Correction used a pharmacist from a psychiatric treatment center that was part of the Idaho Department of Health and Welfare network as the ghost purchaser of drugs to execute Paul Rhoades in 2011. The IDHW confirmed to the *Idaho Statesman* that IDHW had "requested a clinical pharmacist employee travel to Salt Lake City in November 2011 to pick up pentobarbital from a pharmacy for the state of Idaho." We know from IDOC deposition testimony that IDOC paid "upward of $10,000 in cash" for the out-of-state drug purchase.

To execute Richard Leavitt in 2012, IDOC chartered a private plane at a cost of $2,448 and sent two IDOC officials with a suitcase containing $15,000 in cash to Tacoma, Washington where they exchanged money for drugs in a Walmart shopping center parking lot. They bought compounded pentobarbital from pharmacist Kim Burkes, the owner of the Union Avenue Compounding Pharmacy. How reputable was that drug source? The *Idaho Statesman* reports that "In February 2017, the Washington Department of Health placed Burkes' pharmacist's license on probation for one year for repeat inspection violations in 2015 and 2016," including for stocking expired drugs. She was the second

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[11] Death Penalty Information Center, *Investigative Report: Idaho Records Reveal State's Efforts to Conceal Ghost Purchase of Execution Drugs and Out-of-State Cash Payment to Pharmacy With Dubious Regulatory History*, January 21, 2022, https://deathpenaltyinfo.org/news/investigative-report-idaho-records-reveal-states-efforts-to-conceal-ghost-purchase-of-execution-drugs-and-out-of-state-cash-payment-to-pharmacy-with-dubious-regulatory-history.

pharmacist associated with the Union Avenue Compounding Pharmacy to have their license placed on probation.

And beyond just the back-alley nature of the cash purchases, the drugs themselves appear to have been incompetently transported. Compounded pentobarbital needs to be properly refrigerated in transport. From all we can see, it wasn't.

It is often considered a truism, and Idaho's conduct with regard to the purchase of execution drugs seems to emphasize the point: governments don't hide information from the people unless they believe they have something to hide. Idaho's past conduct underscores the need for transparency and accountability in the execution process, not secrecy. Given that past history, "Trust me, I'm the government" is not an acceptable substitute for public oversight.

Instead of concealing execution information from the public, Idaho should act openly and transparently so that its citizens, legislators, and judges know the facts and can make more fully informed judgments about the death penalty.

Thank you for your time.