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## Oppose SB 1393 – A Huge Step Backward for Virginia into a World of Secrecy and Lack of Accountability

SB 1393 would empower the Department of Corrections to contract with pharmacies to make up drugs for use in execution by lethal injection. The bill would also shield: 1) the identities of persons or entities engaged to compound drug products, 2) the identities of persons or entities engaged to manufacture or supply the materials used to compound drug products, and 3) the name of the materials or components used to compound drug products from disclosure under FOIA or during discovery or introduction as evidence in a civil proceeding except for good cause shown.

**Opens Virginia up to human experimentation.** The proposed legislation ignores the disastrous consequences that have resulted from recent cases where states have ventured into real life human executions before subjecting those protocols to measured consideration and review. For example, experimental drug combinations were used in the horrifically botched executions of Clayton Lockett<sup>1</sup>, Joseph Wood<sup>2</sup>, and Dennis McGuire<sup>3</sup>. Without information about the pharmacies that compound the drugs and the raw ingredients used, it is impossible to say whether a compounded product will be effective and work as intended. Virginia should not engage in human experimentation.

**Prevents the public, the press, and everyone else from knowing what happened during an execution, botched or not.** By prohibiting the public from knowing anything about the drug source, materials, or components the proposed legislation makes the execution process almost entirely secret and subject to the unsupervised whim of the Director of the Department of Corrections. The awesome power of the government to kill must be accompanied by transparency and accountability, both of which would go away if this bill becomes law.

**Raises constitutional concerns.** On January 23, 2015 the U.S. Supreme Court granted cert in *Glossip v. Gross*, a lethal injection challenge out of Oklahoma. This is the first time in seven years that the Court will review and opine on lethal injection procedures. This case also presents the opportunity for the Court to clarify and amend the standard for determining the constitutionality of a lethal injection procedure. It would be prudent for the General Assembly to wait and see how the Court addresses the issues before passing legislation that affects the Commonwealth's execution procedures.

**The secrecy provisions are unnecessary.** For more than ten years, the DOC has made known the materials, components, and entities engaged in the manufacture or supply of materials relating to the execution process without incident. The legislature is without any factual basis for accusing the public of being ill-equipped to handle this information or doubting its ability to continue to do so. As the American Bar Association stated, "[i]f credible evidence of such threats does come to light, there are civil and criminal remedies available. Furthermore, courts are well-suited to craft narrowly-tailored remedies that protect names and identifying information from entering the public record while still allowing prisoners to bring meaningful challenges to execution protocols."<sup>4</sup> This is a solution in search of a problem.

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<sup>1</sup> Katie Fretland, *Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess'*, THE GUARDIAN (Dec. 13, 2014), available at <http://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

<sup>2</sup> Josh Sanburn, *Inside the Efforts to Halt Arizona's Two-Hour Execution of Joseph Wood*, TIME (July 24, 2014), available at <http://time.com/3026985/joseph-wood-arizona-lethal-injection-botched/>.

<sup>3</sup> Dana Ford & Ashley Fantz, *Controversial execution in Ohio uses new drug combination*, CNN (Jan. 17, 2014), available at <http://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution/>.

<sup>4</sup> American Bar Association, Death Penalty Due Process Review Project Death Penalty Representation Project, Section of Individual Rights and Responsibilities, Report to the House of Delegates, Resolution 108B (Feb 2015) available at

**The American Bar Association opposes attempts to hide the lethal injection process.** As the ABA stated, it “is concerned about this movement toward increased secrecy and regressive policies surrounding the processes by which prisoners are executed by lethal injection, particularly given the gravity of the authority exercised by state and federal governments in the execution of prisoners.”<sup>5</sup> This policy reflects the “ABA’s longstanding policy that ‘death penalty cases [should be] administered fairly and impartially, in accordance with due process.’”<sup>6</sup> The ABA “calls upon each jurisdiction that imposes capital punishment to ensure that it has execution protocols that are subject to public review and commentary, and include all major details regarding the procedures to be followed, the qualifications of the execution team members, and the drugs to be used. Without this information, the analysis called for by the U.S. Supreme Court in *Baze [v. Rees]*, 553 U.S. 35 (2008)] to determine whether an execution protocol poses a substantial risk that inmates will face severe and needless suffering, cannot be done.”<sup>7</sup> The ABA concluded that “[s]ociety’s interest in the fair administration of the death penalty is significant—and far outweighs any jurisdiction’s asserted governmental interest in secrecy regarding their execution drugs and procedures.”<sup>8</sup>

**It misses the underlying problem – we have a capital punishment system that doesn’t ensure fairness and accuracy.** An estimated 1 in every 25 people on death row in the U.S. is innocent,<sup>9</sup> and Virginia is not immune from the potential to execute an innocent person. In August 2013 the American Bar Association published a report that found problems throughout Virginia’s death penalty process – from the law enforcement identification and interrogation process at the beginning to the post conviction process at the end.<sup>10</sup> It is unconscionable that we are debating methods of execution when there is strong evidence that calls into question the basic fairness and accuracy of Virginia’s death penalty process.

**SB 1393 undermines government transparency and accountability and enables human experimentation.**

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[http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2015\\_hod\\_midyear\\_meeting\\_108b.uthcheckdam.docx](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2015_hod_midyear_meeting_108b.authcheckdam.docx).

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Pema Levy, *One in 25 Sentenced to Death in the U.S. Is Innocent, Study Claims*, NEWSWEEK, Apr. 4, 2014, available at <http://www.newsweek.com/one-25-executed-us-innocent-study-claims-248889>.

<sup>10</sup> American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Virginia Death Penalty Assessment Report* (Aug. 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/va\\_complete\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf).