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Beaty and the Beast: A Prisoner's Due Process Right to Notice of Changes to Execution Protocols

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BEATY AND THE BEAST: A PRISONER'S DUE PROCESS RIGHT TO NOTICE OF CHANGES TO EXECUTION PROTOCOLS

Abstract: On May 25, 2011, in *Beaty v. Brewer,* the U.S. Court of Appeals for the Ninth Circuit held that a prisoner's due process rights do not include the right to notice or to appeal a last-minute change to a state's method of execution. In doing so, the court established a loophole, permitting states to avoid Eighth Amendment challenges to execution protocols by waiting until the final moment to amend them. This Comment argues that implicit within a prisoner's right to challenge a state's method of execution is a due process right to timely notice of changes to that method of execution.

Introduction

Eighteen hours before Donald Beaty's scheduled execution, the State of Arizona announced that it would substitute a new drug as the first drug in the three-drug lethal injection sequence at his execution.[1] This last-minute substitution prompted Beaty to request an injunction or temporary restraining order.[2] Beaty claimed that the use of the new drug would violate his rights under the Eighth and Fourteenth Amendments of the U.S. Constitution.[3] After failing to obtain a stay in lower courts, Beaty appealed to a panel of the U.S. Court of Appeals for the Ninth Circuit, which denied his request.[4] In May 2011, in *Beaty v. Brewer,* the Ninth Circuit voted against rehearing the case en banc, and the State executed Beaty.[5]

Courts have differed as to whether the last-minute substitution of a new drug as part of an execution protocol violates an inmate's constitu-

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[1] Beaty v. Brewer, 649 F.3d 1071, 1072 (9th Cir. 2011) (Reinhardt, J., dissenting).

[2] *See* Beaty v. Brewer, 791 F. Supp. 2d 678, 679 (D. Ariz.), *aff'd,* 649 F.3d 1071 (9th Cir. 2011).

[3] *Id.* at 679–80.

[4] *Beaty,* 649 F.3d at 1072 (denying request for injunctive relief).

[5] *Id.* at 1071–72 (denying rehearing en banc); JJ Hensley & Jim Walsh, *Arizona Inmate Put to Death by Lethal Injection,* Ariz. Republic (May 25, 2011, 10:36 PM), http://www.azcentral.com/community/tempe/articles/2011/05/24/20110524arizona-supreme-court-stops-execution-donald-beaty.html.

tional rights.[6] On the one hand, on May 19, 2011, a mere week before *Beaty* was decided, the U.S. Court of Appeals for the Eleventh Circuit, in *Powell v. Thomas,* held that a drug substitution did not violate an inmate's Eighth Amendment rights.[7] In *Powell,* the Eleventh Circuit affirmed the district court's ruling that an amendment or change to a lethal injection protocol, absent timely notice and an opportunity to be heard, does not constitute a due process violation.[8] On the other hand, one federal district court has held that "fundamental fairness, if not due process," requires that an inmate receive timely notice of changes to a state's execution protocol.[9]

In declining to rehear Beaty's case en banc, the Ninth Circuit followed the Eleventh Circuit, effectively denying a prisoner meaningful review of changes to the state's method of execution.[10] As a result, the Ninth Circuit rendered the right to challenge execution protocols a practical nullity.[11] Furthermore, the court's determination creates a potential loophole that will allow states to avoid challenges to their execution protocols by waiting until the final moment to make changes or amendments to those protocols.[12]

Part I of this Comment provides an overview of Beaty's conviction and his request for an injunction or temporary restraining order.[13] Part II discusses recent cases addressing an inmate's Fourteenth Amendment right to receive notice of changes to an execution protocol.[14] Finally, Part III examines flaws in the Ninth Circuit's reasoning.[15] Further, it argues that the right to timely notice of changes to the method of execution is implicit in an inmate's right to challenge a state's method of execution.[16]

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[6] *See* Powell v. Thomas, 641 F.3d 1255, 1256, 1258 (11th Cir. 2011) (affirming the district court's denial of a stay of execution after Alabama substituted of pentobarbital for sodium thiopental weeks before plaintiff's execution); Pavatt v. Jones, 627 F.3d 1336, 1337, 1339–40 (10th Cir. 2010) (affirming district court's denial of a stay in response to Oklahoma's substitution of pentobarbital for sodium thiopental on eve of plaintiff's execution).

[7] *See* 641 F.3d at 1258.

[8] *See id.*

[9] *See* Oken v. Sizer, 321 F. Supp. 2d 658, 664 (D. Md. 2004).

[10] *See Beaty,* 649 F.3d at 1072 (denying rehearing en banc); *id.* at 1073 (Reinhardt, J., dissenting).

[11] *See id.* at 1072 (majority opinion).

[12] *See id.*

[13] *See infra* notes 17–42 and accompanying text.

[14] *See infra* notes 43–59 and accompanying text.

[15] *See infra* notes 60–84 and accompanying text.

[16] *See infra* notes 60–84 and accompanying text.

I. Beaty's Conviction, Appeals, and the Ninth Circuit's Denial of His Request for an Injunction

In June 1985, a jury convicted Donald Edward Beaty for the sexual assault and murder of Christy Ann Fornoff, a thirteen-year-old girl from Tempe, Arizona.[17] The trial judge sentenced Beaty to death.[18] Beaty repeatedly appealed his conviction over the next twenty years.[19] In 2009, his conviction became final.[20]

Having exhausted all avenues for appealing his conviction, Beaty continued to delay his sentence by challenging Arizona's method of execution as a violation of his Eighth and Fourteenth Amendment rights.[21] In 2009, Beaty filed suit with six other death row inmates against the Arizona Department of Corrections (ADC).[22] The district court rejected Beaty's claim, holding that Arizona's lethal injection protocol did not violate the Eighth Amendment.[23] It did so by reasoning that Arizona's lethal injection protocol provided more safeguards than Kentucky's, which the U.S. Supreme Court, in 2008, upheld as constitutional in *Baze v. Rees*.[24] On appeal, the Ninth Circuit, in *Dickens v. Brewer,* affirmed the district court.[25]

Because the Ninth Circuit upheld Arizona's execution protocol in *Dickens,* Beaty had no further avenues for appeal.[26] The state set the date of his execution for May 25, 2011.[27] Yet eighteen hours before Beaty's scheduled execution, the ADC announced that it had substituted pentobarbital for sodium thiopental, the first drug in its three-drug lethal injection combination.[28] In response, Beaty filed a motion

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[17] State v. Beaty, 762 P.2d 519, 524 (Ariz. 1988).

[18] *Id.*

[19] Hensley & Walsh, *supra* note 5.

[20] Beaty v. Ryan, 130 S. Ct. 364 (2009) (mem.) (denying petition for writ of certiorari).

[21] *See* Dickens v. Brewer, No. CV07–1770-PHX-NVW, 2009 WL 1904294, at *1 (D. Ariz. July 1, 2009).

[22] *Id.*

[23] *Id.* at *19–20.

[24] *See* Baze v. Rees, 553 U.S. 35, 41 (2008); *Dickens,* 2009 WL 1904294, at *19–20.

[25] 631 F.3d 1139, 1150 (9th Cir. 2011).

[26] Michael Kiefer, *Execution Date Set for Inmate in 1984 Tempe Murder,* Ariz. Republic (Apr. 20, 2011, 12:00 AM), http://www.azcentral.com/arizonarepublic/local/articles/2011/04/20/20110420beaty0420.html.

[27] *Id.*

[28] *See Beaty,* 791 F. Supp. 2d at 679, 682. Prior to the substitution, Arizona's protocol provided for the use of three drugs: (1) sodium thiopental, a barbiturate that causes unconsciousness; (2) pancuronium bromide, a muscle relaxant that induces paralysis; and (3) potassium chloride, which triggers cardiac arrest. *Id. See generally* Execution Procedures, ADC (2012), *available at* http://www.azcorrections.gov/Policies/700/0710.pdf (describing Arizona's execution procedures and chemical makeup of lethal injection syringes). The ADC

for a stay of execution with the Arizona Supreme Court and the U.S. District Court for the District of Arizona.[29] He argued that the drug substitution posed a substantial risk of violating his Eighth Amendment right against cruel and unusual punishment and his due process rights under the Fourteenth Amendment.[30]

In his Eighth Amendment claim, Beaty argued that as a result of the last-minute substitution of pentobarbital, ADC employees would lack the training necessary to administer the drug properly, putting him at risk of serious harm.[31] Although a recent medical study has questioned the efficacy of sodium thiopental, alleging that it does not fully anesthetize many inmates,[32] Beaty did not object to the efficacy of pentobarbital as a substitute drug.[33]

In his Fourteenth Amendment claim, Beaty argued that the Due Process Clause entitled him to timely notice of changes to Arizona's execution protocol.[34] Without that notice, he argued, he would be unable to determine whether the changes violated his Eighth Amendment rights.[35] According to Beaty, the State violated this entitlement by failing to notify him of the drug substitution until the day before his execution, depriving him of the time necessary to review the substitution.[36]

The district court denied Beaty's request for injunctive relief.[37] Beaty then filed an emergency motion with the Ninth Circuit seeking an injunction or a temporary restraining order.[38] A panel of the Ninth Circuit denied Beaty's motion, holding that he failed to show that he was entitled to injunctive relief.[39] Beaty then appealed to the Supreme Court, which denied his petition for certiorari.[40] While the Supreme Court was reviewing Beaty's petition, a Ninth Circuit judge requested a

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made the substitution in response to a request from the U.S. Department of Justice, which was concerned that the ADC had failed to complete the forms required to import sodium thiopental. *Beaty*, 791 F. Supp. 2d at 680.

[29] *Beaty*, 791 F. Supp. 2d at 679 & n.1.

[30] *See id.* at 680.

[31] *Id.* at 683.

[32] *See* Leonidas G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 365 Lancet 1412, 1414 (2005).

[33] *See Beaty*, 791 F. Supp. 2d at 683.

[34] *See id.* at 685.

[35] *See id.*

[36] *See id.* at 679–80.

[37] *Id.* at 680.

[38] *Beaty*, 649 F.3d at 1072.

[39] *Id.*

[40] Beaty v. Brewer, 131 S. Ct. 2929 (2011) (mem.) (denying petition for writ of certiorari); Hensley & Walsh, *supra* note 5.

vote on whether to rehear the panel's decision en banc.[41] A majority of non-recused judges voted to deny rehearing en banc, and the panel's order became final.[42]

II. The Implicit Right to Notice of Changes in Execution Protocols

In his complaint, Beaty argued that by notifying him of its drug substitution less than twenty-four hours before his scheduled execution, Arizona had deprived him of his due process rights under the Fourteenth Amendment.[43] Yet, that claim was made against a backdrop of predominantly contrary precedent.[44] In the few cases that have considered the issue, most courts have held that the Due Process Clause requires neither notice of changes to a state's method of execution nor an opportunity to respond and be heard.[45]

No court has proffered a rational for why an inmate does not have a right to notice of changes to a state's method of execution under the Due Process Clause.[46] Furthermore, those courts that have held that the Due Process Clause might not entitle inmates to notice have based their decisions on the fact that no other court has recognized such a right.[47] For example, in 2011, in *Powell v. Thomas,* the U.S. District Court for the Middle District of Alabama denied an inmate's motion for a stay of execution in response to the State's last-minute substitution of pentobarbital for sodium thiopental.[48] The court held that denial

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[41] *Beaty,* 649 F.3d at 1072 (denying rehearing en banc); *id.* at 1074 (Tallman, J., concurring).

[42] *Id.* at 1072 (majority opinion).

[43] *See* Beaty v. Brewer, 791 F. Supp. 2d 678, 681 (D. Ariz.), *aff'd,* 649 F.3d 1071 (9th Cir. 2011).

[44] *See, e.g.*, Powell v. Thomas, 641 F.3d 1255, 1258 (11th Cir. 2011); Clemons v. Crawford, 585 F.3d 1119, 1129 n.9 (8th Cir. 2009); Cook v. Brewer, No. CV 10–1454-PHX-RCB, 2011 WL 251470, at *5 (D. Ariz. Jan. 26, 2011).

[45] *See, e.g.*, *Powell,* 641 F.3d at 1258; *Clemons,* 585 F.3d at 1129 n.9; *Cook,* 2011 WL 251470, at *5.

[46] *See, e.g.*, *Clemons,* 585 F.3d at 1129 & n.9 (noting the lack of authority for the proposition that prisoners have a due process right to examine the backgrounds of execution personnel and declining to reach due process claim because plaintiffs dropped claim on appeal); Powell v. Thomas, 784 F. Supp. 2d 1270, 1283 (M.D. Ala. 2011) (reasoning that no authority supports the assertion that inmates have a due process right to notice and opportunity to be heard about drug substitutions in execution protocols); *Cook,* 2011 WL 251470, at *5 (noting that plaintiff failed to identify authority supporting assertion of due process right to information about state's method of execution).

[47] *See, e.g.*, *Clemons,* 585 F.3d at 1129 & n.9; *Powell,* 784 F. Supp. 2d at 1283; *Cook,* 2011 WL 251470, at *5.

[48] 784 F. Supp. 2d at 1284.

was appropriate because no authority supported the plaintiff's assertion that an inmate has a due process right to receive notice and an opportunity to be heard in response to a drug substitution in an execution protocol.[49] On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's denial of a stay, concluding that the substitution did not violate the plaintiff's Eighth Amendment rights.[50]

In contrast, two district courts, in response to this lack of explicit authority, reasoned that an inmate's right to notice is implicit in broader notions of the Due Process Clause.[51] Furthermore, of those, one court noted that courts had implicitly recognized that right by reviewing the constitutionality of execution protocols.[52] In 2004, in *Oken v. Sizer,* the U.S. District Court for the District of Maryland held that "[f]undamental fairness, if not due process," demands that the State notify an inmate of the protocol to be used at the inmate's execution a reasonable time amount of prior to execution.[53] In *Oken,* the court noted the dearth of cases establishing an inmate's right to notice of a state's execution protocol.[54] Thus, the court relied on numerous cases in which courts had reviewed challenges to execution protocols, reasoning that the fact that courts had heard these challenges "presuppose[d]" prisoners' right to notice of changes to protocols.[55] In addition, the court looked to broader notions of due process and concluded that the Due Process Clause requires notice of changes to protocols.[56]

Further, in 2009, in *Dickens v. Brewer,* the U.S. District Court for the District of Arizona noted that inmates—including Beaty, a party to that case—are entitled to notice of changes to the state's execution protocol that will be in place at the time of their execution.[57] Similar to the court in *Oken,* the court in *Dickens* assumed that the right to notice was implicit in notions of fundamental fairness and due process.[58] Therefore, in both *Dickens* and *Oken* the courts recognized the right to notice of changes to a state's method of execution.[59]

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[49] *Id.*

[50] *Powell,* 641 F.3d at 1258.

[51] *See* Dickens v. Brewer, No. CV07–1770-PHX-NVW, 2009 WL 1904294, at *23 n.9 (D. Ariz. July 1, 2009); Oken v. Sizer, 321 F. Supp. 2d 658, 664 (D. Md. 2004).

[52] *See Oken,* 321 F. Supp. 2d at 664.

[53] *See id.*

[54] *Id.*

[55] *Id.*

[56] *See id.* at 665.

[57] *See* 2009 WL 1904294, at *23 n.9.

[58] *See id.*; *Oken,* 321 F. Supp. 2d at 664.

[59] *See Dickens,* 2009 WL 1904294 at *23 n.9; *Oken,* 321 F. Supp. 2d at 664.

III. The Ninth Circuit's Denial of Beaty's Right to Due Process

Implicit in the right to challenge a state's method of execution is an inmate's right to notice of changes to the state's execution protocol.[60] Without such protection, an inmate may be unable to ensure that the protocol does not violate the Eighth Amendment freedom from cruel and unusual punishment.[61] Yet the Ninth Circuit panel, both in its decision to deny injunctive relief and to deny rehearing en banc failed to recognize Beaty's due process right to timely notice of the State of Arizona's substitution of pentobarbital for sodium thiopental.[62] Courts should recognize, however, that long-standing death penalty jurisprudence implicitly grants inmates the right to receive notice and an opportunity to be heard when a State changes the execution protocol.[63] This was the position taken by Judge Stephen Roy Reinhardt in his dissent in *Beaty,* and by the U.S. District Court for the District of Maryland, in 2004, in *Oken v. Sizer,* which held that "[f]undamental fairness, if not due process," requires that inmates receive notice of a state's execution protocol in a timely manner.[64]

Courts have repeatedly recognized that an inmate has a right to challenge a state's method of execution for compliance with the Eighth Amendment.[65] In fact, the U.S. Supreme Court has recently expanded an inmate's ability to do so.[66] In 2006, in *Hill v. McDonough,* the Supreme Court held that method of execution challenges may proceed

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[60] *See infra* notes 70–84 and accompanying text.

[61] *See* Beaty v. Brewer, 649 F.3d 1071, 1072–73 (9th Cir. 2011) (Reinhardt, J., dissenting); Powell v. Thomas, 641 F.3d 1255, 1257–58 (11th Cir. 2011) (reasoning that the Eight Amendment might entitle plaintiff to notice of change in method of execution if a change were sufficiently significant).

[62] *See Beaty,* 649 F.3d at 1071–72 (denying rehearing en banc); *id.* at 1072 (denying request for injunctive relief).

[63] *See id.* at 1072–73 (Reinhardt, J., dissenting); Oken v. Sizer, 321 F. Supp. 2d 658, 664 (D. Md. 2004).

[64] *See Beaty,* 649 F.3d at 1072–73 (Reinhardt, J., dissenting); *Oken,* 321 F. Supp. 2d at 664.

[65] *See Oken,* 321 F. Supp. 2d at 664.

[66] *See* Hill v. McDonough, 547 U.S. 573, 580–81 (2006). *See generally* Harvey Gee, *Eighth Amendment Challenges After* Baze v. Rees: *Lethal Injection, Civil Rights Lawsuits, and the Death Penalty,* 31 B.C. Third World L.J. 217 (2011) (discussing opportunities for prisoners to bring method of execution challenges under 42 U.S.C. § 1983); Megan Greer, *Legal Injection: The Supreme Court Enters the Lethal Injection Debate:* Hill v. McDonough, *126 S. Ct. 2096 (2006),* 30 Harv. J.L. & Pub. Pol'y 767 (2007) (stating that the U.S. Supreme Court's holding in *Hill v. McDonough* will allow for additional method of execution challenges); Liam J. Montgomery, Note, *The Unrealized Promise of Section 1983 Method-of-Execution Challenges,* 94 Va. L. Rev. 1987 (2008) (noting the increased opportunities for method of execution challenges under *Hill v. McDonough*).

under 42 U.S.C. § 1983 and do not have to be brought as actions for habeas corpus.[67] Prior to *Hill,* the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) banned second or successive petitions for habeas corpus, and thus prevented many inmates from challenging a state's method of execution.[68] Therefore, in *Hill,* the Court demonstrated that inmates should have a broader right to challenge the state's method of execution than was previously granted under the AEDPA.[69]

From this principle of death penalty jurisprudence—that inmates have the right to challenge their method of execution—it follows that states must provide prisoners with notice of changes to the method of execution.[70] Were it otherwise, states could evade challenges by waiting until the last minute to amend their execution protocols, thereby impeding prisoners from exercising their right to review their method of execution.[71] As Judge Reinhardt noted in his dissent, in reality, if states do not have to provide inmates with notice, inmates' right to challenge execution protocols would be "meaningless."[72]

Furthermore, the right to challenge a state's method of execution is an essential aspect of our nation's system of capital punishment.[73] This is because the right of an inmate to challenge his method of execution provides a means to challenge the appropriateness of the punishment in the eyes of the public and the Court.[74] This assurance, that all possible measures have been taken to ensure both the accuracy of the conviction and the appropriateness of the punishment, imbues the application of capital punishment with legitimacy.[75] This assurance is particularly necessary to ensure the legitimacy of capital punishment,

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[67] *See* 547 U.S. at 580–81.

[68] *See* Kyle P. Reynolds, Comments, *"Second or Successive" Habeas Petitions and Late Ripening Claims After* Panetti v. Quarterman, 74 U. Chi. L. Rev. 1475, 1475 (2007). In most cases since *Hill,* the plaintiff previously filed a habeas corpus petition, and thus would have been prohibited by AEDPA from bringing his claim as a habeas petition. *See* Montgomery, *supra* note 66, at 2001.

[69] *See Hill,* 547 U.S. at 580–81.

[70] *See Beaty,* 649 F.3d at 1078 (Reinhardt, J., dissenting); *Oken,* 321 F. Supp. 2d at 664.

[71] *See Beaty,* 649 F.3d at 1078 (Reinhardt, J., dissenting); *Oken,* 321 F. Supp. 2d at 664.

[72] *See Beaty,* 649 F.3d at 1078 (Reinhardt, J., dissenting).

[73] *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?,* 82 Iowa L. Rev. 319, 333–45 (1997) (describing long history of Eighth Amendment challenges to methods of execution).

[74] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976). *See generally* Montgomery, *supra* note 66 (discussing the role of method of execution challenges in protecting prisoners against unconstitutional executions).

[75] *See* Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals,* 18 J.L. & Pol. 773, 775 (2002) (noting capital punishment system assumes government executes only the guilty).

because the Supreme Court has recognized that "death is different" from imprisonment and thus requires a heightened degree of reliability.[76] Inmates can only be said to have been given this right, however, if the process they were afforded meets constitutional requirements.[77]

In *Beaty,* the process failed to meet the requirements of the Due Process Clause, thus undermining the legitimacy of Arizona's system of capital punishment.[78] Although the Arizona Supreme Court, the U.S. District Court for the District of Arizona, and a panel of the Ninth Circuit reviewed Beaty's claim, the review of each of those courts failed to comport with constitutional requirements.[79] With less than twenty-four hours to demonstrate the merits of his claim—that the change to the execution protocol would violate his Eighth Amendment rights—Beaty could not fully act upon the process these courts afforded him.[80] This time constraint exemplified the concern against which the Due Process Clause is designed to protect. As the Supreme Court, in 1950, in *Mullane v. Central Hanover Bank & Trust Co.*, stated, the "right to be heard has little reality or worth unless one is informed that the matter is pending . . . ."[81]

Furthermore, both Beaty and the ADC should have expected a stay of execution to allow Beaty to evaluate Arizona's amendment to its execution protocol.[82] This is because in 2009, in *Dickens v. Brewer,* the District of Arizona, reviewing a challenge to Arizona's execution protocol by Beaty and other inmates, noted that there was "no dispute that each Plaintiff is entitled to notice of any amendment to the Arizona Protocol if the amendment will be in effect for the Plaintiff's execution."[83] Thus, in failing to follow this conclusion, the Ninth Circuit has introduced uncertainty into method of execution litigation and established a potential loophole that will allow states to avoid challenges to their execu-

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[76] *See Woodson,* 428 U.S. at 305 (stating that death is qualitatively different from imprisonment, requiring a corresponding difference in reliability); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,* 109 Harv. L. Rev. 355, 370 (1995) (describing Supreme Court's requirement of "heightened reliability" in capital cases).

[77] *See Beaty,* 649 F.3d at 1078 (Reinhardt, J., dissenting).

[78] *See id.*

[79] *See id.*

[80] *See id.* at 1071–72 (Tallman, J., dissenting); *Beaty,* 791 F. Supp. 2d at 680.

[81] *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

[82] *See Beaty,* 649 F.3d at 1071–72 (denying rehearing en banc); *id.* at 1072 (denying injunctive relief); Dickens v. Brewer, No. CV07–1770-PHX-NVW, 2009 WL 1904294, at *23 n.9 (D. Ariz. July 1, 2009).

[83] *See Dickens,* 2009 WL 1904294, at *23 n.9.

tion protocols by waiting until the last minute to amend those protocols.[84]

Conclusion

In *Beaty,* the Ninth Circuit held that an inmate's due process rights do not include the right to receive notice or to appeal a change to a state's method of execution. In doing so, however, the court established a loophole by which a state may avoid Eighth Amendment challenges by amending execution protocols at the eleventh hour. By failing to give Beaty notice and opportunity to challenge the change in execution protocol, the Ninth Circuit cast doubt over the legitimacy of Arizona's use of capital punishment. Essential to maintaining that legitimacy is permitting inmates to exercise their due process rights to review the states' methods of execution. Without that right, the public cannot ensure that states will administer the death penalty in a humane manner. A defendant, however, cannot be said to have been afforded this right absent notice and an opportunity to be heard. The right to challenge absent notice has no utility.

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[84] *See Beaty,* 649 F.3d at 1071.