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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

**THOMAS E. CREECH, JAMES H.
HAIRSTON, RICHARD A. LEAVITT,
GENE F. STUART,**

Plaintiffs,

v.

BRENT REINKE, in his official capacity as
Director, Idaho Department of Corrections;
KEVIN KEMPF, in his official capacity as
Chief, Operations Division, Idaho
Department of Corrections;
JEFF ZMUDA, in his official capacity as
Deputy Chief, Bureau of Prisons, Idaho
Department of Corrections; and
RANDY BLADES, in his official capacity as
Warden, Idaho Maximum Security
Institution, Idaho Department of Corrections

Defendants.

Case No. 12-00173-S-EJL

CAPITAL CASE

Civil Action

**PLAINTIFF LEAVITT'S
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR
STAY OF EXECUTION**

Expedited Oral Argument and
Evidentiary Hearing Requested

Execution Scheduled June 12, 2012

Plaintiff Leavitt moves, pursuant to Federal Rule of Civil Procedure 65(a) and (b) and 28 U.S.C. §1651, for a preliminary injunction or stay of execution barring the Idaho Department of

Correction from executing Richard A. Leavitt on June 12, 2012. A memorandum in support is being filed contemporaneously with this motion.

Respectfully submitted this 23rd day of May, 2012.

Samuel Richard Rubin

/s/
Oliver W. Loewy

Teresa A. Hampton

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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JOSH TEWALT, in his official
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Prisons, Idaho Department of
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Plaintiffs commenced this lawsuit on April 6, 2012, seeking an order permanently enjoining the Idaho Department of Correction (“IDOC”) from executing them based on what they denominate in their Complaint as the 2012 Protocol. Dkt. No. 1. On May 5, 2012, Defendants filed a Motion to Dismiss and supporting memorandum. Dkt. No. 10. On May 17, 2012, the District Court for the Seventh Judicial District of Idaho entered an order directing Defendants Reinke and Blades “to cause” the execution of Plaintiff Leavitt (“Leavitt”) on June 12, 2012. Exh. 1.¹ Leavitt seeks a stay of execution or preliminary injunction barring the IDOC from executing him on June 12, 2012, and until resolution of this lawsuit. *See* Fed. R. Civ. Proc. 65.

A stay is required where the applicant “establish[es] that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *Landrigan v. Brewer*, 625 F.3d 1132, 1133 (9th Cir. 2010) (district court properly stayed execution after applying *Winter* factors), *rev’d on certiorari review on different grounds*, 131 S.Ct. 445 (2010). The standard for issuance of a preliminary injunction requires consideration of the same factors. *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 1761 (2009).

For the reasons below, Idaho’s execution procedures threaten to violate Leavitt’s Fourteenth Amendment right to due process and Eighth Amendment right against cruel

¹ Exhibits attached to this Motion are cited to as “Exh. *.” Any exhibits which were attached to previous filings in this case include the docket number, e.g. “Dkt. *, Exh. *.”

and unusual punishment by allowing the IDOC Director or IDOC Chief of the Operations Division, Defendants Kempf and Reinke respectively, to “revise, suspend, or rescind any procedural steps, at any time, at his sole discretion.” Dkt. 1-7, Exh.1 at p. 1. *See infra* at Section I.A. Further, for the reasons below, Idaho’s execution procedures threaten to violate Leavitt’s Eighth Amendment right against cruel and unusual punishment. *Baze v. Rees*, 553 U.S. 35 (2008). *See infra* at Section I.B. Those procedures create a demonstrated risk of severe pain, do not provide safeguards relied upon in *Baze*, and are not substantially similar to the Kentucky protocol upheld in *Baze*. For these reasons, considered separately and together, Mr. Leavitt meets the standard for a stay. This Court should enter an order enjoining or staying his execution pending resolution of this lawsuit.

I. LEAVITT IS LIKELY TO SUCCEED ON THE MERITS

A. The Unfettered Discretion to Revise the 2012 Protocol Violates Leavitt’s Right to Due Process.

The 2012 Protocol expressly allows for IDOC personnel to revise the protocol at any time, for any reason and at their sole discretion. Dkt. 1-7, Exh. 1 at 1. The 2012 Protocol may, then, be revised only moments before Mr. Leavitt’s execution. The 2012 Protocol does not provide that notice of 2012 Protocol revisions be given to Mr. Leavitt or his counsel at any time.

Executing Mr. Leavitt pursuant to an amended version of the 2012 Protocol without first according him a fair opportunity to review the amendments and register any legal objections to them in a court of law would violate his right to due process. U.S.

Const. Amend. XIV. *Dickens v. Brewer*, 2009 WL 1904294 at *23 (D.Ariz. 2009) (“Fundamental fairness, if not due process, requires that the execution protocol that will regulate an [sic] prisoner’s death be forwarded to him in prompt and timely fashion.”) (quoting *Oken v. Sizer*, 321 F.Supp., 2d 658, 664 (D.Md. 2004), *aff’d*, 631 F.3d 1139 (9th Cir. 2011)).

Just last week, the Ninth Circuit Court of Appeals addressed a strikingly similar contention in an Arizona case. *Lopez v. Ryan*, 2012 WL 1693926 (9th Cir. 5/15/2012), *reh’g en banc denied* 2012 WL 1760700 (9th Cir. 5/18/2012). Idaho’s 2012 Protocol “was modeled after the Arizona Department of Corrections’ execution protocol[,]” but Idaho’s protocol is even more discretionary than Arizona’s. Dkt. 10-1 at 3-4 (Defendant’s Memorandum In Support of 12(b) Motion To Dismiss).

The *Lopez* panel majority declined to rule on the “due process challenge based on unfettered discretion and transparency[,]” on which Judge Berzon based her dissent, because “in this appeal Lopez did not advance the argument[.]” *Lopez*, 2012 WL 1693926 at *2. Nonetheless, Judge Berzon’s concurring and dissenting opinion from the panel majority decision coupled with the two opinions (representing the views of seven judges) dissenting from denial of rehearing en banc put beyond any doubt that the Ninth Circuit Court of Appeals is uniquely frustrated by Arizona’s “‘amending its execution protocol on an ad hoc basis – through add-on practice, trial court representations and acknowledgments, and last minute written amendments[.]’” *Id.* at 1 (quoting *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012)). The Ninth Circuit refers to this moving target as Arizona’s “rolling protocol.” *Towery*, 672 F.3d at 653.

The constitutional difficulties are even greater with Idaho's rolling protocol. The Arizona protocol at issue in *Lopez* and *Towery* allowed only very limited discretion, as compared to that which Idaho's 2012 Protocol provides the IDOC Director and IDOC Chief of Operations. Specifically at issue in *Towery* was the Director of the Arizona Department of Correction having discretion:

to select members of the IV Team, provided they are "appropriately trained," as well as to designate the IV Team Leader. The Director also has discretion to choose either a three- or a one-drug protocol, using either sodium pentothal or pentobarbital and to decide, "upon the advice of the IV Team Leader," whether to use peripheral or central femoral IV access to administer the drugs (as long as a medically-licensed physician is available to implement the latter option).

Id. at 659. By contrast, Idaho's 2012 Protocol provides that either the IDOC Chief of Operations or the IDOC Director may revise or suspend the protocol in any way, at any time and at either's sole discretion. Dkt. 1-7 at 1 (2012 Protocol). At the time the Ninth Circuit decided *Towery*, the Director of the Arizona Department of Corrections had already exercised his limited discretion in choosing a one-drug protocol utilizing pentobarbital. In upholding the Arizona protocol, the Ninth Circuit relied on those discretionary decisions and "accept[ed] those representations and undertakings *as binding on the State.*" *Towery*, 672 F.3d at 658 (italics added). Arizona had voluntarily stopped its protocol from rolling any further with respect to Mr. Towery's execution. The target was fixed.

The court noted though that those discretionary decisions could have been exercised in a manner which "burden[ed] the right to be free of cruel and unusual punishment." *Id.* at 660. The court cited to "the lethal injection litigation surrounding

Ohio's lethal injection protocol" as providing examples of such burdensome discretionary decisions. *Id.* (citing to *In re Ohio Execution Protocol Litig.*, 2012 WL 84548 at *9 (S.D. Ohio 1/11/2012), *motion to vacate stay denied*, 671 F.3d at 602 (6th Cir. 2012)).

In stark contrast to the execution procedures the Ninth Circuit confronted in *Towery*, the IDOC Director and IDOC Chief of Operations, Defendants Reinke and Kempf respectively, may change the Idaho 2012 Protocol *at any time*. This contrast between the Arizona execution procedures which the Ninth Circuit approved in *Towery* and the Idaho 2012 Protocol underscores why *Towery* does not control the instant case. Even with Defendant Reinke's reported decision to proceed with a one-drug protocol in Leavitt's execution, *Towery* does not control because that decision may be changed at any time and because Defendants Reinke's and Kempf's discretion ranges far beyond the choice of a one-drug protocol.² Under the 2012 Protocol, Defendants Reinke or Kempf could decide to use a three-drug protocol at any time, including only moments before the anticipated execution. Likewise, Defendant Reinke's reported intent to execute Mr. Leavitt using pentobarbital could be altered at any time, including moments before the anticipated execution. For example, the Missouri Department of Corrections has very recently announced its plan to use propofol. Exh. 3 (Kansas City Star article, 5/18/2012). Defendants Reinke or Kempf may exercise their unfettered discretion to use in Leavitt's

² The Idaho Statesman reports that, "The state execution team will administer a single, lethal dose of the surgical sedative pentobarbital during the scheduled June 12 execution . . . said Brent Reinke[.]" Ex. 2 (Idaho Statesman 5/18/2012 article). In a May 17, 2012 telephone call, opposing counsel informed undersigned counsel of Defendant Reinke's decision to use a one-drug protocol, that they would confirm with Defendant Reinke the identity of the one drug to be used and then relay that information to undersigned counsel. To date, undersigned counsel has received no further communication from opposing counsel.

execution propofol or some other drug or drugs not specified in the 2012 Protocol.

Similarly, those same Defendants may exercise their unfettered discretion to change any other part of the 2012 Protocol, including but not limited to the means of delivering the drugs and the amounts of drugs to be used. The only constraint on their discretion is statutory: “The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of a substance or substances approved by the director of the Idaho department of correction until death is pronounced by a coroner or a deputy coroner.” I.C. §19-2716.

In dissenting from the denial of rehearing in *Lopez*, Judge Pregerson, joined by Judges Reinhardt, Wardlaw, W. Fletcher, and Paez, noted that:

As Judge Berzon reminds us in her partial dissent concerning the execution of Samuel Lopez, the simple fact remains that this court, the public, defense counsel, and inmates awaiting execution lack a definite understanding of the procedures and protocols the State of Arizona follows in executing its citizens. Because Arizona: (1) does not make known a detailed, written protocol; (2) limits the ability of counsel or witnesses to observe critical stages of the execution process³; and (3) restricts its documentation of executions - prisoners awaiting execution and their defense counsel are prevented from obtaining information that could support a successful constitutional challenge to Arizona’s use of lethal injection to execute death row prisoners.⁴

. . . .

I would grant Samuel Lopez a stay of execution. The State of Arizona must comport with the requirements of due process of law

³ Idaho likewise shrouds in secrecy critical stages of its execution process, allowing witnesses to observe only after the prisoner is strapped to the table, and leads from an electrocardiograph machine are attached to the prisoner, and the IVs or central line are initiated. Dkt. 1-7 at Exh. 1 at 6.

⁴ The IDOC declined undersigned counsel’s 2011 public records request for execution record on the ground that it was available only through court-ordered discovery.

and establish a **clear** and humane protocol that gives the public, this court, and most importantly, inmates and their defense counsel, notice of its execution procedures.

Arizona has stubbornly refused to define the amorphous and highly discretionary protocol it follows in executing its citizens. Until the state adopts a clearly written and humane execution protocol there exists a substantial risk that the constitutional rights of those it executes will be violated.

Lopez, 2012 WL 1760700 at *9-*10 (bold in original). Judge Reinhardt, joined by Judges Pregerson, Wardlaw, W. Fletcher, Fisher, Paez, and Berzon protested the denial of rehearing on similar grounds, noting that “if a skilled lawyer were instructing the state on how best to avoid *any* meaningful review of the constitutionality of its execution procedures, he would be hard pressed to improve on the unconscionable regime that the state has adopted.” *Id.* at 11 (italics in original).

Given the level of discomfort which Arizona’s rolling protocol elicited from the Ninth Circuit Court of Appeals, that court will be even more disturbed if confronted with Defendants’ unfettered discretion to revise at any time the protocol it intends to use in Mr. Leavitt’s execution. Leavitt is likely to succeed on the merits of his claim that executing him pursuant to a protocol which he has not been afforded a reasonable opportunity to review and be heard on would violate his right to due process.

B. The 2012 Protocol Clearly Creates A Demonstrated Risk of Severe Pain.

Incorporating the *Baze* safeguards into the 2012 Protocol or adopting an exclusively one-drug protocol is a feasible, readily implemented procedure which would significantly reduce the substantial risk of severe pain created by the 2012 Protocol as

established below. *Baze*, 553 U.S. at 52. Other states, including Ohio, South Dakota, and Washington, have adopted a one-drug protocol exclusively or as one of multiple alternatives. *See* Exhibits 4, 5, 6 (lethal injection protocols).

The 2012 Protocol provides for four possible kinds of lethal injection. It provides for presumptive three-drug executions, but includes one-drug executions as an alternative. It specifies two kinds each of three-drug and one-drug executions. All four lethal injection methods call for administering chemicals through an intravenous catheter (“IV”), and all include the use of heparin/saline to flush the IV lines. Each method differs from the remaining three in the particular remaining chemicals administered:

- The first method calls for administering the following three chemicals in the following order: sodium pentothal (“thiopental”), an anesthetic; pancuronium bromide, a paralytic; and potassium chloride, a cardiac-arrest inducing chemical.
- The second method is the same as the first except that pentobarbital is substituted for thiopental as the first chemical.
- The third method calls for administering thiopental without pancuronium bromide or potassium chloride.
- The fourth method calls for administering pentobarbital without pancuronium bromide or potassium chloride.

Thiopental and pentobarbital, the alternative first drugs in the three-drug methods, are barbiturates. Pancuronium bromide is the second chemical administered in each of the three-drug methods. When an appropriate dose of pancuronium bromide is administered intravenously to a human being, motor weakness progresses to a total muscular paralysis. The paralytic effect starts first in the small muscles (eyes, jaw). It then progresses to the limbs. The paralytic effect progresses, finally, to the muscles of

the rib cage and diaphragmatic muscles, which results in cessation of breathing.

Pancuronium bromide does not affect consciousness and does not prevent the perception of pain.

Pancuronium bromide precludes an accurate assessment of consciousness by visual and auditory observations. Pancuronium bromide paralyzes all muscles that would otherwise move when an individual is in excruciating pain. Dkt. 1-8, Exh. 14 at paras. 5, 17 (Sworn declaration of David Lubarsky, M.D., *Arthur v. Thomas, et al.*, No. 11-CV-438-MEF-TFM). A conscious individual who receives a therapeutic or greater dose of pancuronium bromide would experience suffocation and be unable to move or otherwise respond. Dkt. 1-8, Exh. 7 at para. 10.

Potassium chloride is the last chemical administered in each of the three-drug methods. Dkt. 1-7, Exh. 1, Appendix A, p. 2. At a sufficient dose, potassium chloride disrupts the normal electrical activity of the heart, inducing cardiac arrest. Potassium chloride does not affect consciousness and does not prevent the perception of pain. As it travels in the bloodstream from the site of injection towards the heart, potassium chloride activates all of the nerve fibers inside the blood vessel. This activation causes an extraordinarily painful burning sensation absent anesthesia. Dkt. 1-8, Exh. 7.

“The proper administration of [the anesthetic thiopental] ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.” *Baze*, 553 U.S. at 44. If an anesthetic is not used or if it does not reach the brain, and the remaining chemicals are administered, the inmate will experience suffocation caused by the paralytic; then an extreme burning throughout his

blood vessels as the potassium chloride is distributed; and, finally, cardiac arrest. Dkt. 1-8, Exh. 7 at para. 10, 13, 20.

1. Botched Lethal Injection Executions Are a Contemporary Reality.

Botched lethal injection executions are not a new phenomenon, but they are a continuing one. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution And Lethal Injection And What It Says About Us*, 63 Ohio St. L.J. 63, 139-41 (2002) (listing by inmate name thirty-one botched lethal injection executions between 1982 and 2001, and describing evidence of error). Denno's list includes cases where inmates needlessly suffered after the administration of the chemicals. For example, in each of the following botched executions, the protocol called for administering a series of the same types of chemicals in the same order as called for by the 2012 Protocol. When using thiopental, an anesthetic, the following botched executions were recorded:

- Witnesses reported that during his 1992 Oklahoma execution, Robyn Lee Parks "violently gagged and bucked in his chair after the drugs were administered." Denno at 140.
- Justin Lee May, executed by the State of Texas in 1992, "gasped and reared against his restraints during his nine-minute death." *Id.*
- After the chemicals started to flow into Luis M. Mata during his 1996 Arizona execution, his "head jerked, his face contorted, and his chest and stomach sharply heaved." *Id.*
- Scott Dawn Carpenter, executed by the State of Oklahoma in 1997, "gasped and shook for three minutes following the injection." *Id.*

Botched lethal injections continue even after *Baze*. For example, during his June, 2011, Georgia execution, Eddie Powell reportedly raised his head abruptly, apparently

tried to sit up, was pressing against his restraints, and was apparently clenching his teeth. Dkt. 1-8, Exh. 15 at para. 6. As Dr. Waisel, an anesthesiologist with one of Harvard University teaching hospitals, notes in his sworn statement, “The one-minute time course of the extensive and perhaps purposeful agitation should not have happened if the ‘massive’ overdose of pentobarbital worked as claimed.” *Id.*

2. Substantial Risk for Botched Executions: Problems Relating to the Initiation, Maintenance and Administration of Chemicals through IVs.

Absent proper training and practice in initiating and maintaining IVs, there is a substantial risk that an IV will not serve as a reliable mechanism for delivering chemicals into the bloodstream. Dkt. 1-8, Exh. 7 at 5, 6, 20, *passim*. In the lethal injection context, this means that there is a substantial risk that an insufficient amount of anesthetic will reach the prisoner, leaving him to experience the pain and suffering caused by a paralytic chemical and a cardiac-arrest inducing chemical which do reach him. *Baze*, 553 U.S. at 53.

The necessary training and experience needed to avoid this substantial risk is reserved for advanced healthcare professionals. For example, the training of basic EMTs and phlebotomists – two kinds of healthcare professionals which the 2012 Protocol allows to initiate and maintain IVs – does not cover establishing or maintaining IVs, or delivering any fluids through IVs. Dkt. 1-7, Exh. 5 at 21, Exh. 4. Nor do these particular kinds of healthcare providers typically gain experience in these regards. *Id.*

Plaintiffs submitted as an exhibit to their complaint an affidavit from Mark J.S. Heath, M.D., a practicing anesthesiologist with approximately 21 years experience and an

Memorandum In Support of Plaintiff Leavitt’s Emergency Motion
For Preliminary Injunction or Stay of Execution - 12

Assistant Professor of Clinical Anesthesiology at Columbia University School of Medicine. In it, Dr. Heath addresses some potential difficulties in initiating and maintaining an IV and administering chemicals through an IV. Dkt. 1-8, Exh. 7. When initiating an IV, the needle or cannula “may . . . puncture[], tear[], or otherwise perforate the wall of the vein[.]” *Id.* at para. 6. After an IV is initiated, the cannula “can shift position so [some or all of] the fluid travels into the surrounding tissue rather than the blood vessel.” *Id.* “Regardless the particular mechanism, inadvertent delivery of fluid into the tissues surrounding the vein is referred to as ‘extravasation’ and/or ‘infiltration.’” *Id.*

Dr. Heath addresses the consequences of infiltration of IVs used during a three-drug execution of the sort specified by the 2012 Protocol:

The Idaho lethal injection protocol mandates using pancuronium bromide and potassium chloride to execute inmates. Absent adequate anesthetic depth (i.e., a deep level of unconsciousness from which a highly noxious stimulation will not produce arousal), the infiltration of either of those chemicals into the surrounding tissue will result in severe pain and suffering. In particular, if all three drugs infiltrate into the tissue surrounding the vein, the first drug, thiopental [or, alternatively, pentobarbital], will not reach sufficient levels in the bloodstream to produce anesthesia. By contrast, the second drug, pancuronium, will reach sufficient levels to produce generalized paralysis. The third drug, potassium, causes a severe burning sensation when infiltrated into tissues. . . . The important point is that infiltration of the three lethal injection drugs, in part or in whole, is highly likely to produce an agonizing and torturous execution.

Dkt. 1-8, Exh. 7 at para. 7.

Assessing whether an IV is infiltrated is a hands-on process in which a properly trained and experienced individual inspects the site, visually and tactilely “for swelling,

discoloration, and temperature changes, as well as monitoring of the IV equipment.”

Dkt. 1-8, Exh. at para. 11. Importantly, “[t]he signs of an infiltrated IV are often very subtle, and can easily be missed by an inexperienced practitioner. Indeed, even a highly experienced practitioner may initially fail to detect an infiltrated IV, although the likelihood of this error occurring is reduced by accrued practice experience.” *Id.* at para. 12.

IVs may also fail through leakage. “Leakage may occur anywhere there is fluid, including any of the various points of connection through which the fluid being administered flows.” Dkt. 1-8, Exh. 7 at para. 8. It may occur “where the IV line connects to the saline bag, where it connects to additional IV lines, at any point where additional lengths of tubing (“IV extension sets”) are connected, at any point where an injection stopcock is inserted, at the site where the syringe (or needle on the syringe) is introduced to the IV apparatus, or where it connects to the hub of the cannula.” Dkt. 1-8, Exh. 4 at para. 8. Importantly, “[i]nfiltration and leakage are not necessarily ‘all-or-nothing’ events. Nor are they mutually exclusive causes of IV failure.” Dkt. 1-8, Exh. 7 at para. 10.

Using Idaho’s lethal injection protocol as an example: infiltration and/or leakage could cause an insufficient amount of thiopental or pentobarbital to reach the prisoner’s brain to sufficiently anesthetize him for the next two steps of the execution, paralysis and cardiac arrest. In this scenario, if partial or complete doses of the pancuronium bromide and potassium chloride are subsequently delivered into the inmate’s bloodstream, the inmate would experience the extreme pain and suffering of conscious paralysis and cardiac arrest. Moreover, an insufficiently anesthetized person would experience burning in his or her veins upon administration of concentrated potassium chloride, and any amount of potassium

chloride delivered to the surrounding tissue or to the bloodstream would cause extreme pain absent sufficient anesthetic. . . . Of note, the doses of pancuronium bromide and potassium chloride called for in the Idaho protocol are so large that the delivery of a fraction of the dose would lead to paralysis and possibly cardiac arrest.

Id.

3. The 2012 Protocol Fails to Incorporate the Particular Safeguards Which the Supreme Court Requires to Avoid the Substantial Risk of Severe Pain with Three-Drug Lethal Injections.

Baze requires safeguards against the severe pain which an inmate will suffer if the IVs do not function properly. Initiating and maintaining a functioning, open and unblocked IV, and delivering chemicals through an IV are complex skills which require training, experience, and competence. The Supreme Court agreed “that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.” *Baze*, 553 U.S. 35 at 53.

The Supreme Court approved the Kentucky lethal injection protocol but only because it included “several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner.” *Id.* at 55. Absent those safeguards, there is a substantial risk of serious harm in violation of the Eighth Amendment. *Id.* at 55. These safeguards are: relevant credentials; contemporary and continuing daily experience; adequate in-house training; redundancy; and a meaningful consciousness check.

- a. In *Rhoades v. Reinke* the IDOC avoided its protocol’s deficient credential and experience requirement through sworn testimony regarding the qualifications of the relevant individuals, but Defendants have provided no such assurances in this case.**

The first “most significant” safeguard on which the *Baze* court relied was that “members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman[.]” *Baze*, 553 U.S. at 55. Under the Kentucky protocol at issue in *Baze*, the IV team is responsible for establishing the IV lines. Exh. 7 (Kentucky Protocol). The 2012 Protocol’s Medical Team is responsible for much more, including mixing the chemicals, preparing and labeling the syringes, initiating and maintaining the IVs through which the drugs are administered, monitoring the prisoner (including level of consciousness), and administering the chemicals. Dkt. 1-7, Exh. 1 at 9 and Appendix A.

The 2012 Protocol provides that each Medical Team member, including the Medical Team Leader, possess at least one of the following credentials:

- Emergency medical technician [“EMT”];
- Licensed practical nurse (LPN) or registered nurse (RN);
- Military corpsman;
- Paramedic;
- Phlebotomist;
- Physician assistant;
- Physician; or
- Other medically trained personnel including those trained in the United States Military.

Dkt. 1-7, Exh. 1 at 9.

Though the 2012 Protocol mandates that the Medical Team is responsible for IV initiation and maintenance as well as for administering the drugs, it does *not* require that Medical Team members “have at least one year of professional experience.”

Additionally, while the minimum requirements for Medical Team members includes certain skilled occupations – e.g., EMTs, LPNs, physician assistants, paramedics – the 2012 Protocol does not require that these workers be currently licensed or have any recent experience and competence in initiating IV catheters. Consequently, a Medical Team member may have earned his qualifying credential years ago, have no intervening experience, and have no contemporary relevant and reliable skills. Some of the skilled occupations are unlicensed and require no certification or recertification. So, while individual Medical Team members may have earned their particular credentials in the distant past when they may have been competent in IV initiation, maintenance, and drug administration, they need not retain that competence today. This contrasts starkly with the *Baze* requirements which are designed as safeguards. Team membership requirements which do not ensure relevant and adequate training and experience are not safeguards.

Idaho licensed LPNs need not be trained or have any experience in initiating IVs or administering medication through IVs. They need not be trained or experienced in assessing whether an individual is sufficiently conscious to feel extreme pain.

Regarding phlebotomists, the State of Idaho does not license, certify, or regulate their training or scope of practice. See Dkt. 1-7, Exh. 4 (Letter from Nicole Walton, Pbt, Phlebotomy Instructor, College of Western Idaho dated 8/25/11). Phlebotomists do not

Memorandum In Support of Plaintiff Leavitt’s Emergency Motion
For Preliminary Injunction or Stay of Execution - 17

initiate, maintain, or administer any substance via IVs in the ordinary scope of practice in Idaho. *Id.* Phlebotomists are not trained to initiate, maintain, or administer any substance via IVs. *Id.*

Respecting EMTs, the State of Idaho licenses and regulates the training and scope of practice of EMTs and Paramedics. The Idaho legislature has invested the Idaho Emergency Medical Services Physician Commission (“EMS Physician Commission”) with the authority and obligation to “adopt appropriate rules defining the allowable scope of practice and acts and duties which can be performed by persons licensed by the EMS bureau[.]” I.C. § 56-1023(1). The EMS Physician Commission Standards Manual (“Standards Manual”) fulfills this legislative mandate. Dkt. 1-7, Exh. 5 (EMS Physician Commission Standards Manual). The Standards Manual distinguishes between EMTs and Advanced EMTs (“AEMTs”) for training and scope of practice purposes. *Id.* at 2, 16-18. The Standards Manual allows only AEMTs and Paramedics to initiate an IV and administer non-medicinal substances via IV infusion. *Id.* at 22-23. The Standards Manual allows only Paramedics to administer medicinal substances via IV infusion or to administer any substance via IV push. *Id.* at 23.

Regarding military corpsmen, there are different kinds. Not all kinds of military corpsmen have training and/or experience in initiating, maintaining or administering substances through an IV.

Finally, the 2012 Protocol does not define “[o]ther medically trained personnel,” the catch-all credential category which can be used to qualify for Medical Team membership, as requiring any minimum training or experience. The “[o]ther medically

trained personnel” credential category could be interpreted to encompass Certified Medical Assistants. IV medication administration is outside the scope of Certified Medical Assistant practice and certification. Dkt. 1-7, Exh. 6 (Timothy P. Hodges, FAAFP, Medical Director-Medical Assistant Program/College of Western Idaho letter to Greg Worthen, Federal Defender Services of Idaho, dated 8/22/2011). It would be inappropriate for a Medical Assistant to start or manage IV fluids, or administer intravenous medication. *Id.*

The 2012 Protocol provides that:

At least three (3) days before the scheduled execution date, [the Administrative Team shall] obtain technical assistance for the purpose of reviewing the lethal substances, the amounts, the methods of delivery and injection, and the offender’s physical and historical characteristics to evaluate compliance with this SOP. The individual(s) conducting the technical review will observe the Medical Team place IV catheters and establish an IV drip line in a live body. The individual(s) conducting the technical review will meet with the Administrative Team to review his findings. The director of the IDOC will make the final determination regarding compliance with this SOP.

Dkt. 1-7, Exh. 1 at 28. However, the 2012 Protocol does not mandate any training, experience or knowledge requirement for the individual(s) who provide the technical assistance described in the last paragraph.

Finally, the 2012 Protocol does not require that team members, or anyone else who participates in mandated training or rehearsals, perform with any minimal competency at any assigned task.

b. Inadequate On-Site Training

The *Baze* court relied on a third safeguard: that the “IV team members, along with the rest of the execution team, participate in at least 10 practice session per year.” *Baze*, 553 U.S. at 55. The court emphasized that those sessions “encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.” *Id.* The 2012 Protocol requires that the Execution Teams (i.e. the Escort and Medical Teams) participate in training sessions, but it does not require that they participate in “10 practice sessions per year . . . encompass[ing] a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.” *Id.*

The 2012 Protocol’s in-house training provision does not require that the training sessions involve anyone other than Medical Team members. Consequently, there is no requirement that the training be conducted by someone with the necessary skills which, in accord with the 2012 Protocol, every Medical Team member may lack.

The 2012 Protocol requires that all Medical Team members participate in only “four (4) training sessions prior to participating in an actual execution[.]” Dkt. 1-7, Exh. 1 at 10. Those individuals may have no daily experience – *indeed no prior training or experience at all* – in establishing and maintaining IVs. This means that a phlebotomist – a “credential” which requires no training or experience to acquire in Idaho, *see* Dkt. 1-7, Exh. 4 – or an individual certified in First Aid, Cardiopulmonary Resuscitation, and Automatic External Defibrillator use and who has no other medical training and experience, may become eligible for Medical Team membership after only four so-called

training sessions, allowing them to establish an IV, monitor it, and mix and administer the drugs. This plainly violates *Baze*.

c. The 2012 Protocol does not contain the fourth *Baze* safeguard, meaningful redundancy.

In addition to the training and contemporary and continuing experience safeguards, the Kentucky protocol includes a fourth safeguard – that the IV team prepare two sets of lethal injection chemicals before the execution commences as well as a primary and secondary IV line. The Supreme Court held, “These redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected.” *Baze*, 553 U.S. at 55. These redundancies constituted a safeguard in Kentucky because that state’s protocol requires that the chemical preparation and placement of the lines be accomplished by trained and experienced personnel.

The 2012 Protocol likewise requires a backup IV, and backup chemical preparation and readiness as well. Dkt. 1-7, Exh. 1. However, it does not require that the individuals initiating, maintaining, or delivering chemicals through the IV have any relevant training and experience in doing so. Where no such training and experience requirements exist, such as in Idaho, the redundancies do not become a safeguard. Having that same untrained and inexperienced person do the task twice does not materially improve the chances of it being done correctly.

d. The 2012 Protocol does not contain the final *Baze* safeguard, a meaningful consciousness check.

The Kentucky “protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds.” *Baze*, 553 U.S. at 56. This determination is made by a physical check of the offender.

The 2012 Protocol provides that the Medical Team Leader “shall be responsible for monitoring the offender’s level of consciousness.” Dkt. 1-7, Exh. 1, Appendix A at 6. If a three-drug method is used, then the Medical Team Leader must check whether the prisoner is unconscious after administration of the first drug but before the pancuronium is administered. *Id.* at 8. In determining whether the prisoner is unconscious, the Medical Team Leader is to use “all necessary medically appropriate techniques such as giving verbal stimulus, soliciting an auditory response, touching the eyelashes, and/or conducting a sternal rub.” *Id.*

Unless properly administered, none of the articulated methods of assessing consciousness allows an adequate determination of whether a prisoner is sufficiently conscious to experience extreme pain from the administration of pancuronium bromide and potassium chloride. The sternal rub is inadequately described to ensure that it will be properly applied to assess the prisoner’s level of unconsciousness. Absent currency in using a sternal rub to assess unconsciousness to extreme pain, an individual will not know how to properly apply a sternal rub to make such an assessment. The 2012

protocol does not require that any person directly involved in an execution and charged with consciousness checking have previous training in consciousness checking.

Further, phlebotomists, EMTs, paramedics, military corpsmen, LPNs, or other medically trained personnel which the 2012 Protocol permits to be on an execution team, are not required for credentialing purposes to have any training and/or experience in assessing unconsciousness against extreme pain following the administration of an anesthetic.

Dr. Heath notes that:

A person who is unconscious but not aroused by lighter forms of stimulation may still be arousable by an intense or highly noxious stimulus. The levels of stimulation produced by pancuronium injection (which causes suffocation due to the inability to draw breath) or by potassium injection (which causes excruciating pain) are the types of highly noxious stimuli that could easily arouse an unconscious person and revert them to a state of consciousness in which they would experience the agonizing effects of pancuronium and potassium.

Dkt. 1-8, Exh. 7 at para. 15. *See also* Exh. 8 at pp. 40, 74 (Dr. Waisel testimony in *DeYoung v. Owens*, No. 1:11-cv-2324-SCJ (N.D. Ga. July 19, 2011)).

Requiring an appropriate consciousness check by an adequately trained individual experienced in conducting consciousness checks is an alternative which would significantly reduce the risk of needless severe pain inherent in administering the remaining two chemicals. A person experienced and either certified or adequately trained in conducting consciousness checks is necessary because discerning levels of consciousness is a nuanced skill.

The sophistication necessary comes not only from theoretical knowledge, but from training under supervision and feedback and experience. Patients respond differently, and the educated eye needs to be able to give an increasing level of stimulation and needs to be looking for subtle signs, such as, . . . fluttering of the eyes, wincing, finger movement, toe movement, any of those, and it takes a practiced eye to do that.

Exh. 8 at 74-75 (Dr. Waisel testimony, DeYoung v. Owens, et al., No. 11-cv-2324-SCJ (N.D. Ga.)). A person needs training in order to adequately assess an individual's consciousness following the administration of anesthesia. *Id.* at 75.

4. The 2012 Protocol Allows for a “Cut Down” to Establish a Central Line.

The 2012 Protocol contemplates that the Medical Team leader may opine that it is “not possible to reliably place two (2) peripheral lines[.]” Dkt. 1-7, Exh. 1, Appendix A at 7. In that event, “the Medical Team leader will direct Medical Team members to place an IV catheter in a central line for the purpose of administering the chemicals.” *Id.* In the event a central line must be established, the 2012 Protocol mandates that the Medical Team member responsible for placing a central line catheter “utiliz[e] appropriate medical procedures.” Dkt. 1-7, Exh. 1, Appendix A at 8. Among the medical procedures considered appropriate among medical professionals is a “cut down” (i.e.- making an incision in the thigh to access the femoral vein). This is a “dangerous” procedure which should “*be performed only by a trained physician in a clinical environment with a patient under deep sedation.*” *Nelson v. Campbell*, 541 U.S. 637, 642 (2004) (paraphrasing affidavit of Dr. Mark J.S. Heath) (emphasis added). However, there are alternative ways to establish a central line which are “less invasive, less painful, faster, cheaper, and

safer,” including “percutaneous central line placement.” *Nelson*, 541 U.S. at 646 (2004) (quoting affidavit of Dr. Mark J.S. Heath). The Sixth Circuit Court of Appeals rejected an Eighth Amendment attack on a lethal injection protocol which failed to explicitly ban the use of cut-down procedures, but it did so only because the director of the state department of correction represented that a cut-down procedure would not be used. *Cooey v. Strickland*, 589 F.3d 210, 228 (6th Cir. 2009).

5. The 2012 Protocol Does Not Address What to do in the Event the Offender Regains Consciousness After or During the Administration of Potassium Chloride.

Dr. Heath opines that “absent proper training and experience on the part of the personnel who are charged with placing the IV cannulae and injecting the drugs, there is a high risk that . . . an insufficient amount of anesthetic agent will reach the prisoner’s brain[.]” Dkt. 1-8, Exh. 7 at para. 20. He notes elsewhere in his affidavit that because IV failure is not all-or-nothing, a partial dose of the paralytic and potassium chloride could reach an offender, causing severe pain. Dkt. 1-8, Exh. 7 at para. 10. The protocol does not contemplate a prisoner awakening from a non-fatal but still severely painful dose of potassium chloride. The protocol has no provision for relieving the offender’s severe pain. This violates *Baze* and the Eighth Amendment prohibition against cruel and unusual punishment.

6. IDOC Officials Are Not Subjectively Blameless For Purposes Of The Eighth Amendment.

To prevail on a claim of future harm as cruel and unusual punishment, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that

prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’ *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994).” *Baze*, 553 U.S. at 50. In stating “a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard[,]” the *Baze* court was referring to the “demonstrated risk of severe pain” standard which it grounded in *Farmer*. *Baze*, 553 U.S. at 61. As the court held, “[T]he proffered alternatives must effectively address a ‘substantial risk of serious harm.’ *Farmer*, [511 U.S.] at 842.” *Id.* at 52. Where the risk of severe pain is increased due to inexplicable delays in crafting a protocol which does not violate the Eighth and Fourteenth Amendments, the prison officials are not subjectively blameless. Their actions contributed to a substantial risk of serious harm or an objectively intolerable risk of harm. Where the prison officials were not subjectively blameless, the prison officials’ failures constitute evidence meeting the petitioner’s burden.

In the instant case, IDOC officials are not subjectively blameless. They have known since 2008 that they needed to establish execution procedures in compliance with *Baze*. They successfully defended materially identical challenges to the IDOC execution protocol adopted in October, 2011, only by providing this Court with assurances in the form of sworn testimony that the *Baze* safeguards were in place for that plaintiff’s execution. Further, IDOC officials have known for several years that one or more death sentenced inmates’ cases were drawing to a conclusion. Yet in January of this year, they chose to implement the 2012 Protocol with the same deficiencies as its October, 2011, protocol. IDOC officials are not subjectively blameless. Their failure to implement a

constitutionally adequate execution protocol unquestionably increases the likelihood of a substantial risk of harm. Together with the IDOC officials' failure, the evidence Mr. Leavitt proffers above demonstrates a likelihood of success on the merits.

II. Absent A Stay, Mr. Leavitt Will Suffer Irreparable Harm.

By establishing that his right to due process is threatened or impaired by the unfettered discretion invested in Defendants Reinke and Kempf to revise the 2012 Protocol at any time, Mr. Leavitt has established that he will suffer irreparable harm absent a stay of execution. In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Supreme Court held that when reviewing a motion for a preliminary injunction, a finding of irreparable injury is mandated where it is found that a constitutional right is threatened or impaired. *See also ACLU of KY v. McCreary County, KY*, 354 F.3d 438, 445 (6th Cir. 2003) (same). "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. National Aeronautics and Space Admin*, 530 F.3d 865, 882 (9th Cir. 2008) (citing to *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997), *rev'd on other grounds* 131 S. Ct. 746 (2011)).

This second factor – irreparable harm absent a stay – is incorporated in the *Baze* stay standard. Because the *Baze* safeguards are not incorporated in the 2012 Protocol, a substantial likelihood exists that Mr. Leavitt will suffer irreparable harm—severe pain and suffering—should his execution move forward.

III. The Balance of Equities Strongly Tips In Mr. Leavitt's Favor.

Defendants have long been aware that the IDOC execution protocol must be brought into compliance with the Eighth Amendment requirements articulated in *Baze v. Kentucky*, 533 U.S. 35 (2008), as well as the Due Process guarantee of the Fourteenth Amendment. They successfully defended materially identical challenges in November, 2011, but only through sworn and particularized assurances to this Court that the *Baze* safeguards were in place for that plaintiff's execution. Defendants were, then, aware of the 2012 Protocol's deficiencies under the Due Process and Eighth Amendment guarantees, but nevertheless chose to implement that deficient protocol. Defendants have unclean hands that tip the balance of equities strongly in Mr. Leavitt's favor.

IV. A Stay Or Injunction Is In The Public Interest.

"[T]he public has a fundamental interest in the protection of all people's constitutional rights, *see Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002)." *Klein v. City of Laguna Beach*, 381 Fed.Appx. 723, 727 (9th Cir. 2010). It has an especially strong interest in the government not killing a citizen when the State's delays caused insufficient time for the court to resolve this matter in a deliberate fashion. The strong public interest is in an orderly and deliberate decision of the important issues raised. If Idaho is to exact the ultimate penalty, it should only do so in a humane manner, without inflicting severe and unnecessary pain on the condemned inmate.

V. Conclusion

Mr. Leavitt meets his burden for a stay. He has established that the 2012 Protocol violates his due process right to know the procedures to be used in his execution in sufficient time to review them and be heard in a court of law on any objections to it. He has also established that the 2012 Protocol creates a demonstrated risk of severe pain in violation of the Eighth Amendment. That risk is substantial when compared to the known and available alternatives, an exclusively one-drug protocol or the incorporation of the *Baze* safeguards into the 2012 Protocol's three-drug execution methods. In light of these reasons, considered separately and together, the Court should issue a preliminary injunction or stay of execution pending the resolution of this lawsuit.

Dated this 23rd day of May, 2012.

Respectfully submitted,

_____/s/_____
Oliver W. Loewy
Teresa A. Hampton
Capital Habeas Unit
Federal Defenders Services of Idaho, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Krista Howard

khoward@idoc.idaho.gov

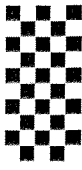
_____/s/
Molly Brown

EXHIBIT LIST

EXHIBIT #	EXHIBIT DESCRIPTION
1	<i>State of Idaho v. Richard A. Leavitt</i> , Case CR-1985-4110 – Death Warrant
2	Idaho Statesman 05/18/2012 article, entitled “Idaho opts for 1 drug only in execution policy”
3	KansasCity.Com article dated 05/18/2012, entitled “Missouri finds a drug option for executions”
4	Ohio Lethal Injection Protocol
5	South Dakota Lethal Injection Protocol
6	Washington Lethal Injection Protocol
7	Kentucky Lethal Injection Protocol
8	Dr. Waisel testimony in <i>DeYoung v. Owens</i> , No. 1:11-cv-2324-SCJ (N.D. Ga. July 19, 2011)

EXHIBIT 1

EXHIBIT 1



RECEIVED
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2012 MAY 17 AM 11:49

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
BINGHAM COUNTY, IDAHO

2012 MAY 17 AM 11:28

CASE#
SARA STAUB CLERK

BY _____ DEPUTY

 ORIGINAL

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

STATE OF IDAHO

Plaintiff,

vs.

RICHARD A. LEAVITT,

Defendant.

CASE NO. CR-1985-4110

DEATH WARRANT

TO: Brent Reinke, Director of the Idaho Department of Correction, and Randy
Blades, Warden, Idaho Maximum Security Institution:

WHEREAS, the above-named Defendant, on the 25th day of September, 1985,
was found guilty by a jury of the crime of First-Degree Murder as charged in the
prosecutor's Amended Information; and,

WHEREAS, on the 19th day of December, 1985, this Court made and entered its Pronouncement of Sentence, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death; and,

WHEREAS, on the 8th day of January, 1986, this Court made and entered its Judgment of Conviction, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death; and,

WHEREAS, on the 1st day of May, 1987, this Court entered an order denying Defendant's Petition for Post-Conviction Relief; and,

WHEREAS, on the 30th day of May 1989, the Idaho Supreme Court issued its opinion upholding the conviction and denial of post-conviction relief stemming from conviction, but reversing the death sentence and remanding for resentencing; and,

WHEREAS, after a resentencing hearing, on the 25th day of January, 1990, this Court signed its Memorandum Decision and Findings of the Court in Considering the Death Penaly, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death, which was filed on the 29th day of January, 1990; and,

WHEREAS, on the 15th day of March, 1990, this Court signed the Judgment of Conviction and Sentencing Order, finding that Defendant is guilty of Murder in the First-Degree and imposing the sentence of Death, which was filed on the 6th day of April, 1990; and,

WHEREAS, on the 27th day of November, 1991, the Idaho Supreme Court issued its opinion upholding the death sentence; and,

WHEREAS, this Court has entered orders denying all of Defendant's successive and subsequent petitions for post-conviction and other state collateral relief; and,

WHEREAS, the Idaho Supreme Court has affirmed the denial of Defendant's successive and subsequent petitions for post-conviction and other state collateral relief; and,

WHEREAS, on the 14th day of December, 2000, the Honorable B. Lynn Winmill entered Judgment granting Defendant federal habeas relief and ordering the state to initiate new trial proceedings; and,

WHEREAS, on the 14th day of June, 2004, the United States Court of Appeals for the Ninth Circuit, reversed the granting of federal habeas relief requiring the initiation of new trial proceedings, but remanded for consideration of Defendant's ineffective assistance of counsel claims arising from his resentencing; and,

WHEREAS, on the 28th day of September 2007, the Honorable B. Lynn Winmill entered Judgment granting Defendant federal habeas relief and ordering the state to initiate new sentencing proceedings; and;

WHEREAS, on the 17th day of May, 2011, the United States Court of Appeals for the Ninth Circuit reversed the granting of federal habeas relief requiring the initiation of new sentencing proceedings; and,

WHEREAS, on the 14th day of May, 2012, the United States Supreme Court denied Defendant's petition for certiorari, and;

WHEREAS, on the 16th day of May, 2012, the United States Court of Appeals for the Ninth Circuit issued its Mandate, which automatically lifted any stay imposed by Judge B. Lynn Winmill; and,

WHEREAS, Idaho Code § 19-2715(2) mandates that upon a remittitur or mandate being issued after a sentence of death has been affirmed, the district court shall set a new execution date; and,

WHEREAS, the Court is not aware of the existence of any stay of execution or other legal impediment to execution of the judgment.

NOW THEREFORE, YOU ARE HEREBY COMMANDED, pursuant to Idaho Code § 19-2716 and the Judgment of this Court, to receive said Defendant into your custody, and on the 17 day of June, 2012, you shall cause the execution of said sentence of death to take place, unless said sentence is stayed by law, and that you shall make a return upon this Death Warrant, showing the time, mode and manner in which it was executed pursuant to Idaho Code § 19-2718.

DATED this 17 day of May, 2012.



DISTRICT JUDGE

EXHIBIT 2

EXHIBIT 2

Idahostatesman.com

Idaho opts for 1 drug only in execution policy

By TODD DVORAK — Associated Press

Posted: 11:58am on May 18, 2012; Modified: 5:48pm on May 18, 2012

Idaho's executioners will use one drug to carry out a lethal injection scheduled next month, bringing the state in line with other death penalty states switching from a three-drug mixture, the state's corrections chief said Friday.

The state execution team will administer a single, lethal dose of the surgical sedative pentobarbital during the scheduled June 12 execution of convicted murderer Richard Leavitt, said Brent Reinke, director of the Department of Corrections.

His decision marks a departure from Idaho's most recent execution in November, when a mixture of three chemicals, including pentobarbital, were used to kill Paul Ezra Rhoades in the state's first execution in 17 years.

Reinke said the single-dose injection complies with the newest version of the state's execution policy, which also allows the state the options of returning to the three-drug mixture later.

A lethal dose of pentobarbital "appears to be very effective," Reinke said. "And the feedback we're getting from other states that use this (method) is that they are very pleased with the process."

The switch was also driven in part by the difficulty of obtaining the other two drugs that were used on Rhoades. Pentobarbital is an anesthetic used to put condemned inmates to sleep before other lethal drugs are administered, but it's lethal in higher doses.

If Idaho follows through in using a single drug next month, the state would join Arizona, Ohio, Texas and several other states that in the last year have made the switch to pentobarbital. Decisions by those states were fueled by complications in getting other drugs, a preference for one-drug lethal injections and after the only U.S. manufacturer of execution drug sodium thiopental signaled it would stop production.

"I made the decision on availability of the drug and what we're seeing in other capital punishment states," Reinke said. "It's just easier to obtain one chemical over three."

He declined to say how much pentobarbital the agency has on hand for next month's execution or those likely to occur in the next several years.

It's unclear what the decision means for a pending lawsuit that Leavitt and three other death row inmates filed in federal court last month.

The plaintiffs claim Idaho's new execution procedures give too much power to prison officials, create a risk of severe pain and would allow unqualified workers to carry out medical procedures. It also asks the judge to halt all executions until those issues are resolved.

Oliver Loewy, a lawyer with the federal public defender's office representing the death row plaintiffs, was encouraged by the department's decision to use pentobarbital in Leavitt's execution.

"We have been fighting for the one-drug protocol, as the three-drug method poses a substantial risk of unnecessary and excruciating pain for the prisoner," Loewy said in a statement. "We hope it signals the

state's broader willingness to adopt a standard for a one-drug policy for any future executions that are carried out in Idaho."

EXHIBIT 3

EXHIBIT 3



KansasCity.com

THE KANSAS CITY STAR

[Back to web version](#)

Wednesday, May 23, 2012

Posted on Fri, May. 18, 2012

Missouri finds a drug option for executions

Alternative anesthetic lets Missouri develop new protocol for lethal injections, the first of its kind.

By TONY RIZZO
The Kansas City Star

The state of Missouri is back in the execution business with a drug that's never been used to put prisoners to death in the United States.

Stymied by a chemical shortage affecting every death-penalty state, the Missouri Department of Corrections said this week that it now will carry out death sentences with propofol, a widely used surgical anesthetic that also was a factor in singer Michael Jackson's death.

Attorneys representing some of the state's death row inmates learned of the plan Thursday after corrections officials met with some inmates and informed them of the new protocol.

Defense attorneys said it's too early to say what, if any, legal challenges might be mounted in regard to the new one-drug execution protocol that replaces Missouri's previous three-drug cocktail.

"It's something we will have to look at very carefully," said Joseph Luby, an attorney with the Death Penalty Litigation Clinic in Kansas City. "Propofol has no track record in executions."

Missouri is the first state to formally adopt the use of propofol, also known by the brand name Diprivan, for use in lethal injections, said Richard Dieter, executive director of the Death Penalty Information Center in Washington, D.C.

"No one has used it yet," Dieter said. "Other states may have considered it."

Deborah Denno, a law professor at Fordham University in New York and nationally known expert on lethal injection issues, called it a "pretty extraordinary development" that raises many questions.

"I would anticipate legal challenges," she said.

Missouri's last execution took place in February 2011. Since shortly after that, the state has been unable to obtain the anesthetic that puts inmates to sleep before they are injected with two other chemicals that stop the lungs and heart. Officials also had been unable to obtain an alternative drug that some states had adopted to take its place.

With news that the corrections department had obtained a different drug, Missouri Attorney General Chris Koster on Thursday asked the state Supreme Court to set execution dates for 19 inmates. They include Michael Taylor, one of the killers of Ann Harrison, a Kansas City teenager kidnapped in 1989 while waiting for the school bus in front of her house, and Allen Nicklasson, convicted of kidnapping and killing Excelsior Springs businessman Richard Drummond in 1994 after Drummond stopped to help Nicklasson and a co-defendant when their car broke down.

Koster said in his motion that there are no legal impediments or stays now in place to stop the executions.

"Unless this court sets an execution date after a capital murder defendant's legal process is exhausted, the people of Missouri are without legal remedy," Koster said in his motion.

According to Supreme Court procedures, lawyers for the inmates must be given the opportunity to file responses before the Supreme Court sets execution dates.

"There is no timetable as far as when the court would rule (on dates)," said spokeswoman Beth Riggert. "The court rules when it deems it appropriate."

Missouri and every other state using lethal injection once used the same three-drug mixture that employed sodium thiopental to anesthetize prisoners. The drug has been employed in all 68 executions Missouri has carried out since 1989.

Inmates in Missouri and across the country had filed numerous legal challenges to the method, alleging that it created the risk of inflicting cruel and unusual punishment if not administered properly. However, the U.S. Supreme ruled in 2008 that the method was not unconstitutional.

In early 2010, shortages of sodium thiopental began cropping up, and in early 2011 the only domestic supplier announced it would no longer manufacture the drug.

States also had difficulty obtaining it from foreign sources, and on March 27, a federal court in Washington, D.C., banned any importation of sodium thiopental and ordered the Food and Drug Administration to contact every state that it believed had any foreign-manufactured thiopental and instruct them to surrender it to the FDA. It also permanently prohibited importation of the drug.

With thiopental in short supply, some states began to substitute another anesthetic, pentobarbital, for use in the three-drug method.

In February 2011, Ohio began using pentobarbital by itself to execute prisoners. Earlier this year, Arizona became the second state to switch to one-drug executions using pentobarbital.

Dieter, with the death penalty information center, said pentobarbital has been used, either by itself or in combination with other drugs, in the last 45 executions in the United States.

But last July, its Danish manufacturer announced that it was imposing restrictions on how pentobarbital was distributed to prevent its use in executions.

Since its on-hand supply of thiopental expired in March 2011, Missouri had been unsuccessful in finding it or pentobarbital.

In announcing its new protocol this week, Missouri Department of Corrections officials did not comment on when they obtained the new drug or where it was obtained.

According to Missouri's new written protocol, inmates will be injected with two grams of propofol. An area anesthesiologist said that amount is 10 times the dosage that would be used in a surgical setting for a 220-pound patient.

According to Missouri's new protocol, the chemical will be prepared by a doctor, nurse or pharmacist. An intravenous line will be inserted and monitored by a doctor, nurse or emergency medical technician. Department employees will inject the chemicals.

Doctors say the drug is used widely in medical settings and does not have some of the side effects, like post-operative nausea and vomiting, of previously used anesthetics. It was developed in England in the late 1970s.

Currently, only one execution date is pending in Missouri. Michael Tisius, convicted of killing two jailers in Randolph County, is scheduled to be put to death Aug. 3.

An attorney representing Tisius could not be reached for comment Friday.

To reach Tony Rizzo, call 816-234-4435 or send email to trizzo@kcstar.com.


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EXHIBIT 4

EXHIBIT 4

STATE OF OHIO

DEPARTMENT OF REHABILITATION
AND CORRECTION

SUBJECT:	PAGE <u>1</u> OF <u>17</u>
Execution	NUMBER: 01-COM-11
RULE/CODE REFERENCE: ORC 2949.22; 2949.25	SUPERSEDES: 01-COM-11 dated 04/11/11
RELATED ACA STANDARDS:	EFFECTIVE DATE: September 18, 2011
	APPROVED: 

I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Ohio Department of Rehabilitation and Correction the authority to manage and direct the total operations of the Department and to establish such rules and regulations as the Director prescribes.

form

II. PURPOSE

The purpose of this policy is to establish guidelines for carrying out a court-ordered sentence of death.

III. APPLICABILITY

This policy applies to all individuals involved in carrying out a court-ordered death sentence in accordance with all applicable policies, administrative regulations, and statutes.

IV. DEFINITIONS

Auxiliary Team Member – A physician who has been designated by the Warden to provide advice and consultation as described in this policy.

Critical Incident Debriefing Team - A group selected by the Southern Ohio Correctional Facility (SOCF) Warden, and including the Religious Services Administrator (RSA), available to assist any persons involved in the execution process. A psychological debriefing process is available via DRC clinical staff and others to recognize stressors associated with executions and to work through them with affected staff as follows:

- Worker's own experiences of the execution including reactions and perceptions.
- Review any negative aspects and feelings.
- Review any positive aspects and feelings.
- Relationships with workers and/or family.
- Empathy (sharing) with others.
- Disengagement from execution experience.

SUBJECT: Execution

PAGE 2 OF 17

- Integration of this experience into the professional work role for a positive future contribution to the overall team effort.
- Exploring religious convictions and feelings.

Death House - A physical location within the SOCF used for the execution of a death-sentenced prisoner.

Death Row – (1) A housing area at the Ohio State Penitentiary (OSP) that has been designated by the Director of the Department of Rehabilitation and Correction to house male prisoners who are committed to the Department with a sentence of death; (2) A housing area at the Ohio Reformatory for Women (ORW) that is similarly designated to house female prisoners committed to the Department with a sentence of death; (3) A housing area at the Mansfield Correctional Institution (MANCI) that has been designated by the Director of the Department of Rehabilitation and Correction to house male prisoners who are committed to the Department with a sentence of death who are determined to be seriously mentally ill pursuant to the criteria set forth in Department Policy 67-MNH-27, Transfer of Prisoners to the Ohio State Penitentiary, or whose medical needs are inconsistent with assignment to OSP pursuant to Department Policy 68-MED-13, Medical Classification. Death Row is also a reference to a housing status for prisoners sentenced to death; it is not a security classification.

Drug Administrator - Any qualified member of the Medical Team who administers any execution drug or witnesses the preparation and administration of any execution drug. A Drug Administrator shall be currently qualified under Ohio Law to administer and prepare drugs for intravenous and intramuscular injections. A Drug Administrator may also establish or assist in establishing IV connections.

Execution Team - A group consisting of no less than twelve (12) members designated by the Warden of the Southern Ohio Correctional Facility to carry out court-ordered executions. Their duties also include preparation and testing of equipment, carrying out pre- and post-execution activities, and counseling with the prisoner.

Execution Timeline - A record of events before and during an execution to include the specific information required to be recorded by this policy and other information at the discretion of the Execution Team.

Medical Team Member – A person who is a member of the Execution Team and who is currently qualified under Ohio Law to administer and prepare drugs for intravenous and intramuscular injections, or who has at least one year experience as a certified medical assistant, phlebotomist, EMT, paramedic or military corpsman.

Religious Services Administrator - The Religious Services Administrator is the coordinator and administrator for religious services for the Ohio Department of Rehabilitation and Correction (DRC). The RSA will provide counseling and support services for the offender and others consistent with the provisions of this directive.

Reprieve - The postponement of an execution.

Stay - A court-ordered suspension or postponement of a legal execution.

SUBJECT: Execution

PAGE 3 OF 17

V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction to carry out the death penalty in a constitutional manner and as directed by Ohio Courts of Law. All execution processes shall be performed in a professional, humane, sensitive, and dignified manner. It is the responsibility of the Director to designate a penal institution where death sentences shall be executed. The Warden of that facility, or Deputy Warden in the absence of the Warden, is responsible for carrying out the death sentence on the date established by the Ohio Supreme Court.

The procedures set forth in this policy are to be strictly followed. Any situation that arises that would make following these policies difficult, impractical, or impossible shall be immediately reported to the Director or the Warden. Any variations of a substantial nature must be approved by the Director as described in this policy.

There will be no variations from the following requirements:

1. At least three Medical Team Members, two of whom are authorized to administer drugs under Ohio law, shall be used in the conduct of court-ordered executions.
2. The drugs required by this policy shall be used.
3. Functions required to be performed by medically-qualified persons, as described in this policy, shall be performed by Medical Team Members.
4. All Execution Team functions shall be performed by appropriately trained and qualified members of the Execution Team.

VI. PROCEDURES

A. General Guidelines

1. All prisoners sentenced to death by a court of law shall be transported to a reception center within the Department of Rehabilitation and Correction for initial processing. Upon completion of the reception process, the prisoner shall immediately be transferred to the designated institution: MANCI or OSP for male prisoners or ORW for female prisoners.
2. All court-ordered executions shall be carried out at the Southern Ohio Correctional Facility and will be planned to commence at 10:00 a.m. on the scheduled execution date, subject to developing circumstances.
3. Unless otherwise designated by the Director/designee, the prisoner shall remain on Death Row until transferred to the Death House for scheduled execution.
4. The Ohio Supreme Court shall designate the date of execution. Upon receipt of a scheduled execution date, the Warden of the institution housing the prisoner shall notify the Director, the RSA, and the Warden at SOCF.

SUBJECT: Execution

PAGE 4 OF 17

5. Attendance at the execution is governed by the Ohio Revised Code, section 2949.25 and includes:
 - a. The Warden or Acting Warden of the institution where the execution is to be conducted, and such number of correction officers or other persons as the Warden or Acting Warden thinks necessary to carry out the death sentence.
 - b. The sheriff of the county in which the prisoner was tried and convicted.
 - c. The Director of the Department of Rehabilitation and Correction, or designee, and any other person selected by the Director/designee to ensure that the death sentence is carried out.
 - d. Such number of physicians and medical personnel as the Warden or Acting Warden thinks necessary. A physician may be designated by the Warden as an auxiliary member of the execution team, and whose role will be to provide consultation or advice as may be necessary. This physician shall attend such number of execution rehearsals as the Warden may consider necessary, but no less than one rehearsal per execution. The Auxiliary Team Member shall attend training sessions on topics identified in VI.B.4.b.i. – iv. below. It is anticipated that the Auxiliary Team Member may not routinely attend the executions, but would be available to provide consultation or advice in the event of some unanticipated circumstance.
 - e. The prisoner may select one of the following persons: the RSA, minister-of-record, clergy, rabbi, priest, imam, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination or sect, subject to the approval of the Warden.
 - f. Three persons designated by the prisoner who are not confined in any state institution subject to the approval of the Warden or Acting Warden based on security considerations.
 - g. Three persons designated by the immediate family of the victim, subject to the approval of the Warden or Acting Warden based on security considerations, as detailed in Department Policy 03-OVS-06, Victim Involvement in the Execution Process.
 - h. Representatives of the news media as the Director/designee authorize which shall include at least one representative of the following: a newspaper, a television station, and a radio station.
6. Given the gravity of the sentence to be carried out, it is imperative that these procedures be strictly adhered to and all actions by Department personnel in carrying out the sentence be fully documented as required by this policy. However, due to the difficult and sometimes unpredictable nature of the tasks to be performed in carrying out the sentence it may not always be possible to follow these procedures to the letter. Thus, variations from the requirements of the policy directive may sometimes be necessary. Any member of the Execution Team who determines for any reason it is difficult, impractical, or impossible to strictly follow the procedures in this policy directive shall

SUBJECT: Execution

PAGE 5 OF 17

immediately report the same to the Warden or to the Director. The Director may then consult with the Warden and others as appropriate. Only the Director may authorize a deviation from the procedures in this policy directive. Any such deviation shall be documented as soon as possible.

B. Execution Preparation – Approximately thirty (30) days prior to the scheduled execution date

1. Notification

The Warden of the institution where the prisoner is housed shall notify the Director by memo when a firm date is scheduled for a prisoner's execution with copies going to the Regional Director, DRC Chief Counsel, Assistant Director, APA, Ohio State Highway Patrol (Portsmouth and Jackson), and the Office of Victim Services.

2. Execution Drugs

- a. The Warden shall ensure a sufficient quantity of the drugs used for executions (pentobarbital, midazolam, and hydromorphone) are stocked within the SOCF Infirmary for a pending execution or anticipated future executions.
- b. The Warden's assessment of what constitutes a sufficient quantity shall include ensuring a sufficient amount for a contingency against contamination or inadvertent loss.
- c. At his discretion, the Warden may, at any time, direct the Health Care Administrator or the Health Care Administrator's designee to order execution drugs from a licensed pharmacist at the Central Pharmacy of the Department of Mental Health, or any other licensed pharmacist.
- d. All drugs obtained shall be maintained in the Infirmary.

3. Assessment of Prisoner

- a. Every possible effort shall be made to anticipate and plan for foreseeable difficulties in establishing and maintaining the intravenous (IV) lines. The prisoner shall be evaluated by appropriately trained medical staff at the parent institution not later than twenty-one (21) days before the execution to evaluate the prisoner's veins and plan for the insertion of the IV lines. This evaluation shall include a "hands-on" examination as well as a review of the medical chart to establish any unique factors which may impact the manner in which the Execution Team carries out the execution. Potential problems shall be noted and discussed, and potential solutions considered, in advance of the execution. Concerns or potential issues shall be communicated to the Warden or designee at SOCF as soon as possible.
- b. Any evaluation that is conducted by a member of the institution medical staff shall be noted in the prisoner's medical chart.

SUBJECT: Execution

PAGE 6 OF 17

- c. The prisoner's medical condition shall be assessed in order to identify any necessary accommodations or contingencies that may arise from the prisoner's medical condition or history. Any medical condition or history that may affect the performance of the execution shall be communicated as soon as possible to the Warden of SOCF, who shall confer with others as necessary to plan such accommodations or contingencies. The fact of the assessment and any conclusions shall be documented in the prisoner's medical chart.
- d. Any concerns for establishing or maintaining IV lines and any concerns or plans for medical accommodations or contingencies shall be communicated to the Execution Team in order that these things may be discussed and addressed in execution trainings or rehearsals.
- e. An appropriate member of the mental health staff at the parent institution shall evaluate the prisoner not later than twenty-one (21) days before the execution to evaluate his or her stability and mental health in light of the scheduled execution. Any concerns or contingencies affecting the execution process shall be communicated to the Warden of SOCF as soon as possible. The fact of the assessment and any conclusions shall be documented in the prisoner's mental health chart. If the prisoner has no mental health file due to not being on the mental health caseload, the fact of the assessment and any conclusions shall be documented in the prisoner's medical chart.

4. Training

- a. The Execution Team shall begin conducting training sessions no less than once per week until the scheduled date of execution. The training shall address any accommodations or contingencies that might be anticipated.
- b. Training in the following topics shall be provided for every member of the Execution Team prior to service and at least once per year thereafter:
 - i. The general nature and effects of the execution drugs that are used during the execution process;
 - ii. Drug administration procedures, including the insertion of the IV needles and administration of intramuscular injections;
 - iii. Signs or symptoms of problems when administering drugs; and
 - iv. Any legal developments of significance.

5. Other Preparations

- a. The RSA shall make contact with the prisoner to establish counseling and family contact information.

SUBJECT: Execution

PAGE 7 OF 17

- b. Prior to commencement of the initial training session, the Warden or the Team Leader shall verify and document the qualifications of the Medical Team members. Medical team members shall provide evidence of certification status at least once per year and upon any change in status.
- c. The Team Leader shall ensure that each member of the Execution Team has received a copy of the current execution policy. Each member of the Execution Team shall sign for its receipt.

C. Execution Preparation - Approximately fourteen (14) days prior to the execution

- 1. The Warden of the institution where the prisoner is housed shall have the Execution Information Release (DRC1808) completed by the prisoner. This form will verify information on the prisoner, visitors, witnesses, spiritual advisor, attorney, requested witness, property, and funeral arrangements.
- 2. The names of official witnesses/media witnesses shall be supplied to the Warden, as outlined in this policy.
- 3. The names and relationships of the victim's witnesses shall be supplied to the Warden.
- 4. The RSA shall provide family information from the prisoner to the Warden.

D. Execution Preparation - Approximately twenty-four (24) hours prior to the scheduled execution

- 1. The prisoner shall be transferred from Death Row and housed in the Death House at SOCF. The prisoner shall be constantly monitored by at least three (3) members of the Execution Team. An Execution Timeline shall be maintained.
- 2. An Authorized Independently Licensed Mental Health Professional shall interview the prisoner periodically and submit progress reports to the Warden. All prisoner files shall be maintained in the Warden's office at SOCF, unless otherwise directed by the Warden.
- 3. The Warden shall establish a line of communication with DRC legal staff and the Attorney General's Office for notice of case status and/or other significant legal changes.
- 4. The RSA shall provide counseling and spiritual support unless the prisoner requests not to have contact.
- 5. Beginning with his/her arrival at SOCF, the prisoner shall not be forced to meet with non-staff visitors that he does not wish to see.

E. Execution Preparation - The following events shall take place upon the prisoner's arrival at the Death House

- 1. Once the prisoner is at SOCF, the Death House shall be restricted to the following:
Director/designee(s);

SUBJECT: Execution

PAGE 8 OF 17

Warden;
 Communications Chief/designee;
 Institution Deputy Warden;
 Administrative Assistant to the Warden;
 Chaplain;
 Physician;
 Independently Licensed Mental Health Professional;
 Chief of Security;
 Maintenance Superintendent;
 Any other person as deemed necessary by the Warden.

2. The prisoner shall be evaluated by medical staff on the day of arrival at SOCF to evaluate the prisoner's veins and plan for the insertion of the IV lines. This initial evaluation shall include a "hands-on" examination as well as a review of the medical chart. At a minimum, a "hands-on" examination shall also occur later that evening. Potential problems shall be discussed, and potential solutions considered. The performance of these two evaluations shall be noted in the Execution Timeline. Any relevant portion of the medical file may be kept in the Death House for appropriate reference as needed.
3. SOCF chaplains shall make periodic visits to the prisoner, if requested by the prisoner.
4. The Deputy Warden shall assign security personnel to staff entrances, checkpoints, and to assist the Ohio State Highway Patrol (OSHP).
5. The Team Leader shall ensure that the prisoner's property is inventoried in front of the prisoner. The prisoner will have previously, per paragraph C.1. specified who is to receive his or her personal effects. The Team Leader shall ensure that the Inmate Property Record Disposition and Release (DRC2055), correctly specifies this information, and the Team Leader shall sign it to confirm the review.
6. The prisoner shall, per paragraph C.1. specify in writing his/her request for funeral arrangements, which shall be recorded in the Execution Information Release, (DRC1808).
7. The prisoner shall be allowed contact visits with family, friends and/or private clergy, as approved by the Warden between the hours of 4:30 p.m. and 7:30 p.m. on the day prior to the scheduled execution. Cell front visits shall be permitted between the hours of 6:30 a.m. and 8:00 a.m. on the day of the scheduled execution. The attorney and spiritual advisor may continue to visit with the prisoner until 8:45 a.m. The Warden may increase the visiting opportunities at his discretion.
8. The Team Leader shall ask the prisoner to identify his or her special meal request. The special meal shall be served the day prior to the scheduled execution, at a time to be determined by the Managing Officer.
9. The Warden shall brief key personnel, to include medical and mental health staff, in order to allow intake information to be obtained.

SUBJECT: Execution

PAGE 9 OF 17

10. The Warden shall receive updates from security personnel and the OSHP on crowd control, demonstrations, pickets, etc.
 11. The Chief of Security or designee shall brief the Warden on the level of tension within the remainder of the prison population.
 12. The Warden shall relay any out of the ordinary activity to the South Regional Director.
 13. The Execution Team shall continue to prepare as needed.
- F. Execution Preparation – Morning of Execution Day. At any time, as determined by the Team Leader, on the morning of the execution:
1. The prisoner shall be permitted to take a shower and dress in the designated clothing the morning of the execution.
 2. Vein Assessment

A “hands-on” examination of the prisoner’s veins shall be made before the IV is established. Potential problems shall be discussed, and potential solutions considered. The performance of this evaluation shall be noted in the Execution Timeline.
 3. Drugs Obtained from Infirmary
 - a. The institution Health Care Administrator or a person designated by the Warden who is a person qualified under Ohio law to administer drugs shall take possession of the drugs pentobarbital, midazolam, and hydromorphone from the institution pharmacy storage area, and shall document possession of the drugs by signing form Order for Execution Medications (DRC2001). This person shall deliver the drugs to the Death House.
 - b. The Health Care Administrator or qualified designee shall give possession of the drugs to a Drug Administrator, in the presence of a second Drug Administrator. These persons shall complete form Order for Execution Medications (DRC2001).
 - c. The drugs shall be prepared for injection by a Drug Administrator. The preparation of the drugs shall be monitored by a second Drug Administrator who shall independently verify the preparation and dosage of the drugs. Both Drug Administrators shall document this in the form Order for Execution Medications (DRC2001).
 4. Drug Preparation
 - a. One Drug Administrator shall prepare the execution drugs as follows:
 - i. Syringes 1 and 2: Five (5) grams of pentobarbital (under whatever generic or trade name it may be known or sold), 100 ml of a 50mg/mL solution shall be withdrawn and divided into two syringes labeled “1” and “2”.

SUBJECT: Execution

PAGE 10 OF 17

- ii. Syringes 3 and 4: Five (5) additional grams of pentobarbital shall be obtained and kept available in the Equipment Room, but need not be withdrawn into syringes unless the primary dose of five grams proves to be insufficient for the procedure. Two additional syringes labeled “3” and “4” shall be kept available for contingent use.
 - iii. Syringes A and B: Drugs for intramuscular injection may be drawn up into syringes for use as needed if the decision is made to use an alternative method. Ten (10) mg of midazolam (under whatever generic or trade name it may be known or sold) shall be obtained or prepared with 5mg/mL concentration. Forty (40) mg of hydromorphone (under whatever generic or trade name it may be known or sold) shall also be obtained or prepared with 10 mg/mL concentration. The midazolam and hydromorphone in the amounts specified above shall be drawn into or mixed in a single syringe for intramuscular injection, which shall be labeled “A.” A second such syringe shall be prepared if needed, and shall be labeled “B.”
 - iv. Syringe C: A third syringe of sixty (60) mg of hydromorphone may also be prepared if needed and labeled as “C.”
- b. A second Drug Administrator shall witness the Drug Administrator’s preparation of the execution drugs.
- c. The drug preparation shall be documented as follows:
 - i. The Drug Administrator who prepared the execution drugs and the Drug Administrator who witnessed the preparation shall complete form Order for Execution Medications (DRC2001).
 - ii. A Drug Administrator shall inform the Command Center when the Execution Drugs are prepared, and the Command Center shall record in the Execution Timeline the time that the drugs were prepared.
- 5. Official witnesses to the execution will report to the institution. The victim’s witnesses shall report to the Portsmouth Highway Patrol Post for escort to the institution by designated SOCF personnel.
- 6. The prisoner shall be allowed to have visits as described in E.7. above.
- 7. The RSA shall be present to counsel and provide spiritual support to the prisoner and staff.
- 8. All communication equipment shall be tested, including primary and secondary communication with both the Governor’s Office and the Office of the Attorney General.
 - a. Primary communications shall be via a telephone line opened directly to the Command Center from the execution chamber. This line shall be tested one (1) hour prior to the scheduled execution. Other than testing, this line shall remain open.

SUBJECT: Execution

PAGE 11 OF 17

b. Secondary communications shall be via cellular telephone.

c. In the event that both the primary and secondary communications are inoperable, the execution shall be delayed until communications are established.

G. Execution Preparation - Approximately fifteen (15) minutes prior to the scheduled execution

1. Witnesses Transported to Death House.

All authorized witness groups shall be escorted to the Death House separately by designated staff. Witnesses shall be escorted to viewing rooms before the death warrant is read.

2. Phone for Prisoner's Counsel

If the prisoner chooses to have his or her counsel as a witness, at all times after counsel enters the witness room, counsel shall have free access to the phone near the entrance door of the Death House.

a. The phone in the Death House foyer will enable counsel to call into the waiting room for prisoner's counsel in the prison compound where another person, whose presence is arranged by counsel for the prisoner and whose presence satisfies the prison's security concerns, and which person is acting on behalf of the prisoner and his or her counsel, will be situated during all times after the death warrant is read.

b. The Warden shall allow this other person to have access to his or her own laptop computer and to a phone that can connect that person to an outside line.

3. Death Warrant

The Warden shall read the death warrant to the prisoner.

4. Closed-Circuit Camera Activated

Immediately after the death warrant is read, the closed-circuit camera in the execution chamber shall be turned on so that witnesses in the witness rooms can view the subsequent activities in the execution chamber on the television screen in those rooms.

5. Prisoner Enters Execution Chamber

The Warden and Execution Team shall escort the prisoner to the execution chamber, assist the prisoner onto the bed and secure the straps. The team shall roll up the prisoner's sleeves or take other steps to ensure that the arms are plainly visible to persons in the chamber and to those in the equipment room.

SUBJECT: Execution

PAGE 12 OF 17

6. Curtain Closed

Once the prisoner is secured to the bed, the curtain shall be closed, prior to the insertion of the IV needles. The closed-circuit camera shall remain on to allow the witnesses to view the establishment of IV site(s).

7. IV Site(s) Preparation & Establishment

- a. The Medical Team shall enter the Execution Chamber to prepare IV site(s).
- b. The Medical Team shall establish one or two viable IV sites.
 - i. The arm veins near the joint between the upper and lower arm shall be utilized as the preferred site for the IV injection.
 - ii. In the event that the Medical Team member is unable to establish an IV at a preferred site, the Medical Team member(s) may establish an IV at alternative site(s) for use by the Drug Administrator when administering execution drugs.
 - iii. The Execution Team may utilize a non-invasive device such as a light, if desired, to assist in locating a vein.
- c. The Medical Team member(s) shall be allowed as much time as is necessary to establish viable IV site(s).
 - i. If the Medical Team member(s) are unable to establish viable IV site(s), the Medical Team members shall consult with the Warden.
 - ii. The Warden shall consult with the Director and others as necessary for the purpose of determining whether or how long to continue efforts to establish viable IV site(s) before proceeding to the alternative method of execution.

8. Confirming & Recording Establishment of IV Site(s)

- a. A Medical Team member shall test the viability of the IV site with a low-pressure saline drip through IV tubing. If necessary, a heparin lock may be attached to the IV needle as an alternative to the saline drip.
- b. The Warden, Team Leader, and a Drug Administrator shall all confirm the visibility of the IV sites.
- c. The Medical Team member(s) shall exit the Execution Chamber and shall announce the number of attempts made to establish viable IV site(s) to the Command Center contact for capture on the timeline.
- d. The Command Center shall record in the Execution Timeline the number of attempts.

SUBJECT: Execution

PAGE 13 OF 17

9. Curtain Opened

The curtain shall be opened after the establishment of viable IV site(s) or upon a decision to use the alternative method. The curtain shall remain open during the remainder of the execution until the examination for the pronouncement of death, unless the execution is abandoned or halted.

10. Last Words

The Warden shall ask the prisoner if he has any last words. If the prisoner has a last statement, he will be allowed to make it while the witnesses are present in the adjacent viewing rooms, and are able to see him and hear him via microphone.

- a. There shall generally be no restriction on the content of the prisoner's statement and no unreasonable restriction on the duration of the prisoner's last statement.
- b. The Warden may impose reasonable restrictions on the content and length of the statement. The Warden may also terminate a statement that he or she believes is intentionally offensive to the witnesses.

H. Commencement of Execution

1. Execution by IV Injection

- a. Upon the Warden's signal, a Drug Administrator shall intravenously administer the previously prepared syringes 1 and 2.
- b. The low-pressure saline drip shall be allowed to flush saline through the line(s) following completion of the IV drug administration.
- c. A second Drug Administrator shall be present in the equipment room to observe the administration of the execution drugs. This Drug Administrator shall announce the start and finish times of each injection to the Command Center contact for capture on the timeline.
- d. The Command Center shall record in the Execution Timeline the start and finish times of each injection.
- e. Following administration of the IV drugs, a Drug Administrator shall reenter the Execution Chamber to inspect the IV site for evidence of incontinence or infiltration and to listen to the prisoner for breathing and heart sounds.
- f. At the completion of the process and after a sufficient time for death to have occurred, the curtain shall be closed and an appropriate medical professional shall evaluate the prisoner to confirm death. The curtain shall then be re-opened and the Warden shall announce the time of death. In the event that the appropriate medical professional cannot confirm that death has occurred, the curtain shall be reopened until an appropriate time has passed to reevaluate the prisoner.

SUBJECT: Execution

PAGE 14 OF 17

2. Using Alternative IV Sites

- a. The Team Leader, a Medical Team member, and the Warden shall observe the prisoner during the injection process to look for signs of swelling or infiltration at the IV site, blood in the catheter, and leakage from the lines and other unusual signs or symptoms.
- b. The Execution Team shall communicate to the Drug Administrators any problems detected during the administration of the execution drugs.
- c. The Drug Administrator who is administering the execution drugs shall determine whether it is necessary to use another viable IV site.
- d. In the event that the Drug Administrator who is administering the execution drugs detects a problem in the administration of the drugs, the Drug Administrator shall use any other viable IV site. No prior consultation with the Warden or other members of the Execution Team is required.
- e. Whenever it is necessary to change IV sites, the Drug Administrator shall administer a full dosage of the execution drug through the alternate, viable IV site using syringes 3 and 4.
- f. In the event the Drug Administrator changes to another viable IV site, the Drug Administrator shall ensure the Command Center is informed. The Command Center shall record in the Execution Timeline any change in IV site(s).

3. Establishing Other IV Sites(s)

- a. In the event there is no alternative viable IV site, the Medical Team shall consult with the Warden and Director.
- b. The Warden, following consultation with the Director, shall determine whether to proceed with execution by IV injection or whether execution by intramuscular injection should be used.
- c. In the event the Warden determines to proceed with execution by IV injection, the Execution Team shall repeat the steps in paragraphs VI.G.6. - 8 and continue with the execution as provided for in paragraph (VI)(H).
- d. The Warden shall ensure the Command Center is informed of his decision. The Command Center shall record the Warden's decision in the Execution Timeline.

4. Alternative Execution by Intramuscular Injection

The Warden, following consultation with the Director, may order an execution by intramuscular injection if execution by IV injection is unfeasible, or if pentobarbital could not be obtained for use in the execution.

SUBJECT: Execution

PAGE 15 OF 17

- a. The execution drugs used for execution by intramuscular injection shall be prepared as provided for in VI.F.4.
- b. A Drug Administrator shall enter the chamber at the direction of the Warden and shall administer an intramuscular injection of 10 mg midazolam and 40 mg hydromorphone, labeled syringe "A," into a large muscle of the prisoner, usually the deltoid or triceps muscle. Alternative sites may include the hip, thigh or other location as may be appropriate under the circumstances.
- c. Five minutes after injection of Syringe A, a Drug Administrator shall re-enter the chamber to listen for breathing and heart sounds. If the prisoner is still breathing, the Drug Administrator shall administer the intramuscular injection of 10 mg midazolam and 40 mg hydromorphone, labeled syringe "B," into a large muscle.
- d. Five minutes after injection of Syringe B, a Drug Administrator shall re-enter the chamber to listen for breathing and heart sounds. If the prisoner is still breathing, the Drug Administrator shall administer an intramuscular injection of 60 mg of hydromorphone only, labeled syringe "C," into a large muscle. This step shall be repeated until the prisoner is deceased.
- e. At the completion of the process and after a sufficient time for death to have occurred, the curtain shall be closed and an appropriate medical professional shall evaluate the prisoner to confirm the fact of his or her death. The curtain shall then be re-opened and the Warden shall announce the time of death. In the event that the appropriate medical professional cannot confirm that death has occurred, the curtain shall be reopened until an appropriate time has passed to reevaluate the prisoner.

I. Post-Execution

1. The Warden, or his designee, shall notify the Director that the execution has been carried out.
2. The Medical Team shall remove the IV equipment and clean the IV sites.
3. The RSA or the prisoner's Spiritual Advisor shall anoint the body of the prisoner if requested by the prisoner.
4. The RSA shall coordinate the burial of the prisoner's body with local chaplains if the prisoner's family does not want the body.
5. The Execution Team shall remove the deceased from the execution bed and place him or her on a gurney.
6. Disposition of the body shall be in accordance with arrangements made prior to the execution at the prisoner's request.
7. The Warden shall sign and return the death warrant to the Court, indicating the execution has been carried out.

SUBJECT: Execution

PAGE 16 OF 17

8. Prepared Execution Drugs

- a. One Drug Administrator shall properly dispose of any execution drugs that have been prepared for administration but not been utilized.
- b. A Second Drug Administrator shall witness the disposal.
- c. Both Drug Administrators shall document the disposal in form Order for Execution Medications (DRC2001).

9. Unprepared Execution Drugs

- a. One Drug Administrator shall properly return any unprepared execution drugs to the Infirmary.
- b. A Second Drug Administrator shall witness the return of the unprepared execution drugs.
- c. Both Drug Administrators shall document the return of the unprepared execution drugs in form Order for Execution Medications (DRC2001).

10. Recording Used Execution Drugs

The Team Leader shall document the name or description, the expiration date, and the lot number of the execution drugs used.

11. After-Action Review

Immediately following an execution, the Execution Team and the on-site administrators directly involved in the execution process shall meet to review the process of the execution. Any unique or unusual events shall be discussed, as well as opportunities for improvement and successful procedures. Actions and documentation of the events shall be reviewed to identify any discrepancies. Discrepancies from the policy directive shall be clearly described and noted in a written record. The record shall be signed and dated by the Warden.

12. Critical Incident Debriefing

- a. The Warden shall ensure that critical incident debriefings are available for the Execution Team and staff participants immediately following the execution.
- b. The Critical Incident Debriefing team shall conduct interviews in accordance with CIM guidelines.
- c. The RSA shall be available for debriefing for the family of the prisoner.

SUBJECT: Execution

PAGE 17 OF 17

13. Quality Assurance Review

The Director shall designate a Special Assistant for Execution Policy and Procedures. The Special Assistant shall evaluate the performance of the Execution Team, review the conduct of court-ordered executions and report to the Director of the Department. His or her duties will consist of reviewing documentation, training, and professional qualifications, to ensure compliance with the written policy directive. The Special Assistant may utilize assistants as necessary to compile or assess the information, and may consult with others consistent with the confidentiality of the process. Whenever appropriate, the Special Assistant shall consult with a properly trained medical person when reviewing the medical aspects of the execution procedures. The Special Assistant will also provide consultation and advice concerning modifications in the written directive. The Special Assistant will prepare a report to the Director following each execution, with any suggestions or recommendations that are appropriate.

Related Department Forms:

Execution Information Release	DRC1808
Order for Execution Medications	DRC2001
Inmate Property Record Disposition and Release	DRC2055

EXHIBIT 5

EXHIBIT 5

**South Dakota State Penitentiary
EMERGENCY RESPONSE MANUAL
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ERM A.12(B) Capital Punishment Final Days Procedures

A. GENERAL

1. The punishment of death shall be inflicted within the walls of a building at the State Penitentiary. SDCL §23A-27A-32, 23A-27A-33. The South Dakota State Penitentiary (hereinafter SDSP) shall provide all proper equipment and appliances for the infliction of such punishment. SDCL §23A-27A-32, 23A-27A-33. The necessary setup includes a room, hereinafter referred to as the "Chemical Room," equipped with a one-way mirror that allows occupants to observe the Execution Chamber and the inmate after he is strapped to a gurney in the execution chamber.
2. Death shall be inflicted by administering intravenous injections of a substance or substances in a lethal quantity. The substance or substances and manner of execution shall be and remain consistent with state and federal constitutional requirements as identified herein.
3. The Warden or designee is responsible for having the chemicals for lethal injection and any other necessary items for use on the scheduled date of execution. Under the direction of the Warden or designee two complete sets of the substance or substances used to conduct an execution shall be kept in separate secure locations.
4. The Warden shall arrange for the attendance of South Dakota Department of Corrections (hereinafter SDDOC) staff, law enforcement officers and other persons he/she deems necessary and proper to perform the functions involved in conducting a scheduled execution. This shall include all those required by South Dakota statute to attend.
5. If at any time during the execution process the Governor stays, pardons, or commutes the sentence of the condemned person or if a court of competent jurisdiction issues a stay after an execution has commenced, the execution team shall stop the execution. Ambulance staff equipped with advanced life support capabilities, including a heart defibrillator and such supplies and equipment as would be needed to attempt to revive an individual who has been injected with one or more of the substances identified in Section D, shall be on standby at the SDSP.

B. QUALIFICATIONS OF EXECUTION TEAM MEMBERS

1. An execution carried out by intravenous injection shall be performed by person(s) trained to perform venipuncture and to administer intravenous injections. The person(s) shall be selected by the Warden and approved by the Secretary of Corrections. SDCL 23A-27A-32.
2. The person(s) selected by the Warden to mix the drugs and prepare the syringes shall demonstrate proficiency through relevant training and two years' experience in the preparation of syringes for intravenous administration and mixing and preparation of drugs for such administration.
3. The person(s) selected by the Warden to insert the intravenous needles into the veins of the prisoner and connect, monitor, and maintain intravenous lines shall be certified or licensed and have at least two (2) years' professional experience as one of the following: medical or osteopathic physician, physician assistant, registered nurse, certified medical assistant, licensed practical nurse, phlebotomist, paramedic, emergency medical technician, or military corpsman.
4. The person(s) selected by the Warden to administer the injections shall demonstrate proficiency through relevant training and two years' experience in the administration of drugs by intravenous injection.

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October 13, 2011

Page 1 of 9

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C. PREPARATION OF CHEMICALS

1. The following identifies the contents of each syringe used in the course of the 3-Drug or 2-Drug executions.

SYRINGE LABELED/MARKED	CONTENTS
#1	Sodium Thiopental (1.5 grams in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution)
#2	Sodium Thiopental (1.5 grams in a 60 cc solution provided Syringe #1 is also 1.5 grams of Sodium Thiopental in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution provided Syringe #1 is also 2.5 grams of Pentobarbital in a 50 cc solution)
#3	Normal Saline (25 ml)
#4	Pancuronium Bromide (100 mg of 2 mg/ml concentration in a 50 cc solution)
#5	Normal Saline (25 ml)
#6	Potassium Chloride (120 mEq. in a 60 cc solution)
#7	Potassium Chloride (120 mEq. in a 60 cc solution)
Backup syringes (if needed):	
#8	Normal Saline (25 ml)
#9	Sodium Thiopental (1.5 grams in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution)
#10	Sodium Thiopental (1.5 grams in a 60 cc solution provided Syringe #1 is also 1.5 grams of Sodium Thiopental in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution provided Syringe #1 is also 2.5 grams of Pentobarbital in a 50 cc solution)
#11	Normal Saline (25 ml)
#12	Pancuronium Bromide (100 mg of 2 mg/ml concentration in a 50 cc solution)
#13	Normal Saline (25 ml)
#14	Potassium Chloride (120 mEq. in a 60 cc solution)
#15	Potassium Chloride (120 mEq. in a 60 cc solution)

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October 13, 2011

Page 2 of 9

**South Dakota State Penitentiary
EMERGENCY RESPONSE MANUAL**

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2. The following identifies the contents of each syringe used in the course of the 1-Drug execution using Sodium Thiopental.

SYRINGE	
LABELED/MARKED	CONTENTS
#1	Sodium Thiopental (1.25 grams in a 50 cc solution)
#2	Sodium Thiopental (1.25 grams in a 50 cc solution)
#3	Sodium Thiopental (1.25 grams in a 50 cc solution)
#4	Sodium Thiopental (1.25 grams in a 50 cc solution)
#5	Normal Saline (25 ml)
Backup syringes (if needed):	
#6	Sodium Thiopental (1.25 grams in a 50 cc solution)
#7	Sodium Thiopental (1.25 grams in a 50 cc solution)
#8	Sodium Thiopental (1.25 grams in a 50 cc solution)
#9	Sodium Thiopental (1.25 grams in a 50 cc solution)

3. The following identifies the contents of each syringe used in the course of the 1-Drug execution using Pentobarbital.

SYRINGE	
LABELED/MARKED	CONTENTS
#1	Pentobarbital (2.5 grams in a 50 cc solution)
#2	Pentobarbital (2.5 grams in a 50 cc solution)
#3	Normal Saline (25 ml)
Backup syringes (if needed):	
#4	Pentobarbital (2.5 grams in a 50 cc solution)
#5	Pentobarbital (2.5 grams in a 50 cc solution)

4. Any person sentenced to death prior to July 1, 2007, may choose to be executed by the 3- or 1-Drug protocol set forth in this document, provided the SDDOC possesses the necessary substance or substances for the method chosen at the time scheduled for the inmate's execution, or in the manner provided by South Dakota law at the time of the person's conviction (2-Drug protocol set forth in this document). Any person sentenced to death prior to July 1, 2007, shall be executed using the 3- or 1-Drug protocol provided in this document using the substance or substances in the SDDOC's possession unless the inmate requests in writing to the Warden not less than seven (7) days prior to the scheduled execution date that the inmate wishes to be executed by the 2-Drug protocol set forth herein in accordance with South Dakota law as it existed prior to July 1, 2007.

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ERMA12B (2).doc

October 13, 2011

Page 3 of 9

South Dakota State Penitentiary
EMERGENCY RESPONSE MANUAL
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5. For any inmate sentenced to death after July 1, 2007, the Warden shall elect the method of execution from one of the foregoing 3-, 2-, or 1-Drug methods for which the SDDOC possesses the necessary substance or substances at the time scheduled for the inmate's execution. The Warden will give consideration to, and make the effort to accommodate, the inmate's method of preference, provided the inmate selects 3-, 2-, or 1-Drug methods for which the SDDOC possesses the necessary substance or substances at the time scheduled for the inmate's execution.

D. PREPARATION FOR EXECUTION

1. The SDDOC staff selected to participate in the execution shall drill at least weekly for six to eight weeks prior to the scheduled date of execution. The warden shall schedule additional drills the week of the scheduled execution.
2. Not less than seven (7) days prior to the execution week announced in the Warrant of Death Sentence and Execution, a physician or other medical professional qualified to assess venous access shall examine the inmate. A written report shall be prepared describing the inmate's physical condition and any medical condition of the inmate that may lead to potential problems establishing an IV site. This report, along with a copy of the lethal injection protocol, shall be provided to the executioner(s) for review and consideration no later than one day before the scheduled date of execution.
3. All substances will be mixed or prepared as necessary no more than 8 hours prior to the execution and shall thereafter be maintained in accordance with manufacturers' instructions in temperatures not in excess of 22°C/71.6°F, or such temperature specifically called for by the manufacturer, until ready for use. All substances will be mixed or prepared in bright, un-dimmed light.
4. To provide notification of any last minute stay or appeal, arrangements shall be made to provide direct telephone access between the Warden, the chemical room, the Governor's office, the Chief Justice of the South Dakota Supreme Court or designee, and the Attorney General's office. The Governor, the Chief Justice, and Attorney General or their designees shall be provided with phone numbers to the Warden's office, the chemical room, and multiple backup phone numbers (such as personal cell phone numbers of the Warden and Deputy Warden). In addition, the Warden and Deputy Warden shall be equipped with SDSP issued radios.
5. On the date of the scheduled execution, the prisoner shall be escorted to the execution chamber and strapped to the gurney by the Tie Down Team.
6. On the date of execution, the chemical room shall be kept clear of all persons except for the Executioners, the Warden, and any SDDOC staff selected by the Warden to assist with the execution of the sentence of death.
7. The Tie Down Team Leader shall verify that all restraints are secure and so advise the Warden, at which time the Tie Down Team shall move to the hallway and stand by.
8. The IV team shall enter the chamber and establish two independent IV lines to the inmate's veins. The IV team will establish IV lines only in peripheral veins located in the inmate's arms, hands, legs, or feet, preferably one in each arm. In the event the IV team cannot establish peripheral vein lines, the IV team will establish central vein lines by percutaneous methods, but only if the IV team member establishing the central vein line can demonstrate current training, credentialing, and proficiency in establishing IV lines in central veins by percutaneous methods. The IV team will establish and secure the IV lines in such a way as to leave them visible for monitoring.

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9. The gurney shall at all times be placed so that the inmate's head and face are visible to the Warden and to those in the chemical room. If the inmate desires, and if it will not interfere with the efficacy of the substance or substances being used for the execution, the inmate's head will be propped up by a firm, foam wedge-shaped cushion to better permit IV team members in the chemical room to see the inmate's face during the procedure.
10. Every effort will be extended to ensure that no unnecessary pain or suffering is inflicted on the inmate.
11. If the IV team cannot secure one (1) or more sites within one (1) hour, the Governor's Office shall be contacted by the Secretary and a request shall be made that the execution be scheduled for a later date during the week of the execution, as set forth in the Warrant of Death Sentence and Execution.
12. The IV team shall start a saline flow and a sufficient quantity of saline solution shall be injected to confirm that the IV lines have been properly inserted and are not obstructed. IV team members will continue to monitor IV functioning from within the chemical room.

E. INJECTION PROCEDURES—3 DRUG PROTOCOL

1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
 4. Syringe #1
 5. Syringe #2
 6. Syringe #3
7. If it appears to the Warden that the prisoner is not unconscious within three (3) minutes after administration of the sodium thiopental or pentobarbital, the Warden shall order the flow of chemicals ceased into the primary site. The backup IV shall be used with a new flow of sodium thiopental or pentobarbital.
8. The Warden and IV team shall assess and monitor the inmate's lack of consciousness by using all steps in a graded consciousness check – a sequence of increasingly strong stimulations to assess consciousness – starting with checking for movement, eyelash reflex, response to verbal commands and culminating in a physical stimulation that would be painful if the inmate were awake. If possible, a currently certified EMT or other medical professional qualified in assessing consciousness, whose identity may, at the Warden's discretion, remain confidential, will be in the execution chamber with the Warden to assist the Warden in determining that the inmate is unconscious following the injection of the sodium thiopental or pentobarbital and prior to the administration of the pancuronium bromide and potassium chloride.

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9. The Warden and IV team shall continuously monitor the IV and infusion sites. If the inmate appears unconscious three (3) minutes after the initial or backup flow of sodium thiopental or pentobarbital is complete, the executioner(s) shall commence the rapid flow of the remaining chemicals as follows.
10. Syringe #4
11. Syringe #5
12. Syringe #6
13. Syringe #7
14. Ten (10) minutes after the third drug is administered, the person(s) responsible for pronouncing death shall examine the inmate in order to confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If the inmate's death is confirmed, the person(s) shall inform the Warden. If that person(s) is unable to confirm the inmate's death, the Warden shall order injection of the remaining backup syringes.
15. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
16. The microphone shall be turned off and the curtains/blinds shall be drawn.
17. The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.

F. INJECTION PROCEDURES—2 DRUG PROTOCOL

1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
4. Syringe #1
5. Syringe #2
6. Syringe #3
7. If it appears to the Warden that the prisoner is not unconscious within three (3) minutes after administration of the sodium thiopental or pentobarbital the Warden shall order the flow of chemicals ceased into the primary site. The backup IV shall be used with a new flow of sodium thiopental or pentobarbital.

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8. The Warden and IV team shall assess and monitor the inmate's lack of consciousness by using all steps in a graded consciousness check – a sequence of increasingly strong stimulations to assess consciousness – starting with checking for movement, eyelash reflex, response to verbal commands and culminating in a physical stimulation that would be painful if the inmate were awake. If possible, a currently certified EMT or other medical professional qualified in assessing consciousness, whose identity may, at the Warden's discretion, remain confidential, will be in the execution chamber with the Warden to assist the Warden in determining that the inmate is unconscious following the injection of the sodium thiopental or pentobarbital and prior to the administration of the pancuronium bromide and potassium chloride.
 9. The Warden and IV team shall continuously monitor the IV and infusion sites. If the inmate appears unconscious three (3) minutes after the initial or backup flow of sodium thiopental or pentobarbital is complete, the executioner(s) shall commence the rapid flow of the remaining chemicals as follows.
 10. Syringe #4
 11. Syringe #5
 12. Ten (10) minutes after the second drug is administered, the person(s) responsible for pronouncing death shall examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If that person(s) is not able to pronounce death, the Warden shall order injection of the remaining backup syringes.
 13. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
 14. The microphone shall be turned off and the curtains/blinds shall be drawn.
 15. The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.
- G. INJECTION PROCEDURES – 1 DRUG PROTOCOL (Sodium Thiopental)
1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
 2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
 3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
 4. Syringe #1
 5. Syringe #2
 6. Syringe #3
 7. Syringe #4
 8. Syringe #5

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9. Ten (10) minutes after the drug is administered, the person(s) responsible for pronouncing death shall examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If that person(s) is not able to pronounce death, the Warden shall order a second set of chemicals to be administered in the following order.
10. Syringe #6
11. Syringe #7
12. Syringe #8
13. Syringe #9
14. Ten (10) minutes after the second round of the drug is administered, the person(s) responsible for pronouncing death shall again examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils.
15. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
16. The microphone shall be turned off and the curtains/blinds shall be drawn.

The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.

H. INJECTION PROCEDURES – 1 DRUG PROTOCOL (Pentobarbital)

1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
4. Syringe #1
5. Syringe #2
6. Syringe #3

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7. Ten (10) minutes after the drug is administered, the person(s) responsible for pronouncing death shall examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If that person(s) is not able to pronounce death, the Warden shall order a second set of chemicals to be administered in the following order.
8. Syringe #4
9. Syringe #5
10. Ten (10) minutes after the second round of the drug is administered, the person(s) responsible for pronouncing death shall again examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils.
11. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
12. The microphone shall be turned off and the curtains/blinds shall be drawn.

The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.

Douglas L. Weber

Douglas L. Weber, Chief Warden and Director of Prison Operations

October 13, 2011

Date

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October 13, 2011

Page 9 of 9



U.S. Department of Justice

Office of the Deputy Attorney General
Attorney General

SEP 29 2011

Washington, D.C. 20530

September 23, 2011

339107

Robert Mayer, Esquire
Deputy Attorney General
Office of the South Dakota Attorney General
1302 E Highway 14
Suite 1
Pierre, SD 57501-8501

Dear Mr. Mayer:

The Drug Enforcement Administration (DEA) has discovered that the South Dakota Department of Corrections is presently in possession of sodium thiopental which was imported without compliance with the Controlled Substance Act and, therefore, cannot be used.

The Department would like to assist the South Dakota Department of Corrections to rectify the deficiencies with respect to sodium thiopental. The DEA will provide you with a list of registered importers that South Dakota may use to legally import the substance. Alternatively, if South Dakota desires to obtain an importer registration, DEA will work expeditiously to process that request.

We understand the difficulty this situation may present for the State of South Dakota, and would like to work with you to promptly come to an appropriate resolution. If the State has any questions about the DEA regulations governing the Department of Correction's acquisition and use of other controlled substances, we will provide you with whatever assistance we have available.

Sincerely,

Deborah A. Johnston
Associate Deputy Attorney General

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

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www.state.sd.us/atg

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

October 5, 2011

Deborah A. Johnston
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Associate Deputy Johnston,

I would like to take this opportunity to address your recent concerns about the South Dakota Department of Corrections' importation of sodium thiopental, and to accept your invitation to assist South Dakota in importing substances for purposes of state enforcement of our criminal laws.

The concern regarding South Dakota's importation of sodium thiopental is misplaced. I am enclosing the Form 236, U.S. Customs Certification and Importation Declaration dated March 25, 2011, that DEA received when federal authorities cleared the shipment through customs. To further relieve your concerns, the imported sodium thiopental has independently tested positive for meeting the United States Pharmacopeia's sodium thiopental standards for safety and efficacy. If the DEA would similarly wish to independently test a sample of the sodium thiopental, the State is certainly willing to accommodate; however, the State must retain legal custody of sufficient amounts of the substance to preserve chain of custody and to assure its safety and efficacy for future use.

As you are aware, the Controlled Substance Act was enacted "to deal in a comprehensive fashion with the growing menace of drug abuse." H.R.Rep.No.91-1444, 91st Cong., 2nd Sess. at 3 (1971)

Deborah Johnston
US DOJ

reprinted in 1970 U.S.C.A.N 4566, 4567. The lawful use of controlled substances for penal executions does not implicate the DEA's drug abuse prevention mission for penal executions. See *Delaware v. Deputy*, 644 A.2d 411, 419 (Del. 1994) (recognizing the lack of judicial authority construing either the CSA's or FDCA's purpose to include the prevention of lawful executions of inmates); U.S. Const., 10th Amendment.

Recent DEA actions with respect to other States' lethal injection substances provides justification to reiterate that the United States Supreme Court has made it abundantly clear that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." See *Gregg v. Georgia*, 428 U.S. 153, 184 (U.S. 1976). In this vein, the next likely execution to be scheduled in South Dakota is Donald Moeller, who raped, sodomized, and stabbed to death a 9 year-old little girl 21 years ago. Two separate juries of South Dakota citizens sentenced Moeller to death for his crimes. Twenty-one years for a victim's family to await justice is disturbing, particularly in light of Congress' clear direction to the Department of Justice in the 2006 AEDP amendments to establish the rules for state death penalty certification procedures, a responsibility that appears to have gone unfulfilled.

I am encouraged by your referenced desire to assist the South Dakota Department of Corrections to rectify any perceived deficiencies with respect to sodium thiopental or in the alternative, to assist South Dakota to obtain an import registration by working to "expeditiously" process such a request. To further assist, I am again including South Dakota's submissions to DEA for an import registration filed on August 18, 2011.

Finally, there is presently no urgent need to confiscate South Dakota's sodium thiopental justifying an ex parte proceeding of any nature because no executions are scheduled. South Dakota is not willing to forfeit state property without proper notice and opportunity to be heard before a court and interim appeal if necessary, unless and until we have satisfactory replacement inventory.

Deborah Johnston
US DOJ

In conclusion, I welcome your offer to work with us "to promptly come to an appropriate resolution." Please feel free to contact either myself or Assistant Attorney General Paul Swedlund in my office to discuss how we may address any further concerns that you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Marty J. Jackley". The signature is fluid and cursive, with the first name "Marty" being more prominent.

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde
Enc.

cc: South Dakota Governor Dennis Daugaard
United States Attorney Brendan Johnson

Completed Internet Form - NOT FOR SUBMISSION
DEA Control Number - W11058099.J
Submission Date: 08-18-2011

APPLICATION FOR REGISTRATION
UNDER CONTROLLED SUBSTANCES ACT OF 1970

Form DEA 225 - Completed
Internet Receipt, NOT FOR
SUBMISSION

NAME: APPLICANT OR BUSINESS (LAST)

South Dakota Department of Corrections

(First, MI)

TAX IDENTIFYING NUMBER ANAOR

466000364

SOCIAL SECURITY NUMBER

PROPOSED BUSINESS ADDRESS. (WHEN ENTERING A P.O. BOX, YOU ARE REQUIRED TO ENTER A STREET ADDRESS)

3200 East Hwy 34

Application Complete. Internet
confirmation no.: 2807384
Fee Paid: \$0.00

THE DEBT COLLECTION IMPROVEMENT ACT OF
1998 (PL 104-134) REQUIRES THAT YOU FURNISH
YOUR FEDERAL TAXPAYER IDENTIFYING NUMBER
TO DEA. THIS NUMBER IS REQUIRED FOR DEBT
COLLECTION PROCEDURES SHOULD YOUR FEE
BECOME UNCOLLECTABLE. IF YOU DO NOT HAVE A
FEDERAL TAXPAYER IDENTIFYING NUMBER, USE
YOUR SOCIAL SECURITY NUMBER.

CITY

Pierre

STATE ZIP CODE

SD 57501 5070

APPLICANT'S BUSINESS PHONE NUMBER

605 - 773 - 3478

APPLICANT'S FAX NUMBER

605 - 773 - 3194

REGISTRATION CLASSIFICATION

1. BUSINESS
ACTIVITY: IMPORTER

2. INDICATE HERE IF
YOU REQUIRE ORDER
FORM BOOKS. ☐

3. Drug Schedules. (Fill in all circles that apply)

☐ Schedule I ☐ Schedule II Narcotic ☐ Schedule II Non Narcotic ☐ Schedule III Narcotic ☒ Schedule III Non Narcotic ☐ Schedule IV ☐ Schedule V ☐ List 1

4. All Applicants must answer the following:

Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying under the laws of the state or jurisdiction in which you are operating or propose to operate?

State License No. State:


Expire Date: --


State Controlled Substance Lic. No.


Expire Date: --

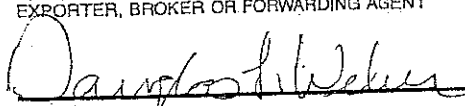
1. Has the applicant ever been convicted of a crime in connection with controlled substance(s) under state or federal law, or is any such action pending? N
2. Has the applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending? N
3. Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending? N

4. If the applicant is a corporation (other than a corporation whose stock is owned or traded by the public), association, partnership, or pharmacy, has any officer, partner, stockholder or proprietor been convicted of a crime in connection with controlled substances under state or federal law, or ever surrendered, for cause, or had a federal controlled substance registration revoked, suspended, restricted or denied, or ever had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending? N

U. S. Department of Justice / Drug Enforcement Administration		OMB APPROVAL No. 1117-0009	
CONTROLLED SUBSTANCES IMPORT / EXPORT DECLARATION		See reverse for Privacy Act	
(Read instructions on reverse before completing)			
1. CHECK ONE <input checked="" type="checkbox"/> IMPORT DECLARATION Nonnarcotic Substances in Schedules III, IV, V <input type="checkbox"/> EXPORT DECLARATION Nonnarcotic Substances in Schedules III, and IV and all substances in Schedule V		U.S. CUSTOMS CERTIFICATION Date of Departure / Arrival Name of Carrier / Vessel Date of Certification Signature of Customs Official	
IMPORTER/EXPORTER (Name and Address) SOUTH DAKOTA STATE PENITENTIARY 1600 N. NORTH DRIVE SIOUX FALLS, SD 57104 DEA REGISTRATION NO. BD 9933549		BROKER OR FORWARDING AGENT, IF USED (Name and Address) PHIL PATTERSON, INC. 1209 HARNEY ST. OMAHA, NE 68102	
2. CONTROLLED SUBSTANCES TO BE IMPORTED OR EXPORTED			
2a. NAME AND QUANTITY OF DRUG or PREPARATION (Enter names as shown on labels; numbers and sizes of packages; strength of tablets, capsules, etc., CSA Drug Code and NDC Number)		2b. CONTROLLED SUBSTANCE CONTENT OF DRUG OR PREPARATION expressed as acid, base or alkalojd. (Enter names of controlled substances contained in the drug, compound, or preparation)	
THIOPENTAL SODIUM 1 GM IP FOR INJECTION BRAND "THIOSOL SODIUM" QTY 500 - 20X25 VIALS DRUG LICENSE NUMBER: 21BZ-7/103/2135		THIOSOL SODIUM (THIOPENTONE INJECTION)	
3. <input checked="" type="checkbox"/> FOREIGN <input type="checkbox"/> DOMESTIC PORT OF EXPORTATION (last U.S. Customs Port) AND APPROX. DEPARTURE DATE MUMBAI (BOMBAY) INDIA 3/17/11		<input type="checkbox"/> FOREIGN <input checked="" type="checkbox"/> DOMESTIC PORT OF IMPORTATION (first U.S. Customs Port) AND APPROX. ARRIVAL DATE NEWARK, NJ 3/18/11	
4. MODE OF TRANSPORT; NAME OF VESSEL / CARRIER (if known) AIR - CONTINENTAL AIRLINES FLT C0049		NAME OF ALL INTERMEDIATE CARRIERS CEVA LOGISTICS - TRUCKER FROM NEWARK	
5. NAME AND ADDRESS OF FOREIGN CONSIGNEE/CONSIGNOR NEON LABORATORIES LTD. 143 Damji Shamji Industrial Complex Chakala M.I.D.C., Mumbai, Maharashtra 400093, India			
I hereby certify that the above named substance(s) to be <input checked="" type="checkbox"/> Imported, <input type="checkbox"/> Exported, are intended for <input type="checkbox"/> Legitimate medical need, <input type="checkbox"/> Scientific research, <input checked="" type="checkbox"/> Other (If intended for reexport beyond the country of destination described in block 5 above, attach documentation per Title 21, CFR 1312.27.) If used as "Export Declaration", attach documentation that Importation is not contrary to the laws or regulations of the country of destination.			
SIGNATURE OF AUTHORIZED INDIVIDUAL OF IMPORTER/EXPORTER, BROKER OR FORWARDING AGENT 		NAME OF FIRM AND TELEPHONE NUMBER SOUTH DAKOTA STATE PENITENTIARY (605) 367-5118	
DATE Mar 25, 2011			

U. S. Department of Justice / Drug Enforcement Administration		OMB APPROVAL No. 1117-0009	
CONTROLLED SUBSTANCES IMPORT / EXPORT DECLARATION		See reverse for Privacy Act	
(Read Instructions on reverse before completing)			
1. CHECK ONE <input checked="" type="checkbox"/> IMPORT DECLARATION Nonnarcotic Substances in Schedules III, IV, V <input type="checkbox"/> EXPORT DECLARATION Nonnarcotic Substances in Schedules III, and IV and all substances in Schedule V		U.S. CUSTOMS CERTIFICATION Date of Departure / Arrival Name of Carrier / Vessel Date of Certification Signature of Customs Official	
IMPORTER/EXPORTER (Name and Address) SOUTH DAKOTA STATE PENITENTIARY 1600 N. NORTH DRIVE SIOUX FALLS, SD 57104 DEA REGISTRATION NO. BD 9933549		BROKER OR FORWARDING AGENT, IF USED (Name and Address) PHIL PATTERSON, INC. 1209 HARNEY ST. OMAHA, NE 68102	
2. CONTROLLED SUBSTANCES TO BE IMPORTED OR EXPORTED			
2a. NAME AND QUANTITY OF DRUG OR PREPARATION (Enter names as shown on labels; numbers and sizes of packages; strength of tablets, capsules, etc., CSA Drug Code and NDC Number)		2b. CONTROLLED SUBSTANCE CONTENT OF DRUG OR PREPARATION expressed as acid, base or alkaloid. (Enter names of controlled substances contained in the drug; compound, or preparation)	
THIOPIENTAL SODIUM 1 GM IP FOR INJECTION BRAND "THIOSOL SODIUM" QTY 500 - 20X25 VIALS DRUG LICENSE NUMBER: 21BZ-7/103/2135		THIOSOL SODIUM (THIOPENTONE INJECTION)	
3. <input checked="" type="checkbox"/> FOREIGN <input type="checkbox"/> DOMESTIC PORT OF EXPORTATION (last U.S. Customs Port) AND APPROX. DEPARTURE DATE MUMBAI (BOMBAY) INDIA 3/17/11		<input type="checkbox"/> FOREIGN <input checked="" type="checkbox"/> DOMESTIC PORT OF IMPORTATION (first U.S. Customs Port) AND APPROX. ARRIVAL DATE NEWARK, NJ 3/18/11	
4. MODE OF TRANSPORT; NAME OF VESSEL / CARRIER (if known) AIR - CONTINENTAL AIRLINES FLT COD49		NAME OF ALL INTERMEDIATE CARRIERS CEVA LOGISTICS - TRUCKER FROM NEWARK	
5. NAME AND ADDRESS OF FOREIGN CONSIGNEE/CONSIGNOR NEON LABORATORIES LTD. 143 Damji Shamji Industrial Complex Chakala M.I.D.C., Mumbai, Maharashtra 400093, India			
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SIGNATURE OF AUTHORIZED INDIVIDUAL OF IMPORTER/EXPORTER, BROKER OR FORWARDING AGENT 		DATE Mar 25, 2011	NAME OF FIRM AND TELEPHONE NUMBER SOUTH DAKOTA STATE PENITENTIARY (605) 367-5118
DEA Form - 286 (Apr. 1988)		Previous edition dated 4/80 is OBSOLETE. COPY 3	

U. S. Department of Justice / Drug Enforcement Administration		OMB APPROVAL No. 1117-0009	
CONTROLLED SUBSTANCES IMPORT / EXPORT DECLARATION		See reverse for Privacy Act	
(Read Instructions on reverse before completing)			
1. CHECK <input checked="" type="checkbox"/> IMPORT DECLARATION Nonnarcotic Substances in Schedules III, IV, V ONE <input type="checkbox"/> EXPORT DECLARATION Nonnarcotic Substances in Schedules III, and IV and all substances in Schedule V		U.S. CUSTOMS CERTIFICATION	
IMPORTER/EXPORTER (Name and Address) SOUTH DAKOTA STATE PENITENTIARY 1600 N. NORTH DRIVE SIOUX FALLS, SD 57104 DEA REGISTRATION NO. BD 9933549		Date of Departure / Arrival	
		Name of Carrier / Vessel	
		Date of Certification	
		Signature of Customs Official	
BROKER OR FORWARDING AGENT, IF USED (Name and Address) PHIL PATTERSON, INC. 1209 HARNEY ST. OMAHA, NE 68102			
2. CONTROLLED SUBSTANCES TO BE IMPORTED OR EXPORTED			
2a. NAME AND QUANTITY OF DRUG or PREPARATION (Enter names as shown on labels; numbers and sizes of packages; strength of tablets, capsules, etc., CSA Drug Code and NDC Number)		2b. CONTROLLED SUBSTANCE CONTENT OF DRUG OR PREPARATION expressed as acid, base or alkalioid. (Enter names of controlled substances contained in the drug; compound, or preparation)	
THIOPENTAL SODIUM 1 GM IP FOR INJECTION BRAND "THIOSOL SODIUM" QTY 500 - 20X25 VIALS DRUG LICENSE NUMBER: 21BZ-7/103/2135		THIOSOL SODIUM (THIOPENTONE INJECTION)	
3. <input checked="" type="checkbox"/> FOREIGN <input type="checkbox"/> DOMESTIC PORT OF EXPORTATION (last U.S. Customs Port) AND APPROX. DEPARTURE DATE MUMBAI (BOMBAY) INDIA 3/17/11		<input type="checkbox"/> FOREIGN <input checked="" type="checkbox"/> DOMESTIC PORT OF IMPORTATION (first U.S. Customs Port) AND APPROX. ARRIVAL DATE NEWARK, NJ 3/18/11	
4. MODE OF TRANSPORT; NAME OF VESSEL / CARRIER (if known) AIR - CONTINENTAL AIRLINES FLT 00049		NAME OF ALL INTERMEDIATE CARRIERS CEVA LOGISTICS - TRUCKER FROM NEWARK	
5. NAME AND ADDRESS OF FOREIGN CONSIGNEE/CONSIGNOR NEON LABORATORIES LTD. 143 Damji Shamji Industrial Complex Chakala M.I.D.C., Mumbai, Maharashtra 400093, India			
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SIGNATURE OF AUTHORIZED INDIVIDUAL OF IMPORTER/EXPORTER, BROKER OR FORWARDING AGENT 		NAME OF FIRM AND TELEPHONE NUMBER SOUTH DAKOTA STATE PENITENTIARY (605) 367-5118	
DATE Mar 25, 2011			
Previous edition dated 4/80 is OBSOLETE. COPY 4			

U. S. Department of Justice / Drug Enforcement Administration		OMB APPROVAL No. 1117-0009
CONTROLLED SUBSTANCES IMPORT / EXPORT DECLARATION		See reverse for Privacy Act
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IMPORTER/EXPORTER (Name and Address) SOUTH DAKOTA STATE PENITENTIARY 1600 N. NORTH DRIVE SIOUX FALLS, SD 57104 DEA REGISTRATION NO. BD 9933549		Date of Departure / Arrival
		Name of Carrier / Vessel
		Date of Certification
BROKER OR FORWARDING AGENT, IF USED (Name and Address) PHIL PATTERSON, INC. 1209 HARNEY ST. OMAHA, NE 68102		Signature of Customs Official
2. CONTROLLED SUBSTANCES TO BE IMPORTED OR EXPORTED		
2a. NAME AND QUANTITY OF DRUG OR PREPARATION (Enter names as shown on labels; numbers and sizes of packages; strength of tablets; capsules, etc., CSA Drug Code and NDC Number)	2b. CONTROLLED SUBSTANCE CONTENT OF DRUG OR PREPARATION expressed as acid, base or alkaloid. (Enter names of controlled substances contained in the drug, compound, or preparation)	2c. DATE IMPORTED/EXPORTED AND ACTUAL QUANTITY (Completed by registrant at time of transaction)
THIOFENTAL SODIUM 1 GM IP FOR INJECTION BRAND "THIOSOL SODIUM" QTY 500 - 20X25 VIALS DRUG LICENSE NUMBER: 21BZ-7/103/2135	THIOSOL SODIUM (THIOPENTONE INJECTION)	
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4. MODE OF TRANSPORT; NAME OF VESSEL / CARRIER (if known) AIR - CONTINENTAL AIRLINES FLT 00049		NAME OF ALL INTERMEDIATE CARRIERS CEVA LOGISTICS - TRUCKER FROM NEWARK
5. NAME AND ADDRESS OF FOREIGN CONSIGNEE/CONSIGNOR NEON LABORATORIES LTD. 143 Damji Shamji Industrial Complex Chakala M.I.D.C., Mumbai, Maharashtra 400093, India		
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SIGNATURE OF AUTHORIZED INDIVIDUAL OF IMPORTER/EXPORTER, BROKER OR FORWARDING AGENT 	DATE Mar 25, 2011	NAME OF FIRM AND TELEPHONE NUMBER SOUTH DAKOTA STATE PENITENTIARY (605) 367-5118

Armory Temperature Recordings

Oct-11 7:30 humidity % 4:00 humidity% initials

1	Sat				
2	Sun				
3	66	44%	66	38%	in
4	66	37%	66	37%	in
5	66	39%	66	37%	in
6	66	35%	66	36	in
7	66	38%	65	37	in
8	Sat				
9	Sun				
10	Columbus Day Holiday				
11	64	53%			in
12					
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					
26					
27					
28					
29					
30					
31					

Armory Temperature Recordings

Sep-11	7:30	humidity %	4:00	humidity%	initials
1	70	54	71	54	h
2	71	52	70	52	h
3	69	51	69	51	h
4	70	55	68	58	h
5	68	52	68	55	h
6	68	46	68	48	h
7	70	52	53 2	69	h
8	70	48	70	50	h
9	68	50	70	52	h
10					
11					
12	70	60	69	48	h
13	68	48	68	50	h
14	70	61	70	58	h
15	71	58	70	56	h
16	68	56	69	56	h
17					
18					
19	66	55	68	58	h
20	70	59	68	57	h
21	68	50	68	51	h
22	68	36	65	56	h
23					
24					
25					
26	64	46	65	43	h
27	68	38	68	38	h
28	68	38	67	38	h
29	66	36	66	35	h
30	66	38	66	38	h

Armory Temperature Recordings

Aug-11	7:30	humidity %	4:00	humidity%	initials
1	72		72		h
2	71		71		f
3	70	55	71	55	h
4	71	58	71	56	h
5	73	49	72	49	h
6					
7					
8	73	63	73	58	h
9	70	59	72	57	h
10	73	56	71	56	h
11	70	56	70	57	h
12	72	53	71	54	h
13					
14					
15	71	53	70	53	h
16	71	55	71	54	h
17	72	54	72	56	h
18	72	54	71	53	h
19	71	58	71	58	h
20					
21					
22	71	58	72	58	h
23	71	61	73	58	h
24	73	60	73	57	h
25	73	56	72	55	h
26	71	55	72	56	h
27					
28					
29	73	60	72	58	h
30	72	56	72	56	h
31	72	58	70	60	h

Armory Temperature Recordings

Jul-11 7:30 4:00 Initials

12	76	74	J
13	75	74	J
14	75	74	J
15	74	74	J
16			J
17			
18	74	75	J
19	74	75	J
20	76	74	J
21	76	75	J
22	76	74	J
23			
24			
25	JPA	JPA	J
26	76	75	J
27	76	75	J
28	75	75	J
29	76	72	J
30			

CERTIFICATE OF ANALYSIS [BOTTLES #1-#4]

PRODUCT: PENTOBARBITAL SODIUM USP CII
 ITEM NUMBER: [REDACTED]
 LOT NUMBER: [REDACTED] [DIFFERENT LOT # THAN BOTTLES #5-#8]
 MFG. DATE: 2011
 EXPIRATION: 2015

CAS: 57-33-0
 MW: 248.2500000000
 FORMULA: C₁₁H₁₇N₂NaO₃

TEST	SPECIFICATIONS	RESULTS
Aerobic Plate Count Bact	<300 cfu/g max <i>Alert at 100 cfu/g</i>	50 cfu/g max
Aerobic Plate Count Fung	<300 cfu/g max <i>Alert at 100 cfu/g</i>	50 cfu/g max
Assay	98.0-102.0 %	99.2 %
Bacterial Endotoxins	<0.8 eu/mg max	0.08 eu/mg max
Completeness of solution	pass <i>After 1 minute, the solution is clear and free from undissolved solid.</i>	pass
Description	pass <i>White, crystalline granules or white powder, odorless or has slight characteristic odor; slightly bitter taste; solutions decompose on standing, heat accelerating the decomposition; aq solns are unstable.</i>	pass <i>White powder; odorless.</i>
Free Pentobarbital	<=3.5 %	0.4 %
Heavy metals	<=0.003 % max	0.003 % max
Identification	pass <i>A: UV- Passes test, B: Passes test. C: Passes test for Sodium.</i>	pass
Loss on drying	<=3.5 %	0.3 %
OVI	pass <i>meets the requirements.</i>	pass
pH	9.8-11.0	10.18
Related compounds	pass	pass <i>6-IMINO-ETHYL-5-(1-METHYL-BUTYL) BARBITURIC ACID: <0.05% (1-METHYL-BUTYL) BARBITURIC ACID: <0.05% 5-ETHYL-5-(1-ETHYL-PROPYL)BARBITURIC ACID: <0.05% 5-ETHYL-5-(1,3-DIMETHYLBUTYL) BARBITURIC ACID: <0.05% UNKNOWN IMPURITIES: <0.05% TOTAL: <0.05% 6-IMINO-ETHYL-5-(1-METHYL-BUTYL) BARBITURIC ACID: NMT 0.2% 5-ETHYL-5-(1-ETHYL-PROPYL) BARBITURIC ACID: NMT 0.1% 5-ETHYL-5-(1,3-DIMETHYLBUTYL) BARBITURIC ACID: NMT 0.3% UNKNOWN IMPURITIES: NMT 0.1% TOTAL: NMT 0.5%</i>
Residual Solvents-Ethano	<0.5 % max	0.1002 % max
Residual Solvents-Toluen	<0.089 % max	0.0090 % max
Solubility	Pass <i>Very soluble in water; freely soluble in alcohol; practically insoluble in ether.</i>	Pass
Solution (Water) Color	pass	pass
Specified Organisms	pass <i>ABSENCE OF E. COLI, SALMONELLA, PSEUDOMONAS AERUGINOSA AND STAPHYLOCOCCUS AUREUS.</i>	pass

CERTIFICATE OF ANALYSIS [BOTTLES #5-#8]

PRODUCT: PENTOBARBITAL SODIUM USP CII

ITEM NUMBER:

CAS: 57-33-0

LOT NUMBER:

[DIFFERENT LOT # THAN BOTTLES #1-#4]

MW: 248.2500000000

MFG. DATE:

2011

FORMULA: C₁₁H₁₇N₂NaO₃


EXPIRATION:

2015

TEST	SPECIFICATIONS	RESULTS
Aerobic Plate Count Bact	<300 cfu/g max <i>Alert at 100 cfu/g</i>	50 cfu/g max
Aerobic Plate Count Fung	<300 cfu/g max <i>Alert at 100 cfu/g</i>	50 cfu/g max
Assay	98.0-102.0 %	99.2 %
Bacterial Endotoxins	<0.8 eu/mg max	0.08 eu/mg max
Completeness of solution	pass <i>After 1 minute, the solution is clear and free from undissolved solid.</i>	pass
Description	pass <i>White, crystalline granules or white powder, odorless or has slight characteristic odor; slightly bitter taste; solutions decompose on standing, heat accelerating the decomposition; aq solns are unstable.</i>	pass <i>White powder; odorless.</i>
Free Pentobarbital	<=3.5 %	0.4 %
Heavy metals	<=0.003 % max	0.003 % max
Identification	pass <i>A: UV- Passes test, B: Passes test, C: Passes test for Sodium.</i>	pass
Loss on drying	<=3.5 %	0.3 %
OVI	pass <i>meets the requirements.</i>	pass
pH	9.8-11.0	10.14
Related compounds	pass	pass <i>6-IMINO-ETHYL-5-(1-METHYL-BUTYL) BARBITURIC ACID: <0.05% 5-ETHYL-5-(1-ETHYL-PROPYL) BARBITURIC ACID: <0.05% 5-ETHYL-5-(1,3-DIMETHYLBUTYL) BARBITURIC ACID: <0.05% UNKNOWN IMPURITIES: <0.05% TOTAL: <0.05%</i> <i>6-IMINO-ETHYL-5-(1-METHYL-BUTYL) BARBITURIC ACID: NMT 0.2% 5-ETHYL-5-(1-ETHYL-PROPYL) BARBITURIC ACID: NMT 0.1% 5-ETHYL-5-(1,3-DIMETHYLBUTYL) BARBITURIC ACID: NMT 0.3% UNKNOWN IMPURITIES: NMT 0.1% TOTAL: NMT 0.5%</i>
Residual Solvents-Ethano	<0.5 % max	0.1002 % max
Residual Solvents-Toluen	<0.089 % max	0.0090 % max
Solubility	Pass <i>Very soluble in water; freely soluble in alcohol; practically insoluble in ether.</i>	Pass
Solution (Water) Color	pass	pass
Specified Organisms	pass <i>ABSENCE OF E. COLI, SALMONELLA, PSEUDOMONAS AERUGINOSA AND STAPHYLOCOCCUS AUREUS.</i>	pass

EXHIBIT 6

EXHIBIT 6

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 1 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

REVIEW/REVISION HISTORY:

Effective: 9/3/93
 Revised: 6/15/98
 Revised: 8/10/01
 Revised: 6/21/07
 Revised: 10/25/08
 Revised: 3/8/10
 Revised: 12/26/11

SUMMARY OF REVISION/REVIEW:

Removed references to 3 drug protocol throughout
 Added pentobarbital as option for one lethal injection throughout
 Added III.B.2.a.1) on determining drug used
 IX.A.4.e. - Adjusted amount of additional dosage
 IX.A.4.g. - Added clarifying language


APPROVED:

Signature on file

BERNARD WARNER, Secretary
 Department of Corrections

11/21/11

 Date Signed

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 2 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

REFERENCES:


DOC 100.100 is hereby incorporated into this policy; [RCW 10.95.160-190](#); [WAC 137-48-050](#);
DOC 410.040 Incident Command System (ICS)

POLICY:

- I. The Department has established procedures governing capital punishment to meet the requirements of RCW 10.95.160-190. These procedures set forth:
 - A. Security requirements for an Inmate Sentenced to the Death Penalty (ISDP),
 - B. Protocol for conducting an execution,
 - C. The care provided the ISDP while a valid Death Warrant is in force, and
 - D. The method of execution by lethal injection or hanging.
- II. The Department Secretary designates the Assistant Secretary for Prisons to coordinate:
 - A. The responsibilities of the Washington State Penitentiary (WSP) Superintendent.
 - B. A review of the procedures and all operational decisions in carrying out the execution, as well as the legal status of the Death Warrant.


DIRECTIVE:

- I. ISDP Housing
 - A. Upon receipt of an ISDP and prior to receipt of a Death Warrant:
 1. Male ISDPs shall be housed in a single person cell located in a segregated area of WSP.
 2. Female ISDPs shall be housed in a segregated area of the Washington Corrections Center for Women (WCCW). Prior to the execution date, the female ISDP will be transported to WSP for housing and execution.
- II. Pre-Execution Procedure
 - A. Consistent with RCW 10.95.190, a log shall be maintained with the Death Warrant in the Superintendent's Office.
 - B. Responsibilities are listed in the Execution Procedures and Assignments Checklist (Attachment 1).
 - C. Only staff assigned by the Superintendent will attend the execution. No facility staff will be required to participate in any part of the execution procedure.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 3 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

III. Notification to ISDP


- A. After receiving confirmation of a valid Death Warrant, the Superintendent will designate an Associate Superintendent to personally interview the ISDP regarding procedures relating to the execution.
- B. The Associate Superintendent will provide the ISDP with a written summary of procedures, to include mail, visits, telephone usage, and available religious services. The ISDP will be informed of the following:
 1. The date of the execution.
 2. The punishment of death shall be by lethal injection.
 - a. The primary and presumed method of execution will be an intravenous injection using a one drug protocol (i.e., pentobarbital or thiopental sodium, followed by a saline flush).
 - 1) The Superintendent will determine which drug will be used before the ISDP is given a choice of methods.
 - b. The ISDP may elect hanging as an alternate means of execution.
 - c. The procedure to be used will be determined 14 days prior to the execution, and the method cannot be changed after that date. The one drug protocol shall be the exclusive method of execution unless the ISDP elects hanging in writing.
 3. Mail procedures for an ISDP with an active Death Warrant will be as follows:
 - a. The Mail Room Sergeant will be instructed, in writing, to forward all incoming mail, unopened, to the designated Associate Superintendent, who will screen and exclude any items which may threaten the order and security of the facility with regard to the ISDP.
 - 1) Mail intended to harass the ISDP will be considered a threat to the orderly operation of the facility and restricted per WAC 137-48-050.
 - 2) Legal mail will be screened, not read.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 4 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

- b. The Mail Room Sergeant will maintain a log of all incoming and outgoing mail, noting the date and time of receipt and delivery. A separate log will be maintained for all legal mail.
- 4. All visits between the ISDP and authorized visitors will be no contact.
 - a. Visitation for an ISDP will be consistent with the visiting procedures of other offenders housed in the Intensive Management Unit (IMU).
 - b. Seven days prior to the execution, daily visits will be authorized in addition to visits with the attorney of record.
 - c. Twenty-four hours prior to the execution date, all visits and visitors require the approval/denial of the Superintendent.
 - d. After the ISDP is moved to the execution holding cell, visits will be restricted to approved clergy and the attorney of record.
- 5. The ISDP will have unlimited phone access during the daily yard period. Fourteen days prior to the execution date, an additional daily one hour yard will be provided.
 - a. There will be no limit on the number or duration of calls to and from the attorney of record.
 - b. Only calls with the attorney of record will be authorized following transfer to the execution holding cell.

IV. Media Relations


- A. The Superintendent/designee will coordinate all requests for information concerning an execution.
 - 1. A single event to provide representatives of major and local media an opportunity to access the chamber will be authorized by the Superintendent and coordinated by designated staff.
- B. The Superintendent will establish procedures for selecting media witnesses as specified in the Witness Selection section of this policy.
 - 1. No audio/electronic/video equipment, cameras, telephones, or recording/communication devices will be permitted in the chamber. Media witnesses will be subject to an electronic and pat search. Written consent for search will be required using DOC 21-575 Acknowledgment of Visitor Search Requirements.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 5 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

2. The only items that are allowed in the chamber are pens, pencils, and writing tablets supplied by the facility.
- C. Requests from media representatives for access to the Information Center must be submitted in writing.
 1. Information Center access will not be permitted more than 3 hours prior to an execution.
- D. Media access to a designated area of the facility parking lot will be permitted at a designated time the day prior to the execution.
- E. Media will not be permitted to film or conduct interviews with facility staff without the prior authorization of the Superintendent/designee.
- F. All normal facility security procedures will apply. Failure to comply with these procedures, Department policies, operational memorandums, or directions from authorized personnel may be cause for removal from the facility and/or facility grounds. The Superintendent may establish emergency rules and procedures.

V. Witness Selection


- A. Not less than 20 days prior to an execution, individuals who wish to attend and witness the execution must submit a letter of request (e.g., application) to the Superintendent. The letter must designate the relationship to the ISDP and reason(s) for wishing to attend. Eligible individuals include:
 1. Judicial officers (i.e., the Judge who signed the Death Warrant for the ISDP, the current Prosecuting Attorney or a Deputy Prosecuting Attorney of the county from which the final Judgment and Sentence and Death Warrant were issued, and the most recent attorney of record representing the ISDP),
 2. Law enforcement representatives (i.e., officers responsible for investigating the crime for which the inmate was sentenced to death),
 3. Media representatives,
 4. Representatives of the families of the victims (i.e., immediate family or victim advocates of the immediate family), and
 5. Representatives from the ISDP's immediate family.
- B. Not less than 15 days prior to the execution, the Superintendent shall determine the total number of individuals, other than Department employees, who will be allowed to attend and witness the execution.
 1. The Superintendent shall determine the number of witnesses allowed in each category of eligible individuals.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 6 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

- a. No less than 5 media representatives will be included, with consideration given to news organizations serving communities affected by the crimes or the execution.
 - b. Up to 2 law enforcement representatives will be included. The chief law enforcement officer of the jurisdiction where the crime was committed shall designate the law enforcement representatives.
2. Once the list is composed, the Superintendent shall serve the list on all parties who submitted a letter (e.g., application) to witness the execution.
- C. Not less than 10 days prior to the execution, the Superintendent shall file the witness list with the Superior Court from which the conviction and Death Warrant were issued. The witness list will be filed with a petition asking that the court enter an order certifying the list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than 5 days after the filing of the petition.
 - D. Unless a show cause petition is filed with the Superior Court from which the conviction and Death Warrant were issued within 5 days of the filing of the Superintendent's petition, the Superintendent's list, by order of the Superior Court, will become final and no other party will have standing to challenge its appropriateness.
 - E. In no case may the Superintendent or the Superior Court order or allow more than 17 witnesses to a planned execution, excluding required staff.
 - F. All witnesses must adhere to the facility's search and security provisions in regards to witnessing an execution and may be subject to emergency rules and procedures. Written consent for search will be required using DOC 21-575 Acknowledgment of Visitor Search Requirements.

VI. Execution Holding Cell

- A. Prior to the execution, but no sooner than 24 hours before, the ISDP will be moved to the execution holding cell.
- B. The holding cell will contain:
 1. Bedding that includes a mattress, 2 sheets, 3 blankets, a pillow, and a pillow case,
 2. Personal hygiene items that include 2 towels, a washcloth, and a bar of soap,

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 7 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		


3. Approved personal items and clothing that include underwear, facility clothing, legal materials, religious items, jewelry, or other personal items as requested by the ISDP and approved by the Superintendent, and
 4. Other personal items as requested by the ISDP and approved by the Superintendent to be retained by holding cell staff and issued as requested by the ISDP.
- C. A female ISDP may be housed in the WSP Intensive Management Unit (IMU) prior to being moved to the execution holding cell.
- D. Two correctional staff will be posted at the holding cell at all times and a complete log of activities will be maintained.

VII. Final Meal

- A. At the meal period just prior to the time of execution, the ISDP will be allowed to provide his/her meal selection from a menu prepared and provided by the Food Service Manager. The Food Service Manager will ensure preparation and delivery of the meal to the ISDP.

VIII. Execution Preparation

- A. The Superintendent will appoint individuals to support the execution process.
1. No staff will be required to participate in any part of the execution procedure.
 2. Briefings and rehearsals will be conducted as necessary to ensure adequate preparation for the execution. For an execution by lethal injection, there shall be a minimum of 3 practice sessions preceding an execution that shall include the siting of intravenous (IV) lines.
- B. Medical Review
1. A physical examination of the ISDP may be conducted to determine any special problems (e.g., collapsed veins, obesity, deterioration of bone or muscular structure) that may affect the execution process. The ISDP's height and weight will be measured during the examination.
 2. Based upon the physical examination, the Superintendent may consult with appropriate experts to determine whether deviation from the policy is advisable to ensure a swift and humane death.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 8 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		


C. Crowd Control

1. The Superintendent will notify law enforcement agencies of the date of execution, enabling them to prepare for any traffic and crowd control issues that may arise.
2. Prior to the execution, the Superintendent will hold briefings for local and state law enforcement agencies to determine the manner and extent to which WSP and Department resources will support law enforcement in managing crowd control and potential external threats.
3. An area(s) will be designated for the general public.
4. The WSP Emergency Response Team (ERT) will provide crowd control for the protection of the WSP grounds.
 - a. The ERT Commander(s) will be briefed by the Superintendent prior to the execution.
 - b. In the event that protesters and/or onlookers gather, law enforcement assistance will be requested to direct them to the designated area.

IX. Execution Procedure

A. Lethal Injection

1. Lethal Injection Materials/Personnel
 - a. All tubing, syringes, saline solution, and other apparatus will be on site and verified no later than 7 days prior to the execution.
 - b. The Superintendent will direct the acquisition of the appropriate quantities of the lethal substance. It will be available and on site 7 days prior to the execution date.
 - c. The Superintendent will ensure the security and continued verification of all materials.
 - d. Lethal Injection Team members will have sufficient training or experience to carry out the lethal injection process without any unnecessary pain to the ISDP. Minimum qualifications include one or more years of professional experience as a certified Medical Assistant, Phlebotomist, Emergency Medical Technician, Paramedic, military corpsman, or similar occupation.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 9 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

2. Lethal Injection Table


- a. The Superintendent, in conjunction with the Plant Manager, will examine and verify that the lethal injection table is in working order with all restraints available.

3. Preparation of the Execution Area

- a. The Lethal Injection Team will inspect the area designated for lethal injection and make any final recommendations to the Superintendent.
- b. The Lethal Injection Team will assemble all necessary materials for transport to the chamber no less than one hour prior to the time of execution. The Lethal Injection Team Leader will secure the lethal substance and personally transport it to the chamber.
- c. The solution for injection will be prepared not more than 30 minutes prior to administration.

4. Execution Process

- a. The Superintendent will direct that the ISDP be brought to the chamber. The Escort Team will place the ISDP on the lethal injection table and appropriately secure the ISDP to the table. The Escort Team will then leave the room.
- b. The Lethal Injection Team will establish 2 IV lines and start a normal flow of saline through each line. The Lethal Injection Team will ensure that a slow, normal saline flow is maintained through each line.
- c. The Superintendent will ask the ISDP if s/he has any last words.
- d. Upon notification from the Superintendent, the Lethal Injection Team will introduce the following lethal solution using a bolus injection into the tubing in the order specified per Attachment 2:
 - 1) 5 g pentobarbital or thiopental sodium
 - 2) 50 cc normal saline
- e. Either line may be used for injection of the solution(s) as required.
- f. The Lethal Injection Team Leader will signal the Superintendent when the solution has been administered.


 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 10 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

- g. If the Superintendent observes that the ISDP is conscious following the first dose of pentobarbital or thiopental sodium, s/he will close the curtain and summon the physician to examine. If the physician is unable to pronounce death, the Superintendent will re-open the curtain and direct the Lethal Injection Team to administer an additional 5 g dose of pentobarbital or thiopental sodium.
- h. At a time deemed appropriate by the Superintendent, the curtain will be closed. The Superintendent will call for the physician to examine the body and make a pronouncement of death.
- i. After the pronouncement of death, the Lethal Injection Team will remain in the area until directed to leave.
- j. Post-execution procedures will be followed.

B. Hanging

- 1. The gallows area trap door(s) and release mechanisms will be inspected for proper operation.
- 2. A determination of the proper amount of drop of the ISDP through the trap door will be made. The following standard military execution drop chart will be used:

<u>WEIGHT (Pounds)</u>	<u>DROP DISTANCE</u>
120	8'1"
125	7'10"
130	7'7"
135	7'4"
140	7'1"
145	6'9"
150	6'7"
155	6'6"
160	6'4"
165	6'2"
170	6'0"
175	5'11"
180	5'9"
185	5'7"
190	5'6"
195	5'5"
200	5'4"

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 11 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		


205	5'2"
210	5'1"
220 and over	5'0"

3. Equipment

- a. Hood – The hood will be a neutral color with an outer surface made of rough material, split at the open end so that it will come down over the chest and back.
- b. Collapse Board – A board will be provided for use in case the ISDP collapses.
- c. Restraints – Restraints will be used to ensure that the hands and arms of the ISDP are securely held to his/her front and sides.
- d. Rope – The rope will be manila hemp, at least $\frac{3}{4}$ inch and not more than $1\frac{1}{4}$ inches in diameter and approximately 30 feet in length. The rope will be soaked and then stretched while drying to eliminate any spring, stiffness, or tendency to coil. The knot will be treated with wax, soap, or clear oils ensuring a smooth sliding action through the knot. The knot will be tied according to Army regulations.

4. Execution Process

- a. Restraints will be placed on the ISDP by assigned staff.
- b. The Escort Team will escort the ISDP to the gallows area. The ISDP will be placed, standing, in the spot designated by the Superintendent. The Superintendent will ask the ISDP if s/he has any last words.
- c. The hood will be placed on the ISDP and leg restraints applied. If a collapse board appears to be necessary, the Escort Team will put the board in place.
- d. The noose will be placed snugly around the ISDP's neck in such a manner that the knot is directly behind the left ear.
- e. The Superintendent will direct the trapdoor be released.
- f. The Escort Team will move to the lower floor location to assist with removal of the deceased ISDP. The curtains will be closed.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON		
	REVISION DATE 12/26/11	PAGE NUMBER 12 of 12	NUMBER DOC 490.200
	TITLE CAPITAL PUNISHMENT		

- g. At a time deemed appropriate by the Superintendent, the physician will be called to make a pronouncement of death.

X. Post-Execution Procedure

- A. The Assistant Secretary for Prisons will notify the Secretary and Incident Command Center of the time of death. Necessary calls to Headquarters will be made to the Department Emergency Operations Center.
- B. The Superintendent will inform a designated staff of the time of death, who will then inform the witnesses.
- C. The witnesses will be escorted out of the execution area immediately after the pronouncement of death.
- D. The media witnesses will be escorted to the Information Center.
- E. The Chaplain will provide official notification to the family of the time of death.
- F. The body will be removed from the facility by a predetermined route.
- G. A post-trauma specialist and the Chaplain will be available to staff preceding, during, and after the execution. Staff will also be provided a confidential list of off-site locations where counseling and/or spiritual support will be available.
- H. Within 20 days after the execution, the Superintendent shall return the Death Warrant to the clerk of the trial court from which it was issued, along with the log identified in the Pre-Execution Procedure section of this policy.

DEFINITIONS:

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

ATTACHMENTS:

[Execution Procedures and Assignments Checklist \(Attachment 1\)](#)
[Superintendent's Checklist - Lethal Injection \(Attachment 2\)](#)

DOC FORMS:

[DOC 21-575 Acknowledgment of Visitor Search Requirements](#)

EXHIBIT 7

EXHIBIT 7

No. 07-5439

IN THE
Supreme Court of the United States

RALPH BAZE, et al,
Petitioners,

v.

JOHN D. REES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX
VOLUME IV

REDACTED VERSION FOR PUBLIC RECORD

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PETITION FOR CERTIORARI FILED JULY 11, 2007
CERTIORARI GRANTED SEPTEMBER 25, 2007

970

KENTUCKY STATE PENITENTIARY
VISITING SCHEDULE FOR DEATH ROW INMATE
PRE-EXECUTION (DEATH WATCH)

ATTORNEYS/PARALEGALS

REVISED 12/14/2004

DAILY [REDACTED] TO [REDACTED] CONTACT
24-HOUR ACCESS IN EVENT OF EMERGENCIES

PERSONAL VISITORS

DAILY BY APPOINTMENT [REDACTED] TO [REDACTED] CONTACT
DAY OF SCHEDULED EXECUTION [REDACTED] TO [REDACTED] CONTACT

MINISTERS

MONDAY THROUGH FRIDAY [REDACTED] TO [REDACTED]
INSTITUTIONAL CHAPLAIN [REDACTED] TO [REDACTED]

NEWS MEDIA

MONDAY THROUGH FRIDAY [REDACTED] TO [REDACTED] CONTACT
BY SPECIAL ARRANGEMENTS ONLY

VISITATION GUIDELINES

ANY ITEM BROUGHT IN BY ATTORNEYS/PARALEGALS, MINISTERS, OR NEWS MEDIA SUCH AS, BUT NOT LIMITED TO, CASSETTES, WIRELESS MIKES, BOOKS, OR MAIL MUST BE APPROVED IN ADVANCE BY THE WARDEN. NO ITEMS WILL BE ALLOWED IN BY PERSONAL VISITORS.

1. VISITS WILL BE CONDUCTED AT A DESIGNATED LOCATION.
2. NO MORE THAN FOUR VISITORS AT A TIME.
3. THE WARDEN RESERVES THE RIGHT TO DENY ACCESS TO THE INSTITUTION, ANY VISITOR OR PERSON, HE DEEMS A RISK TO THE SECURITY OF THE INSTITUTION.

REVISED 12/14/2004

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST

ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER

<u>ACTIONS</u>	<u>RESPONSIBILITY</u>	<u>COMPLETED/DATE/TIME</u>
1. Notify Department of Corrections [REDACTED] and [REDACTED] [REDACTED] of receipt of Governor's Death Warrant (immediately).	_____	_____
2. Begin a special section of condemned's medical record for all medical actions (X - 14 days).	_____	_____
3. Nurse visits and checks on the condemned each shift, seven days a week, using the special medical section to record contacts and observations (X - 14 days).	_____	_____

971

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST
ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER
PAGE 2 of 4

REVISED 12/14/2004

<u>ACTIONS</u>	<u>RESPONSIBILITY</u>	<u>COMPLETED/DATE/TIME</u>
4. [REDACTED] personally observes and evaluates the condemned five (5) days per week, Monday through Friday (X - 14 days).	_____	_____
5. Place the [REDACTED]'s documentation in the permanent record immediately after personal contact.	_____	_____
6. Department of Corrections [REDACTED] or his designee reviews and initials nursing documentation in #3 daily (X - 14 days).	_____	_____
7. [REDACTED] reviews nursing and doctor's documentation weekly.	_____	_____

972

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST
ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER
PAGE 3 of 4

REVISED 12/14/2004

<u>ACTIONS</u>	<u>RESPONSIBILITY</u>	<u>COMPLETED/DATE/TIME</u>
8. Physical examination is completed by the <div style="background-color: black; width: 100px; height: 1.2em; margin: 5px 0;"></div> or his designee no later than seven (7) days prior to execution.	_____	_____
9. Place the physical in the permanent medical record upon completion.	_____	_____
10. <div style="background-color: black; width: 60px; height: 1.2em; display: inline-block;"></div> evaluation is completed by <div style="background-color: black; width: 60px; height: 1.2em; display: inline-block;"></div> no later than seven (7) days prior to execution.	_____	_____
11. Place the psychiatric interview and psychiatric evaluation in the permanent medical record and send copies to the Warden.	_____	_____

973

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST
ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER
PAGE 4 of 4

REVISED 12/14/2004

<u>ACTIONS</u>	<u>RESPONSIBILITY</u>	<u>COMPLETED/DATE/TIME</u>
12. [REDACTED] or his designee personally observes and evaluates the condemned's medical condition weekly.	_____	_____
13. Place the [REDACTED] or his designee notes in the permanent record immediately after personal contact.	_____	_____
14. Notify all medical staff to immediately notify the Warden, [REDACTED] [REDACTED] or designee, and [REDACTED] [REDACTED] of any change in the inmate's medical or psychiatric condition.	_____	_____

974

**THE EXECUTION
LETHAL INJECTION**

REVISED 12/14/2004

SEQUENCE OF EVENTS

RESPONSIBILITY

COMPLETED/DATE/TIME

1. At [REDACTED] the Warden orders the condemned escorted to the execution chamber and strapped to the gurney.
2. The IV team members will be the members of the execution team who site and insert the IV lines.
3. The team enters the chamber and runs the IV lines to the condemned inmate, site and insert one (1) primary IV line and one (1) backup IV line in a location deemed suitable by the team members.
4. The insertion site of preference shall be the following order: arms, hands, ankles and/or feet, neck.

975

THE EXECUTION: LETHAL INJECTION
Page 2 of 9

REVISED 12/14/2004

SEQUENCE OF EVENTS

RESPONSIBILITY

COMPLETED/DATE/TIME

5. To best assure that a needle is inserted properly into a vein, the IV team members should look for the presence of blood in the valve of the sited needle.

6. If the IV team cannot secure one (1) or more sites within one (1) hour, the Governor's Office shall be contacted by the Commissioner and a request shall be made that the execution be scheduled for a later date.

7. The team will start a saline flow.

8. The team will securely connect the electrodes of the cardiac monitor to the inmate and ensure the equipment is functioning.

THE EXECUTION: LETHAL INJECTION
Page 3 of 9

REVISED 12/14/2004

SEQUENCE OF EVENTS

RESPONSIBILITY

COMPLETED/DATE/TIME

9. The team will then move to the hallway and stand by.

10. The team leader will recheck all restraints and determine they are secure and so advise the Warden.

11. The Warden will confirm that all is ready.

12. The Warden will make one final check with the attorneys stationed outside the chamber.

13. The Deputy Warden will open the curtain and turn on the microphone.

977

THE EXECUTION: LETHAL INJECTION

Page 4 of 9

REVISED 12/14/2004

SEQUENCE OF EVENTS**RESPONSIBILITY****COMPLETED/DATE/TIME**

14. The Warden states, "At this time

we will carry out the legal execution

of _____ (condemned name)." _____

15. The Warden asks the condemned if he

wants to make a final statement

(two (2) minutes allowed). _____

16. Upon the Warden's order to "proceed"

and the microphone turned off, a designated

team member will begin a rapid flow of lethal

chemicals in the following order:

1) Sodium Thiopental (3 gm.)

NOTE: If it appears to the Warden

That the condemned is not unconscious

THE EXECUTION: LETHAL INJECTION

Page 5 of 9

REVISED 12/14/2004

SEQUENCE OF EVENTS**RESPONSIBILITY****COMPLETED/DATE/TIME**

within 60 seconds to his command to
 "proceed", the Warden shall stop the
 flow of Sodium Thiopental in the primary
 site and order that the backup IV be
 used with a new flow of Sodium Thiopental.

- 2) Saline (25 mg.)
- 3) Pancuronium Bromide (50 mg)
- 4) Saline 25 (mg)
- 5) Potassium Chloride (240 meq).

17. A designated team member will begin
 a stopwatch once the lethal injections
 are complete. If the heart monitor does

979

THE EXECUTION: LETHAL INJECTION
Page 6 of 9

REVISED 12/14/2004

SEQUENCE OF EVENTS

RESPONSIBILITY

COMPLETED/DATE/TIME

not indicate a flat line after ten (10) minutes and if during that time the physician and coroner are not able to pronounce death, the Warden will order a second set of lethal chemicals to be administered (Sodium Thiopental, Pancuronium Bromide, and Potassium Chloride). This process will continue until death has occurred.

18. A designated team member will observe the heart monitor and advise the physician of cessation of electrical activity of the heart.

980

THE EXECUTION: LETHAL INJECTION
Page 7 of 9

REVISED 12/14/2004

<u>SEQUENCE OF EVENTS</u>	RESPONSIBILITY	COMPLETED/DATE/TIME
19. The curtains shall be drawn when the Physician and coroner enter the chamber and confirm death by checking the condemned's pulse and pupils and so advise the Warden.	_____	_____
20. The curtain will then be opened. The Warden turns on the microphone and states: "At approximately ____ p.m. the execution of _____ was carried out in accordance with the laws of the Commonwealth of Kentucky".	_____	_____
21. The microphone is turned off and the curtains will be drawn.	_____	_____

981

THE EXECUTION: LETHAL INJECTION
Page 8 of 9

REVISED 12/14/2004

<u>SEQUENCE OF EVENTS</u>	<u>RESPONSIBILITY</u>	<u>COMPLETED/DATE/TIME</u>
22. The witnesses are escorted out of the witness room, first the media, inmate's witnesses, and then the victim's witnesses.	_____	_____
23. The team will prepare the body for departure.	_____	_____
24. Release body per prior arrangements.	_____	_____
25. Funeral director completes death certificate.	_____	_____
26. Not more than one (1) day after execution, the Warden shall return the copy of the judgment of the court pronouncing the death sentence, of the manner, time and place of its execution.	_____	_____

982

THE EXECUTION: LETHAL INJECTION
Page 9 of 9

REVISED 12/14/2004

SEQUENCE OF EVENTS

RESPONSIBILITY

COMPLETED/DATE/TIME

27. Close out inmate account during
 next business day.

28. Contact individual designated to
 receive condemned's personal property
 for pick up of property the next
 business day.

29. Compile all documents pertaining to
 Execution and place in inmate file.

983

EXECUTION TEAM QUALIFICATIONS

1. The following people with at least one year of professional experience may be on the IV team:
 - a) Certified Medical Assistant, or
 - b) Phlebotomist, or
 - c) Emergency Medical Technician, or
 - d) Paramedic, or
 - e) Military Corpsman
2. Prior to participating in an actual execution, the member of the IV team must have participated in at least two (2) practices.
3. Members of the IV team must remain certified in their profession and must fulfill any continuing education requirements in their profession.
4. The execution team shall practice at least ten (10) times during the course of one (1) calendar year.
5. Each practice shall include a complete walk through of an execution including the siting of two (2) IVs into a volunteer.
6. Execution team members, excluding IV team members, must have participated in a minimum of two (2) practices prior to participating in an actual execution.

STABALIZATION PROCEDURE AFTER THE EXECUTION HAS COMMENCED

1. In the event that a stay is issued after the execution has commenced, the execution team will stand down and medical staff on site will attempt to stabilize the condemned with the below listed equipment and personnel.
 - A. The Warden will arrange for an ambulance and staff to be present on institutional property.
 - B. A medical crash cart and defibrillator shall be located in the execution building.

EXHIBIT 8

EXHIBIT 8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANDREW DEYOUNG,) DOCKET NO.
) 1:11-CV-2324-SCJ
PLAINTIFF,)
)
V.)
)
BRIAN OWENS AND WARDEN)
CARL HUMPHREY, ET AL.,) ATLANTA, GEORGIA
) JULY 19, 2011
DEFENDANTS.)

TRANSCRIPT OF TRO HEARING
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MARK EVAN OLIVE
JEFFREY LYN ERTEL
BRIAN S. KAMMER
ATTORNEYS AT LAW

FOR THE DEFENDANTS: SABRINA B. GRAHAM
BETH ATTAWAY BURTON
THERESA MARIE SCHIEFER
JOSEPH J. DROLET
ATTORNEYS AT LAW

LOIS D. PHILLIPS, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
U.S. DISTRICT COURT
ATLANTA, GEORGIA 30303-3361
(404) 215-1317
LOIS_PHILLIPS@GAND.USCOURTS.GOV

1 YES, GIVE IT TO MS. WRIGHT.

2 OKAY. CALL YOUR FIRST WITNESS.

3 THE COURT: WHEN HE GETS UP TO THE STAND DR. WASEL,
4 MS. WRIGHT WILL ADMINISTER THE OATH TO YOU.

09:39 5 **DAVID B. WASEL, PLAINTIFF'S WITNESS,**
6 UPON BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS
7 FOLLOWS:

8 THE COURT: YOU MAY BE SEATED.

9 **DIRECT EXAMINATION**

09:39 10 BY MR. OLIVE:

11 Q. GOOD MORNING, WOULD YOU STATE YOUR NAME, PLEASE, SIR?

12 A. DAVID B. WASEL.

13 Q. SPELL YOUR LAST NAME?

14 A. W-A-I-S-E-L.

09:39 15 Q. AND WHAT IS YOUR PROFESSION, SIR?

16 A. I AM AN ANESTHESIOLOGIST.

17 Q. YOU SAID ANESTHESIOLOGIST?

18 A. YES, SIR.

19 Q. WHERE ARE YOU EMPLOYED?

09:40 20 A. CHILDREN'S HOSPITAL, BOSTON HARBOR MEDICAL SCHOOL.

21 Q. WHAT ARE YOUR DUTIES THERE?

22 A. TO PROVIDE PERI-OPERATIVE CARE FOR CHILDREN OF ALL AGES WHO
23 HAVE DISEASES, SURGICAL, OF ALL AGES. I ALSO DO MEDICAL ETHICS
24 THERE, AND I ALSO WORK INPATIENT SAFETY.

09:40 25 Q. AND I ASSUME THAT YOU PERFORM ANESTHESIA, ADMINISTER

1 A. YES, I AM.

2 Q. ARE YOU FAMILIAR WITH THE TWO DIFFERENT PROTOCOLS THAT GEORGIA
3 PROMULGATED, ONE WITH THIOPENTAL AND THE MORE RECENT ONE WITH
4 PENTOBARBITAL?

10:03 5 A. YES, I AM.

6 Q. HAVE YOU REVIEWED THEM BOTH?

7 A. YES, I HAVE.

8 Q. CAN YOU TELL US THE RELATIVE DEGREE OF STUDY AND RESEARCH INTO
9 THOSE TWO DRUGS?

10:04 10 A. OF COURSE. WHILE BOTH DRUGS WERE DEVELOPED IN THE LATE
11 TWENTIES, EARLY THIRTIES, BY THE EARLY TO MID-FIFTIES THIOPENTAL
12 BECAME THE STANDARD DRUG FOR ANESTHESIA, FOR INDUCING ANESTHESIA.
13 SO IF YOU WERE TO HAVE AN OPERATION IN 1980, YOU WOULD HAVE
14 RECEIVED IT. I WOULD SAY THAT 90 PERCENT OF PATIENTS FROM THE
10:04 15 MID-FIFTIES TO EARLY NINETIES RECEIVED THIOPENTAL, WHICH IS AN
16 ASTRONOMICAL NUMBER OF PATIENTS, BEYOND MY ABILITY TO CALCULATE.
17 BECAUSE IT BECAME THE STANDARD, WE, MEDICINE STUDIED IT
18 VERY MUCH BECAUSE WE WANTED TO KNOW EVERYTHING ABOUT IT. SO
19 BETWEEN THE TWO, BETWEEN THE EXTENSIVE STUDYING AND BETWEEN THE
10:04 20 EXTENSIVE USE, WHICH OFTEN EXPOSES ISSUES ABOUT A DRUG THAT AREN'T
21 FOUND OTHERWISE, WE KNOW EVERYTHING ABOUT THIOPENTAL.

22 PENTOBARBITAL, ON THE OTHER HAND, WAS NOT ADOPTED AS A
23 DRUG TO INDUCE GENERAL ANESTHESIA AND DEVELOPED FOR MORE OF A
24 NICHE AREA IN TREATING PATIENTS WITH BRAIN DISEASE, SPECIFICALLY,
10:05 25 SEIZURES THAT WOULD NOT ABATE THROUGH OTHER MEASURES AND THE

1 TRAINED PERSON WITH EXPERIENCE WOULD.

2 Q. AND DO YOU HAVE ANY EVIDENCE THAT THAT CONSCIOUSNESS CHECK
3 THAT WAS PERFORMED ON MR. BLANKENSHIP WAS NOT A PROPER
4 CONSCIOUSNESS CHECK?

10:41 5 A. MAY I LOOK AT THE NOTES?

6 Q. ABSOLUTELY.

7 THE COURT: I THINK HE'S READY.

8 BY MS. SCHIEFER:

9 Q. OH, I APOLOGIZE?

10:42 10 A. I WOULD HAVE SIGNIFICANT CONCERNS THAT IT WAS NOT A PROPER
11 CONSCIOUSNESS CHECK FOR TWO REASONS: ALTHOUGH I DO NOT KNOW THE
12 HISTORY OF THE NURSE DOING THIS, VERY, VERY FEW NURSES -- AND IT'S
13 CERTAINLY NOT REQUIRED BY THEIR CERTIFICATION -- HAVE KNOWLEDGE OR
14 EXPERIENCE IN ASSESSING ANESTHETIC DEATH. NUMBER TWO, ALTHOUGH I
10:42 15 ONLY HAVE REPORTS ABOUT WHAT THEY DID, IT SEEMED TO ME IT WAS A
16 VERY LIGHT STIMULUS, LIGHT STIMULUS AROUND THE EYES, AND SO AS I
17 ALLUDED TO EARLIER, A PERSON CAN BE -- NOT RESPOND TO A MILD
18 STIMULUS, BUT THEN RESPOND TO A MORE PAINFUL STIMULUS, SUCH AS
19 POTASSIUM CHLORIDE.

10:43 20 Q. AND AGAIN, WE WON'T GET INTO THIS TOO MUCH AT THIS POINT, BUT
21 YOU WERE NOT ACTUALLY PRESENT AT THE EXECUTION, CORRECT?

22 A. I WAS NOT PRESENT AT THE EXECUTION.

23 Q. AND THE INFORMATION THAT YOU RECEIVED INITIALLY IN PUTTING
24 TOGETHER YOUR AFFIDAVIT WAS SOLELY AFTER A THIRTY-MINUTE
10:43 25 CONVERSATION WITH AN AP REPORTER WITNESS, CORRECT?

1 A. ON TOP OF A SERIOUS BRAIN DISEASE.

2 Q. SO THAT'S TWO ON-TOP-OF'S?

3 A. YES.

4 Q. YOU WERE ASKED ABOUT A CONSCIOUSNESS CHECK BY THE NURSE. TO
12:06 5 YOUR KNOWLEDGE THIS WAS THE FIRST TIME A PROTOCOL REQUIRED A
6 CONSCIOUSNESS CHECK IN GEORGIA? IS THAT CORRECT? OR DO YOU NOT
7 KNOW?

8 A. I DO NOT RECALL. I CAN CHECK THE OLDER ONE, IF YOU WISH ME
9 TO.

12:06 10 Q. THAT'S ALL RIGHT.

11 IF YOU WILL CHECK THE RESPONDENTS' OR DEFENDANTS'
12 APPENDIX M, IT'S THE BLUE COVER, AND GO TO PARAGRAPH 8. IT READS,
13 I SAW THE NURSE TOUCH HIS RIGHT SHOULDER, SPEAK TO
14 MR. BLANKENSHIP, TOUCH HIS EYELASHES, AND RECEIVE NO RESPONSE TO
12:06 15 ANY OF THIS. IS TOUCHING EYELASHES AN EFFECTIVE CONSCIOUSNESS
16 CHECK?

17 A. NOT AS A WHOLE CHECK, NO. IT IS OFTEN USED AS AN INITIAL
18 CHECK ON A PRELUDE TO OTHER CHECKS.

19 Q. CAN YOU TALK TO US IN A LITTLE MORE DETAIL ABOUT THE
12:07 20 SOPHISTICATION NECESSARY FOR TRUE CONSCIOUSNESS CHECKS?

21 A. THE SOPHISTICATION NECESSARY COMES NOT ONLY FROM THEORETICAL
22 KNOWLEDGE, BUT FROM TRAINING UNDER SUPERVISION AND FEEDBACK AND
23 EXPERIENCE. PATIENTS RESPOND DIFFERENTLY, AND THE EDUCATED EYE
24 NEEDS TO BE ABLE TO GIVE AN INCREASING LEVEL OF STIMULATION AND
12:07 25 NEEDS TO BE LOOKING FOR SUBTLE SIGNS, SUCH AS, YOU KNOW,

1 FLUTTERING OF THE EYES, WINCING, FINGER MOVEMENT, TOE MOVEMENT,
2 ANY OF THOSE, AND IT TAKES A PRACTICED EYE TO DO THAT.

3 Q. OKAY. SO A NURSE HYPOTHETICALLY WHO HAD BEEN THROUGH EVERY
4 EXECUTION IN GEORGIA THAT DID NOT REQUIRE BY PROTOCOL A

12:08 5 CONSCIOUSNESS CHECK -- ACCEPT THIS AS HYPOTHETICAL AS TRUE, IT MAY
6 PROVE FALSE -- AND THIS IS THE FIRST TIME A CONSCIOUSNESS CHECK IS
7 REQUIRED, WOULD YOU EXPECT THAT PERSON TO REQUIRE TRAINING?

8 A. OF COURSE.

9 Q. YOU WERE ASKED ABOUT WHETHER YOUR TESTIMONY HERE WAS SIMILAR
12:08 10 TO THE TESTIMONY IN THE BLANKENSHIP HEARING WHERE YOU EXPRESSED
11 OTHER CONCERNS ABOUT THE LETHAL INJECTION PROTOCOL? DO YOU
12 REMEMBER THAT QUESTION?

13 A. YES, I DO.

14 Q. DO YOU STILL HAVE THE CONCERNS THAT YOU TESTIFIED TO EARLIER
12:08 15 IN THE BLANKENSHIP TRANSCRIPT?

16 A. YES.

17 Q. AND DO YOU REAFFIRM THAT TESTIMONY?

18 A. YES.

19 Q. SO YOU STILL MAINTAIN THE PROBLEMS EXIST THAT YOU FORECAST IN
12:08 20 BLANKENSHIP?

21 A. YES.

22 Q. AT THAT HEARING COUNSEL FOR THE STATE ASSURED THE COURT -- AND
23 IT'S OUR APPENDIX 8 AT 16 -- THAT PENTOBARBITAL WORKS AS FAST AS
24 SODIUM PENTOTHAL, AND THAT A PERSON WILL BE UNCONSCIOUS WITHIN,
12:09 25 QUOTE, THIRTY TO SIXTY SECONDS, CLOSED QUOTE, AFTER RECEIVING AN

1 INJECTION OF PENTOBARBITAL. DO YOU THINK THAT HAPPENED IN THIS
2 CASE?

3 A. I DO NOT THINK THAT HAPPENED IN THIS CASE.

4 Q. THE ISSUE OF THE EYES BEING OPEN: I COULD HAVE MY EYES WIDE
12:10 5 OPEN, I COULD HAVE THEM HALF OPEN, I COULD HAVE THEM AN EIGHTH
6 OPEN. WHEN YOU SAY, EYES WIDE OR EYES OPEN, WHAT ARE YOU
7 REFERRING TO WHEN YOU SAY THAT?

8 A. IT IS NOT UNREASONABLE THAT WHEN SOMEONE CLOSES THEIR EYES
9 UNDER ANESTHESIA THERE IS A SMALL BIT, 80 PERCENT CLOSED,
12:10 10 90 PERCENT CLOSED, THAT KIND OF THING. BUT THERE IS A VAST
11 DIFFERENCE BETWEEN THAT MERELY ALMOST CLOSED AND ANYTHING, YOU
12 KNOW, HALF OPEN OR MORE THAN THAT. AS I LOOK AT YOU NOW, SIR.

13 Q. AS YOU BELIEVE WHAT?

14 A. AS I LOOK AT YOU NOW. THERE IS A VAST DIFFERENCE BETWEEN, YOU
12:10 15 KNOW, 10, MAYBE 20 PERCENT OPEN AND OPEN TO THE POINT WHERE I CAN
16 SEE THEY ARE OPEN FROM A DISTANCE.

17 Q. SO IF A PERSON SAYS, I'VE SEEN A LOT OF EXECUTIONS AND IN
18 THOSE EXECUTIONS IT'S NOT INFREQUENT THAT THE INMATES EYES ARE
19 OPEN AT DEATH, YOU NEED TO KNOW HOW OPEN, I TAKE IT?

12:11 20 A. CORRECT.

21 Q. WIDE OPEN WOULD INDICATE WHAT?

22 A. WIDE OPEN WOULD BE A VERY STRONG INDICATOR THAT THEY WEREN'T
23 ADEQUATELY ANESTHETIZED.

24 Q. AND IS THERE A WORD FOR ONE-THIRD OPEN?

12:11 25 A. NO.