THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL ANTHONY TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-4173-CV-C-FJG
	)	
LARRY CRAWFORD, et al.,	)	
	)	
Defendants.	)	

DEFENDANT CORRECTIONAL OFFICIALS'
SUBMISSION OF PROPOSED EXECUTION PROTOCOL

Attached as Exhibit A is the proposed execution protocol relating to the preparation and injection of the lethal chemicals. This protocol has been prepared by the defendant Corrections officials and is presented for Court review as directed by this Court's order of June 26, 2006. In this order, the Court ordered the Corrections defendants to incorporate the following provisions in its proposed protocol:

(1) Use of a board certified anesthesiologist to mix all drugs used in the lethal injection process and to directly observe the persons administering those drugs.

(2) Use of not less than five grams of thiopental. Pancuronium bromide and potassium chloride may be used, but not until after certification by the anesthesiologist that the condemned prisoner has reached a sufficient anesthetic depth so that the prisoner will not experience undue pain when the potassium chloride is injected. The protocol is to specify how sufficient anesthetic depth is to be certified.

(3) Implementation of procedures that allow adequate monitoring of the anesthetic

depth of the condemned prisoner.

(4) Implementation of a contingency plan in case the execution procedure does not go as expected.

(5) Implementation of an auditing process to check that the execution protocol is being correctly carried out.

The protocol developed by the Department of Corrections addresses the concerns raised by plaintiff at trial. Although the protocol does not completely implement all the provisions set out by the Court, the Corrections defendants believe that the protocol does appropriately meet the underlying concern of the Court that condemned prisoners be sufficiently unconscious at the time of the injection of the potassium chloride that they will not experience pain from the injection.[1]

Administration of Drugs

The proposed protocol calls for use of five grams of thiopental. ¶¶ B2, E2. Pancuronium bromide and potassium chloride are administered after the thiopental but not until after an assessment by medical personnel that the condemned prisoner is unconscious. This assessment is to include use of standard clinical techniques for assessing consciousness, such as checking for movement, open eyes, eyelash reflex, pupillary responses or diameters,

[1]The Court's order requires several elements to the revised Missouri execution protocol. Defendant Correction officials submit the proposed protocol as one they believe is a good policy instrument. They do not concede that the provisions of the proposed protocol are constitutionally required. Indeed, defendant Corrections officials note that the Court does not identify which elements of its June 26, 2006 order it believes are mandated by the Eighth Amendment.

and response to verbal commands and physical stimuli. ¶ E3.

Monitoring of Anesthetic Depth

As just noted, standard clinical techniques for assessing consciousness will be used. This will be done by direct physical contact with the condemned prisoner following the administration of the thiopental. ¶ E3. Additionally, the bed on which the condemned inmate is lying will be positioned so that the medical personnel can observe the prisoner's face directly or with the aid of a mirror. ¶ D2.

Contingency Plan

An additional five grams of thiopental is prepared before the execution for use in the event that the administration of the first five grams does not render the condemned prisoner unconscious. ¶ B8. A secondary intravenous (IV) line will be set in addition to the primary line. ¶ C1. In the event the administration of the first 5 grams of thiopental has not rendered the prisoner unconscious, the additional five grams of thiopental that have been prepared will be administered through the secondary line, as will the succeeding drugs. ¶ E4. In the event that electrical activity continues in the condemned prisoner's heart for more than five minutes after the final flush solution is injected, additional potassium chloride will be injected. ¶ E10.

Auditing Process

All members of the execution team will complete and sign the "Sequence of Chemicals" form that verifies that the drugs were given in the order specified in the protocol. ¶ F2. The medical personnel taking part in the execution will complete and sign the

"Chemical Log" indicating the quantities of the drugs used (as well as the quantities disposed of) during (and after) the execution. ¶ F3. Within three days of an execution, the prison superintendent will submit the "Sequence of Chemicals" and the "Chemical Log" to the Director of the Division of Adult Institutions (DAI) of the Missouri Department of Corrections. ¶ F4. The DAI Director and the Department Director will review these records. ¶ F4. If any irregularity is found, the DAI Director will promptly determine whether there were any deviations form this protocol and report the findings of the investigation to the Department Director. ¶ F4.

Obtaining the Use of a Board Certified Anesthesiologist

Inability to obtain and use board certified anesthesiologist. The Department of Corrections is unable to comply with the Court's direction to obtain and use a board certified anesthesiologist in its execution process.[2] After the Court issued its June 26, 2006 order, defendant Corrections officials sent letters to 298 board certified anesthesiologists in this State and southern Illinois inquiring of their willingness to participate in executions, as outlined by the court's order. To this date, no one has accepted. *See* Exhibit B, attached to this pleading.

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[2]The Court's order calls for a board certified anesthesiologist to mix the drugs to be used, to observe the administration of the drugs, to monitor the anesthetic depth of the condemned prisoner, and to certify that the condemned prisoner has achieved sufficient anesthetic depth to be free of undue pain when the potassium chloride is injected. As shown above, these functions will be performed by medical personnel. Standards for determining unconsciousness and the means of monitoring the condemned prisoner throughout the process are also set out. Additionally, a board certified anesthesiologist has provided guidance in the development of this protocol.

This reaction by the medical community is unsurprising. It was foreshadowed in the Ninth Circuit opinion in *Beardslee v. Woodford*, 395 F.3d 1064, 1074 (9th Cir. 2005). And as plaintiff alleged in his amended complaint, a physician's participation may be perceived as a violation of a professional's ethical standards. *See* Amended Complaint, at ¶ 81, citing American Medical Association's Code of Ethics, E-2.06, which is itself attached as Exhibit 22 to the Amended Complaint.

The hostility of the anesthesiologist community to the Court's order was swift. The June 30, 2006 message from the President of the American Society of Anesthesiologist to member anesthesiologist is perhaps best summarized by its last two words of advice: "[s]teer clear." *See* Exhibit C, at p. 4, attached to this pleading. So they have. *See* Exhibit B, attached to this pleading.

Rather than write a protocol with a role for an anaesthesiologist, complying with the letter of the Court's June 26, 2006 order, but not its spirit of developing a protocol that could actually be implemented, the proposed protocol does not include a board certified anesthesiologist. Instead, it uses medical personnel in roles appropriate for the personnel. For example, a physician, nurse, or pharmacist prepares the chemicals. ¶¶ A2, B1. The thiopental will be prepared in 200 cc of solution (¶ B2), the amount of solution recommended by the manufacturer (Plaintiff's Trial Exhibit 26). The other chemicals do not require mixing because they are packaged as liquids ready to inject.

Medical personnel insert the IV lines. ¶ C1. They attach the electrocardiograph to the condemned, and then monitor the machine. ¶¶ D1, D3. After injection of five grams of

thiopental, medical personnel inspect the catheter site and physically examine the prisoner to confirm he is unconscious. ¶ B3. Only if the medical personnel has confirmed unconsciousness and three minutes have elapsed since the beginning of the injection of the thiopental will there be an injection of the second and third chemicals. ¶ B5. Even under Dr. Henthorn's modeling, the passage of three minutes is sufficient to render the condemned unconscious. Tr. (June 12) 228. But if not, corrections officials stand ready to provide a second five gram injection of the thiopental. ¶¶ B8, E4.

The proposed protocol is sufficient to prevent unnecessary and wanton infliction of pain. The substitution of medical personnel for a board certified anesthesiologist is reasonable under the circumstances. A requirement of using a board certified anesthesiologist is a requirement that cannot presently be met. To enforce it may effectively bar implementation of the death penalty in Missouri. Surely that is not what the court intended.

Use of anesthesiologist not constitutionally required. Even if it were possible for the Department of Corrections to find a board certified anesthesiologist to provide services during executions, the Corrections defendants respectfully contend that the district court legally erred in imposing such a requirement. Assistance of an anesthesiologist at an execution has never been determined to be constitutionally required[3] and, for this reason, the

[3]In fact, it appears from reported opinions that at least two states conduct judicially approved executions without the presence of a doctor of any kind. *Abdur'rahman v. Bredesen*, 181 S.W.3d 292, 301 (Tenn. 2005) (describing a process in which the prison warden prepares the drugs and a non-physician prison official injects the drugs; a physician is on site only to perform a "cut down" procedure in the event the paramedics, two of whom

order goes beyond the Court's power in requiring the assistance of an anesthesiologist in Missouri executions.

The one case defendants have found that directly examined the issue of whether the assistance of an anesthesiologist is required during executions concluded that an anesthesiologist is not required. *Evans v. Saar*, 412 F. Supp. 2d 519, 524-25 (D. Md. 2006) (denying injunction to stay execution). *See also Bieghler v. State*, 839 N.E.2d 691, 695-96 (Ind. 2005) (denying habeas relief despite challenge that state had not developed its execution protocol with input from a person trained in anesthesiology), *cert. denied*, 126 S. Ct. 1190 (2006). Not even the decision in *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1314 (2006), relied on by plaintiff, requires use of anesthesiologist for either option approved by the district court. One option permitted by the *Morales* court was execution by means of a massive dose of thiopental alone or some other barbiturate or combination of barbiturates, without any direction that a doctor be present. 415 F. Supp. 2d at 1047. Even the second option required only a person with formal training and experience in the field of general anesthesia and not necessarily a board certified anesthesiologist. *Id.*

Further, the evidence from this case establishes that an execution can be carried out

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are present at the execution, are unable to insert an IV in the condemned's arm), *cert. denied*, 126 S. Ct. 2288 (2006); *Ex parte Aguilar*, 2006 WL 1412666, at *4 (Tex. Ct. Crim. App., May 22, 2006) (reference in Concurring Statement to suggestion of plaintiff's expert witness that lethal injection procedure "should be performed by and reviewed by doctors"), *stay of execution denied sub nom. Aguilar v. Dretke*, 2006 WL 1667012 (U.S. Sup. Ct., May 24, 2006).

without unnecessary and wanton pain without the assistance of a board certified anesthesiologist. The protocol proposed by the Department of Corrections complies with the constitutional standard. Plaintiff's expert, Dr. Henthorn agreed that a five gram dose of thiopental would result in the condemned being rendered deeply unconscious (more so than the level of consciousness intended for surgical procedures) within two minutes and for a much longer time period than required to complete the execution. Tr. (June 12) 235-36. Thus, if five grams of thiopental is administered, there would be no need to monitor the anesthetic depth of the condemned for some time. Tr. (June 12) 236-37. Therefore, even under plaintiff's evidence, once five grams of thiopental is administered and given two minutes to take effect, monitoring of anesthetic depth is not necessary to assure that a condemned prisoner will not experience unnecessary and wanton pain during the administration of the next two drugs.

Assurance that the thiopental prepared is administered appropriately is important, and the protocol developed by the Department of Corrections does implement steps to provide such assurance. A doctor, nurse, or pharmacist is to prepare the thiopental. ¶ A2. This is a straight-forward matter of mixing a powder with a liquid found in a manufacturer's kit. *See Evans*, 412 F. Supp. 2d at 524-25; Tr. (Jan. 30) 30-31.[4] Two IV lines are set by persons with

[4]The difficulty in mixing referred to by Dr. John Doe I in his/her deposition (entered into evidence) was the result of attempting to mix the thiopental at a concentration higher than normally used. Under the attached protocol developed by the Department of Corrections, the five grams thiopental will be administered in 200 cc of solution, which is the standard 2 ½ % solution (25 mg per mL [equivalent to cc]). *See* Exhibit D, attached to this pleading (page from Physician's Desk Reference setting out information on contents of manufacturer's kits). Thus, the preparation of the thiopental will no longer present the

training, education, and experience in doing so. ¶¶ A3, C1. The setting of IV lines is a procedure within the competence of doctors, nurses, and emergency medical technicians. [5] *Reid v. Johnson*, 333 F. Supp. 2d 543, 546 n.6 (E.D. Va. 2004); *State v. Webb*, 750 A.2d 448, 452 (Conn. 2000), *cert. denied*, 121 S. Ct. 93 (2000). At the time the IV lines are set, they are checked to make certain they are not obstructed. ¶ C2. The medical person who is to assess the consciousness of the condemned prisoner between the administration of the thiopental and the succeeding drugs will also check the IV catheter site at that time as well. ¶ E.3. These steps will provide assurance that the thiopental has been appropriately administered, which in turn, as discussed above, renders the need to assess anesthetic depth unnecessary.[6]

Another point raised by plaintiff at the trial is also addressed in the protocol. Dr. Henthorn testified that waiting to two minutes after injection of thiopental before injecting

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problems dealt with by Dr. Doe.

[5]The provision that permits a emergency medical technician (EMT) to set IV lines and to check them for obstructions is not a step back from previous Department of Corrections practice of obtaining the presence of a doctor at executions. Permitting the medical roles to be filled by an EMT is only a foresighted recognition that there may be a time that the presence of a doctor cannot be obtained. In such a case Corrections will plan to go forward with the execution with the aid of an EMT, just as it would have had a doctor not been available in the past. The intent of the Department of Corrections is to obtain the presence of a doctor at executions if at all possible.

[6]Even though vigilant attention to proper administration of the thiopental will provide assurance that the condemned prisoner has reached a quite deep level of unconsciousness before the succeeding drugs are administered, the medical person present at the execution will still assess the consciousness of the condemned with standard clinical techniques before the second two drugs are administered. ¶ E3.

the succeeding drugs would substantially reduce the risk of pain to the condemned prisoner. Tr. (June 12) 228. This concern is allayed by the provision in the protocol that calls for the second and third drugs not to be administered sooner than three minutes have elapsed since the beginning of the injection of the thiopental. ¶ E5.

The protocol as drafted provides an ample level of confidence that condemned prisoners executed under its provisions will not be subjected to cruel and unusual punishment.

A court may exercise its power only on the basis of a constitutional violation. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 91 S. Ct. 1267, 1276 (1971). "The court's exercise of equitable discretion must heel close to the identified violation and respect 'the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'" *Gilmore v. California*, 220 F.3d 987, 1005 (9th Cir. 2000) (quoting *Milliken v. Bradley*, 97 S. Ct. 2749, 2757 (1977)). *See also Toussaint v. McCarthy*, 801 F.2d 1080, (9th Cir. 1986) ("Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation"), *cert. denied*, 107 S. Ct. 2462 (1987); 18 U.S.C. 3626(a)(1) ("Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiff").

The Court's direction to defendant Corrections officials to include assistance of a board certified anesthesiologist goes beyond its power under these standards. As discussed above, no court has ever found that assistance of an anesthesiologist is constitutionally

required at an execution. Moreover, as shown above, there is no necessity here, considering the evidence adduced and the protocol developed by the Department of Corrections, to require the assistance of a board certified anesthesiologist at executions in Missouri. Imposing such a requirement is much broader than necessary to remedy the concerns of the Court.

WHEREFORE, the defendant Corrections officials, pray this Court to approve the protocol developed by the Department of Corrections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

John W. Simon, Attorney at Law
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/s/ *Michael Pritchett*
Assistant Attorney General

PREPARATION AND INJECTION OF CHEMICALS

A. Execution team members

1. The execution team consists of contracted medical personnel and department employees.

2. A physician, nurse, or pharmacist prepares the chemicals used during the lethal injection.

3. A physician, nurse, or emergency medical technician (EMT–intermediate or EMT–paramedic) inserts intravenous lines, monitors the prisoner, and supervises the injection of lethal chemicals by nonmedical members of the execution team.

4. Two department employees inject the chemicals into the prisoner.

B. Preparation of chemicals

1. Medical personnel prepare the lethal chemicals. The quantities of these chemicals may not be changed without prior approval of the department director. Fifteen (15) syringes are prepared and labeled in a distinctive manner as follows.

2. Syringes 1, 2, 3, and 4 each contain 1.25 grams of thiopental (also known as sodium thiopental or sodium pentothal) in a 50 cc solution for a total of 5 grams of thiopental.

3. Syringe 5 contains 30 cc of saline solution.

4. Syringe 6 contains 60 milligrams of pancuronium bromide in a 60 cc solution.

5. Syringe 7 contains 30 cc of saline solution.

6. Syringes 8 and 9 each contain 120 milliequivalents of potassium chloride in 60 cc of solution for a total of 240 milliequivalents of potassium chloride.

7. Syringe 10 contains 60 cc of saline solution.

Exhibit A

8. Syringes 1A, 2A, 3A, and 4A each contain 1.25 grams of thiopental (also known as sodium thiopental or sodium pentothal) in a 50 cc solution for a total of 5 grams of thiopental. (These syringes are prepared in the event that additional thiopental must be administered.)

9. Syringe 5A contains 60 cc of saline solution. (This syringe is prepared in the event that additional flush is required.)

C. Intravenous lines

1. Medical personnel determine the most appropriate locations for intravenous (IV) lines. They insert both a primary IV line and a secondary IV line unless the prisoner's physical condition makes it unduly difficult to insert more than one IV. Medical personnel may insert the primary IV line as a peripheral line or as a central venous line (e.g., femoral, jugular, or subclavian) provided they have appropriate training, education, and experience for that procedure. The secondary IV line is a peripheral line.

2. A sufficient quantity of saline solution is injected to confirm that the IV lines have been properly inserted and that the lines are not obstructed.

D. Monitoring of prisoner

1. Medical personnel attach the leads from the electrocardiograph to the prisoner's chest. Medical personnel check the electrocardiograph to confirm that it is functioning properly.

2. The gurney is positioned so that medical personnel can observe the prisoner's face directly or with the aid of a mirror.

3. Medical personnel monitor the electrocardiograph and the prisoner during the execution.

E. Administration of chemicals

1. Upon order of the department director, the chemicals are injected into the prisoner by the execution team members under the observation of medical personnel. The lights in the execution support room are maintained at a sufficient level to permit proper administration of the chemicals.

2. The thiopental is injected from syringes 1, 2, 3, and 4 (5 grams). The saline solution in syringe 5 (30 cc) is injected.

3. Before the second and third chemicals are injected, medical personnel physically examine the prisoner to confirm that he is unconscious. Medical personnel use standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, pupillary responses or diameters, and response to verbal commands and physical stimuli. In addition to examining the prisoner, medical personnel inspect the catheter site(s).

4. In the unlikely event that the prisoner is still conscious, thiopental is injected from syringes 1A, 2A, 3A, and 4A (5 grams) into the secondary IV line. Approximately 30 cc of the saline solution in syringe 5A is injected. Medical personnel confirm that the prisoner is unconscious as directed in paragraph E.3. When the secondary line is used for thiopental, it is also used for the remaining chemicals.

5. After confirming that the prisoner is unconscious, the second and third chemicals are injected provided at least three minutes have elapsed since the execution team members started injecting the thiopental which rendered the prisoner unconscious.

6. The pancuronium bromide in syringe 6 (60 milligrams) is injected into the prisoner.

7. The saline solution in syringe 7 (30 cc) is injected.

8. The potassium chloride in syringes 8 and 9 (240 milliequivalents) is injected.

9. The saline solution in syringe 10 (60 cc) is injected.

10. If the electrical activity of the prisoner's heart does not cease within five minutes, additional potassium chloride is injected to cause death.

11. When all electrical activity of the heart ends as shown by the electrocardiogram, medical personnel pronounce death.

F. Documentation of chemicals

1. Medical personnel properly dispose of unused chemicals.

2. Before leaving ERDCC, all members of the execution team complete and sign the "Sequence of Chemicals" form thereby verifying that the chemicals were given in the order specified in this protocol.

3. Before leaving ERDCC, medical personnel complete and sign the "Chemical Log" indicating the quantities of the chemicals used and the quantities of the chemicals discarded during the execution.

4. Within three days of the execution, the ERDCC superintendent submits the Sequence of Chemicals and the Chemical Log to the director of the Division of Adult Institutions. The DAI division director and the department director review the records. If they do not detect any irregularities, they approve the two documents. If any irregularities are noted, the DAI division director promptly determines whether there were any deviations from this protocol and reports his findings to the department director.

July 14, 2006

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL ANTHONY TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 05-4173-CV-W-FJG
	)	
LARRY CRAWFORD, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF TERRY MOORE

I, Terry Moore, being of lawful age and duly sworn upon my oath, state the following:

1. I am the Director of the Division of Adult Institutions within the Missouri Department of Corrections. As the Division Director, I oversee the operations at the Eastern Reception and Diagnostic Center, the correctional center where executions are carried out.

2. After receiving the court's June 26, 2006 order in this case, I directed my assistant to obtain the names and addresses of board-certified anesthesiologists in Missouri and southern Illinois. On July 6, 2006, we sent by first-class mail a letter to 298 anesthesiologists. A representative copy of that letter is attached. In the letter, I requested that the anesthesiologist contact me if he or she might be willing to provide services to the department.

3. Despite this attempt to obtain a board-certified anesthesiologist, to date no one has been retained.

Exhibit B

Affiant states nothing further in *Michael Taylor v. Crawford, et. al* (05-4173-CV-W-FJG).

Terry Moore

Terry Moore, Division Director

County of Cole)
) ss
State of Missouri)

Subscribed and sworn to before me this 14th day of July 2006.

Tracy Clennin

Notary Public

My commission expires: 1-24-07

TRACY CLENNIN
Notary Public - State of Missouri
COUNTY OF MONITEAU
My Commission Expires Jan. 24, 2007

MATT BLUNT
Governor

LARRY CRAWFORD
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TDD Available

State of Missouri
DEPARTMENT OF CORRECTIONS
Ad Excelleum Conamur - "We Strive Towards Excellence"

July 6, 2006

[redacted]MD
PO Box
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Saint Louis, MO 63178

Dear Dr. :

You might have seen recent news reports that a federal judge ordered the Missouri Department of Corrections to use the services of a board-certified anesthesiologist when the department executes a condemned prisoner by means of lethal injection. In an effort to comply with this order, we obtained the names of all board-certified anesthesiologists in certain geographical areas.

Executions occur at the Eastern Reception, Diagnostic, & Correctional Center in Bonne Terre, Missouri. There is no regular schedule for executions, but they normally occur during the early morning hours on Wednesdays. There are fewer than five executions in a typical year in Missouri. The anesthesiologist would assist with the execution but would not actually administer the lethal drugs. The anesthesiologist would be notified well in advance of each execution and would be compensated for these services.

If you think that you might be willing to provide your professional services as an anesthesiologist during executions, please contact me as soon as possible for a brief, confidential discussion. My telephone number is 573-526-6543 and my e-mail address is Terry.Moore@doc.mo.gov.

Sincerely,

Terry Moore

Terry W. Moore, Director
Division of Adult Institutions
Missouri Department of Corrections