STATE OF LOUISIANA
FIRST JUDICIAL DISTRICT COURT
PARISH OF CADDO

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STATE EX REL.	*	
NATHANIEL R. CODE, JR.,	*	
Petitioner	*	
	*	Case. No. 138,860-A
VERSUS	*	
	*	
BURL CAIN, Warden,	*	
Louisiana State Penitentiary,	*	
Angola, Louisiana	*	
Respondent	*	
* * * * * * *		

excerpt from **PETITIONER'S POST-HEARING MEMORANDUM**

II. LETHAL INJECTION VIOLATES THE RIGHT TO HUMANE TREATMENT GUARANTEED BY ARTICLE I, SECTION 20 OF THE LOUISIANA CONSTITUTION AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Overview

In Claim 16 of Petitioner's original application for post-conviction relief, Mr. Code set forth the foundation for his challenge of the lethal injection process as implemented in Louisiana. If his execution goes forward, and in the likely event that he has not been properly and *continuously* anesthetized, Mr. Code will experience excruciating pain. As the evidence has shown, the lethal injection procedure in Louisiana consists of the injection of three chemicals through intravenous lines into the

condemned inmate: an anesthetic: sodium pentothal; a muscle relaxant: pancuronium bromide; and a chemical to stop the heart: potassium chloride. The administration of the second of these lethal chemicals, pancuronium bromide, will paralyze all of Mr. Code's voluntary muscles. Because he will be unable to speak or move, he will be unable to communicate the fact that he has not been properly and continuously anesthetized and that he is consciously experiencing excruciating pain.

Mr. Code contends that the practice of lethal injection as it is currently carried out in Louisiana violates his state constitutional right to humane treatment and his federal constitutional right to be free from cruel and unusual punishments. Article I, Section 20 of the 1974 Louisiana Constitution states, in part, that "[n]o law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment." The Louisiana Supreme Court has held that this provision "affords no less, and in some respects more, protection than that available under the Cruel and Unusual Punishments Clause of the Eighth Amendment...." *State v. Perry*, 608 So.2d 594, 610 (La. 1992); s*ee also*, *State v. Sepulvado*, 367 So.2d 762, 746 - 66 (La. 1979).

Both the state and federal constitutions forbid the infliction of unnecessary pain in the execution of a sentence of death. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); *State v. Perry*, 608 So.2d at 613 ("the infliction of a severe punishment by the state cannot comport with human dignity when it is unnecessary and nothing more than the pointless infliction of suffering"). Further, "[p]unishments are cruel when they involve ... a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). A punishment is particularly constitutionally offensive if it involves the *foreseeable* infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273

(1973), citing *Resweber*, *supra* (had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status").

On the evidence presented below, it is not only *foreseeable* but also *predictable* that death by lethal injection as it is currently carried out in Louisiana will produce unnecessary pain, torture, and lingering death. Since the July 8, 1995 initial filing of Mr. Code's claim, five Louisiana inmates have been executed by a lethal injection procedure that fails to take minimally necessary steps to safeguard against the real risk that the condemned inmate will regain consciousness while being poisoned with the torturously painful chemicals known as pancuronium bromide and potassium chloride. The evidence shows that there are major problems with lethal injection as administered in Louisiana, because no proper medical foundation exists in the Louisiana process to provide safeguards against the risk of torturous pain.

At the evidentiary hearing, Mr. Code presented this Court with testimony from twenty-four witnesses, lay and expert alike, as well as seven depositions, and one proffer of testimony.[1] The State has presented but one witness in rebuttal. While considerable evidence was presented in these hearings regarding pharmacology, medicine, science and expert knowledge, the compelling picture that emerges from this testimony reveals that the actual problem with the Louisiana lethal injection process is more the result of a clash

[1] That proffer was the testimony of Glenn Pettifer, an LSU veterinarian anesthesiologist. While this Court sustained the State's objection on April 20, 2004 that any testimony from a veterinarian was not relevant, it is notable that two years later, on April 27, 2006, members of the United States Supreme Court felt that that same subject matter was relevant enough to pose as the basis of some questions at oral argument on the latest challenge to lethal injection taken up by that Court, in *Hill v. McDonough*, 05-8794. The relevancy, both in the U.S. Supreme Court and here, is straightforward: the methods held inhumane and illegal to euthanize a cat or dog (in Louisiana and nationwide) cannot and do not transform into legal or constitutional methods when used to lethally inject a condemned inmate. Mr. Code prays that this Court review and consider the testimony of Dr. Glenn Pettifer and convert his testimony from proffer to record testimony.

between two wholly distinct organizational systems than a dispute about how many milligrams of a poisonous chemical are drawn up into a syringe or that chemical's effect when injected into humans: it is the clash between the world of corrections with its priorities focused on security matters versus the world of science and medicine which has humane standards based upon the precision of scientific principles.

Not to put too fine a point on it, but the problem should be seen as the spectre of chemical torture for condemned inmates that results when the world of corrections and prisons has chosen in its well-intentioned, but nonetheless amateurish, way to "play doctor" or overlay the trappings of medicine onto the arena of penology. In one brief but telling moment of the hearings, the State objected to Petitioner's use of the phrase "medical procedure" to describe the Louisiana lethal injection process:

> STATE:
>
> Your Honor, the only person that's called this a medical procedure is Mr. Clements. *This is not a medical procedure*. *This is an execution*. Now, you know, he can phrase that however he wants, and I am sure he will. But that's -- just because he says it is so doesn't make it so. And that characterization there has not been proven up in this Court as of yet; and I doubt very seriously if it ever will be. That's probably why they have those regulations about the doctors being involved in it that he has already elicited from a number of witnesses about certain standards of the American Medical Association. So it is -- I would take issue with that characterization. And it hasn't been proven here at this point in this hearing.

(EH 02-11-03, pp. 70-71). (Emphasis supplied).

Ironically, the State here summed up the fundamental argument that Petitioner will now present in this post-hearing memorandum: as implemented in Louisiana, lethal injection is *not* a medical procedure; and just because the State says the Louisiana lethal injection process is humane and comports with constitutional standards does not make it

so. Mr. Code will show 1) how Louisiana lethal injection executions are not really based in science, 2) how they are not really medical procedures, 3) how the "regulations about doctors being involved" are actually regulations and ethical standards that *forbid* doctors to be involved, and 4) how the State's failures to follow basic scientific and medical protocols condemns each Louisiana death row inmate to the very real risk of unnecessary torturous pain. That foreseeable risk of unnecessary pain and inhumane treatment violates both the Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution. The DOC is using a sequence of drugs and a method of administration that was created with minimal medical expertise (and no expertise in anaesthesiology) and little deliberation over three decades ago in Texas and Oklahoma, and then was adopted without knowledge or critique by the Louisiana Department of Corrections with little or no medical or scientific background. Virtually nothing has changed in the process originally adopted in Louisiana in 1992. As a result, beginning in 1993, seven Louisiana death row inmates have been executed by a means that the American Veterinary Medical Association and Louisiana statute[2] regard as unacceptable to use to euthanize cats or dogs.

Petitioner will outline how the current Louisiana lethal injection system was created, and how at each stage, unrecognized flaws were built into the system and practice. To that end, Petitioner will cite the testimony of the twenty-five witnesses and seven deponents to show that these uncorrected cumulated flaws continue to pose a genuine risk that Nathaniel Code will be subjected to needless pain in this execution process.

[2] La.R.S. 3:2462; 3:2465.

B. Critical Deficiencies from Day One: DOC Helps Draft A Law To Mandate An Execution Procedure That Mimics A Medical Procedure Before Even Investigating How It Should Be Carried Out.

For Louisiana, the process began in 1990, with the state legislature taking steps to mandate the implementation of lethal injection as the method for executions. Annette Viator, Department of Corrections (DOC) chief legal counsel, relates her initial involvement in the change to lethal injection:

> I went to the legislature that summer and wrote some legislation to change Louisiana's method of execution from electrocution to lethal injection.[3]

Senate Bill 243, sponsored by Senator Don Kelly, of Natchitoches, was signed into law on July 20, 1990, by Governor Charles "Buddy" Roemer.[4] It amended La.R.S. 15:569:

> B. Every sentence of death imposed on or after January 1, 1991 shall be by lethal injection; that is, by the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.
>
> C. No licensed health care professional shall be compelled to administer a lethal injection.[5]

Just a week earlier, the Baton Rouge Morning Advocate had run an editorial entitled, "Change won't end risk of trouble,"[6] noting that neither electrocutions nor lethal injections had a history of being completely trouble-free. The editorial further noted that Senator Kelly had put off consideration of such a legislative change in 1989 because of

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[3] EH 02/11/03, p. 27.
[4] "Spousal rape, lethal injection among 59 bills signed into law", Baton Rouge Morning Advocate, p. 3-A, July 21, 1990.
[5] La.R.S. 15:569.
[6] Baton Rouge Morning Advocate, p. 6-B, July 13, 1990.

questions about whether executioners would be available. The legislator's concerns were apparently somewhat allayed upon learning that

> [O]fficials at the Department of Corrections *plan to visit* other states which use this method *to find out how executioners are trained*. The bill provides that lethal injections are to be used only on prisoners who are sentenced to death after Jan. 1, 1991. The lengthy process of appeal after this date will allow ample time for this study.
>
> Whatever means of execution is used, a primary concern should be to avoid mistakes that make the prisoner's last moments harder than they have to be.[7]

Significantly, this editorial reveals that in July 1990, even though DOC officials still had key concerns about how to implement lethal injection and even though they still had not conducted any "study" of this execution method, they helped draft legislation to institute lethal injection in Louisiana. On the DOC's unsubstantiated recommendation, the legislature voted for it and the governor signed it into law. The legislation lacked any specific procedure because, as of yet, the authors and the DOC had no idea what lethal injection entailed or how to implement it.

This pattern of advancing implementation of lethal injection in Louisiana without sufficient medical comprehension of what was at stake would sadly be repeated year after year. This unprofessional pattern of DOC officials failing to know what they were doing when they tried their hand at the medical procedure of inducing anaesthesia characterizes the tragic flaw in this whole history. The irony here is that it does not matter whether or not the DOC had the goal of finding a more humane method of execution than the admittedly grisly method of electrocution. The reality is that the DOC's continuing ignorance of medical and scientific standards and protocols doomed condemned inmates to the serious risk of conscious suffocation and conscious awareness of feeling their veins

[7] *Id.* (emphasis applied).

being burned by the caustic potassium chloride injection, but intentionally chemically paralyzed so thoroughly that they could never show it. This DOC ignorance could thus allow LSP's top warden to offer gentle comfort by holding the inmate's hand as the sentence was being carried out, while the warden was oblivious to that inmate's likely stifled pain. Moreover, the paralyzed inmate's potential suffering would forever be hidden from the official witnesses who sat in the observation area.

B. The Next Critical Deficiency: Researching the Lethal Injection Method without A Medical Expert in Anaesthesiology.

Although legislating lethal injection before researching it was akin to putting the cart before the horse, Louisiana might have still remedied this deficiency before implementing it, had the DOC's subsequent research been conducted pursuant to actual medical knowledge and expertise in the very area into which they were treading: anaesthesia (a loss of feeling or sensation). But once again, the corrections system, primarily concerned with and knowledgeable about security issues, failed to recognize and incorporate even the elementary standards of scientific knowledge and methodology required when operating in any realm of medicine, let alone the special area of anaesthesiology.

Annette Viator explains the course of the DOC preparation for implementing lethal injection:

> Well, the first step was the legislation. After it was passed, signed, and enacted, which would have been fall of the same year -- it takes a while to enact it. I believe my next step was to check with the number of states in the United States who presently had lethal injection. There were 10 or 12, I believe. And from that point, I began gathering a group of what I considered experts for the State, and I wanted to find out how it was done. There was almost nothing written about it. And so I gathered up people within corrections, a warden. I gathered somebody in a medical field,

> somebody in security, and I began visiting as many states as I could to talk to people in those states. We tried to talk to them by phone. They were not willing to discuss it over the phone. So we went to four or five states.[8]

Attorney Viator further explained that the DOC research team consisted of herself, Louisiana State Penitentiary (LSP) Warden John Whitley, LSP Deputy Warden for Security, Richard Peabody,[9] and an EMT, an emergency medical technician whose name was concealed in this litigation, but who is referred to as John Doe #1 in the depositions of this matter.[10]

When asked to clarify whether this last person in fact was a medical doctor, Ms. Viator replied that the DOC was not allowed to use medical doctors. She explained:

> I checked with the American Medical Association and the local Louisiana Medical Association and was told that it was a very tenuous area, and that if any doctor told them that they were doing -- they were in danger of losing their license to practice medicine. So it was never going to be a doctor who came with us.[11]

Ms. Viator explained that the research team's mandate from then-DOC Secretary Bruce Lynn was very clear:

> The secretary of corrections asked me to head up that very thing, a committee. His concern was that when we did convert, that it be done a hundred percent legally, a hundred percent ethically, and with as much humanity and respect as possible. And this is what that committee was empowered to do. And at any cost, time, or whatever. He wanted it done right. He said it repeatedly.[12]

Unfortunately, the team's failure to also do its job in a one hundred percent medically and scientifically sound fashion, i.e., the failure to involve input from medical

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[8] EH 02/11/03, pp. 28-29. (emphasis supplied).
[9] Although Ms. Viator could not recall the name of the other DOC representative, in a separate hearing, Deputy Warden Richard Peabody explained that it was he: EH 09/17/03, p. 65. Deputy Warden Sheryl Ranatza later explained that Peabody was Deputy Warden for Security: EH 3/17/03, p. 28.
[10] Deposition of John Doe #1, 02/11/03, p. 103.
[11] EH 02/11/03, p. 29. (emphasis supplied).
[12] EH 02/11/03, p. 30.

doctors knowledgeable in anesthesia, led to critical deficiencies in the committee's research. Ms. Viator, Warden Whitley and Deputy Warden Peabody each confirmed that they had no medical training or background whatsoever.[13] The person on the committee with the most "medical expertise" was John Doe #1. While EMT John Doe #1 did have some background in medicine, the testimony revealed that he had no knowledge about a critical element of the research: the pharmacology of the three chemicals used in the Louisiana lethal injection process.

As will be developed more fully below, the State's own expert, Dr. Nicholas Goeders, professor and chair of the Department of Pharmacology, Toxicology, and Neuroscience at LSU Shreveport Health Sciences Center, confirmed that EMT John Doe #1's (and EMTs John Doe #3's and #4's) lack of knowledge of the pharmacology of sodium pentothal made him (them) *unqualified* to cope with potential complications in the administration of sodium pentothal that might arise during an execution by lethal injection.[14] Perhaps that is why John Doe #1 reported that his primary input on medical matters for the committee was to act as a messenger and pass on information from the Texas protocol to others who made decisions about the chemicals involved.[15]

So whom did the committee rely upon for developing the medical aspect of the procedure? Warden Whitley explained that he relied on Deputy Warden Peabody to collect and develop the medical aspects of this procedure.[16] Sadly, the entire DOC team researching lethal injection was relying for the medical component of its research on a

[13] EH 02/11/03, p. 50 (Viator), p. 71 (Whitley); EH 09/17/03, p. (Peabody).
[14] EH 02/22/06, p. 33.
[15] Deposition of John Doe #1, p. 22.
[16] EH 2/11/03, p. 72.

former social worker[17] who described his own background in medicine as "very limited."[18] Unbeknownst to the research committee, the flaws in the development of the Louisiana lethal injection process were beginning to accumulate.

D. Another Critical Deficiency: Cobbling a Protocol from Parts of Other States' Protocols Without Any Medical Rationale

During Petitioner's evidentiary hearing, the State objected on occasion to the examination of these committee members as to how other states implemented lethal injection. Yet this Court frequently overruled the State's relevancy objections because the relevancy was obvious: Louisiana had never carried out a lethal injection before, and all that the DOC had to work with were the examples of some of the other states' protocols.

Attorney Viator testified that she investigated the protocols of ten or twelve states.[19] In addition, on February 12, 2003, Deputy Warden Peabody produced for Petitioner and this Court a set of documents on his own research on lethal injection procedures in other states, which he had compiled in late 1990 and into 1991. This Court placed the contents of this document under seal[20] to protect against release of numerous matters therein that involved only security issues related to carrying out lethal injections. Deputy Warden Peabody's file documented protocols from fourteen states. Peabody bound these responses together, collecting 483 pages of information about the lethal injection processes carried out by Colorado, Idaho, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Texas, Utah, Washington, and

[17] EH 2/11/03, p. 72.
[18] EH 2/13/03, p. 40 (Peabody had been a respiratory therapist in the 1960s and a "basic" EMT in the mid 80s)
[19] EH 02/11/03, p. 28.
[20] Ex. 119.

Wyoming. Some or all of the DOC committee then conducted on-site visits to some of these states. Their goal was to figure out how to set up and implement an execution by lethal injection in Louisiana.

Close examination of this next stage of Louisiana's protocol development reveals that even after receiving hundreds of pages of documentation, the Louisiana DOC still did not know how to perform a lethal injection. Serious gaps in the committee's understanding of the process still remained, and on-site visits to other states were sought to close the knowledge gap.

Committee member Viator recalled the committee's visit to Texas:

> This warden had been in the Texas Department of Corrections 30, 40 years, worked his way up. He was quite a yeoman in the Department of Corrections. And basically the reason -- he told us as soon as we walked in that he apologized for putting us to so much trouble to come all the way to Texas, but that he didn't say things on the phone that he would rather say in person. He asked us if any of us had tape recorders, if any of us were wired. *And, basically, he pretty much told us in blunt terms that he didn't really have so much of a policy about it, as he did just sort of -- they did whatever worked at the time. He pretty much told us that he didn't have a strict policy.* And when we asked him -- which we were very concerned about the medical portion of it. Again, he surprised us by telling us that *the only thing that mattered was that the guy ended up dead and that he wasn't worried too much about the amount of medicine.* He had certainly used the same types of medicine, *but that he wasn't totally concerned about the amounts or what it may or may not do. They ended up dead, and that's all that he was worried about. The rest of our conversation with him tracked that same thing. He was not terribly concerned about policy, procedure, or who did what, when, where. Just so the right result happened.*[21]

Attorney Viator recalled further aspects of this meeting:

> Q. So is it fair to say when you refer to the Texas warden saying he was -- he had no strict policy, that he had no written policy?
>
> A. If he did, he surely didn't show it to us.

[21] EH 2/11/03, pp. 32-33.

Q. Did you request a copy of something like that to work with?

A. Oh, yes. We were such innocents. We didn't know. We definitely asked for it in writing. But he didn't have it.

Q. Was there a particular aspect of the lethal injection system that you were interested in when visiting Texas?

A. There were a couple. We already knew how to do a strap-down procedure because we figured it was going to be very much the same as with electrocution. That -- that wasn't going to change tremendously. Our death house wasn't going to change except for a table. *So the two things we were most concerned about was the table itself* because it is not just some ordinary kitchen table. *And the other thing, and more importantly, was the medications, how they are administered, in what amount, and by whom. This was really the information we traveled for.* And we could understand that no one wanted to tell us over the phone. It was -- you know, this is a very serious topic.[22]

In light of the fact that the committee already had ninety-seven (97) pages of details about *some aspects* of the Texas protocol sitting in Deputy Warden Peabody's file,[23] attorney Viator's comments here reflected the committee's need to discover *more* information, not made apparent by the initial release of documentation:

1) Not just *what* the lethal chemicals were, but also *how* the lethal chemicals were administered; and

2) Not just that fact that chemicals would be injected into the condemned inmate, but *who* would be performing these important jobs; and what would be the qualifications of the persons setting up the injection system and pushing the drugs.

Warden Whitley had similar concerns about the committee's visit to Texas. In a memo dated April 22, 1991, Warden Whitley provided the following report to DOC Deputy Secretary Larry Smith:

As you are aware Annette Viator, Chief Legal Counsel, Richard Peabody,

[22] EH 2/11/03, pp. 33-34. (emphasis supplied).
[23] Ex. 119, pp. 275-373, the section of Deputy Warden Peabody's documented research from Texas.

> Deputy Warden, [redacted name of EMT] and myself recently toured the Walls Unit at Huntsville, Texas to examine their execution room and procedures. While this trip was beneficial in helping us conceptualize the physical layout and equipment needed for lethal injection, I believe that we can develop a more professional execution procedure. The emphasis in Texas appeared to be on speed with little regard for possible complications such as separation of catheterization connections. Additionally, Texas uses a very primitive system for notifying the warden when injections are complete. The most crucial issue discussed with Warden Pursley was who actually performs the IV catheterization and pushes the drugs. He advised that the identification of these members are kept secret *but lead us to believe that members of his medical staff were involved.* When questioned as to whether or not there were any problems with using licensed personnel, he stated that the licensing boards were not contacted because he did not want to know their position on the matter.
>
> Therefore, while I believe we can develop a professional execution procedure, *the primary question remains who can be used to insert the catheter and push the drugs. Additionally, if it becomes necessary due to inability to find a suitable vein for catheterization; who by law can be utilized to perform a cut down procedure.*[24]

So, in April 1991, even after visiting Death Row in Texas in person, Warden Whitley also still had questions, before he could claim to have the answers of how to create a professional execution procedure:

1) He was not satisfied with the evasive Texan "don't ask, don't tell" response to the remaining queries:

   a. "Who is qualified to set up the I.V. lines and insert the catheters into the inmate's body";

   b. Who is qualified to inject the lethal drugs; and

   c. Who can intervene if routine venous access is impossible to accomplish?

A review of the 97 pages from Texas shows why those and other questions still remained. A single page in the Texas materials was devoted to describing three lethal chemicals and how they were packaged for the lethal injection:

[24] Ex. 119, pp. 2-3, and read in portion into record of EH 9/17/03, pp. 65-66.

Contents of the Syringes:

Syringe labelled #1:

Contents: Sodium pentothal, 2.0 Gm. (four 500 mgm. Vials dissolved in the least amount of diluent possible to attain complete, clear suspension.

Quantity: 1 syringe

Syringe labelled N/S:

Contents: Normal Saline, 10-15 cc.

Quantity: 2 syringes

Syringe labelled #2:

Contents: Pavulon, 50 mgm. per 50 cc. (five 10 cc ampules of 10 mgm each in each syringe)

Total Injection: 100 cc / 100 mgm., or 2 syringes/ One extra made up as stand-by.

Quantity: 3 syringes

Syringe labelled #3:

Contents: 50 milequiv. per 50 cc. (five 10 cc. Ampules of 10 milequiv. each in each syringe.)

Total injection: 100 cc / 100 milequiv., or two syringes. One extra made up as stand-by.

Quantity: 3 syringes[25]

Aside from that single page, the only other words in the Texas documentation that actually relate to the execution process or participants, consist of a thumbnail outline regarding the removal of the inmate from his cell, the starting of injection of the drugs and the verification of death:

VI. Execution

[25] Ex. 119, p. 320.

A. The inmate will be removed from his cell at 12:01 a.m. after the Director has given the Warden permission to proceed with the execution. The inmate will [sic] strapped to the gurney and catheters placed in each arm. A saline solution will begin flowing in each arm. When the saline solution has begun its flow, [the protocol here exclusively discusses the process of the official witnesses being brought into the execution observation room]. The warden will then ask the condemned inmate for his last statement. If the inmate has a statement, he is allowed to make it. The warden then states, "We are ready."

B. At the time, the designee(s) of the Director, shall begin the flow of substance(s) necessary to cause death. This individuals(s) [sic] shall be visibly separated from the execution chamber by a wall and locked door, and shall not be identified.

C. A TDC physician shall be summoned and ascertain that the inmate is dead …. [26]

Another page from the Texas documentation provides slightly different details about this same event:

> The inmate will be taken from the cell area into the Death House and secured to a hos[pital] gurney. A medically trained individual (not to be identified) shall insert an intra[venous] catheter into the condemned person's arm and cause a neutral saline solution to flow.[27]

Yet another version of this same sequence of events in Texas executions appears:

> The inmate will be secured to a hospital gurney and rolled from the cell area into Death House. There, a medically trained individual (not to be identified) shall insert an intravenous catheter into the condemned man's arm.
>
> * * *
>
> At this time, the designee(s) of the Director, shall begin the flow of a neutral solution, and, subsequently introduce by syringe sodium thiopental necessary to cause death. This individual(s) shall be visibly separated from the execution chamber by a wall and locked door, and shall not be identified.
>
> A physician shall pronounce the inmate dead ….[28]

[26] Ex. 119, p. 317.
[27] Ex. 119, p. 323.
[28] Ex. 119, p. 345.

Thus, three different sketches of the overall injection process are included in the Texas materials, without indicating which one of them, if any, was most current. In addition, one other memo relating to the injection of lethal chemicals appears, dated March 27, 1985:

> Dear Mr. Mosley [Assistant Director of Security]:
>
> > In reference to Steve Martin's letter of March 19th, concerning execution procedures, I feel that giving a condemn prisoner, who has been sedated, some type of lethal substance *poses medical concerns that are unanswerable as we have no information and no results of any research that has been done* showing the effect of a lethal substance being given to an inmate who is in a sedated state. It could possibly act as an antidote.
> >
> > I do feel that from an administrative standpoint the warden and his injection team should be given the liberty to administer some type of tranquilizer or sedative to any inmate who is in an extremely agitated state and poses a problem to us in the -- in attempting to insert the catheters into his veins due to him struggling.
>
> Sincerely, J.B. Pursley[29]

Texas Warden Pursley's memo is instructive on a couple of points. First, Pursley admits that even though Texas had been carrying out lethal injections for almost two and a half years (since December 7, 1982)[30] the TDC itself *still* had *unanswerable* questions about the science and medical effects of the chemicals involved, even to the point that Texas officials believed that sedation prior to lethal injection might act as an antidote to the anaesthetic effects of the lethal chemicals.

But secondly, and more tellingly, from the TDC's "administrative standpoint" the final decision on lethal chemicals was a decision based solely on *security* concerns, letting the *unanswerable medical questions* remain unanswered: lethal injections were ordered to continue full speed ahead. This memo certainly echoes the impression Pursley

[29] Ex. 119, p. 338. (emphasis added).
[30] Ex. 119, p. 282.

made on attorney Viator six years later, when she recalled that, to Pursley, *the only thing that mattered was that the guy ended up dead and that he wasn't worried too much about the amount of medicine.* This cavalier and unprofessional attitude disturbed attorney Viator and Warden Whitley. To add to the discomfort caused by Pursley, LSP Pharmacist Donald Courts reported that the Texas prison pharmacist had a similar blasé attitude when he asked him about the reports that Texas routinely injected 5 grams of sodium pentothal:

> … I need to ask you. Every other state I have spoken to is using 2 grams of sodium pentothal. Why are y'all using five?' And he [the Texas prison pharmacist] started laughing and said, 'Well, you see, when we did our very first execution, the only thing I had on hand was a 5-gram vial. And rather than do the paperwork on wasting 3 grams, we just gave all five. [31]

But where did this discomfort with Texas leave the Louisiana research committee? First, they were still clueless about many aspects of how to perform a lethal injection, partly from omissions, partly from contradictions in Texas' written protocol. Secondly, what they did learn about Texas's procedure disturbed them as being unprofessional.

Did Louisiana thus take steps to improve on the unsatisfactory and unprofessional system employed by Texas? Did Louisiana use science and medical expertise to improve beyond the rushed Texas process and give more "regard for possible complications?" What specific protocol eventually *was* established for Louisiana? What medical foundation did this final Louisiana protocol rely upon? For that matter, what medical foundation did the protocols from *any* of those fourteen other states rely upon?

[31] EH 3/18/03, pp. 58-59.

After ten full days of evidentiary hearing, the answers to these questions remain somewhat elusive. What is known and documented shows that Louisiana lethal injection system was no better than the mess in Texas, and that, in the end, the Louisiana plan could not pass constitutional muster if scrutinized closely.

E. The Other Detailed Information Sources That the Louisiana Research Team Could Have Incorporated into a Protocol.

The Louisiana research team had other states to rely on besides Texas. Collectively, the committee members recalled something about contacts with the states of Colorado,[32] Idaho,[33] Nevada,[34] Utah[35] and Wyoming.[36] One of the reasons that committee members may have recalled some of these other states is that documents from those states contain more detailed information on the written protocols in those states. But, as will be seen, Louisiana did not create a protocol incorporating this improved level of detail.

Colorado's eighty-five (85) pages of information, dated July 1, 1991, contain one section entitled "Injection Team Procedures." This seven-page section not only details how many persons will fill each specific job, but how many back-up personnel will be employed. Three pages are devoted to the "intravenous setup procedure," describing each component of the I.V. lines and where each piece of equipment should located in the setup.[37] Specific details remind the I.V. team that they may be required to use a second extension set of I.V. tubing "Travenol #2C0066 or equivalent" for the right arm because

[32] EH 02/11/03, p. 34 (Viator), p. 53 (Whitley); EH 09/17/03, p. 15 (Peabody) ; Colorado was also recalled by LSP Pharmacist Don Courts, EH 03/18/03, p. 60.
[33] EH 9/17/03, p. 15 (Peabody)
[34] EH 2/11/03, p. 53 (Whitley);
[35] EH 9/17/03, p. 15 (Peabody); Deposition of John Doe #1, 02/11/03, p. 21.
[36] Deposition of John Doe #1, 02/11/03, p. 21.
[37] Ex. 119, pp. 47-49.

it is farther away than the left arm from the I.V. injection site.[38] Four additional pages detail the "execution procedure,"[39] containing several cautionary warnings about potential complications and how to avoid them. Separate appendices include an "Injection Room Staff Execution Checklist," re-listing an outline to be checked off of the order of each specific step to be taken from initial set-up to completion, and a "Timekeeper Checklist" to document the exact time of each step in the injection process.

To be sure, some details are still lacking from the Colorado protocol. Although the numbers of staff assigned to various roles (two persons and one back-up assigned to the "catheter" post [I.V. set-up]; two persons and one back-up assigned to the "saline" post [also listed as "injection technicians"), no qualifications are identified for any of these six positions, although rehearsals and trainings are repeated throughout the protocol. Notably, the amount of one chemical is the different from what is written in the Texas protocol (and different still from what was admittedly practiced in Texas): sodium pentothal is listed as 2.5 grams.

Wyoming has sixty-six (66) pages of detailed instructions, with a cover letter to Deputy Warden Peabody noting, "Wyoming's injection procedure is cloned from the Texas injection procedure."[40] Wyoming's protocol contains additional details which are not included in Texas's documentation, e.g., requiring a medical doctor to "affix a device to monitor vital signs to the condemned inmate…."[41] In addition, Wyoming has written requirements for multiple rehearsal sessions, not included in the Texas protocol.[42] Wyoming also gives a detailed listing of the I.V. equipment set-up, as was done in

[38] Ex. 119, p. 48.
[39] Ex. 119, pp. 49-52.
[40] Ex. 119, p. 418.
[41] Ex. 119, p. 436.
[42] Ex. 119, 437.

Colorado's protocol, but which was absent from Texas' written procedure. Finally, Wyoming's protocol contains contradictory references to the amount of sodium pentothal to be used, once requiring "2 to 5 grams"[43] and at other times referring to "2.0 grams."[44]

Idaho had a fifty-five (55)-page protocol, also with more detail about the I.V. set-up and injection procedures than Texas, and specifically requiring a 5.0-gram amount of sodium pentothal.[45] Nevada never sent any documentation to Deputy Warden Peabody.

Louisiana did not follow the more detailed examples of Colorado, Wyoming or Idaho in writing its lethal injection protocol. In addition, Deputy Warden Peabody stated he could not give a reason why certain portions of other states' protocols were not adopted, and that in general:

> regarding the specific amounts of individual drugs, I have no knowledge as to what drug quantities were used, or why they may have differed from other states, no, I do not.[46]

Likewise, Peabody could not explain why Louisiana's protocol differed from other states in the following details:

- That Idaho used five grams of Sodium Pentothal compared with Louisiana's two grams.[47]

- That for two out of three chemicals in the Idaho protocol, three syringes each were used, (two for injection and one stand-by) as opposed to one syringe for injection and one for stand-by in the Louisiana method;[48]

- That even though Missouri officials promoted the use of a machine to inject the lethal chemicals, because there had "been a few mishaps" in states injecting drugs by hand, Louisiana opted to go with manual injections, with Peabody noting that Warden Whitley made the final

[43] Ex. 119, 443.
[44] Ex. 119, pp. 444, 450.
[45] Ex. 119, pp. 135-142.
[46] EH 9/17/03, p. 76.
[47] EH 9/17/03, pp. 75-76.
[48] EH 9/17/03, pp. 77-79.

decision on that matter, and Peabody knew of no medical basis for that decision.[49]

- That in New Jersey, the last meal to inmates had to be served at least eight hours before the execution, whereas in Louisiana, especially more recent executions, full meals were served just three hours before the time of execution;[50]

- That in New Jersey, registered nurses and certified intervenous therapists were required to attend the execution, whereas in Louisiana, no such requirement existed;[51]

- That the Oregon protocol, containing a provision for resuscitation of the inmate if a stay of execution is received after the injection has been started, is not included in the Louisiana protocol;[52]

- That in Texas, Valium is included in the protocol; at first, Deputy Warden Peabody claimed that they did not include Valium in Louisiana, but then saw from the Louisiana Execution Equipment and Supply Checklist that Louisiana *did* include Valium, and claimed that it was included because several states did the same;[53]

- That the Utah protocol called for a doctor on stand-by to do a cut down if necessary: there was great discrepancy in testimony as to whether a medical doctor was on stand-by, with Deputy Warden Peabody taking a very equivocal position that this doctor may have been one of the official doctor witnesses or may not have been,[54] contrasting with every official doctor witness denying he was present in a stand-by capacity[55] and Secretary of Corrections Richard Stalder taking the adamant position that there never was a doctor on stand-by and as far as he knew, never was any policy developed for a stand-by doctor to be present,[56] and not one version of the Louisiana protocols ever mentioned any stand-by doctor being present to do a cut down.

Deputy Warden Peabody could give no medical reason why Louisiana's protocol was decided differently than these other states' protocols. Peabody reported that persons

[49] EH 9/17/03, pp. 81-82.
[50] EH 9/17/03, p. 84.
[51] EH 9/17/03, pp. 85-86.
[52] EH 9/17/03, p. 98.
[53] EH 9/17/03, pp. 100-103. (But see, *supra*, where it is more fully explained that no medical basis existed for this decision in Texas or Louisiana, only a security justification.)
[54] EH 2/13/03, p. 100.
[55] Dr. Marvin Ettinger, EH 2/11/03, p. 11; Dr. Edmundo Gutierrez, EH 3/17/03, p. 38; Dr. Richard Heflin, EH 3/18/03, p. 24; Dr. Anthony Tarver, EH 3/18/03, pp. 97, 103-104.
[56] Deposition of Richard Stalder, pp. 44-45.

with "some kind of medical license" were involved in making the decision about the chemicals.[57] Although Deputy Warden Peabody claimed that one of the LSP medical directors was involved in the decision, LSP Pharmacist Donald Courts, not a medical doctor, was the person who later claimed to have made the decision solely with an emergency medical technician, also not a medical doctor: "*It wasn't a medical decision*. It was based on the other states had all used a similar dose."[58]

It bears noting that in this review of the history of the development of Louisiana's protocol, that the Louisiana committee never chronicled any *medical basis* for the three drug cocktail used in Texas or elsewhere, begging the question, where did the idea originate to use this system in *any* state? Research recently produced by Human Rights Watch in an April 2006 report, provides the explanation of the genesis of this system.[59] The first state to pass a lethal injection statute was Oklahoma. Representatives from the organization Human Rights Watch interviewed Dr. Jay Chapman, in 1977, an Oklahoma medical examiner, who first created the method. When asked why he chose an ultra-short-acting barbiturate in combination with a paralytic agent, he stated:

> I didn't do any research. I just knew from being placed under anesthesia myself, what we needed. I wanted to have at least two drugs in doses that would each kill the prisoner, to make sure that if one didn't kill him, the other would.[60]

When he was asked why he added a third drug to the two drugs specified in the Oklahoma statute, Dr. Chapman replied, "why not?"

He went on to explain that, even though the other chemicals, in the

[57] EH 9/17/03, p. 89.
[58] EH 3/18/03, p. 61. (Emphasis supplied.)
[59] Human Rights Watch, "So Long as They Die: Lethal Injections in the United States", April 2006, Volume 18, No. 1(G), p.
[60] *Id*, p. 15.

> dosages called for, would kill the prisoner, "You just wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug?" He is not sure why he picked potassium chloride. "I didn't do any research … it's just common knowledge. Doctors know potassium chloride is lethal. Why does it matter why I chose it?"[61]

Thus, no evidence exists that serious medical research was ever done in settling on the three-drug sequence, which was adopted in Texas and Louisiana to this day.

In the end, the Louisiana protocol ended up mimicking the Texas protocol in all its deficiencies and gaps in written directions. Warden Whitley admitted that after all was said and done, "I would say it matches the Texas system probably more than … the others."[62]

Louisiana DOC finally produced Regulation No. 10-25 on February 20, 1991,[63] which was slightly modified on January 20, 1992 and redesignated as Regulation No. C-03-001[64] (updated again on September 19, 1997[65] and December 2, 1997).[66] In addition to this short outline, Louisiana also had a four-page "Lethal Injection Equipment/Supplies Inventory Checklist"[67] of medical equipment, which included a list of the three lethal chemicals and their quantities. The quantity of sodium pentothal was twice that as listed in Texas[68] and Louisiana had no listing for normal saline injections. LSP Pharmacist Donald Courts verified that the quantities of pancuronium bromide and potassium chloride listed therein were totally inaccurate, attributing this discrepancy to a "typo", while noting that he had never seen such a checklist before.[69] Collectively reviewing all

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[61] *Id*.
[62] EH 2/11/03, p. 67.
[63] Ex. 101, p. 13.
[64] Ex. 101, pp. 10-13.
[65] Ex. 101, pp. 15-18.
[66] Ex. 101, p. 14.
[67] Ex. 101, pp. 4-7.
[68] Louisiana: 8 times 500 mg., or 4.0 grams total (Ex. 101, p. 6) versus Texas: 2.0 grams.
[69] EH 3/18/03, pp. 76-82.

versions of the four-page outline and the admittedly inaccurate checklist, the Louisiana DOC's documentation was still as woefully deficient in detail as the Texas protocol it mimicked.

In addition to these officially designated "Departmental Regulations," Petitioner received a variety of other documents that also purported to represent the written manifestation of the Louisiana lethal injection procedure existing up to and through May 10 2002, when the seventh and most recent execution was carried out in Louisiana. Examples of these documents include a one-page undated document entitled "Synopsis of Process," which includes detailed chronological instructions for the assignments of each of the six strap-down team members, while making scant reference to the actual I.V. team and executioner's roles:

> the warden …. signals the I.V. technician(s) to enter. An I.V. line is inserted into each arm utilizing Normal Saline. These lines run through the wall of the alcove to the I.V. set-up. The inmate is then connected to a cardiac monitor and a pulse oximeter by lead run through the hole in the alcove wall. The I.V. technician(s) then exit the execution room. The warden then opens the curtain. The warden then signals the executioner to proceed with the execution process. The executioner signals the warden when the process has been completed.[70]

Another undated one-page document entitled "Procedure for Lethal Injection" and twice noted as "Confidential" in the sub-section entitled "5:00 pm on day of Lethal Injection" gives a thumbnail sketch of activities:

1. Go to Death House and set up all equipment
2. Insure ambulances are on standby at Training Academy.
3. Standby on order from Warden to initiate procedure
4. Monitor inmate during procedure[71]

[70] Ex. 101, p. 332.
[71] Ex. 101, p. 1.

These undated "non-departmental regulation" versions of documentation on lethal injection referenced differing amounts of the chemicals to be used,[72] or else did not bother to quantify the chemicals at all.[73]

Thus, anyone looking at this documentation would harbor nagging questions as to what methodology Louisiana had eventually decided upon to execute by lethal injection. Petitioner, for one, complained about the deficiencies in Louisiana's protocol in his original petition in this matter filed on July 8, 1995, specifically asking for an evidentiary hearing to answer eleven pivotal questions not addressed by the DOC regulations.[74]

What Petitioner did not realize is that in April 1991, the DOC team researching how to create the Louisiana protocol had had the same questions. Serious questions thus existed in 1991, in 1995 and persist into 2006 because the Louisiana DOC's written protocol continues to be deficient. More troubling, the method that participants reported in this hearing to actually implement lethal injection *does not match* the method that these documents describe, and taken together or separately, the written and orally described methods do not protect the condemned inmate against the serious foreseeable risk of torture.

F. 1993-2002: Seven Louisiana Executions Relying on an Oral Protocol That Is Impossible To Verify And Quantify.

Oral history has its place in society for passing knowledge and culture from one generation to the next, but it is not an efficient or appropriate vehicle for providing execution teams with precise standards and scientific procedures to be followed in an activity that is fashioned after the medical specialty of anesthesiology. Testimony shows

[72] Ex. 101, pp. 1.
[73] Ex. 101, pp. 8, 332, 614, 869.
[74] Ex. 3, p. 193.

that the warden in charge at Angola when the lethal injection process was created never talked with his successor about the mechanics of lethal injection[75], and that he allowed Deputy Warden Peabody (with Peabody's self-described "very limited" medical background) to handle talking with "medical people" in other states.[76] The DOC never had any detailed documentation of the process it used for the past seven executions. Instead, the first more detailed description of the alleged Louisiana process appeared in the form of an undated, unsigned document on December 11, 2002, months after the seventh and most recent execution in Louisiana.

John Doe #1 admitted that he never saw a written protocol and never followed a written protocol in his key role as a member of the I.V. Team in implementing the first four lethal injections in Louisiana.[77] Similarly, John Doe #2, another I.V. technician, who participated in all seven lethal injections, learned how to do what he did and implemented it purely on oral communication.[78] John Doe #4, an I.V. technician who participated in the sixth and seventh executions, likewise admitted that he never prepared or referred to any written protocol or instructions.[79]

The syringe-pushing executioner, the other key actor in the lethal injection process, one who had absolutely no background in medicine whatsoever,[80]also never saw any written protocol. John Doe #3, who performed the executioner role in the 2000 and 2002 executions in Louisiana,[81] confirmed that he was unaware of any written standards

[75] EH 2/11/03, pp. 72-73 (Whitley: never talked with Cain about lethal injection process); EH 2/12/03 p. 23 (Cain: Whitley talked about not showing own feelings about executions).
[76] EH 2/11/03, p. 72.
[77] Deposition of John Doe #1, 2/11/03, at 87.
[78] Deposition of John Doe #2, 6/17/03, at 121.
[79] Deposition of John Doe #4, 6/17/03, at 65.
[80] Deposition of John Doe #3, 2/11/03, at 9.
[81] Deposition of John Doe #3, 2/11/03, at 9.

or instructions.[82] John Doe #6, the syringe-pushing executioner in executions #2-5, similarly lacked any background in medicine,[83] and likewise never saw any written protocol detailing syringe-pushing duties.[84]

In simple contrast, the State's expert in toxicology and pharmacology, Dr. Goeders, testified that if he intended to experiment with or later euthanize any of his laboratory rats, he could not take the first step towards such a project without committing the entire process to paper in a detailed, written "animal care and use" protocol, which would first be scrutinized carefully by LSU academic committees under exacting and detailed national standards intended to insure that those rats were to be treated in a humane manner.[85] Laboratory rats at LSU awaiting euthanasia rate a more "humane" standard of care than Mr. Code does in the lethal injection awaiting him at LSP.

The State can be anticipated to argue that this admitted deficiency was rectified by the eventual production of a written Louisiana lethal injection protocol, as seen at Exhibit 101, pp. 340-344. First, Petitioner will explain how this protocol came into being, and then explain why even this document, which for the first time provides details of certain technical steps in the Louisiana lethal injection process, fails to remedy the problem.

The record developed establishes that this written protocol never existed during all seven of the lethal injection executions carried out from March 5 1993 to May 10 2002. When asked on September 6, 2002 to search for a written lethal injection protocol,

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[82] Deposition of John Doe #3, 2/11/03, at 52.
[83] Deposition of John Doe #6, 6/24/04, at 7.
[84] Deposition of John Doe #6, 6/24/04, at 38-40 (John Doe #6 did remember some written policy about DOC debriefings about "traumatic events" but then noted that execution duty was not considered a "traumatic event" for DOC employees, although John Doe #6 felt otherwise).
[85] EH 2/21/06, pp. 11, 40-41.

LSP Legal Director Dora Rabalais contacted several prison personnel, including the EMS Director Steve Moreau. Colonel Moreau told Ms. Rabalais that to his knowledge, there was no written procedure defining that protocol.[86] Ms. Rabalais confirms that this newly minted protocol was created between December 9 and 11, 2002, purely as a response to the public records litigation which undersigned counsel brought against the DOC:

> A. I know that we went back after we had the public records hearing in Baton Rouge and produced additional records to you at that time. I think at the second hearing that we had before Judge Janice Clark in Baton Rouge, by that time Warden Ranatza had -- they had compiled a protocol to give to you. And it was not in existence at the time that I did the research. But they compiled it based on their knowledge of what -- you know, what happens at an execution. And I think that was given to you sometime in December at the second hearing.
>
> Q. If I were to tell you that the two dates for the appearances in December were on December the 9th and December the 11th of 2002, in the 19th Judicial District Court in Baton Rouge, would have any reason to disagree?
>
> A. No. I know that those dates are correct.[87]

Ms. Rabalais confirmed that, to her knowledge, this document was created because the lethal injection procedure had never been reduced to writing before: specifically memorializing for the first time "all things that everybody knew what they had to do and when it had to be done."[88] Again, LSU lab rats got better treatment through documented protocols since 1985[89] than the seven Louisiana inmates who were executed from March 1993 to May 2002.

But in fact, did this five-page, undated, unsigned document lacking any DOC letterhead or insignia of who authored it or its effective date, really resolve Petitioner's

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[86] EH 2/10/03, at 15, 18-19.
[87] EH 2/10/03, at 22.
[88] EH 2/10/03, at 25.
[89] EH 2/21/06, at 11.

constitutional challenge? In one word: no. More than a decade's worth of nagging questions still remained unanswered, if one compares this new protocol with the prior four-page protocol and the inaccurate "Lethal Injection Equipment / Supplies Inventory Checklist. If this document actually reported "all things that everybody knew what they had to do and when it had to be done," then the following questions must be raised:

1) How many members of the I.V. Team are present in the secret injection chamber?
2) What are the qualifications of the members of the I.V. Team?
3) How many executioners are present in the secret injection chamber?
4) How is the Valium injection[90] used?
5) Who is qualified to use the Cut-Down Set and Scalpels[91]?
6) Why is there no kit to perform a percutaneous procedure if venous access were a problem?
7) What procedure is to occur if the I.V. Team cannot set up two separate I.V. administration sets?
8) What are the six 35 cc syringes, the four 12 cc syringes, and the four 6 cc syringes[92] used for?
9) Why are there discrepancies between the total amounts of pancuronium bromide listed in the Supplies Checklist (150 mg.) and the new protocol (80 mg.)?
10) Why are there discrepancies between the total amounts of potassium chloride listed in the Supplies Checklist (150 meq.) and the new protocol (240 meq.)?

More troubling, the new December 2002 protocol contradicts the actual process that had been implemented inside the secret injection room, according to the deposition testimony of several participants who reported what they actually did at multiple lethal injection executions. For example, John Doe #5 is neither a member of the I.V. Team or a syringe-pushing executioner. Nonetheless, John Doe #5 admitted in his deposition that he had been present in the secret injection chamber at six out of the seven lethal injection

[90] Ex. 101, p. 6.
[91] Ex. 101, p. 4.
[92] Ex. 101, p. 6.

executions.[93] Instead of a syringe-pushing executioner,[94] or an I.V. Team member, John Doe #5 described his role as more of an overall supervisor who was in charge of insuring that all the procedures, personnel and supplies were in place to carry out the execution.[95] John Doe #5's presence at almost every execution is a significant omission from any of the written protocols, including the latest from 2002, as no mention is made anywhere of anyone in the secret injection chamber, except members of the I.V. Team and a single syringe-pushing executioner.

The parade of undisclosed participants did not end with John Doe #5. Besides himself, John Doe #5 admitted to the presence of other persons in the secret injection chamber who are not mentioned anywhere in the new 2002 protocol or any previous protocol.[96] John Doe #5 reported that not one, but two, persons usually had performed the role of the syringe-pushing executioner.[97] The 2002 protocol never described this. Six (6) times the latest 2002 protocol refers to the role of the executioner in the singular number, never in the plural.[98] In the various versions of DOC Department Regulation No. C-03-100 and 10-25, the executioner is always referred to in the singular, never in the plural, and therein that person is described simply as "the person designated by the warden."[99]

John Doe #5 elaborated in his description of the purpose for having multiple syringe-pushing executioners, all the while remaining evasive about defining the exact roles that each of the two executioners played:

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[93] Deposition of John Doe #5, p. 20.
[94] Deposition of John Doe #5, p. 28.
[95] Deposition of John Doe #5, p. 4.
[96] Deposition of John Doe #5, p. 9.
[97] Deposition of John Doe #5, pp. 10, 11.
[98] Ex. 101, pp. 340 (twice), p. 342 (twice), p. 343 (twice).
[99] Ex. 101, pp. 13, 18, 23.

Q: Okay. So when there are two people doing something in the same time, it is sort of a team approach to doing the different parts of the task that need to be done to get the syringes pushed; is that an accurate statement?

A: It would be accurate.

Q: Okay.

A: The decision as to who did which roles and which actual parts of the procedure, are how it was done in that regard, was left to those individuals.

Q: Okay. So that was something that those individuals knew ahead of time, that they were -- they had some flexibility perhaps?

A Yes. They knew --

Q I mean, it wasn't necessarily a rigidly predetermined role --

A No.

Q -- when they walked into that room.

A No, by design, it was not.[100]

John Doe #5 then explained that the reasoning behind this vagueness in the actual custom and practice of the syringe-pushing executioner's role was intentional, not accidental:

Q: Okay. When you say by design what was -- you're talking about a design of the way that it's your understanding that the prison wanted to deal with how to handle an execution?

A: Yes.

Q: Okay. And so would you call that a formal or informal policy to how they were going to deal with it?

A: We chose not to write out specific duties to be carried out by certain individuals at certain times because we wanted the flexibility to not have to identify which individual did what with regard to who actually pushed what drugs.

[100] Deposition of John Doe #5, pp. 15-16.

Q: Okay.

A: And if I may do a little -- can I kind of go off track here a little bit?

Q: Are you asking to go off the record?

A: No.

Q: Okay.

A: The big selling point of the machine that was mentioned in some of the things y'all may have talked about at some point in the past, was to protect the identity of who actually administered the drugs.

Q: Right.

A: Two people pushed buttons at the same time. Neither individual knows which button actually activated the mechanism.

Q: Okay.

A: Therefore, you protect the identity of the individual who, quote, administered the lethal doses.

Q: All right.

A: The same theory is exactly what I'm trying to explain to you.

Q: Okay.

A: Is that we did not spell it out. We did know [sic] say Person A, does this, Person B does that during the procedure, for that very reason. Whether or not one did it all or whether they helped each other or whether they took turns, that was up to them.

Q: Okay. I understand. I believe I understand, if you don't mind I'm going to try to recap what you said?

A: Sure.

Q: It was a -- was it -- is it accurate to say that there was a conscience [sic] desire to try to create a system that avoided seeming that one person had all of the burden of doing that job of a syringe pusher?

A: Correct.

Q: And this was in recognition of the severity of the job, the difficulty?

A: I don't know the severity, the nature of the job, certainly.

Q: The nature of the job, let's leave it at that. But the nature of the job was something that was, as you say, with -- to take the example of states that use a lethal injection machine, where they have multiple persons, maybe two, maybe even three that split, so that it's not all considered that one person is the one who is -- can be thought to be responsible for the actual act of doing that final syringe pushing?

A: Correct.

Q: And so it's your testimony that in Louisiana that it's crafted in such a way, at least in what you've seen, there are two folks there, two persons in this room that jointly approach the issue of how syringe pushing is accomplished?

A: Correct.

Q: And that when you -- when that time comes for each execution, the different ones '93, '95, 6, 9, 2000, and 2002 these executions each had an opportunity where there was probably more than one person that might have shared, and we don't know what anyone did is what we're saying?

A: Correct.

Q: And whether you witnessed it personally or not, do you have any reason to believe that the times you weren't there that there was anything different that went -- that happened?

A: As far as I know, I was only there -- not there for one execution, and all the others were handled in that manner that I described.[101]

The "manner" that John Doe #5 describes is not the "manner" that is described anywhere in any protocol, let alone the latest version in 2002. Several aspects of John Doe #5's report merit discussion: 1) the lack of precision and definition of the roles of the

[101] Deposition of John Doe #5, pp. 16-20.

persons acting as syringe-pushers, 2) the reason for the vagueness and 3) the "nature" of the job.

G. The Lack of Precision And Definition Of The Roles Of The Persons Acting As Syringe-Pushers

Mr. Code will face two basic groups of personnel in the final stages of his execution: the strap-down team, who escort him to the execution gurney and secure him there, and the members of the execution team: the persons who set up the I.V. lines, which Mr. Code will be able to see (but the official witnesses are blocked from seeing by a curtain drawn over the view) and the syringe-pushing executioner, who will be concealed from both him and the official witnesses.

A greater contrast can hardly be imagined between the written specificity of the roles of each of the members of the strap-down team versus the amorphous, unwritten description of the multiple persons filling the role of executioner. Once again, the precise focus on familiar security-related functions outweighs the focus and emphasis devoted to the unfamiliar medical end of the procedure.

In contrast to Peabody's opaque description of two persons who have no medical experience deciding privately amongst themselves who will handle which syringe to kill the condemned inmate, the image of the written protocol for the security team cannot be more tight and regimented:

> **After 6:00 P.M. but prior to 11:59 P. M.** – The strap down team consists of six (6) security officers and two alternates. These officers enter the tier to prepare for the execution. The inmate is dressed in the underwear, pants, a t-shirt, and a pair of shower shoes.
> The Inmate will be restrained.
>
> **Officer #2** – will stand at the doorway of the cellblock area to await the signal from the warden to bring the inmate from the tier (The warden will

stand in the death house doorway.). Officer #2 will relay the signal to Officer #1.

Officers #1, 2, 3, 4 and 5 – will escort the inmate to the execution chamber. Officer #1 walks behind the inmate. Officer #2 walks in front of the inmate. Officer #3 holds the inmate's right arm; Officer #4 holds the inmate's left arm. Officer #5 and 6 follow behind Officer #1.

UPON ENTERING THE EXECUTION CHAMBER:

The inmate will be permitted to make a last verbal statement if he so desires. This statement will be made to the witnesses via the microphone equipment provided.

Officers #3 and #4 – assist the inmate on to the lethal injection table and remove his handcuffs and waist belt. Officer #3 secures his right arm to the right arm extension of the table while Officer #4 secures his left arm to the left arm extension of the table.

Officer #1 and #2 – remove the leg shakes [sic] and secure the inmate's legs to the table.

Officer #5 – restrains the inmate's upper body to the table with shoulder straps.

ONCE RESTRAINED:

Officer #6 – checks all restraints prior to the strap down team's exit from the execution chamber.

Once the strap down team has exited the execution chamber, the warden closes the curtain over the window to the witness room and signals the I.V. Technicians to enter.[102]

The highly detailed description of personnel and their tasks on the night of an execution proves that the DOC can be very precise when it wants to: when it deals with its area of expertise – security matters. Interestingly, this security strap-down function is wide-open and visible to the public. It is only when the pseudo-medical phase of the task begins that the first barrier of concealment falls before the official witnesses. The official

[102] Ex. 101, pp. 330-331.

witnesses cannot see the I.V. Team at work setting up I.V. connections on the inmate because the Warden pulls a curtain to block their view. The official witnesses are further blocked from seeing any of the actions of the syringe-pushing executioner, because that person is always hidden in the closed secret injection room. Publicly, what they are allowed to see is a crisp and highly regimented strap-down process. The State would like the public and the Petitioner to believe that behind the scenes, the pseudo-medical end of the process is just as crisp and highly regimented and just as professional. But the written protocols belie any picture of organization, and the reports from the persons hidden from view do not even corroborate the level of organization that is described in the written protocol document.

H. The Non-Medical Reason For the Vagueness

John Doe #5 explained that the reason for the prison's reticence to be specific as to what acts each syringe-pushing executioner performed was to have "the flexibility to not have to identify which individual did what with regard to who actually pushed what drugs." John Doe #5 further analogized the descriptive vagueness as a human counterpart to the lethal injection machines used by other states, first claiming that the machine's "big selling point" "was to protect the identity of who actually administered the drugs", but then admitting that the purpose of two people pushing a machine button at the same time meant that neither individual knew which button actually activated the mechanism. This artifice to diffuse or cloud a sense of immediate responsibility for the person most closely involved in the killing of the inmate, of course, may technically work well on a lethal injection machine or with a firing squad, where all members but one get a

blank in their rifle so that no one knows whose trigger-pulling resulted in the firing of an actual bullet to dispatch the condemned.

But who among us would be willing to undergo a genuine medical procedure requiring general anesthesia under similar circumstances? Who among us would be willing to believe that, under that scenario, with nary a doctor present, let alone an anesthesiologist, the chances of avoiding a premature return to consciousness would still remain acceptable and safe? As it is, even in the standard medical arena, with fully credentialed and trained anesthesiologists present, the incidence of awareness under anesthesia is more common than the public at large or the DOC in particular are apparently aware. A 2004 study from Emory University School of Medicine estimated that 26,000 cases of anesthesia awareness occur in the United States every year.[103]

The totally random process used by the practitioners of lethal injection in Louisiana simply fails to provide the constitutionally sufficient guarantee that Mr. Code will not regain consciousness and die a torturous death of being suffocated by pancuronium bromide, then burned alive chemically by potassium chloride. The mimicking of the medical procedure of truly inducing and maintaining anesthesia falls well short of reality because the DOC wants to shield the executioners from having to feel too bad about what they are doing, and to protect their confidentiality.

I. The "Nature" Of The Job: STRESS

John Doe #5 seemed to object to undersigned counsel's choice of the phrase "severity of the job" as the reason for the practice of having multiple executioners and random assignments of activities. Likewise, the State objected from time to time in

[103] Sebel PS; Bowdle TA; Ghoneim MM; Rampil IJ; Padilla RE; Gan TJ; Domino KB, The incidence of awareness during anesthesia: a multicenter United States study. Anesthesia and Analgesia, 2004; 99(3):833-9

depositions about Petitioner exploring the concept of stress and what relevance it had in the lethal injection process. But executions are stressful for all participants. LSP Warden Burl Cain concedes, "The issue is coping, how we cope with it."[104] Warden Cain explained some of his feelings from 1995, the first time he presided over an execution: he felt terrible that he chose to signal the start of the lethal injection by making a "thumbs down" sign. At length, Warden Cain described how he was later bothered by that decision and by other aspects of the execution of inmate Thomas Ward, thinking about how he had probably just sent his soul to hell, and chiding himself not saying a word to him. [105]

Warden Cain was not the only person to experience stress from participating in the executions of LSP inmates. John Doe #6, a syringe-pushing executioner, confirmed performing that function in four executions.[106] In a news article dated May 14, 2002, the Lake Charles American Press reported comments from an interview with this same person, in an article entitled, "Executioner steps away after four lethal injections." The article recounts a conversation between undergraduate psychology researcher Michael Osofsky and this executioner. The article relates the following about this executioner:

> The week before his last assignment, *he had trouble sleeping. His hands shook violently*. He recalled the EKG monitor above his head, noticing that the heart rate changed if he pushed the syringe faster or slower.[107]

In his deposition, he similarly confirmed this nervousness, as he recalled who else might have been present in the secret injection room:

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[104] Carey, Benedict, "When Death Is on the Docket, the Moral Compass Wavers", New York Times, February 7, 2006.
[105] EH 2/12/03, pp. 41-43.
[106] Deposition of John Doe #6, pp. 5-7.
[107] Lake Charles American Press, "Executioner steps away after four lethal injections", May 14, 2002, p.

> I don't think Warden Cane [sic] ever came in. Secretary Stalder did but I don't think Warden Cane [sic] ever came into the room that I know of. He might have, he could have. *I was extremely nervous*.
>
> * * *

Q: You mentioned earlier you were kind of nervous. Can you tell us about that?

A: *It's nervous experience*. *That sums it up.* [108]

John Doe #6 explained more explicitly that progressively (over the four executions) he experienced the following personal problems in the days immediately preceding execution dates: 1) difficulty sleeping, 2) difficulty concentrating, 3) his hands would shake (specifically beginning with the second, and progressing with the third and fourth executions).[109]

Nervousness would also be an appropriate adjective to describe John Doe #6's feeling when he finally decided to discontinue his role as executioner:

> There is a lot of reprocutions [sic] if something was to go wrong, you know. I asked them and they said okay, they let me quit. I thought it would be like getting out of the mob.[110]

Although John Doe #6 claimed that he was just joking about the "mob" comment, it must be remembered that until he finally did ask for permission to quit the executioner's job, he was very worried about asking, and he admitted that he had a progressively more traumatic experience each time. John Doe #6 remembered reading a prison directive from DOC Secretary Stalder about "traumatic events" and stress debriefings for corrections staff which were made available after a traumatic event. Notably, performing executions was not considered an eligible activity for such staff

[108] Deposition of John Doe #6, pp. 20-22. (emphasis supplied).
[109] Deposition of John Doe #6, pp. 61-62.
[110] Deposition of John Doe #6, p. 55.

stress debriefing, although John Doe #6 wished aloud that they had been eligible events, as far as he was personally concerned.[111]

John Doe #6's memory of these events does not match Warden Cain's recollection exactly:

> I am aware that one person asked me to not do it anymore. But the reason he gave me was because he felt like his confidentiality had been breached. He didn't want his mother to know, and that he didn't want to do it anymore. But also, then, we conveyed to this person too that if he needed to talk or have any psychiatric help that it was available. Here is how, when, and where. Whether or not he actually did that, I don't know.[112]

Both descriptions seem to agree that irrespective of whether John Doe #6 eventually sought mental health assistance after quitting as executioner, he did not take advantage of any such assistance during the time he performed his job as executioner to four inmates under increasing stress.

In sum, supervisor John Doe #5's description of the activities in the secret injection room paint a picture of vague and imprecise definitions of the roles of syringe-pushers, a picture that is only made worse when seen in light of the stresses on these persons, whose medical "expertise" consisted of knowledge of First Aid and CPR for John Doe #6[113] and vaccinating animals and being an EMT a quarter century earlier for John Doe #3.[114]

Proof that the 2002 protocol does not accurately describe the activities and personnel inside of the secret injection room came from yet another person without any medical knowledge[115] who also was present in all seven lethal injection executions: DOC

[111] Deposition of John Doe #6, pp. 39-40.
[112] EH 2/12/03, p. 118.
[113] Deposition of John Doe #6, p. 6.
[114] Deposition of John Doe #3, p. 12.
[115] Deposition of Richard Stalder, p. 33.

Secretary Richard Stalder.[116] Although Secretary Stalder was deposed, he elected not to assume a confidential identity in that deposition.[117] Stalder described his role as being an on-site last minute liaison with the Governor's Office and the courts,[118] not any kind of supervisor.[119] Stalder added even more discrepancy about personnel by reporting that up to four I.V. Team members might be present at an execution, while claiming that confidentiality concerns prevented him from explaining why the number varied.[120] He also confirmed that there might be a back-up syringe-pushing executioner.[121]

People are required in many walks of life to work under stressful situations, and that fact alone does not prove up Mr. Code's claim of constitutional error in the Louisiana lethal injection process. But stressed and medically naïve syringe-pushers who are required to make up their own role in the process each time they enter the secret injection room, backed up by a supervisor who has no more medical knowledge than them, and reinforced by a couple of I.V. Team members who know little or nothing accurate about the pharmacology of the chemicals being injected, builds the picture that no safeguards are in place to protect Mr. Code from the foreseeable risk of lingering torture.

Reliance in the process is not bolstered by the fact that both syringe-pushers and the least experienced member of the I.V. Team reported that they never debriefed after an execution to determine how things went and what could be done better next time. [122]

Reliance in the process is further undermined by discrepancies between the reports of execution personnel with each other and the 2002 protocol on a fairly basic

[116] Deposition of Richard Stalder, pp. 19-20.
[117] Deposition of Richard Stalder, p. 5.
[118] Deposition of Richard Stalder, p. 22.
[119] Deposition of Richard Stalder, p. 34.
[120] Deposition of Richard Stalder, p. 28.
[121] Deposition of Richard Stalder, pp. 29-30.
[122] Depositions of John Does #3, p. 51, #4, p. 86, #6, p. 52.

point: how many syringes are present in the secret injection chamber and how many of these syringes are "drawn up" or completely prepared for immediate use. The 2002 protocol lists two sets of three syringes apiece with one set being a "backup set of drugs and syringes … a precautionary measure to be prepared and used only in the event one of the prepared syringes are dropped or otherwise becomes inoperative during the injection procedure." As the protocol's language is equivocal as to whether the two sets of syringes are fully prepared, verification from the actual participants is called for. EMTs John Does #1, #2 and #4 remember two sets of syringes with only one set drawn up.[123] But syringe pushers John Does #3 and #6 remember seeing only one set of three syringes with no back up set visible.[124] LSP Pharmacist Donald Courts verified that only the first set of three syringes is ever prepared, never the second set.[125]

Whether the back up set of syringes was empty but available to be filled, or not in sight at all because locked up in a padlocked carrying case,[126] the method was deficient medically. As LSP Pharmacist Donald Courts noted, it takes *five minutes* to mix up a syringe of the first chemical, sodium pentothal, as four separate vials containing the powdered form of 500 milligrams of the chemical must each be mixed separately with sterile water, and then each newly created solution must separately be drawn up into the single syringe.[127] If for any reason, the I.V. team were to realize that an inmate had required extra sodium pentothal to maintain the anesthetic effect, five extra minutes would have to pass before they would become capable of providing the additional necessary anesthetic to the syringe-pusher to inject and re-sedate the inmate.

[123] Depositions of John Does #1, p. 82, #2, p. 32, #4, p. 26.
[124] Depositions of John Does #3, p. 32, #6, p. 26.
[125] EH 3/18/03, p. 68.
[126] Deposition of John Doe #4, p. 26.
[127] EH 3/18/03, p. 73.

Having a protocol, which has built into it the risk of five minutes of an inmate's conscious exposure to the other painful chemicals, would certainly qualify as a risk of lingering pain and suffering in violation of the federal Eighth Amendment and the state Article 1, Section 20's prohibitions. In *Fierro v. Gomez*, 77 F.3d at 308, the Ninth Circuit, stating that "Campbell had suggested that asphyxiation would be an impermissibly cruel method of execution[,]" held that execution by lethal gas was cruel and unusual punishment because the condemned person would be conscious for as briefly as one to as many as several minutes while he suffocated. Under this standard, the failure to prepare a second set of anesthetic chemical when using the paralytic pancuronium bromide in the execution process would violate Mr. Code's state and federal constitutional rights to be free from foreseeable, lingering pain.

J. No Medical Basis for the Louisiana Protocol

Besides deficiencies in the staffing and equipment used in the Louisiana lethal injection process, the evidentiary hearing made clear that there was no medical basis for what had been finally decided upon as the lethal triple cocktail of 2,000 milligrams of sodium pentothal, 40 milligrams of pancuronium bromide and 120 millequivalents of potassium chloride. John Doe #1 and LSP Pharmacy Director Donald Courts each confirmed that the chemicals were decided upon by a discussion with each other. Courts verified that their decision to use 2,000 milligrams of sodium pentothal was not a decision based on any medical principles:

> *It wasn't a medical decision*. It was based on the other states had all used a similar dose. And it worked well, and they had not had any problems, and the objective was accomplished.[128]

[128] EH 3/18/03, p. 61. (emphasis supplied.)

I.V. Team leader John Doe #1 admitted that he had a single meeting with Donald Courts and the prison medical director because they needed to look into how to procure these drugs, because LSP did not normally carry them in the Pharmacy.[129] Thus, not only did the I.V. Team members have no experience using these chemicals, the Pharmacy Director also had no experience with them either. The decision to have a protocol with the above-listed chemicals in the amounts listed above was made by persons who never had any regular experience with these chemicals in their everyday work. The world of the corrections planned to institute a process that mimicked a medical procedure, without basing their plan upon the precision of any scientific or medical standards. Secretary Stalder summed it up, when he commented:

> And I'm sure Warden Cain and I have commented to the nature that it is *almost* a sterile medical process, and that it *resembles* very much putting someone to sleep for an operation, and that, you know, just that.[130]

But with Secretary of Corrections Stalder having no medical background,[131] his sense that his role in the lethal injection process, "to try to anticipate and be able to work with the institution to resolve issues like [the need for a cutdown to get venous access when regular I.V. access fails] that may come up on a moment's notice" might have been loaded with good intentions, but in practice, he contributed nothing of medical value to resolve the cutdown issue.

A cutdown is a surgical procedure where a scalpel is used to open the skin, and then the subcutaneous tissue is opened, and a doctor basically progressively cuts into the person to expose a vein.[132] Although it is not mentioned in the Louisiana lethal injection

[129] Deposition of John Doe #1, p. 22.
[130] Deposition of Secretary Stalder, p. 53. (emphasis).
[131] Deposition of Secretary Stalder, p. 44.
[132] EH 2/12/03, p. 158.

protocol, a cutdown kit is one of the supplies listed in the accompanying Louisiana Supply Checklist. It would be used to get access to Mr. Code's veins, if the I.V. Team otherwise had difficulty accessing his veins.

Regarding the cutdown issue, every I.V. Team member correctly testified that they were unqualified to perform this function. Only a medical doctor could perform a cutdown. Yet in 1999, when preparations for the execution of Dobie Williams hit a snag because the I.V. Team could not access Mr. William's arthritic veins in both arms, the problem did arise "at a moment's notice." The I.V. Team eventually did find a peripheral vein connection in the right side of his neck, bypassing the need for a doctor's intervention.

The execution of Dobie Williams was the first attended by LSP Medical Director Richard Tarver as an official witness,[133] and Dr. Tarver remembered Secretary Stalder and Warden Cain meeting him soon after the Williams execution to ask if the prison had any policy to have a stand-by doctor ready to intervene when there were problems of venous access.[134] Dr. Tarver testified that he never took any steps to enact such a policy.[135] Dr. Tarver's failure to take enact a new medical policy for lethal injections was explained by Secretary Stalder, who decided that the need for cutdowns and the need for a physician to stand-by to perform a cutdown were non-existent:

> It did not come up. It has not come up. And we have not resolved -- we have no formal policy. And to the best of my recollection, we don't, you know, we don't anticipate that that will happen. … And so it's just an issue that's been, you know, that we batted around.[136]

[133] EH 3/18/03, p. 93.
[134] EH 3/18/03, p. 104.
[135] EH 3/18/03, p. 105.
[136] Stalder Deposition, pp. 44-45.

Once again, a serious question had been raised, and even "batted around" for good measure, but not answered by any definitive medical response. Sadly, this was one of the same very serious questions raised by Warden Whitley himself in his April 22, 1991 letter to the assistant to Secretary Stalder's predecessor before the Louisiana lethal injection protocol had been created: *"if it becomes necessary due to inability to find a suitable vein for catheterization; who by law can be utilized to perform a cut down procedure."*[137]

In 2006, that question, among many others, has never yet been answered. It has not been answered by any participant in the lethal injection process. It has not been answered by any DOC official. But a related and more significant question also remains not only unanswered, but not even *asked* by DOC officials: why is the DOC even thinking of using such a barbaric and antiquated method for extraordinary venous access like the cut down process?

Petitioner's expert in anesthesiology, Mark Heath, MD, testified that the cut down process is rarely used today in medicine and that a quicker, less invasive, less painful method to achieve the same result is the percutaneous technique.[138] Dr. Heath explained that the cutdown method is needlessly painful and so anachronistic that most practicing physicians have never even performed one.[139] Keeping the cutdown procedure as a back-up and failing to provide the equipment for the more modern percutaneous technique is just one more example of why the Louisiana lethal injection process violates the ban against cruel and unusual punishment. It is foreseeable that a simple needle puncture in the percutaneous technique would be less painful to the inmate than a cut down incision,

[137] Ex. 119, p. 2, and read in portion into record of EH 9/17/03, p. 65. (emphasis added).
[138] EH 2/12/03, p. 158.
[139] EH 2/12/03, pp. 159-160.

yet the DOC persists in refusing to change methods.

The very issue of a cutdown was presented to the United States Supreme Court in *Nelson v. Campbell,* 540 U.S. 1046; 124 S.Ct. 835; 157 L.Ed.2d 692 (2003). Significantly, the specific procedure being challenged was the cutdown procedure that would inevitably be required for inmate Nelson due to the poor condition of his veins. The Supreme Court ruled in Mr. Nelson's favor, reversing a prior denial of his civil rights action and remanding for further proceedings. *Nelson v. Campbell*, 541 U.S. 637; 124 S.Ct. 2117; 158 L.Ed.2d 924 (2004). The *Nelson* litigation is still ongoing in 2006. The matter of how to resolve venous access problems remains a vital issue to be addressed in the Louisiana protocol, and the DOC's failure to replace the cutdown method with the more modern and humane percutaneous technique and its failure to have a physician immediately available to perform this specialized duty mark two more deficiencies which render the Louisiana lethal injection protocol unconstitutional under both federal and state constitutions.[140]

K. The I.V. Team Members Do Not Know The Lethal Chemicals: They Lack Any Practical Experience With Them And Lack Accurate Pharmacological Knowledge About Their Effects

Adding to the Louisiana protocol's deficiencies with equipment (inadequately prepared syringes and only a cutdown kit for venous access problems) are the medical deficiencies with the personnel. Even the personnel who supposedly have some medical background, the members of the I.V. team, are unqualified to handle and administer the lethal chemicals. I.V. Team member John Doe #1 stated that he was "absolutely" certain that enough sodium pentothal was being given to condemned inmates, *not* because of any

[140] This cutdown issue is not merely an academic subject, as Nathaniel Code was an intravenous drug user. R. 4650.

medical reason, but because it is what he "saw in four different executions:" that the drugs worked immediately and the inmates went to sleep.[141] When asked further, John Doe #1 noted: "I *think* sodium pentothal knocked him out. I never saw anything that made me think anything different."[142] Regarding pancuronium bromide, John Doe #1 inaccurately stated that it caused sedation or unconsciousness,[143] which Dr. Heath confirmed is absolutely incorrect, because pancuronium bromide cannot penetrate the blood-brain barrier, noting, "it's been well established that it doesn't affect consciousness or awareness or sensation in any way."[144] Moreover, John Doe #1 incorrectly believed that after the pancuronium is injected, an observer could determine whether an inmate is still awake simply by watching him for movement, eye movement, head movement, any body movement at all.[145] Petitioner's expert, Dr. Heath noted that anyone who relies on signs of bodily movement to determine whether an inmate has regained consciousness clearly does not understand how pancuronium bromide works.[146] John Doe #4 was hardly more knowledgeable than John Doe #1 on this subject, claiming as he did that he was "not positive" whether pancuronium bromide caused sedation.[147]

I.V. Team member John Doe #2 confirmed that he had never used sodium pentothal outside of an execution and had never been trained in its use.[148] When asked specifically about the class of drugs of which sodium pentothal is a part, John Doe #4 responded: "I have *heard of* barbiturates before. I'm just lost for the words right now. …

[141] Deposition of John Doe #1, pp. 23-24.
[142] Deposition of John Doe #1, p. 24. (emphasis supplied).
[143] Deposition of John Doe #1, p. 17.
[144] EH 2/12/03, p. 166.
[145] Deposition of John Doe #1, 2/11/03, at 20.
[146] EH 2/12/03, p. 176.
[147] Deposition of John Doe #4, p. 19.
[148] Deposition of John Doe #2, p. 133.

Can *you give me more information about barbiturates so I can give you more information and tell you yes or no? … I'm trying to remember what exactly the barbiturates are."*[149]

John Doe #4, a member of the I.V. Team for the 2000 and 2002 lethal injections, summed up his knowledge on sodium pentothal in general and its use by him in lethal injection executions:

> Q. Do you know how long it lasts for when it's administered?
>
> A. No, I don't.
>
> Q. So to summarize, would you say that it is correct that you have not had a lot of training about the pharmacology of barbiturates or of sodium pentothal?
>
> A. That's correct.
>
> * * *
>
> Q. Let's see. How do you know that the dose that you're using in the Louisiana lethal injection process is enough?
>
> A. I guess, to use this phrase, I'm a peon in the whole pot. So I'm just -- we're just, we set up the drugs that we're told to do and the amount we're told to do.[150]

As if John Doe #4's lack of chemistry and pharmacology were not disturbing enough, his perspective on the overall effect of what he was doing in an execution was more troubling:

> Q. When you participated in the Louisiana execution by lethal injection, am I correct in saying that it becomes your job to participate in causing the death of the inmate?
>
> A. I wouldn't agree with that.
>
> Q. You would not agree with that?
>
> A. No.

[149] Deposition of John Doe #4, pp. 15-16. (emphasis supplied).
[150] Deposition of John Doe #4, pp. 17, 20.

Q. Is it -- how would you characterize your participation?

A. I am, I guess, abiding by or going on with a court procedure or ruling, and by initiating an IV, that's my part.

Q. Okay. But is the ultimate effect of that procedure that the person will die?

A. In a round-about way.[151]

At least John Doe #4, got the answer correct about one issue concerning pancuronium bromide, even if it may have been in a "round-about" way:

Q. Given what we've discussed about paralysis from pancuronium, how can you be certain that the paralyzed inmate is not suffering?

A. I guess I couldn't really tell you because I'm not the patient.[152]

John Does # 1, 2, and 4 provided the totality of medical know-how on-site at the executions. The syringe-pushing executioners, John Does # 3 and 6, had no medical background, and neither did John Doe #5 nor DOC Secretary Richard Stalder, in the secret injection room. In the gurney room, the chief LSP warden stood alone with the strapped down inmate, and neither warden, neither Whitley nor Cain, had any medical background.

As noted earlier, the State's own expert, Dr. Nicholas Goeders, professor and chair of the Department of Pharmacology, Toxicology, and Neuroscience at LSU Shreveport Health Sciences Center, confirmed that John Doe's #1, 3 and 4 lack of knowledge of the pharmacology of sodium pentothal made them all *unqualified* to cope with potential complications in the administration of sodium pentothal that might arise during an execution by lethal injection.[153] The deficiencies in the medical training of the

[151] Deposition of John Doe #4, pp. 20-21.
[152] Deposition of John Doe #4, pp. 21-22.
[153] EH 02/22/06, p. 33.

personnel further render the Louisiana lethal injection protocol unconstitutional under both federal and state constitutions.

L. Medical Doctors Never Supervised the Implementation Of A Single Louisiana Execution By Lethal Injection

The deficient medical training was not compensated for by supervision by any medical doctor at an execution. Each doctor who testified that he was present at a Louisiana lethal injection verified that they played absolutely no supervisory role at any of the preceding lethal injection executions. None of the protocols will require any medical doctor to supervise the lethal injection of Nathaniel Code. Indeed, as official witnesses, the doctors who were present at prior lethal injections never could even see the process of inserting the I.V. lines, because, as with everyone else in the official witness observation area, their view of the I.V. insertion process was entirely blocked by the warden pulling a curtain over the observation window. Being seated in the official witness area, the doctors likewise were as helpless to observe any of the inner workings of the I.V. Team or the syringe-pushing executioner in the secret injection room. [154]

The Louisiana lethal injection protocol's failure to require execution teams to include persons trained in administering anesthesia, its failure to permit personnel to be close enough to Nathaniel Code to monitor the administration of anesthesia to him, and its failure to use trained personnel to determine whether Nathaniel Code will remain properly anesthetized while being injected with the two subsequent painful drugs, collectively condemn it as a violation of both the state and federal constitutions.

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[154] [154] Dr. Marvin Ettinger, EH 2/11/03, p. 9; Dr. Edmundo Gutierrez, EH 3/17/03, pp. 38-39; Dr. Anthony Tarver, EH 3/18/03, pp. 103-104.

A federal court in California has recently ordered the state to provide such on-site supervision by two certified anesthesiologists as one option for that state to be authorized to implement its lethal injection executions. In *Morales v. Hickman*, Case Number(s) C06219JF and C06926JFRS (N.D.Cal.2006) (http://www.cand.uscourts.gov/cand/judges.nsf/61fffe74f99516d088256d480060b72d/b23fe76dfd8ca3398825711500825cb7/$FILE/06-219Conditional%20Denial.pdf), the district court held that the state could make its lethal injection process comport with the Eighth Amendment in either one of two ways: by having two certified anesthesiologists present and supervising the lethal injection of Mr. Morales, or by eliminating the two painful chemicals from their protocol – pancuronium bromide and potassium chloride. The second option would thus consist of a continuous injection of a barbiturate until Mr. Morales was dead.

At first, the state located two anesthesiologists who agreed to supervise the execution, but both withdrew their offers. The apparent sticking point was the physicians' obligation, under procedures specified by the federal court, to intervene if Mr. Morales appeared to regain consciousness or displayed signs of pain. The court said the anesthesiologists would then have to take affirmative steps to render the inmate unconscious or otherwise alleviate the painful effects of the drugs. As the state decided not to accept the other option of a continuous injection of only a barbiturate, the court stayed the execution. An evidentiary hearing to review the California lethal injection protocol is currently scheduled for September 2006.

M. The State Did Nothing to Counter Petitioner's Expert in Anesthesiology

Dr. Mark Heath, an anesthesiologist with Columbia Presbyterian Medical Center in New York, was accepted by this Court as an expert in anesthesiology who could provide testimony about the effects of the drugs used in the lethal injection process in Louisiana.[155] [156] Dr. Heath pointed out that there was more to anesthesiology than just insuring that a patient be brought out alive after a surgery. If that were the only consideration, Dr. Heath noted that all an anesthesiologist would need to be is a rope expert, so that they could tie the patient down and let the surgery proceed. Dr. Heath noted that, in contrast, another primary consideration is to ensure that the patient experience as little pain and discomfort as possible.[157]

Dr. Heath testified that there were several foreseeable problems with the Louisiana lethal injection protocol that could be easily addressed to make it more humane. The key changes in the protocol are as follows:

1. Replace Cutdown Kit with Percutaneous Kit

Dr. Heath noted that since the DOC witnesses testified to wanting to conduct lethal injection in a humane and dignified manner, then the state should really use up-to-date techniques and avoid needlessly painful techniques that medical professionals might not be skilled and proficient in performing. Thus, Dr. Heath recommended that the Louisiana lethal injection protocol first be amended by removing the cutdown kit and replacing it

[155] EH 2/12/03, p. 155.
[156] The State originally notified undersigned counsel that it intended to present the testimony of its own expert in anesthesiology, Lex Hubbard, MD, an anesthesiologist at the Willis-Knighton Pierremont Medical Center in Shreveport. However, the State did not produce Dr. Hubbard for testimony at the hearing.
[157] EH 2/12/03, p. 140.

with a percutaneous kit.[158]

2. Eliminate Pancuronium Bromide Entirely

Next, Dr. Heath noted that of the three drugs in the Louisiana protocol, sodium pentothal was the only chemical included to make the execution humane.[159] In contrast, potassium chloride would be extraordinarily painful, as it would activate the nerve endings inside of the veins, causing excruciating pain as the chemical traveled from the injection site to the inmate's heart.[160] The remaining chemical, the paralytic pancuronium bromide, therefore was not intended to kill the inmate, and was not intended to make the execution more humane. Dr. Heath opined that the only purpose of pancuronium bromide was to provide a 100% guarantee that the execution *looked* peaceful, humane and serene. However, as the evidence has shown, that image is merely a mirage, distorting and masking what the inmate is actually experiencing: excruciating and conscious pain from suffocation and asphyxiation.

Dr. Heath noted that at one time, pancuronium was used for anesthesia, but that it since fallen into disfavor because it is considered barbaric and inhumane. Also, pancuronium is now banned for veterinarians in euthanizing animals. Therefore, Dr. Heath recommended that Louisiana discard pancuronium bromide from the list of chemicals used in an execution, because it has no place in a humane execution procedure.[161]

Notably, just months after Dr. Heath gave this testimony concerning pancuronium bromide, on June 2, 2003, a Memorandum and Order was issued by the Chancery Court

[158] EH 2/12/03, p. 183.
[159] EH 2/12/03, p. 164.
[160] EH 2/12/03, pp. 164-165.
[161] EH 2/12/03, pp. 165, 183.

for the Tennessee Twentieth Judicial District, Davidson County, Part III, in *Abdur'Rahman v. Sundquist,* NO. 02-2236-III, concerning a lethal injection challenge in that state. The subsequent appellate decision noted that the Chancery Court made certain significant findings, including the following finding that the use of pancuronium bromide (Pavulon) in the Tennessee lethal injection protocol was arbitrary and unnecessary:

> "The proof established that Tennessee's method [of lethal injection] is not state of the art. It was developed simply by copying the same method currently in use by some thirty other states. The method could be updated with second or third generation drugs to, for example, streamline the number of injections administered." (Chancery Court Memorandum and Order, p. 2).
>
> "Moreover, the method's use of Pavulon, a drug outlawed in Tennessee for euthanasia of pets, is arbitrary. The State failed to demonstrate any need whatsoever for the injection of Pavulon." (*Id.*).
>
> "Significantly, there was no proof from the State that the Pavulon is necessary to the lethal injection process. No proof was provided by the State for the use of Pavulon in its lethal injection process. The state's expert, Dr. Levy, on cross-examination, testified that he did not know of any legitimate purpose for the use of Pavulon in the Tennessee lethal injection process. He agreed that the injection of Pavulon without anesthesia would be a horrifying experience." (*Id.* at 6).
>
> "But the use of Pavulon is problematic because it is unnecessary. As stated above, the State failed to demonstrate any reason for its use. The record is devoid of proof that the Pavulon is needed. Thus, the Court concludes that, while not offensive in constitutional terms, the State's use of Pavulon is "gilding of the lily" or, stated in legal terms, arbitrary." (*Id.* at 13).[162]

Furthermore, as briefly noted *supra,* in the *Morales* lethal injection challenge in California, the federal district court barred the state from using either pancuronium bromide or potassium chloride, unless two certified anesthesiologists were present to

[162] Significantly, Tennessee's protocol differs strikingly in two aspects with Louisiana's protocol: 1) where Tennessee injects a standard 5000-milligram dosage of sodium pentothal, Louisiana uses a far lower dosage of only 2000-milligrams of sodium pentothal; and 2) where the Tennessee protocol is concluded by conducting an autopsy complete with toxicological screening of body fluids of the executed inmate, Louisiana officials never conduct any kind of post-mortem examination, not even a simple toxicology screen of postmortem blood samples.

continuously monitor Mr. Morales' level of consciousness until death had been pronounced. The *Morales* challenge is pending presentation of evidence at an evidentiary hearing this fall.

3. Supply equipment for treating pneumothorax (collapsed lung), a foreseeable consequence of inserting a central line in case of difficult venous access

Dr. Heath next addressed the failure of the Louisiana lethal injection protocol's equipment checklist to include any equipment to treat a pneumothorax (a collapsed lung), which was a foreseeable risk.[163] Dr. Heath took serious issue with the DOC position that the problem involving venous access would never arise, noting that some persons are just difficult to set up with an I.V., and might need a central line to get venous access. This is more likely with any inmate who had been an I.V. drug abuser or who was overweight. A pneumothorax without any equipment such as a simple chest tube would result in agonizing pain for the inmate, an extremely painful way to die.[164] Therefore, Dr. Heath recommended that the Louisiana lethal injection protocol include the inexpensive addition of a chest tube and related equipment to respond adequately to any pneumothoraces.[165]

4. Use a Long-Acting Barbiturate Instead of an Ultra-Short-Acting Barbiturate

In addition, Dr. Heath recommended that the DOC should substitute a long-acting barbiturate, such as pentobarbital, for the ultra-short-acting barbiturate, sodium pentothal. This change would lead to a longer lasting anesthetic effect on the inmate, thus making the execution more humane. As it is in the present protocol, sodium pentothal is a drug that wears off much faster than the longer-lasting pancuronium bromide, the paralytic

[163] EH 2/12/03, p. 178.
[164] EH 2/12/03, p. 180.
[165] EH 2/12/03, p. 183.

agent.[166] Thus, Dr. Heath recommended using a long-acting barbiturate instead of an ultra-short-acting barbiturate.[167]

a. Carol Weihrer: A Personal Account of Conscious Paralysis

Although Dr. Heath was able to describe from a physician's perspective what it would feel like to regain consciousness while still paralyzed by a muscle relaxant, Petitioner's witness Carol Weihrer was able to bring the harrowing account of her personal experience with this tragedy to the Court. Even though she was in surgery under the care of multiple doctors, including an anesthesiologist, a human error resulted in her loss of sufficient continuing anesthetic medication, and Ms. Weihrer regained vivid awareness of her surroundings. Try as she did to warn the doctors of the error, the paralytic drug prevented her from moving at all. Once she realized that she could not convey to the doctors that she was awake, she felt that she "would rather die than stay like this … I just don't want to be alive. I can't – I can't stay alive through this. I – I just can't do this."[168] Just because one of the goals of Louisiana's lethal injection is to kill Mr. Code, it would still violate the state and federal constitutions if Louisiana's other goal, that the execution be accomplished in a humane manner, is intentionally ignored by continuing to expose him to the foreseeable risk of conscious paralysis, followed by conscious awareness of the burning chemical salt solution of potassium chloride, progressing through his veins to his heart. A protocol that eliminated these last two painful chemicals would achieve a more humane execution method.

N. **The State Did Nothing to Counter Petitioner's Expert in Veterinary Anesthesiology**

[166] EH 2/12/03, p. 174.
[167] EH 2/12/03, p. 183.
[168] EH 2/13/03, p. 18.

Were the DOC to adopt a method of lethal injection using only a longer-lasting barbiturate, it would in fact be adopting the method which veterinarians use when they euthanize a dog or a cat: "putting it to sleep."

Veterinarians thus avoid the problems that come with the use of pancuronium bromide. The 2000 Report of the American Veterinary Medical Association's Panel on Euthanasia condemns the use of neuromuscular blocking agents in euthanasia of animals either as sole agents or in combination with an anesthetic, meaning that the combination of chemicals which the current Louisiana protocol would authorize to be injected into Mr. Code is not acceptable for euthanizing cats and dogs. That same 2000 report, in its discussion of the use of Potassium Chloride in euthanasia, emphasizes the importance of ensuring that the animal is in a proper surgical plane of anesthesia before the potassium chloride is administered:

> It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously. Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to the noxious stimuli.[169]

Recently, during oral arguments in *Hill v. McDonough*, *Hill v. McDonough*, No. 05-8794, ___ U.S. ___, 2006 U.S. Lexis 4674 at 17-18 (June 12, 2006), United States Supreme Court Justice Stevens referred to the issue of how veterinarian restrictions on animal euthanasia correlate to human lethal injections:

> JUSTICE STEVENS: But isn't there evidence in -- I noticed the brief filed by some veterinarians call our attention to the statute that prohibits the euthanasia of dogs and cats unless they follow a certain procedure. So there must have been a legislative feeling that unless that procedure were followed, there's a risk of undue pain to the dogs and cats. Why isn't there

[169] 2000 AVMA Report, at 680-1.

> a similar basis for believing that if you don't follow a similar procedure that such a risk might be present for human beings?
>
> * * *
>
> JUSTICE STEVENS: But your procedure [Florida lethal injection protocol, including pancuronium bromide and potassium chloride], if I understand it, would be prohibited to be applied to dogs or cats.
>
> * * *
>
> JUSTICE STEVENS: Well, at least it was sufficiently convincing to get the Florida legislature to pass a statute.[170]

Justice Kennedy raised other questions of import in the *Hill* argument, which are directly applicable to Mr. Code's case:

> JUSTICE KENNEDY: This -- this is a death case. It was not that amusing. Let me ask you this. Doesn't the State have some minimal obligation under the Eighth Amendment to do the necessary research to assure that this is the most humane method possible? Doesn't the State have a minimal obligation on its own to do that?
>
> MR. SHANMUGAM: I'm not sure whether it -- it would have an obligation to use the most humane method under the Eighth Amendment because this Court's cases have only suggested that the gratuitous infliction of pain is barred by the Eighth Amendment. I'm not aware of any cases –
>
> JUSTICE KENNEDY: Well, I can define gratuitous -- I don't have the dictionary here. But gratuitous means essentially unnecessary. If there were other -- other means, other alternatives, that might be used, it seems to me that the State might have some minimal obligation to investigate those. [171]

Essentially, this is Mr. Code's argument in this claim: Louisiana has an obligation to avoid foreseeable risk of unnecessary infliction of pain in its lethal injection process. It is not up to Mr. Code to develop the particulars of a protocol that can pass constitutional muster. The United States Supreme Court in *Hill v. McDonough*, No. 05-

[170] Oral argument in *Hill v. McDonough*, pp. 36-37.
[171] Oral argument in *Hill v. McDonough*, No p. 47.

8794, ___ U.S. ___, 2006 U.S. Lexis 4674 at 17-18 (June 12, 2006) unanimously held that it is not necessary for the inmate to identify an alternative to an unconstitutional method of execution, even in a § 1983 action (which Mr. Code's claim is not):

> Respondents and their supporting *amici* conclude that two different rules should follow from these practical considerations. The United States as *amicus curiae* contends that a capital litigant's § 1983 action can proceed if, as in *Nelson, supra,* at 646, 124 S. Ct. 2117, 158 L. Ed. 2d 924, the prisoner identifies an alternative, authorized method of execution. A suit like Hill's that fails to do so, the United States maintains, is more like a claim challenging the imposition of any method of execution -- which is to say, the execution itself -- because it shows the complainant is unable or unwilling to concede acceptable alternatives "except in the abstract." Brief for United States 14.
>
> Although we agree courts should not tolerate abusive litigation tactics, see Part III, *infra,* even if the United States' proposed limitation were likely to be effective we could not accept it. It is true that the *Nelson* plaintiff's affirmative identification of an acceptable alternative supported **[*18]** our conclusion that the suit need not proceed as a habeas action. 541 U.S., at 646, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (citing the inmate's complaint and affidavits). That fact, however, was not decisive. *Nelson* did not change the traditional pleading requirements for § 1983 actions. If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper. See *id.,* at 644, 646, 124 S. Ct. 2117, 158 L. Ed. 2d 924. Cf. *Gonzalez* v. *Crosby,* 545 U.S. ___, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

The current protocol established and instituted by Louisiana fails in several regards to avoid such foreseeable risks of unnecessary infliction of pain in executions. Individually, each flaw will likely result in an unconstitutional execution. Cumulatively, these flaws lead to the inevitable conclusion that Louisiana's lethal injection protocol is flawed to its very core. In light of the unconstitutional nature of the current Louisiana execution protocol, this Court must vacate Mr. Code's sentence of death and impose a sentence of life imprisonment. *Furman v. Georgia,* 408 U.S. 238, 392 (1972) (vacating

death sentence because of violation of Eighth Amendment prohibition against cruel and unusual punishment).