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	*	
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BURL CAIN, Warden,	*	
Louisiana State Penitentiary,	*	
Angola, Louisiana	*	
Respondent	*	
* * * * * * *		

PETITIONER'S REPLY TO POST-CONVICTION MEMORANDUM BY THE STATE OF LOUISIANA

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 (CLAIM 16)

Petitioner's claim is not about whether Louisiana's sole method of execution—lethal injection—is constitutional in the abstract, but rather his challenge addresses the specific manner in which Louisiana has implemented that method and proposes to do so in the future. The sum total of evidence presented over the entire evidentiary hearing supports the conclusion that Louisiana's lethal-injection protocol—*as actually administered in practice*—creates an undue and unnecessary risk that Petitioner will suffer pain so extreme that it offends the federal constitution's Eighth Amendment and state constitution's Article I, Section 20. The evidence was uncontradicted that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride.

Petitioner has presented critiques of Louisiana's protocol, including the flaws in its creation; in the selection and training of the execution team; in the equipment and apparatus used in executions; in the pharmacology and pharmacokinetics of the drugs involved; in the administration of the drugs; and in the monitoring of executions, specifically, the lack of any

execution logs and other pertinent records concerning every execution in Louisiana since lethal injection was adopted as the State's preferred means of execution in 1990.

This Reply endeavors to focus on the arguments presented by the State in its Post-Hearing Memorandum and highlights the relevant portion of the Petitioner's challenge. The State begins by presenting a procedural objection, i.e., that a challenge of lethal injection is not permissible under La.C.Cr.P. Art. 930.3. State Memorandum, at 33. To the contrary, challenges of violations of the Eighth Amendment of the United States Constitution, and challenges to violations of Article 1, Section 20 of the Louisiana Constitution are both permissible under the Louisiana post-conviction statute. As a reminder, the Louisiana Supreme Court order this Court to conduct an evidentiary hearing on this specific claim. *Code v. Cain*, 98-2581 (La. 09/03/99); 747 So.2d 527.

The State next proceeds to bolster its position by citing caselaw which is years behind the current state of litigation on this subject nationwide. For example, the State cites a 2000 decision from the Connecticut Supreme Court, *State v. Webb*, 750 A.2d 448 (Conn. 2000) in which that court did not find a constitutional violation in that state's lethal injection protocol. Connecticut, as here in Louisiana, had pointed to other states and argued tautologically that they had merely copied from these other states and no one has found these other states' protocols to be unconstitutional. As will be shown more fully below, multiple current challenges in 2006 and 2007 (in states with the same general combination of drugs as used in Louisiana and cited in *Webb*) have developed far more incisive evidence to show that the triple lethal drug execution system is not the humane, effective and constitutional method trumpeted by the State.

Next, the State argues that veterinary euthanasia standards are not relevant to a review of Louisiana's lethal injection protocol. State's Memorandum, at 44-45. The State's argument sidesteps the testimony of its own expert, Dr. Nicholas Goeders, who verified that there are detailed medical standards to guarantee humane treatment to avoid pain.[1] These scientifically based national medical standards do not exist for Louisiana death row inmates and the high standard of care mandated for animals is not provided by proxy by "legal guarantees, formality, ceremony or witnesses attendant on the execution." The actual carrying out of a Louisiana execution, albeit conducted in a serious ceremonial manner, with serious formal witnesses, does

[1] Evidentiary Hearing 2/21/2006, at 9, 40-44.

not provide the guarantee of humaneness as is demanded in scientifically based nationally standardized medical protocols devised to euthanize an LSU lab rat.

The State further argues that Louisiana's protocol derived from consultations with medical experts. Deputy Warden Richard Peabody testified that amongst others on the committee who created the protocol, two doctors were consulted, reportedly a Dr. Vance Byers, whose consultation role was unknown to Peabody, and possibly another unnamed LSP Medical Director. 2/13/03 evidentiary hearing transcript, at 48-49.

However, the State cannot rest on this testimony as the final word. As repeatedly occurred throughout the days of testimony on lethal injection, one or another of the witnesses contradicted each other. Here, for example, in trying to corroborate Peabody's testimony that two doctors helped create the Louisiana protocol, counsel for Petitioner examined several former LSP Medical Directors as to their involvement in developing the Louisiana protocol.

Dr. Edmundo Gutierrez testified that he had no idea of the origin of Louisiana's choice of types or amounts of chemicals. 3/17/03 evidentiary hearing transcript, at 57-58. Significantly, this was but one example of contradictory testimony presented by witnesses regarding the origin of the Louisiana protocol. LSP Pharmacist Donald Courts, not a medical doctor, was the person who testified as to having made the decision about which chemicals to be used and in what amounts. Courts testified that he made this decision with only one other person, John Doe #1, an emergency medical technician, so that neither of the two "deciders" were in fact medical doctors: "*It wasn't a medical decision*. It was based on the other states had all used a similar dose."[2]

Thus, contrary to Deputy Warden Peabody's assertion, there was evidence presented that persons without a medical license created the chemical components of the Louisiana protocol without medical supervision. Notably, this testimony came not from an unidentified doctor, but from Donald Courts, the person who had a hands-on role in preparing the chemicals for each of the Louisiana lethal injection executions to date.

In addition, testimony also established that no personnel at Angola ever had any exposure to the use of sodium pentothal or pancuronium bromide outside of executions. This lack of any exposure to these chemicals would offer one explanation why another member of the committee who created the Louisiana protocol would be so mistaken about the chemical properties of the paralytic chemical, pancuronium bromide: Head EMT John Doe #1 incorrectly stated that it

[2] Evidentiary Hearing 3/18/03, at 61. (Emphasis supplied.)

caused sedation or unconsciousness.[3] Moreover, John Doe #1 stated incorrectly 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.[4]

Contrary to the State's assertion, Petitioner's challenge is not a request to "reinvent the wheel" of lethal injection procedures. First, there is no one "wheel," i.e., no single precisely uniform lethal injection procedure nationwide. As Deputy Warden Peabody confirmed, he received data on protocols existing in 1990-1991 from a variety of other states already administering executions by lethal injection. Deputy Warden Peabody confirmed specific differences in lethal injection procedures in these other states, both differences in one state from another and differences in what Louisiana has reported that it currently carries out in comparison to these other states. So, in fact, Louisiana already has reinvented the "wheel" used in other states, only no Louisiana witness could testify as to any medical or scientific basis for these reinventions.

What neither Deputy Warden Peabody nor any other state witness could provide was a reason, any reason, let alone a medical, scientific reason, why these discrepancies exist between Louisiana and other states on specific aspects of the protocols. For example, Deputy Warden Peabody stated he could not give a reason why certain portions of other states' protocols were not adopted in Louisiana 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.[5]

Moreover, current ongoing litigation on multiple challenges of lethal injection nationwide shows that serious new challenges are being raised against the protocols of some of the very states that provided the background protocols for review by Deputy Warden Peabody. These challenges have caused the former protocols of these states to be rejected as violations of the Eighth Amendment. De facto or de jure moratoria of executions due to constitutional challenges of lethal injection exist in ten states.

Missouri's Lethal Injection Protocol Has Been Found Unconstitutional

For example, in Missouri, the three-drug lethal injection protocol has been challenged. On June 26, 2006, the United States District Court for the Western District of Missouri, Central

[3] Deposition of John Doe #1, at 17.
[4] Deposition of John Doe #1, 2/11/03, at 20.
[5] Evidentiary Hearing 9/17/03, at 76.

Division, held that because the State of Missouri wished to continue using its then-existing three chemical protocol, the deficiencies in the written protocol for the use of these three drugs, plus an inconsistent and arbitrary application of these drugs subjected condemned inmates in Missouri to an unreasonable risk of cruel and unusual punishment. *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. June 26, 2006), at 13. After the State of Missouri submitted a revised protocol, the District Court again found that revised protocol to continue to violate the Eighth Amendment and requested further revision by the State of Missouri, giving them until October 27, 2006 to provide the revisions. *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. September 12, 2006).

Instead of providing any suggested revisions, the State of Missouri filed for reconsideration of the Court's September 12th ruling, *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. Oct. 6, 2006), and the District Court denied that Motion. *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. Oct. 16, 2006). On November 1, 2006, the Eighth Circuit Court of Appeals scheduled oral argument on the State's appeal for January 10, 2007. *Taylor v. Crawford*, No. 06-3651 (8th Cir. 11/1/06).[6] The State's appellate brief was filed on December 4, 2006 and the Mr. Taylor's brief was filed on January 2, 2007.[7] In a state that has executed sixty-six (66) inmates by lethal injection, at a rate approaching four per year, no executions have been administered in Missouri in over a year.[8]

Thus, the very Missouri protocol which the State of Louisiana trumpets in its post-hearing memorandum as part of the proof that there is nothing unconstitutional about Louisiana's lethal injection system, State's Memorandum, at 34; Exhibit 119, at 148-157, is a protocol which has now been rejected as unconstitutional. In the wake of that holding, the State of Missouri changed their protocol and that change has been similarly found to have not remedied the constitutional objection. As noted, the federal court challenge in Missouri is ongoing.

California's Current Lethal Injection Protocol Has Been Found Unconstitutional

In California, the lethal injection execution of Michael Morales was stayed on February 21, 2006, the date of Petitioner's last evidentiary hearing. By that time, federal district court Judge Jeremy Fogel had already reviewed numerous documents submitted in the *Morales* case

[6] Source: http://pacer.ca8.uscourts.gov/cgi-bin/reports.pl?CASENUM=06-3651&puid=01162584948.
[7] Counsel for Mr. Taylor cited problems with a Florida execution and a judge's order halting executions in California as part of the "increasing recognition" that lethal injection can be torturous.
[8] Death Penalty Information Center, website: http://www.deathpenaltyinfo.org/getexecdata.php.

regarding the deficiencies of the three-drug lethal injection protocol in California. On top of that, Judge Fogel had the overview of several years of prior litigation on this exact same issue, in the challenges brought in the cases of Donald Beardslee, who was executed on January 19, 2005[9] and the earlier challenge of Kevin Cooper, whose execution was stayed on February 9, 2004 on other grounds. Although Judge Fogel had denied the lethal injection challenges in both the *Beardslee* and *Cooper* cases, he noted in a February 14 2006 order specifically that *new evidence* was being introduced for the first time, which was never present in prior challenges of the three-drug protocol. *Morales v. Hickman*, (Nos. C-06-219-F and C-06-926-JF-RS (N.D. Cal. Feb. 14, 2006), at 8.[10]

Specifically, Judge Fogel noted that the Plaintiff had presented new evidence from six separate California executions which showed that for whatever reason, the five grams of sodium pentothal in California's lethal injection protocol did not have its desired effect, as predicted by the State's toxicology expert.

Nevertheless, the court did not find that these anomalies mandated a stay of execution. Instead, the court held that the existing protocol had to be modified in one of two ways to remedy a problem with deficiencies with the five grams of sodium pentothal. If the State chose neither of the two modified protocols, the court promised that a stay would be ordered:

> As noted at the outset, the present action concerns the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed. While the Court finds that Plaintiff has raised substantial questions in this regard, it also concludes that those questions may be addressed effectively by means other than a stay of execution, and that these alternative means would place a substantially lesser burden on the State's strong interest in proceeding with its judgment.[11]

The first option for the State was to eliminate the final two chemicals from the protocol entirely, i.e., eliminate pancuronium bromide and potassium chloride and instead only infuse 5000 milligrams of sodium pentothal until the inmate died. This option would eliminate entirely the possibility that the inmate would feel any pain reaction to the injection of potassium chloride and would eliminate any possibility that the inmate would be paralyzed and unable to communicate this experience of pain.

The second option was to use the original triple-chemical regimen, but with the prerequisite added that two certified anesthesiologists had to be present at the execution to

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[9] Source: http://www.deathpenaltyinfo.org/getexecdata.php
[10] 415 F. Supp. 2d 1037 (N.D. Cal. Feb. 14, 2006).
[11] *Id.* at 13.

personally intervene if anything indicated that the inmate had regained consciousness before dying, and thus might be consciously experiencing pain. After two volunteer anesthesiologists withdrew their initial offer to participate, the State chose to forego the single-chemical option and a stay was ordered, which continues to be in effect.

Several days of evidentiary hearings were conducted in the *Morales* case, the most recent being from September 26-29, 2006. On December 15, 2006, Judge Fogel issued a "Memorandum of Intended Decision." In this Memo, the Court noted that the current California protocol lacked both "reliability and transparency." The Court further held that

> In light of the substantial questions raised by the records of previous executions, Defendants' actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation. This is intolerable under the Constitution.

Morales v. Tilton, Case No. 5:06-cv-00219-JF, Document 290, Filed 12/15/2006, at 13-14.

The Court ordered the State of California to reply to its Memorandum of Intended Decision within thirty days, and granted counsel for Mr. Morales further time to respond. The Court's Memorandum emphasized that mere "tweaking" of the current California protocol would not suffice, given the enormity of the problems present in the current system. No executions have taken place in California since January 19, 2006. [12]

Florida Suspension of All Lethal Injection Executions

Clarence Hill's lethal injection challenge in the end failed to stay his Florida execution on September 20, 2006. However, less than three months later, on December 15, 2006, Florida Governor Jeb Bush suspended all further executions by lethal injection in that state because of what can only be described as the botched execution of inmate Angel Nieves Diaz two days before. It took 34 minutes and a second set of injections for prison authorities to execute Angel Nieves Diaz on December 13, 2006. In Nieves Diaz's case, witnesses reported seeing him moving as long as 24 minutes after the initial injection, including grimacing, blinking, licking his lips, blowing and attempting to mouth words. The medical examiner that performed an autopsy on Nieves Diaz following his execution, Dr. William F. Hamilton, said that it appeared that the lethal-injection needles punctured *through both* of his veins, sending the lethal chemicals into the small tissues of the arm, extending their excruciating effect. As adduced in Petitioner's Louisiana challenge, insertion of intravenous lines is not a simple and pat procedure: John Doe

[12] Death Penalty Information Center, website: http://www.deathpenaltyinfo.org/getexecdata.php.

#1 admitted that in one Louisiana execution, his partner, John Doe #2 tried three times to set up an IV connection on one inmate without success. Deposition of John Doe #1, at 120.

No Lethal Injections Conducted in Delaware: Lethal Injection Challenge Ongoing

Similarly, in other jurisdictions using a three-drug protocol for lethal injection, ongoing litigation has stopped further executions. In Delaware, no lethal injections have been administered in over a year, and the lethal injection challenge of death row inmate Robert Jackson is ongoing: an evidentiary hearing in federal district court is scheduled to commence on September 4, 2007. *Jackson v. Taylor*, Civ. No. 06-300-SLR (D. Del. Oct. 25, 2006).

LETHAL INJECTION CHALLENGE IN ARKANSAS

Likewise, in Arkansas, a challenge of the three-drug protocol in lethal injection is ongoing, with a stay of execution granted on June 26, 2006 for Terrick Terrell Nooner. *Nooner v. Davis*, No. 5:06CV00110 SWW (E.D. Ark. June 26, 2006). The State has appealed that matter to the Eighth Circuit Court of Appeals and the briefing schedule set on October 24, 2006 calls for a Reply Brief from the State to be filed by January 26, 2007. *Nooner v. Norris*, No. 06-3487 (8th Cir. Oct. 24, 2006).[13] For a state that has a history of twenty-six lethal injection executions, no lethal injection has been carried out in Arkansas in over a year.[14]

LETHAL INJECTION CHALLENGE IN MARYLAND

Moreover, in Maryland, death row inmate Vernon Evans filed a Section 1983 complaint in federal district court challenging that state's three-drug lethal injection protocol on January 19, 2006 in the case of *Evans v. Saar*, No. 06-CV-00149-BEL (D. Md. Jan 19, 2006). Ten days of evidentiary hearing in that matter were held, on September 19-22; October 10-12; and November 2, 3, and 15, 2006. In an Order dated December 7, 2006, the federal district court ordered the following schedule of litigation, focusing on the State's difficulties of searching for and finding professionals with proper experience to conduct lethal injection executions:

> On February 28, 2007, the State will submit a written plan describing the parameters of a proposed search. If the search includes advertisements, the plan should include the text, the periodicals, and the dates on which the advertisement would run. The Court will hold a hearing on March 12, 2007 at 10:00 am to discuss any objections to the plan. The State should have wide latitude in deciding how to conduct the search. Nevertheless, because the search will have evidentiary value, the experiment must be a controlled one.[15]

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[13] Source: http://pacer.ca8.uscourts.gov/cgi-bin/reports.pl?CASENUM=06-3487&puid=01162588020.
[14] Death Penalty Information Center, website: http://www.deathpenaltyinfo.org/getexecdata.php.
[15] https://ecf.mdd.uscourts.gov/cgi-bin/login.pl?657589888647463-L_835_0-1.

No lethal injection executions have been carried out in Maryland in over a year.[16]

LETHAL INJECTION CHALLENGE IN OHIO

In Ohio, five death row inmates have filed a Section 1983 action challenging the three-drug protocol of lethal injection in the case of *Cooley et al. v. Taft*, No. 2:04-cv-01156-GLF-MRA (S.D. Ohio 12/8/2004).[17] That litigation is ongoing, and intervention by other death row inmates is likely.

LETHAL INJECTION CONCERNS IN SOUTH DAKOTA

Governor Mike Rounds of South Dakota stayed the execution of Elijah Page on the day it was to be carried out because of concerns about the state's lethal injection process. The governor said there was a conflict between state law requiring the use of two drugs, and the anticipated practice of using three drugs in the lethal injection. The governor asserted that such a practice could put state employees at risk of violating the law. Mr. Page had waived his appeals, but other inmates had raised challenges to the practice. This gubernatorial act appears to put all executions in South Dakota on hold until at least July 1, 2007. [18]

New Jersey Court Halts Executions, Orders Review of Lethal Injection

The Appellate Division of New Jersey's Superior Court ruled on February 20, 2004 that the New Jersey Department of Corrections (DOC) must examine its lethal injection execution procedures before it carries out any death sentences, thereby halting executions in the state until such a review takes place. The ruling noted,

> Because of the patent gravity of the life and death issues implicated by the regulations, we have concluded that rather than simply striking down those regulations, DOC should have the opportunity to give them further consideration, by additional hearings if necessary, and to articulate, if it is able to do so, a supporting basis for those determinations. In the meantime, however, we are satisfied that the regulations as a whole, as they now stand, may not be implemented by the carrying out of a death sentence.[19]

THE STATE'S POST-HEARING MEMORANDUM FAILS TO ACKNOWLEDGE ANY CURRENT AND ONGOING CHALLENGES

Thus, the State's citation (State's Post-conviction Memorandum at 34) to a six-year-old decision of the Connecticut Supreme Court, *Webb v. Connecticut*, *supra*, or the two-year-old

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[16] Death Penalty Information Center, website: http://www.deathpenaltyinfo.org/getexecdata.php.
[17] Source: https://ecf.ohsd.uscourts.gov/cgi-bin/login.pl
[18] Argus Leader, August 29, 2006.
[19] *In The Matter Of Readoption With Amendments Of Death Penalty Regulations N.J.A.C. 10A:23, By The New Jersey Department Of Corrections*, 367 N.J. Super. 61, 842 A.2d 207 (NJ Sup.Ct. 2004)

decision in *Beardsley* (Memorandum, at 35) focuses on prior jurisprudence, but fails to recognize the rapidly evolving developments in several states regarding challenges against lethal injection. Many of these challenges have developed since the filing of Petitioner's original post-hearing memorandum.

Specifically, post-*Beardsley*, as noted above, the federal district court in *Morales* (the same Court who rejected the *Beardsley* lethal injection challenge) has found enough troubling issues with the three-drug protocol there to order its abandonment or allow its continuance but only under the supervision of two certified anesthesiologists. In addition, the federal district court in the Taylor case in Missouri, cited above, has found that "*after learning more about how executions are carried out in Missouri* … it is apparent that there are numerous problems."[20] The Court in *Taylor* mandated that Missouri's existing three-drug protocol be revised by 1) ordering a Board-certified anesthesiologist to be responsible for mixing of all drugs used; 2) insuring that the level of sodium thiopental administered is five (5) grams; 3) insuring that an anesthesiologist be present to adequately monitor the anesthetic depth of the inmate; 4) creating a contingency plan in case problems develop during the execution procedure; 5) instituting an auditing process to ensure that the persons involved in administering the drugs are actually following the state's protocol; 6) requiring that no additional changes to the Missouri protocol could be made without prior approval from that Court.[21]

Strikingly, the categories for protocol revision addressed by both California and Missouri courts address the same inadequacies present in the Louisiana system:

1) Improper mixing, preparation, and administration of sodium thiopental by the execution team
    a. Testimony universally established that only one of the two sets of syringes were prepared, meaning that the back-up syringe of sodium pentothal, which would be used if an inmate unexpectedly regained consciousness after being injected with two other painful drugs, would need to be prepared by mixing water with the powdered contents of four separate vials, a process which Donald Courts estimated to last five minutes,[22] all while the inmate has regained consciousness and is fully exposed to the pain from chemicals #2 and #3;
2) Failure to have adequate monitoring of the inmate's anesthetic depth
    a. Some of the Louisiana I.V. team members bother to look fruitlessly for muscle movement in the paralyzed inmate to determine if he is experiencing pain; while the syringe-pushers are not even looking at the inmate;
    b. No equipment exists to directly assist in monitoring the inmate's anesthetic depth;
    c. No doctor with skilled knowledge of anesthesia is present in any capacity to measure the inmate's depth of anesthesia;

[20] *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. June 26, 2006), at 11 (emphasis added).
[21] *Id*., at 14-15.
[22] Evidentiary Hearing 3/18/03, at 73.

d. The basic problem of using pancuronium bromide as one of the chemicals is unaddressed: this chemical masks the ability of any person if an inmate regains consciousness before death, when the only monitoring done is simple observation of a paralyzed body;

3) No system to guarantee that the intended dosage of sodium pentothal is actually reaching the inmate's bloodstream (and thus to his brain where the anesthetic effect is accomplished)
    a. Serious concerns exist in California that far less than five (5) grams of sodium thiopental is ever reaching the inmate, and in comparison, the Louisiana protocol only requires two (2), not five (5) grams to begin with, before even considering errors in the drug administration which inhibit delivery of the intended dose;
    b. Notably, the recent botched execution of Angel Nieves Diaz in Florida, in which the inaccurate IV set-up in both his arms, piercing through his veins and not just into them, led to the injection of the lethal drugs into his arm tissue and not directly into his blood stream, thus resulting in depositing of anesthesia in tissue, while still receiving the torturously painful potassium chloride injection;
    c. IV set-up problems have existed in at least two Louisiana executions, that in 1999 of Dobie Williams and in 1996 of Antonio James;
    d. The State's own expert, Dr. Goeders, confirmed that delivery of less than the intended dosage of two grams of sodium pentothal would lead to extreme pain when the subsequent dosages of the painful lethal chemicals;
4) No contingency plan exists for foreseeable problems, even for the basic problem of venous access
    a. The need for how to deal with the necessity for a doctor to assist in venous access, if a cutdown or extraordinary access were required, was noted by Warden Whitley in 1991 before the first lethal injection was ever carried out in Louisiana;
    b. Deputy Warden Richard Peabody insisted that in the early executions in which he played the top supervisory role, there was such a doctor nearby, even though no other witness could corroborate knowledge of such a person;
    c. In contrast, Blaine Edwards, chief of security at 1993 Robert Sawyer execution, stationed outside the front door of Camp F, the location of the execution chamber at LSP, was not aware of any doctor who had been given any security clearance to enter Camp F at the time of the execution. 3/18/03 evidentiary hearing, at 19. Thus, even if Warden Peabody were correct that some unidentified doctor were intended to be available, it seems that this doctor might have had serious trouble gaining access to the death chamber, far longer perhaps than the two to five minutes Peabody estimated would be needed;
    d. DOC Secretary Richard Stalder and other non-doctor prison officials decided after the 1999 execution of Dobie Gillis Williams that venous access would never be a problem requiring a doctor's presence; thus, in the final two executions (2000 and 2002) in which Warden Peabody was absent as supervisor, Peabody's uncorroborated doctor deemed not necessary;
5) No auditing of the overall process to insure that the persons administering the drugs are actually following the protocol
    a. John Doe #5 admitted that the actual practice in lethal injections is for the two syringe-pushers to choose at the last moment between themselves as to who does what part of the injection process and when;
    b. In absolute contrast, no Louisiana protocol ever even contemplated two persons performing the syringe-pushing function;
    c. In addition, no written logs are kept of any part of the execution process
        i. The DOC managed to compile 265 pages of handwritten logs on suicide watch of inmate Leslie Martin before his eventual execution, Exhibit 101, at 345-610. But, reflecting the same

theme as seen throughout the documentation compiled by the DOC, these logs are lopsided in their emphasis on the corrections aspect of the execution (chronicling the activities of the condemned in his last months alive several times per hour behind bars on suicide watch) but providing absolutely no log of any activity after 7:50 pm on May 10, 2002. Leslie Martin was declared dead at 8:16 pm on May 10, 2002. Exhibit 101, at 246.

ii. No documentation is made for any aspect of the actual execution, except for a formal process verbal compiled after the event;

1. No timesheets exist to show exactly when the execution has begun, i.e., when the IV process is started and completed, when a particular lethal chemical has been injected and how long a period of time passes before specific responses are observed in the inmate;
2. No printout tape from the heart monitor or pulse oximeter are preserved to record contemporaneously the heart rate and other data which may be used to assist in determining whether complications had arisen or not;

6) Deficient training and screening of execution personnel:
   a. Warden Peabody, who described his function as essentially the supervisor of all operations in the control room and the gurney room as far as IV line insertion was concerned (except for the 2000 and 2002 executions)[23], admitted that he never saw the entire IV team rehearse their duties together as a unit. Instead, he only presumed that they performed such a coordinated rehearsal;[24]
   b. As noted below, the IV team members had inaccurate understandings of the pharmacology of the drugs they prepared for injection;
   c. Syringe-pusher John Doe #6 continued to perform his duties over four executions even though he experienced great stress, sleep disturbances, and hand tremors, fearing that if he were to ask to resign from that task, it would be "like getting out of the Mob;"[25] Moreover, although John Doe #6 and Warden Cain disagreed with each other as to whether the prison offered counseling to execution team members for traumatic stress from work on the executions,[26] there was no doubt that John Doe #6 never received any such counseling while he was an executioner.
7) Inadequate and poorly designed facilities in which the execution team must work
   a. Execution team members are too far away from the inmate to permit effective observation of any unusual or unexpected movements by the condemned inmate, much less to determine whether the inmate is conscious;
   b. Up to six persons are positioned in the control room, according to Warden Cain, with multiple persons filling the role of supervisor or observer, such as John Doe #5 and DOC Secretary Richard Stalder;
8) Deficiencies in the protocol development and content
   a. Questions raised by Warden Whitley about deficiencies in the protocol have never been adequately addressed in fifteen years;
   b. Former DOC attorney Annette Viator's extensive research files on the development of the lethal injection protocol are missing and were never produced by DOC;
   c. LSP Pharmacist Don Courts' missing records on the controlled dangerous substances inventories for more than half of the lethal injections, making it impossible to verify how much of each chemical was actually used;

[23] 2/13/03 Evidentiary Hearing at 65.
[24] Id, at 78-79.
[25] John Doe #6, at 55.
[26] John Doe #6, at 39-40; Evidentiary Hearing 2/12/03, at 118,

d. Only a bare-bones statute, an internal DOC Administrative Regulation No. C-03-001 and a unformatted set of five undated anonymous pages styling itself as a "protocol" which is contradicted by John Doe #5 as the actual practice ever carried out or intended to be carried out in a Louisiana lethal injection;
e. The discrepancies in the amounts of chemicals listed in the lethal injection equipment inventory documents and the reported amounts of chemicals actually intended to be used;
f. The failure of Warden Cain to have met with his predecessor specifically about the lethal injection process and his review of LSP memoranda (and subsequently throwing them away in Amarillo) while on a trip to Colorado;[27]
g. Changes to the protocol should be done under court supervision, because as it stands right now in Louisiana, the actual practice does not even reflect the written protocol; and the panoply of concerns listed immediately above remain unaddressed.

Regarding the "cut down" procedure, the State's Memorandum, at 36, misses the point of Petitioner's presentation. While it is apparently accurate that no "cut down" ever has been performed in any of the seven lethal injections carried out in Louisiana, the problem is with the failure of the Louisiana Department of Corrections and the lethal injection protocol to have done anything to prepare for the possibility that venous access could ever be problematic on the day of an execution. It is not premature to show that a deficiency exists in the Louisiana lethal injection protocol for a problem that could arise with any inmate, as was almost the case in 1999 with inmate Dobie Williams, and which is a more likely prospect with inmates, such as Petitioner, who have a history of intravenous drug abuse.

The "head in the sand" approach of DOC Secretary Richard Stalder, that "we don't anticipate that [venous access problems] will happen"[28] is simply not sufficient. The State further overlooks the United States Supreme Court's ruling in *Nelson v. Campbell*, 541 U.S. 637 (2004), which dealt with a death row inmate's challenge of the aspect of the Alabama lethal injection protocol requiring "cut downs" in all cases of problems with venous access. *Nelson* primarily dealt with the procedural aspects of whether the inmate could raise a challenge of this aspect of the lethal injection protocol via a Section 1983 action.

In finding in Mr. Nelson's favor as to his right to bring a Section 1983 action, the Court remanded the case below for further proceedings on that challenge. Mr. Nelson's challenge is ongoing. 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 cut-down method with the more modern and humane percutaneous technique and its failure to have a physician

[27] Evidentiary hearing 2/12/03, at 20-21.
[28] Stalder Deposition, at 44-45.

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. While it is presently unknowable what the condition of Mr. Code's veins would be on a future execution date, potentially resulting from his history of intravenous drug use, it is perfectly knowable now that the Louisiana protocol's failure to provide for an answer to venous access problems will be harmful to Mr. Code.

Regarding the issue of unconsciousness and time to death, the State's Memorandum cites several passages of testimony that Petitioner simply cannot verify. As noted above, no logs are kept of any aspect of the execution process. No record of the starting time of an execution exists from which to measure duration from beginning to end. The only time record made is that in the coroner's record of time of death. The State asserts, "Death occurred in six minutes or less," State's Memorandum at 43, and cites testimony of lead EMT John Doe #1, at 41-43. But neither in those specific pages or anywhere else does John Doe #1 make any such assertion, on either direct or cross-examination. Similarly, EMT John Doe #2 makes no such assertion, either on page 110 of his deposition transcript, or any page.

A witness with admittedly no medical background, Warden Burl Cain, did provide the estimate of six minutes on pages 70, 80, 84, 100 of the 2/13/03 transcript. He was the only witness to do so. However, Warden Cain's memory on exact time computation of execution events needs to be taken with a rather large grain of salt. Another execution event that involved timing was addressed in the hearing: the time needed to insert two IV sites on inmate Antonio James in 1996. Contemporaneous reports of a non-official nature, the various newspaper accounts of the official witnesses at the James execution, noted the following:

> Instead of offering the condemned man an opportunity to issue a final written statement, Cain changed the procedure and allowed James to speak into a microphone when he was led into the death chamber.[29]
>
> * * *
>
> He [James] whispered hoarsely, "I don't want to say anything," when he was brought into the execution chamber at 11:59 p.m.[30]
>
> * * *
>
> Cain said prison medical personnel had difficulty in "finding a vein" for a second intravenous tube, although the first was quickly installed. "We just took our time, we didn't want any mistakes," Cain said. **Witnesses said the curtain between**

[29] Baton Rouge Morning Advocate March 2, 1996
[30] Times Picayune States Item March 2, 1996

them and the death chamber was closed for *more than 15 minutes* while medical personnel worked with the IV lines.[31]

Additionally, the death certificate of Antonio James reports his time of death as 12:27 am.[32]

In contrast, Warden Cain, when asked at the hearing seven years after Mr. James' execution, to verify that the finding of this second IV site lasted fifteen minutes, as reported in the newspaper the next day, had a far quicker time estimate in his memory:

Q. And do you recall from the time that -- how much time passed from when they started to try to find a vein to the -- when they finally succeeded in getting that second line in?

A. No.

Q. Would you say it was more than 15 minutes?

A. *No. It wasn't that long*.

Q. Okay.

A. Maybe *five*.[33]

Thus, two contemporaneous newspaper accounts calculated an event on March 1, 1996 as taking fifteen minutes, while Warden Burl Cain, seven years later, recalled the exact same event to have lasted "maybe five" minutes in length. It would appear that the newspaper account was more accurate, otherwise, it would be difficult to account for the twenty-eight (28) minutes which transpired between the newspaper account of Mr. James' comment at 11:59pm and the coroner's certification of Mr. James' death at 12:27pm. More likely is the fact that Warden Cain's memory of time events in years past can be off by a factor of three times. His memory of six-minute executions might more accurately be three times as long.

If the State were to argue that newspaper accounts should not be relied upon to determine precise time designations of such a significant event, Petitioner wholeheartedly agrees, and notes that his resorting to news article accounts would be unnecessary were an official time log of all events be a required component of the Louisiana lethal injection protocol. Simply put, the State's argument is far weaker than the "powerful" illustration that it claims.

Even if Warden Cain's rough guesstimate of six minutes were remotely accurate, the State's memorandum still reaches an unwarranted conclusion. To reach the conclusion that death occurring within six minutes means "the drugs are being administered properly", State

[31] Baton Rouge Morning Advocate March 2, 1996 (emphasis added).
[32] Exhibit 101, at 61.
[33] 2/12/03 Evidentiary Hearing, at 66 (emphasis added).

Memorandum, at 43, is without scientific or medical foundation. Instead, the problem is twofold: how quickly the unconsciousness is achieved and how quickly it wears off, if the intended dosage of sodium thiopental is not delivered. No monitoring of these two aspects takes place in a Louisiana execution. Federal district courts in two states, California and Missouri, have halted executions and demanded protocol revisions that are essentially aimed at reducing the risk of torturous pain to the inmate if consciousness is prematurely regained.

The State uses a non-medical analogy to argue that it is not necessary for the execution team members to know the pharmacology of the three drugs: "[t]hose who follow the protocol don't have to know how it works to know that in fact it does work: you don't have to understand how your car operates in order to drive it safely and efficiently." State's Memorandum, at 43-44. While the latter automotive proposition may be true in part, it *does matter* if your car breaks down and you don't know how to repair it so that you can resume driving safely and reach your intended destination. Even more so in the medical and scientific arena, it *does matter* if you are using medical equipment to sedate someone but you are not able to monitor the level of consciousness of that person before injecting them with extremely painful chemicals such as pancuronium bromide and potassium chloride.

The State's position about the level of expertise of the senior EMTs contradicts the testimony of its only 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 lack of knowledge of the pharmacology of sodium pentothal made him *unqualified* to cope with potential complications in the administration of sodium pentothal that might arise during an execution by lethal injection.[34] John Doe #2 confirmed that he had never used sodium pentothal outside of an execution and had never been trained in its use.[35]

Moreover, another problem with the State's automotive analogy is that in the event of a break down, reference to a written manual would be important to make proper and reliable repairs. Here, by analogy, not only is there no chapter in the lethal injection protocol for dealing with break downs or unforeseen complications, the description of the protocol itself is contradicted by the one on-site witness who has been overlooked by the State throughout its memorandum: John Doe #5, the supervisor inside the secret control room. John Doe #5 is

[34] EH 02/22/06, p. 33.
[35] Deposition of John Doe #2, p. 133.

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 executions.[36] John Doe #5 reported that not one, but two, persons usually had performed the role of the syringe-pushing executioner.[37] John Doe #5 explained that the Louisiana protocol specifically *avoided* spelling out specific duties to be carried out by a specific individual regarding which person actually pushed what drugs.[38] It was more important to enhance participants' anonymity than to create a comprehensive guidebook that would set the scientific and medical standards for a humane execution.

Regarding the effectiveness of sodium pentothal, the State refers to findings in the case of *Reid v. Johnson*, 333 F.Supp.2d 543, 547 (W.D. Va. Sept 3, 2004), specifically citing the testimony of state witness Dr. Mark Dershwitz and the interrelationship between thiopental injections and consciousness levels after an inmate is injected with two (2) grams of sodium thiopental. However, the issue is not what will happen in a *theoretical* setting regarding chemicals, but what actually is really occurring in the execution chamber. The district court in *Morales* directly addressed the difference between the theoretical findings of Dr. Dershwitz and the reality of the execution chamber:

> Plaintiff does not dispute Dr. Dershwitz's conclusions at the theoretical level, agreeing that a person's breathing and consciousness should cease within one minute of the beginning of the administration of sodium thiopental. Instead, he contends that in actual practice in California, for whatever reason, the sodium thiopental *has not had its intended effect*. … While Dr. Dershwitz's explanation may be correct, evidence from eyewitnesses tending to show that many inmates continue to breathe long after they should have ceased to do so cannot simply be disregarded on its face. In rejecting the plaintiffs' claims on the merits in *Cooper* and *Beardslee*, this Court relied on Dr. Dershwitz's opinion that the amount of sodium pentothal used in California's lethal injection protocol should both stop breathing and cause unconsciousness within a minute after administration begins. While there is no direct evidence that any condemned inmate actually was conscious when pancuronium bromide was injected, evidence from Defendant's own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol is actually functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.[39]

Thus, whether it is the textbook toxicology findings of Dr. Dershwitz or of Dr. Goeders, the State's expert here, there is a difference between the theoretical and actual situations. As Dr.

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[36] Deposition of John Doe #5, p. 20.
[37] Deposition of John Doe #5, pp. 10, 11.
[38] Deposition of John Doe #5, pp. 16-20.
[39] *Morales v. Hickman*, (Nos. C-06-219-F and C-06-926-JF-RS (N.D. Cal. Feb. 14, 2006), at 9-11; 415 F. Supp. 2d 1037, emphasis added.

Goeders admitted, when asked what would happen if the inmate did not receive the full intended dose, then loss of consciousness would not be as rapid as with a two (2) gram injection and the duration of unconsciousness would not be the same.[40] In addition, because of the second injection of pancuronium bromide, there would be, as Dr. Goeders put it, "no way to know" whether that person had regained consciousness or not.[41]

Contrary to the State's position, the Louisiana lethal injection protocol is not administered with all due dignity and care, as no care is given to the many glaring deficiencies listed in Petitioner's original and reply memoranda.

The lack of a reliable protocol document becomes even more pronounced when considering the related issue of deficient selection and training of the execution team. As noted in his original Memorandum, Petitioner criticized the fact that virtually all execution team members claimed to have never seen a copy of any type of Louisiana protocol. The dangers of relying on word-of-mouth increase exponentially as the years pass. Already the lead EMT who originally sat in on planning the protocol, John Doe #1, is no longer involved in executions. John Doe #2, who assumed lead EMT duties at executions starting with the 1999 execution, reported being unable to participate fully in the 2002 execution. Worst of all, the presumed word-of-mouth passage of knowledge beyond John Doe #2 is altogether lacking. Although John Doe #2 testified that he would talk about the execution after it was over with the other EMT,[42] if it was EMT John Doe #4 to whom he was talking, he apparently was wasting his breath. EMT John Doe #4 repeatedly denied that he ever had any such debriefing after his two execution involvements.[43]

What is the logical end result of such a breakdown in the passing on of knowledge through oral tradition? EMT John Doe #4, self-described "peon in the whole pot,"[44] was the least experienced member of the I.V. team, having participated in only the 2000 and 2002 executions.[45] His attitude was summed up in his assertion that all he was doing at an execution was just starting IVs[46] and his refusal even to consider that what he was doing was causing the death of the inmate.[47] He verified that he had never seen a written protocol.[48] John Doe #4

[40] Evidentiary Hearing 2/21/06, at 36.
[41] *Id.* at 39.
[42] John Doe #2 deposition, at 116.
[43] John Doe #4 deposition, at 86.
[44] John Doe #4 deposition, at 20.
[45] John Doe #4 deposition, at 7.
[46] John Doe #4 deposition, at 21, 97.
[47] John Doe #4 deposition, at 21.
[48] John Doe #4 deposition, at 45.

admitted never looking out the control room window into the gurney room when an inmate was being strapped down on the gurney.[49] Instead, his attention at that time was devoted to "*just eating cookies, drinking Cokes*."[50]

Apparently, John Doe #4's limited scope of attention prevented him from even seeing how many other persons were present in the small control room with him. Although he denied that anyone else was in the control room in 2002 except for himself and another EMT and one syringe-pusher, he apparently did not remember the presence of DOC Secretary Richard Stalder who reported that he has been present inside of the control room for all seven lethal injection executions[51]; or the third EMT which John Doe #2 said was definitely present in 2002 to help out because an injury prevented John Doe #2 from personally setting up any IV lines.[52] Apparently, John Doe #2 felt compelled both to draft a back-up and be present himself, not willing to rely on John Doe #4 to be in charge. Even after participation in two executions, John Doe #4 made it absolutely clear that he was in no shape to take over the helm:

> Q. Okay. You've had experiences in two executions now, and you've described your role as being that of like an assistant?
>
> A. That's correct.
>
> Q. Do you feel that that experience has given you enough knowledge and understanding of the procedure that you could, you know, run the show, so to speak –
>
> A. No, sir.
>
> Q. -- in another one?
>
> A. Not solely, no.[53]

When confronted with a hypothetical scenario as to how any person might best handle the situation of conducting a Louisiana lethal injection, if all the experienced EMTs and syringe pushing executioners were not available, John Doe #4 resorted to a lot of guessing, and relied exclusively on the time-honored DOC practice of word-of-mouth communications for lethal injections:

> Q. And perhaps in a detailed fashion, so that if somebody new had to get involved in the process, for example, that the people who had been involved up to this point were unavailable for whatever reason, you know, serious injury, death, moving or whatever, all of a sudden you've got a new crew of people there, how would anybody know what to do? That's the question.

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[49] John Doe #4 deposition, at 40.
[50] John Doe #4 deposition, at 40 (emphasis added).
[51] Stalder deposition, at 21-22.
[52] John Doe #2 deposition, at 11.
[53] John Doe #4 deposition, at 86.

A. *I would guess ask.*

Q. So who would you think would be the likely person to go to first to ask?

A. I *guess* between the pharmacist for the formulary, the warden on procedures. *I'm not sure.*

Q. Okay.

A. That would be my starting points. Medical director.[54]

Among the many flaws in John Doe #4's plan would be his reliance on a pharmacist and any warden because they are not medical doctors, and the one person who is a doctor, the medical director, would be a person who has no role in the lethal injection process whatsoever, except to pronounce death of the executed inmate. Incidentally, John Doe #4's hypothetical task would be made all the more difficult as a new medical director has been installed at Louisiana State Penitentiary since the last execution in 2002, and upon information and belief, this new medical director, Dr. Raman Singh, has had no experience with any lethal injection executions in Louisiana.

CONCLUSION

The current lethal injection protocol established and instituted by Louisiana fails in several regards to avoid foreseeable risks of unnecessary infliction of pain in executions, from an inmate consciously suffering the effects of two unnecessary and painful chemicals: pancuronium bromide and potassium chloride. Individually, each flaw can 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.

As noted succinctly in a recent pronouncement in the *Morales* case in California, it is not necessary for a petitioner to show that any of the prior inmates who have been executed by lethal injection have definitively been conscious during their execution, for a constitutional violation nonetheless to exist:

> Defendants observe correctly that Plaintiff's burden of proof at the present stage of the instant proceeding is greater than it was at the preliminary-injunction stage and that *there still is no definitive evidence that any inmate has been conscious during his execution. Nonetheless, the evidence is more than adequate to establish a constitutional violation*. Given that the State is taking a human life, the pervasive lack of professionalism in the implementation of the [California protocol] at the very least is deeply disturbing. Coupled with the fact that the use of pancuronium bromide masks any outward signs of consciousness, the systemic flaws in the implementation of the protocol make it impossible to determine with any degree of certainty whether one or more inmates may have been conscious

[54] John Doe #4 deposition, at 85-86 (emphasis added).

> during previous executions or whether there is any reasonable assurance going forward that a given inmate will be adequately anesthetized. The responsibility for this uncertainty falls squarely upon Defendants, and the circumstances clearly implicate the Eighth Amendment.[55]

In light of the unconstitutional nature of the current Louisiana execution protocol as well as the use of pancuronium bromide to mask the outward signs of consciousness, 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).

[55] *Morales v. Tilton*, Case No. 5:06-cv-00219-JF, Document 290, filed 12/15/2006, at 12 (emphasis added).