

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1

-----X
RALPH BAZE, :
 :
PLAINTIFF :
 :
 v. : CIVIL ACTION No. 04-CI-01094
 :
JOHN REES, :
 :
DEFENDANT. :
-----X

[Street Address]
[City, State]

April 18, 2005

The HEARING in this matter began/continued at
[time a.m./p.m.] pursuant to notice.

BEFORE:
ROGER CRITTENDEN
FRANKLIN COUNTY CIRCUIT JUDGE

APPEARANCES:

On behalf of Plaintiff:

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* * * * *

C O N T E N T S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
DEBORAH WEST DENNO	16	33	51	
TOM CAMPBELL	52	59	62	
WILLIAM LEE HENDERSON	64	95	100	101
PHILIP PARKER	103	136		
TRACEY COREY	138	150	161	167
MIKE WARD	168	183	184	185
JOHN REES	187			

OPENING STATEMENTS

COUNSEL FOR PLAINTIFF	8
COUNSEL FOR DEFENDANT	11

EXHIBITS

MARKED RECEIVED

PLAINTIFF'S EXHIBITS:

1	Execution lethal injection revised 12/14/2004	76
2	IV team checklist	82
3	Controlled Chemical Disposition Record	85
4	Diagram of the new execution building	111

[OPPOSING PARTY'S] EXHIBITS:

1	[Short Description]	[#]	[#]
2	[Short Description]	[#]	[#]
3	[Short Description]	[#]	[#]

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P R O C E E D I N G S

(##:## a.m./p.m.)

THE JUDGE: Is the plaintiff ready, Mr. Shouse?

MR. SHOUSE: Yes, the plaintiff is ready.

THE JUDGE: All right. Witness ready today?

SPEAKER: Yes, Your Honor.

THE JUDGE: Okay. We're going to start taking the testimony or do you have a brief opening?

MR. SHOUSE: Actually, Judge, I do have a brief opening, but first I had some pre-hearing to the opening.

THE JUDGE: All right.

MR. SHOUSE: Some of this I've discussed with some of the --

THE JUDGE: Just speak up, it sounds so (inaudible).

MR. SHOUSE: -- but the defendant on something they might have, and for two of my motion for separation of witnesses.

THE JUDGE: All right, ordered. Anyone that a witness that's going to be testifying, if you're not the

1 first witness, you'll have to remain outside the courtroom
2 until called.

3 MR. SHOUSE: Secondly, I move the court to admit
4 into evidence now just in the interest of judicial economy
5 and to keep the hearing moving, the protocols that have
6 been turned over by the defendants, both old and new, the
7 copies they had submitted, some photographs, some xeroxes
8 of some photographs of the bottles of the drugs that they
9 had purchased back in November. Let's see, the protocols,
10 old and new. Oh, there's a three-page document the detail
11 in Mr. Harper's execution.

12 It has the times in which the injections were
13 begun. It has what drugs were checked-out. It's signed
14 by Mr. Henderson at one point. The autopsy report of Mr.
15 Harper, the toxicology report of Mr. Harper, these are all
16 things that were turned over by the defendant. We don't
17 question their authenticity at all; I'm really sure that
18 they complied with the rules of discovery. And just as to
19 keep the hearing moving, so we don't have to through
20 authentication on everything. I don't know if they had an
21 objection to that or not.

1 MR. MIDDENDORF: Judge, we don't have an
2 objection to that just as long as the two protocols
3 remained sealed. That's our only concern.

4 MR. SHOUSE: And we have no objection to that;
5 I'm sorry, I did forget that.

6 MR. MIDDENDORF: And I know that there will be
7 reference to it during the course of the hearing, but we
8 just want to make sure that they are sealed.

9 MR. SHOUSE: So be will it.

10 MR. MIDDENDORF: We just want to make sure that
11 at least the two protocols still remain sealed, the old
12 one and the new one.

13 MR. SHOUSE: All right.

14 THE JUDGE: They'll remain sealed.

15 MR. SHOUSE: In short, Judge --

16 THE JUDGE: So that's going to be exhibits -- do
17 you want to -- were we going to get together and mark
18 those one and two?

19 MR. SHOUSE: Yes, sir.

20 THE JUDGE: All right.

21 MR. SHOUSE: Also the EKG on Mr. Harper. What I
22 guess I'm asking for is just the documents relating to

1 both the new and the old protocol, everything relating to
2 Mr. Harper just to be agreed upon, that those can be
3 admitted and marked as exhibits as they come up with the
4 witnesses.

5 THE JUDGE: Okay.

6 MR. MIDDENDORF: Judge, we understand your
7 ruling that those are admissible. But at least it can be
8 talked about. I mean, we still believe that that is
9 irrelevant to this hearing. But since we're going to go
10 forward and hear testimony on that, we won't object to the
11 admission of that.

12 THE JUDGE: The only thing that is going to be
13 sealed though are the protocols. You know, that's --

14 MR. MIDDENDORF: That's our concern.

15 THE JUDGE: So are you going to move to admit
16 these as they come in, or you --

17 MR. SHOUSE: Yes, sir.

18 THE JUDGE: Okay.

19 MR. SHOUSE: Yes, sir.

20 THE JUDGE: All right.

21 MR. SHOUSE: We're just moving along --

1 THE JUDGE: There's no problem, there'll be no
2 problem if that -- Mr. Middendorf indicates they'd be no
3 problem.

4 MR. SHOUSE: Thank you. Judge, I do have a very
5 brief opening if I might.

6 THE JUDGE: All right. Do you have any motions
7 before we start with the opening?

8 MR. MIDDENDORF: Just with regard to Carroll
9 Lira, and her medical records, we still have not received
10 that, Your Honor. It's my understanding that she may be
11 testifying on Wednesday. We have asked for very little in
12 discovery, but we still have no received those documents.

13 MR. SHOUSE: That's true, Judge, they did not
14 come in this weekend. I can also inform the court that
15 our first mail delivery of today, for today, indicates
16 that they were not received either. Today, I mean.

17 THE JUDGE: Okay, we'll just take that up when
18 it comes up.

19 MR. SHOUSE: Yes, sir.

20 THE JUDGE: All right.

21 MR. SHOUSE: Yes, sir.

1 THE JUDGE: Hold on for one second, let me see
2 if we've got some kind of problems with this. It's
3 showing normal, it's not (inaudible). Go ahead, Mr.
4 Shouse.

5 MR. SHOUSE: Thank you, Judge. Judge, in the
6 course of this hearing and over the course of the next
7 four days, and, of course, on May the 2nd, and again on
8 May the 10th, should rebuttal become necessary, we intend
9 to prove that there's no scientific basis for the protocol
10 the defendants intend to use in executing Mr. Baze and Mr.
11 Bowling.

12 That the staff the defendants intend to employ
13 in carrying out this protocol, lack even the most basic
14 training in monitoring a condemned inmate, to ensure that
15 that inmate is not suffering unconstitutionally while
16 being put to death. That this protocol is so flawed that
17 Mr. Baze and Mr. Bowling will put to death in a manner
18 that violates that Eighth Amendment of the United States
19 Constitution, and Section 17 of the Commonwealth of
20 Kentucky's constitution.

21 That under KRS 321207, KRS 321990 and the
22 attendant Kentucky Administrator Regulation, the

1 defendants would be guilty of a misdemeanor if they
2 would've put my dog down using the current protocol. That
3 the chemicals used and the dosages dictated were
4 arbitrarily chosen and continued to be altered
5 arbitrarily, and do not ensure what the United States
6 Supreme Court requires, and that is a death in accord with
7 the dignity of man.

8 That there's an unacceptably higher risk that
9 Mr. Baze, and Mr. Bowling will be conscious, aware and in
10 agony when the potassium chloride is injected and will
11 suffer an excruciating burning and suffocation while they
12 die. In short, we intend to prove that the Commonwealth
13 of Kentucky will violate Mr. Baze's and Mr. Bowling's
14 constitutional right to be free of cruel and unusual
15 punishment if they're allowed to proceed with the
16 executions under the current protocol.

17 Clearly Mr. Baze and Mr. Bowling are not only
18 entitled to a risk-free execution, but they are absolutely
19 entitled to an execution that is more than an ad hoc
20 series of procedures and checklists pulled together from
21 other states without any research, or regard for science
22 or the law and carried out by an unqualified staff. We

1 intend to prove that this court cannot allow the
2 Commonwealth to proceed in violation of the law.

3 THE JUDGE: Thank you, counsel.

4 MR. MIDDENDORF: Just a very brief (inaudible).
5 Your Honor, I'll just take a few minutes because I know
6 that we've dealt quite a bit over this the last six months
7 or so. Let me start by making one thing very clear, that
8 Dr. Heath, their expert is consistent to what he testified
9 to in Virginia, that if an inmate in properly given a two-
10 gram doze of sodium thiopental, then that inmate would
11 experience a painless and humane death.

12 So it's easy to assume that Dr. Heath believes
13 that if 2 g administered properly ensures a humane death,
14 then 3 g in Kentucky certainly will as well. But one
15 thing he points to in his research is the levels of sodium
16 thiopental in autopsy results of executed people. What we
17 will show through the testimony of Dr. Dershwitz and also
18 Dr. Corey is his researches were fully inadequate because
19 he doesn't take the time to take into account many other
20 factors that should be considered in his final
21 determination.

1 Also the levels found in Harper's -- in Mr.
2 Harper's and also others is that there are (inaudible),
3 which means that it achieved the desired effect and that
4 was unconsciousness, in forensic science. In contrast,
5 we'll provide you with the testimony of Mark Derschwitz
6 who's not only an anesthesiologist like Dr. Heath, he also
7 has a doctorate in pharmacology.

8 Dr. Derschwitz is also a leader in
9 pharmacokinetics which is the study of determining the
10 affects of drugs on human body which in turn measures the
11 duration of drugs and how they will affect the human body.
12 And that's why we're here today. Dr. Heath even testified
13 in Virginia that he would defer to Dr. Derschwitz's
14 findings because Dr. Derschwitz is the expert in the field.

15 Dr. Derschwitz will testify that given a three-
16 gram dose of sodium thiopental, 99.999 percent of the
17 population will be unconscious for well over two hours.
18 The plaintiffs will say that Eddie Lee Harper's execution
19 was a botched execution, but they have no evidence to
20 support that claim. They would point to the autopsy
21 levels of sodium thiopental, but we will show that it was
22 an appropriate amount.

1 Glenn Haeberlin, the current warden, Bill
2 Parker, the former warden, Bill Henderson, a former deputy
3 warden and Tom Campbell, a former deputy commissioner will
4 all say that within a matter of seconds Eddie Lee Harper
5 closed his eyes as expected, and went to sleep. He never
6 made any more movement after that. So this really comes
7 down to making sure IV lines enter a vein. And the
8 Kentucky Department of Corrections takes many safeguards
9 to assure this. And you've had the opportunity to review
10 a lot of the protocol.

11 You'll hear testimony that the two members of
12 the IV team are more than qualified to insert and IV line.
13 8 and 23 years of experience between the two of them.
14 They also practice outside of doing it on their daily a
15 daily basis, on a monthly basis as part of the execution
16 team. Warden Haeberlin and Rich Pershing will explain to
17 you what they are looking for during an execution to
18 assure that the drugs are properly being administered.

19 All the issues that the plaintiff's were
20 bringing out were pure speculation. Dr. Heath will even
21 go as too far -- go as far to say that we should hang the
22 drugs on the wall just in case we forget which drug goes

1 first during the course of an execution. There are only
2 three drugs. They want you to hold the Kentucky
3 Department of Corrections to a higher standard in the
4 execution of two convicted double murderers than the
5 standard we would receive in a hospital. Thank you, Your
6 Honor.

7 THE JUDGE: Thank you, Mr. Middendorf. Before
8 we call the first witness, I anticipate we'll be breaking
9 at 11:30 today for lunch. We -- district court uses this
10 room for video arrangements. They normally go at 11:00;
11 they've agreed to wait till 11:30 today. We've got a
12 crowd, so we'll probably take -- we'll break at 11:30 for
13 lunch. Yes, Mr. Shouse?

14 MR. SHOUSE: The first witness is Deborah Denno,
15 she's in the hall.

16 THE JUDGE: Deborah Denno. Shouse, would you
17 ask Deborah Daniel to come to the courtroom? Would you
18 leave for a second to get some water? Mr. Shouse, Mr.
19 Middendorf, what do you all anticipate in terms of times
20 today, and --

21 MR. MIDDENDORF: Mr. (inaudible) is going to
22 make it through the afternoon.

1 MR. SHOUSE: That's my understanding.

2 THE JUDGE: Pardon.

3 MR. MIDDENDORF: Today, I would imagine the mid-
4 afternoon, tomorrow I think it would be the short day,
5 Judge.

6 THE JUDGE: All right, we'll talk about that
7 this afternoon then. Let us (inaudible).

8 MR. MIDDENDORF: Judge, the one thing I would
9 like to bring up, I would like to talk to Dr. Corey who
10 they intend to call this afternoon.

11 THE JUDGE: Yes.

12 MR. MIDDENDORF: She has some child care
13 concerns about getting back to (inaudible), so she would
14 like to be called first out if possible --

15 THE JUDGE: After lunch?

16 MR. MIDDENDORF: After lunch. And I told her to
17 meet me actually at the Bush Building at 12:30.

18 THE JUDGE: Okay.

19 MR. MIDDENDORF: So I don't know what time we
20 intend to start.

21 THE JUDGE: Let's start at 1:30; let's take her
22 at 1:30. Is that okay?

1 MR. MIDDENDORF: Yes sir.

2 THE JUDGE: Is that satisfactory to you?

3 MR. MIDDENDORF: That would be fine.

4 THE JUDGE: Would you raise your hand, please?

5

6 Whereupon,

7

DEBORAH WEST DENNO

8 was called as a witness and, having been first duly sworn,

9 was examined and testified as follows:

10 THE JUDGE: All right, please sit.

11 THE WITNESS: Thank you.

12 DIRECT EXAMINATION

13 BY MR. BARRON:

14 Q Would you please state your full name spelling
15 your last name for the record?

16 A My name is Deborah West Denno; my last name is
17 spelt D-e-n-n-o.

18 Q What is your current profession?

19 A I'm a professor of law at Fordham University
20 School of Law in New York City.

21 Q How long have you been a professor at Fordham?

1 A I've been a professor at Fordham for 14 years.
2 The first six of those years, I was a associate professor
3 of law, and the last eight years, I've been a full
4 professor of law.

5 Q Where have you previous testified concerning
6 lethal injection?

7 A I've testified in Connecticut in 1997, and I
8 also testified in Texas in 1997.

9 Q As a law professor, have you researched lethal
10 injection?

11 A Yes, I have.

12 Q When did you begin conducting this research?

13 A I began conducting the research in 1991.

14 Q How many past articles have you published on
15 lethal injection?

16 A I have -- I had five publications on lethal
17 injection.

18 Q What are they called?

19 A The first publication is called (*italics*)
20 "Electrocution, Gas Chamber and Lethal Injection." That
21 was that -- it will be published in the (*italics*)
22 Encyclopedia Britannica later this year, that would be a

1 2005 Publication. The second publication is called,
2 (italics) "Lethally Humane? The Evolution of Execution
3 Methods in the United States." That was published in 1998
4 in these -- excuse me, in 2003 in the second edition of
5 (italics) America's Experiment on Capital Punishment.
6 That was an edited book.

7 The third publication is called (italics)
8 "Execution and the Forgotten Eighth Amendment." That was
9 published in the first edition of the book. (italics) The
10 Death Penalty, America's Experiment. And that was
11 published in 1998. The fourth publication is entitled,
12 (italics) "Getting to Death: Are Executions
13 Constitutional?" That was published in (italics) Iowa Law
14 Review in 1997. And the last publication is called,
15 (italics) "When Legislatures Delegate Death, the Troubling
16 Paradox Behind Executions, Electrocuting and Lethal
17 Injection and what that says about us." That's a 2002
18 publication in (italics) Ohio State Law Journal.

19 Q Let's go through each of these articles in a
20 little more detail. What was the first one you mentioned
21 about?

1 A The first publication I mentioned about is
2 called, "Electrocution, Gas Chamber and Lethal Injection."
3 That's forthcoming in the Encyclopedia Britannica.

4 I was invited to write three separate entries on
5 each of those topics by the editors of the Encyclopedia
6 Britannica. And the Encyclopedia will be published both
7 in hard copy and over the Internet, as I said at the end
8 of this year.

9 The second publication is called "Lethally
10 Humane? The Evolution of Execution Methods in the United
11 States." It was published in 2003 in an edited volume
12 called America's Experiment with Capital Punishment. And
13 that article, or that, it's a book chapter, is an update
14 of my 2002 survey in the Ohio State Law Journal. And that
15 survey did several things. First, in the first part of
16 the article, I look at constitutionality of lethal
17 injection according to Eight Amendment standards. The
18 three primary standards being --

19 MR. MIDDENDORF: Objection, Your Honor, this was
20 agreed not to introduce this standard in our motion
21 literally last Friday.

22 THE JUDGE: All right.

1 MR. BARRON: Your Honor, may I make a respond?
2 We're not going to any details of any standard at the
3 moment; I'm just trying to lay some foundation of her
4 knowledge and expertise in the lethal injection.

5 THE JUDGE: It will still go into standards.
6 Proceed.

7 THE WITNESS: Okay. The second part of that
8 article was my -- the book chapter was my 2001 survey.
9 All 36 states at the time in 2001 who were -- that were
10 using lethal injection. I now looked at all the protocols
11 of those states, and I focused on particular aspects of
12 those protocols in writing up the book chapter, which
13 included the kinds of chemicals that were used in lethal
14 injection and the amount of chemicals, the training,
15 preparation, qualifications of the individuals who engage
16 in lethal injection.

17 Whether the presence of media personnel at a
18 lethal injection execution, the involvement of doctors and
19 -- as well as technical aspects of the lethal injection
20 procedure, and how much of that procedure the witnesses
21 could actually see. The third article was also a book
22 chapter that was published in 1998. It's called,

1 "Execution and the forgotten Eight Amendment," in the
2 first edition of America's Experiment with Capital
3 Punishment. That was an overview of lethal injection at
4 that time, in terms of botched executions, the technical
5 aspects of lethal injection, medical aspects as well as
6 just as in a side, the Eighth Amendment Standards.

7 The fourth articles was entitled, "Getting to
8 Death: Are Executions Constitutional?" As I mentioned
9 that was published in 1997 in Iowa Law Review. In that
10 article, I also looked without going into detail, on
11 Eighth Amendment standards in the context of lethal
12 injection as well as, again, the cost of the technical
13 aspects. I have a whole appendix showing evolution of
14 execution methods over time, of course, across the century
15 as well for every state, as well an explanation in every
16 state about why the state first selected a particular
17 method of execution and why it kept on changing to other
18 methods of execution.

19 The last article is my 2002 article in Ohio
20 State Law Journal. It's called -- that I mentioned, "When
21 Legislatures Delegate Death: The Troubling Paradox Between
22 Behind State Uses of Electrocution and Lethal Injection

1 and What That Says About Us." That is again the first
2 publication of my 2001 survey on lethal injection
3 protocols as I mentioned.

4 That survey looked at the kinds of chemicals
5 that were used, the amount of chemical that were used, the
6 training, preparation and qualifications of execution
7 personnel, the kinds of witnesses that are allowed into a
8 lethal injection execution. Any involvement of medical
9 personnel and how much of the lethal injection that
10 witnesses can see, as well as, as I mentioned, the
11 technical aspects of lethal injection executions.

12 BY MR. BARRON:

13 Q In your 2002 article "When Legislatures Delegate
14 Death," how did you go about researching the information
15 you just discussed?

16 A Well, we were -- we used several strategies for
17 researching this kind of information. In 19 states, we
18 found that the protocols were actually publicly available
19 either on a website, or they were discussed in a
20 particular case, or they were available in hard copies so
21 that we can get -- we could get them in hard copy and
22 actually look at the information.

1 In about 10 states, the protocols weren't
2 publicly available, in which case we ended up phoning
3 members of the Department of Corrections in each state
4 where this information wasn't available, and asking them
5 questions about their execution protocol. And that
6 information was given to us either over the phone or in an
7 e-mail or in a letter, some other kind of communication.
8 And then there were seven states, where we were simply not
9 able to get any kind of information.

10 Q How many states currently have the death
11 penalty?

12 A Thirty-seven states currently have the death
13 penalty, and that's, of course, excluding New York which
14 just abolished the death penalty.

15 Q Out of that, how many states use the lethal
16 injection as the method of execution?

17 A Thirty-six states currently used lethal
18 injection as the method of execution. And again, that
19 excludes New York.

20 Q Which state was the first one to adopt lethal
21 injection?

1 A Oklahoma was the first state to adopt lethal
2 injection.

3 Q In what year?

4 A That was in 1977.

5 Q How did it come about that Oklahoma adopted
6 lethal injection?

7 A Well, in 1977, then senator, Bill Dawson, who's
8 now deceased, was trying to come up with a method of
9 execution to use in Oklahoma because he was finding that
10 electrocution and lethal -- excuse me, electrocution and
11 lethal gas were too expensive to use. So he heard that
12 lethal injection might be a cost efficient way of
13 executing inmates, and he contacted Dr. Stanley Deutsch
14 who at that time was head of the Oklahoma Medical Center's
15 Department of Anesthesiology. He was the chair. And he
16 asked Dr. Deutsch to make some recommendations about
17 lethal injection. And then in a letter of February 28,
18 1977 from Dr. Stanley Deutsch to Bill Dawson, Deutsch
19 wrote out his recommendations.

20 Q What chemicals were adopted in Oklahoma's first
21 lethal injection protocol?

1 A Oklahoma's first lethal injection protocol
2 adopted sodium thiopental and a paralytic agent. There
3 were two chemicals that it adopted.

4 Q Based on your research, what if any medical or
5 scientific research was conducted to determine the affects
6 of thiopental when used for an execution?

7 A Based on my research, I didn't come across any
8 kind of studies on the effect of thiopental during the --
9 an execution.

10 Q What about the affect of the paralytic agent?

11 A In my research, I came across no studies that
12 were looking at the affect of the paralytic agent in the
13 context of an execution?

14 Q What about the affect of those two chemicals in
15 combination?

16 A In my research, I found no studies on the affect
17 of that combination of thiopental and pancuronium bromide.

18 Q What about whether those chemicals caused pain
19 during an execution?

20 A In my research, I found no studies on whether or
21 not those chemicals caused pain in combination.

1 Q And what about whether other alternative
2 chemicals were available that could be used?

3 A In my research, I found no studies or
4 investigation on whether or not any other kinds of
5 chemicals could be used in the course of the lethal
6 injection execution.

7 Q After the Oklahoma adopted lethal injection, how
8 many additional states adopted lethal injection?

9 A There were 36 additional states that adopted
10 lethal injection after Oklahoma.

11 Q Out of those states, how many of them did you
12 review execution protocols or other materials?

13 A I reviewed execution protocols for 28 states.

14 Q Why did you not review for the rest of the
15 states?

16 A I didn't review for the rest of the states for
17 two primary reasons. At the time of my 2001 study,
18 Alabama wasn't yet using lethal injection. And also there
19 was seven states that did not give us information for a
20 variety of reasons. Four states didn't give us
21 information because they said that information was
22 confidential. And those states were Pennsylvania, South

1 Carolina, Virginia and Nevada. Three additional states
2 said they didn't have the information. And those states
3 were Kansas, Kentucky and New Hampshire.

4 Q Out of those states, how many of them used the
5 two chemicals that were originally adopted in Oklahoma?

6 A Out of those 28 states, 27 states used the two
7 chemical that were originally adopted in Oklahoma.

8 Q Which states are those?

9 A Those states are Arizona, Arkansas, California,
10 Colorado, Connecticut, Delaware, Florida, Georgia, Idaho,
11 Illinois, Indiana, Louisiana, Maryland, Mississippi,
12 Missouri, Montana, New York, New Mexico, North Carolina,
13 Ohio, Oregon, South Dakota, Tennessee, Texas, the State of
14 -- excuse me, Utah, the State of Washington and Wyoming.
15 I might have left out a state.

16 Q Out of that 20-plus number of states, how many
17 of them conducted any medical, or scientific research into
18 the affects of the chemicals they were using?

19 A In all my research, I didn't come across any
20 studies that showed that they had conducted any kind of
21 research, or investigation into the affects of these
22 chemicals.

1 Q How many out of that list of states conducted
2 any medical research about whether these chemicals caused
3 pain?

4 A None.

5 Q The affect that would occur if using
6 combination?

7 A I found no research or studies investigating the
8 affect of the combination of those drugs.

9 Q And what about whether alternative chemicals
10 would be available?

11 A I found no research --

12 MR. MIDDENDORF: Your Honor, the whole line of
13 questions has already been asked and answered.

14 THE JUDGE: It has. It's been asked and
15 answered, so -- go ahead.

16 BY MR. BARRON:

17 Q Are there any states that do not use those two
18 chemicals?

19 A The chemicals of sodium thiopental and
20 pancuronium bromide?

21 Q Yes.

1 A Yeah, New Jersey uses sodium thiopental and
2 potassium chloride.

3 Q How did potassium chloride come to be used?

4 A Well, there are three possible explanations for
5 how potassium chloride became to be used in these lethal
6 injection executions. The first explanation seems to be
7 that the --

8 MR. MIDDENDORF: Your Honor, I object, this is
9 speculation. She's talking about "three possible
10 explanations" and "it's seems to be." I don't think
11 that's an appropriate question, or an appropriate answer.
12 It's speculation.

13 MR. BARRON: Your Honor --

14 THE JUDGE: We're already talking about New
15 Jersey, so let's go ahead. What's the -- question is how
16 did potassium chloride come to be used?

17 MR. BARRON: Based on the research that you
18 conducted looking into that.

19 THE WITNESS: Based on my research that was
20 conducted looking into this --

21 MR. MIDDENDORF: Ma'am, I'd like to --

1 THE JUDGE: I'm going to let her answer. I
2 won't -- then we'll go into, what was the research.

3 THE WITNESS: Okay. Number one, Oregon
4 mentioned in its 1977 protocol, it mentioned potassium
5 chloride as a possible paralytic agent to be used in
6 lethal injection execution. And Oregon becomes relevant
7 because it was the foundation for other state's methods of
8 executions including New Jersey. The second reason, or
9 explanation given for the use of potassium chloride is
10 there's been considerable amount written that doctors were
11 involved in the development of lethal injection executions
12 and that they were particularly involved in the execution
13 methods for New Jersey.

14 The third explanation is that, according to Fred
15 Leuchter, who was the predominant maker and creator of
16 execution methods in this country up till 1990, that he
17 was the one who suggested that the third chemical
18 potassium chloride be used in lethal injection executions.

19 Q How did you go about in learning this
20 information and researching it?

21 A I -- in terms of going about and studying the
22 protocols, we looked at every protocol that was used in a

1 lethal injection execution, and called up states as I
2 mentioned.

3 Q Now, you've talked previously about thiopental
4 and the paralytic agent. Now you've added in potassium
5 chloride. Can you just clarify which states now actually
6 use those three chemicals rather than the -- just the two
7 we previously talked about?

8 A Yes, sir, the 27 states that I previously
9 mentioned use those three chemicals in addition to New
10 Jersey.

11 Q Now once this potassium chloride has been added,
12 was there any medical or scientific research on the
13 affects of potassium chloride used during an execution?

14 A No, I've come across no studies or research on
15 the affect of potassium chloride in a lethal injection
16 context.

17 Q You mentioned earlier that you reviewed
18 documents from North Carolina's protocol?

19 A That's right.

20 Q At the time of your article, what concentration
21 of thiopental did they use?

22 A Five grams.

1 Q In preparing for your testimony today, did you
2 review Kentucky's execution protocol including their 2004
3 revisions?

4 A Yes, I did.

5 Q What chemicals do they use in lethal injections?

6 A Kentucky uses sodium thiopental, pancuronium
7 bromide and potassium chloride.

8 Q Are those first two chemicals the same types of
9 chemicals that were used in the original Oklahoma
10 protocol?

11 A Yes, they are.

12 Q And to your knowledge has any medical or
13 scientific studies been conducted on the affects of these
14 three chemicals that Kentucky currently uses in lethal
15 injection executions?

16 A In all my research, I've not come across any
17 kind of medical or scientific studies looking at those
18 three chemicals and their affects in the context of an
19 execution.

20 Q No further questions at this time.

21 THE JUDGE: Thank you. Who's for the
22 Commonwealth?

1 CROSS EXAMINATION

2 BY MR. JUDY:

3 Q Good morning, Professor Denno.

4 A Good morning.

5 Q Let's start off -- can you go step by step in a
6 little more detail on the research you conducted in your
7 2002 Ohio State article?

8 A Certainly. As I said, in about 19 states the
9 protocols that we were looking at were publicly available.
10 So, for example, the information would be available on a
11 website. It would've been already published, or was
12 available in hard copies so that we could look at it. If
13 it was not so publicly available, we've ended up calling
14 individuals at the Department of Corrections or where we
15 were referred to, to get additional information.

16 And I was working with a research assistant, and
17 either my research assistant or I would contact those
18 individuals and ask them more specifics about their
19 protocols. For example, what chemicals they used, the
20 amount of those chemicals, what kinds of witnesses they
21 had, whether there was involvement of some kind of doctor

1 at the time, how much of the -- how much could be seen of
2 the execution, et cetera.

3 Q And you looked at case law?

4 A Yes, we did look at case law.

5 Q You looked at various law review articles?

6 A Yes, we did. And we also looked at newspaper
7 articles as well.

8 Q Did you talk to any doctors on the issue?

9 A Did I talk to -- yes, I did.

10 Q Which doctors?

11 A I talked to Edward Brunner and -- I can't
12 remember the name, excuse me, of the second doctors I
13 talked to.

14 Q Is Dr. Mark Heath?

15 A I spoke to Dr. Mark Heath very briefly when I
16 was conducting the 2002 article. Just very briefly, and
17 only about the Timothy McVay case, and whether Timothy
18 McVay shed tears when he was being executed. But not for
19 anything else.

20 Q You said that there were three states when you
21 wrote this article that state they did not have an
22 execution protocol?

1 A Well, there were actually four states, but the
2 information was confidential, and three states informed us
3 that they did not have an execution protocol.

4 Q And one of those states was Kentucky?

5 A That's right.

6 Q When was this article written?

7 A It was -- well, it was -- my survey was
8 conducted -- I ended the conducting of my survey in the
9 fall of 2001, and I say that in my 2002 article. The
10 article was actually released in January of 2002 because
11 that's -- law review articles takes several months to
12 release after it's been written.

13 Q And according -- how did you come to the
14 conclusion that Kentucky did not have a lethal injection
15 protocol in 2001?

16 A Well, we found that it didn't have a publicly
17 available protocol in the way that I explained, that it
18 wasn't on the website, it wasn't in hardcopy, and it
19 wasn't something that we could get in a case or a
20 newspaper article or a law review article. So we
21 contacted the Department of Corrections and also the
22 General Counsel of -- in Kentucky.

1 And my research assistant asked Brenda Presley
2 on March 14, 2001, about Kentucky's protocol. And she
3 responded that Kentucky didn't have a protocol, that it
4 was going to conduct executions on a case-by-case basis in
5 terms of the information, and that she couldn't provide us
6 any information because there wasn't any.

7 Q Where in your article did you mention that
8 Kentucky was doing it on a case-by-case basis?

9 A I don't mention that in the article; that was in
10 our notes. But I do have in Table 20 of my 2002 Ohio
11 State article. I do specify that we talked to Brenda. We
12 didn't know her last name then and the date that we talked
13 to her. In our notes we have also too details. For
14 example, we have the time that we spoke to her and another
15 individual in the library at the General Counsel's Office
16 as well. And they referred us to Kentucky's statute. And
17 of course, I already had the statute for information on
18 how Kentucky conducted its protocols.

19 Q And who was the other person that you talked to
20 at the library here in Kentucky?

1 A My assistant talked to another person in the
2 library. I don't have the name with me; it's in our
3 notes. I can provide you with that information.

4 Q And you talked -- on Table 20 is found on page
5 23 of your paper, correct?

6 A I imagine so. I don't have my page numbers
7 memorized.

8 Q And you stated on Table 20 that you talked with
9 Brenda Presley in, what, the General Counsel's Office on
10 March 14, 2001?

11 A That's right.

12 Q What was Ms. Presley's position at that time?

13 A I don't know. She didn't provide it.

14 Q Was it asked?

15 A Yes, it was asked. My assistant always ask
16 people's position. Some people did not want to provide
17 their position to us over the phone.

18 Q And was the question asked, does Kentucky have a
19 policy or procedure?

20 A Yes, it was.

21 Q And in Kentucky, do you know there's a law for
22 developing a policy and procedure for a state agency?

1 A I don't know every detail of Kentucky law.

2 Q And so based upon those information, you came to
3 the conclusion that Kentucky did not have an execution
4 protocol?

5 A We were told over the phone by Brenda Presley in
6 the Kentucky's General Counsel Office that Kentucky did
7 not have a protocol. And there was nothing written for us
8 apart from Kentucky's statute.

9 Q Well, I just thought you previously testified
10 that Kentucky's protocol wasn't publicly available.

11 A The statute was publicly available.

12 Q I know. The protocol?

13 A It was not publicly available, that's right

14 Q Well, do they have a policy or do they not have
15 a policy? And if they have a policy, then it's not going
16 to be publicly available, correct?

17 A Well, that's right. We were told that you did
18 not have any kind of protocol. That's right. But there
19 was no protocol, and then it was done on a case-by-case
20 basis in Kentucky.

21 Q When you wrote this article where there any
22 cases that had examined other states protocols?

1 A There were several cases that had examined some
2 states protocols, that's right.

3 Q Now, throughout your paper you consistently
4 state that Kentucky does not have a protocol according to
5 Brenda Presley?

6 A I stated in Table 20 that Kentucky did not have
7 a protocol, and that was also information in Table 11 of
8 my article.

9 Q Okay. Do you recall Table 19?

10 A Yeah, I do.

11 Q It's broken down into three parts.

12 MR. SHOUSE: Judge, I'd ask that the witness be
13 shown this because it sounds like little complicated.

14 THE JUDGE: Please. If you're going to talk to,
15 her unless she's familiar with it. Ask her if she's
16 familiar with it.

17 MR. JUDY: (inaudible).

18 THE JUDGE: Okay, all right, let's see what the
19 questions are.

20 THE WITNESS: I don't every detail but --

21 BY MR. JUDY:

1 Q Yeah. Part three, "States with the private
2 protocol."

3 A I'm familiar with that.

4 Q Which states are listed?

5 A There are five states listed there.

6 Q Which were?

7 A There was Kentucky, there was -- let's see,
8 there's Nevada, Kentucky, South Carolina, Virginia and,
9 let's see -- there was a fifth state as well.

10 Q But according to this, Kentucky did have a prior
11 protocol?

12 A Pennsylvania.

13 Q According to this Kentucky did have a prior
14 protocol?

15 A It had the, what we were told over the phone
16 which was the statute.

17 Q But is the statute and protocol the same thing?

18 A We were told that's what Kentucky's protocol
19 was. I don't think it is, but that's what we were told
20 over the phone and that's what Brenda Presley referred us
21 to.

1 Q Okay. Can you define what -- the term
2 "regularity?"

3 A You want me to define the term "regularity?"

4 Q Yes, please.

5 A Something that happens at some times but not
6 every time.

7 Q Sometimes but not every time? I mean,
8 regularity, something that might happen once a week.

9 THE WITNESS: It depends on the context.

10 THE JUDGE: Could we move on with this, please.

11 MR. JUDY: Yes.

12 THE JUDGE: Whether there was a protocol or not
13 a protocol, whether she found out there was more and not
14 one. There is one, so let's move.

15 BY MR. JUDY:

16 Q Yes. In your article, you stated that Kentucky
17 engaged in an execution with some regularity, right?

18 A That's right, relative to other states.

19 Q And when you wrote this article, how many
20 executions had Kentucky conducted?

21 A I cannot quite remember at the moment. That's a
22 very detailed article and I can't remember every detail.

1 Q Would you just pick two that -- Kentucky has
2 only conducted two execution since 1977?

3 A I can't remember.

4 Q Okay. And you testified that in your research
5 there were no studies on the effects of sodium thiopental,
6 pancuronium bromide and potassium chloride as it relates
7 to lethal injection?

8 A That's right.

9 Q Did you look at studies from medical resources,
10 from medical thesis?

11 A Absolutely.

12 Q What -- there are some 19 odd articles dealing
13 specifically with lethal injection, there are scientific
14 studies on these three drugs?

15 A Oh, that's right. I had specified repeatedly on
16 direct that it was in the context of lethal injection.

17 xxxjj

18 Q And there are studies of when these drugs may be
19 lethal.

20 A I don't dispute that.

21 Q Now, in your article, you've listed 31 botched
22 executions, correct?

1 A That's what I recall.

2 Q It was executions from '77 to 2001?

3 A From what I recall of that article.

4 Q It was a pretty detailed list, wasn't it? You
5 drew your resources from various places?

6 A That's right.

7 MR. JUDY: May I approach the witness, Your
8 Honor.

9 THE JUDGE: Please.

10 BY MR. JUDY:

11 Q Where did you obtain information on this for
12 these 31 alleged botched executions?

13 A Well, on page 141, I specified an asterisked
14 footnote where I obtained that information, and I say that
15 part of the information is obtained from my article,
16 "Getting to Death", which was published in 1997, and part
17 of it was obtained by -- from Michael Radelet's article on
18 facing -- chapter in "Facing The Death Penalty", it's a
19 book, and also a website, and some newspaper articles.

20 Q Eddie Lee Harper was executed in exactly 1999.
21 His execution is not listed on botched executions, is it?

22 A No, it's not.

1 Q Of the 31 allegedly botched executions, did you
2 count how many you listed being botched because they had
3 problems inserting the needle?

4 A Do you want me to count now?

5 Q Please.

6 A I counted about 21. I might have missed a few.

7 Q So, there is 31 alleged botched executions, and
8 they were not correct.

9 A That's right.

10 Q According -- would you dispute that there has
11 been 745 lethal injection executions in the United States
12 between 1997 and November of 2001?

13 A I wouldn't dispute that.

14 Q Okay. So, 745 is true. That means of the 31
15 allegedly botched executions, it counts for 4 percent over
16 that time for varied -- I mean for various botched --
17 allegedly botched lethal injections, correct?

18 A Given that I don't have calculator here with me,
19 I'll take for granted your calculation, and --

20 Q I did it this morning.

21 A Okay. I'll then agree with you.

22 Q Okay. And then you said there's 21 that relates

1 to having problems finding -- inject -- inserting a
2 needle.

3 A That was one of a number of problems. That
4 wasn't the only problem in those botched executions. It
5 just --

6 Q That -- and those accounts for the other 10?

7 A No, I'm saying with the 21 where the problem was
8 finding a needle, in a number of those cases, and I could
9 re-read this, there were additional problems to just
10 finding the needle -- or, excuse me, finding the vein.
11 There were other difficulties going out on such as in a
12 cut-down procedure, I -- excuse me --

13 Q I mean, you read in an article Kentucky does not
14 have a cut-down procedure benefit.

15 A No, I'm just saying you were asking about these
16 31 lethal injection executions, botches that are from all
17 over the country. So I'm just giving some context.

18 Q All right. So basically about when I have to
19 say the botched executions that you allegedly claim were
20 botched was because of something other than needle
21 insertion.

22 A No, I don't agree with that.

1 Q Now, then, you've continued your research till
2 your August 2002 article, haven't you?

3 A Yes.

4 Q And you wrote this article, the Connecticut
5 Supreme Court had reviewed the -- their execution for
6 State v. Webb, correct?

7 A That's right.

8 Q But it is not enlisted in your article, is it?

9 A Oh, that -- we -- that was -- I'm sorry, what --
10 could you be a little bit more precise?

11 Q Okay. The Connecticut Supreme Court issued a
12 published opinion on February 15, 2002, in State v. Webb
13 750 A.2d 448 in which it went through Connecticut's
14 execution protocol.

15 A That's right, and it's not in my article because
16 my article came out in January 2002.

17 Q Well, this was decided on February 15, 2000.

18 A The Webb case?

19 Q Yes. If your article came out in 2002, it came
20 out two years after the article.

21 A Yeah, I'm sorry. Why should I have mentioned
22 that?

1 Q Well, I mean you attacked all the state's
2 protocols because of various problems. But State v. Webb
3 is a Supreme Court of a state that addressed Connecticut's
4 protocol, but it's not mentioned here.

5 THE JUDGE: When was that, I thought you said
6 2002 also.

7 MR. JUDY: I'm sorry, February 15, 2000.

8 THE JUDGE: February 15, 2000, all right, go
9 ahead.

10 THE WITNESS: So, you're asking me why I didn't
11 mention that case --

12 BY MR. JUDY:

13 Q Yes.

14 A -- in my article?

15 Q Yes.

16 A Because I wasn't looking at every conceivable
17 case on every state in an already 240-page article. Also
18 I -- that article, as I mentioned repeatedly in my 2002
19 article, is -- you know, relies on prior publications of
20 mine.

21 Q Well, there were lots of other cases. I mean,
22 it is nice to (inaudible) of Supreme Court case of

1 Florida. The Judge was talking of their protocol.

2 A Well, that's right, but I make no claim in my
3 2002 article that I look at every case that's addressed in
4 every state on every method of execution. My primary goal
5 was to look at the protocols in those states.

6 Q But, I mean --

7 A And I mentioned and discussed Connecticut's
8 protocol in great detail.

9 Q But State v. Webb is the Supreme Court of
10 Connecticut upholding its protocol.

11 A That's right, but I make no claim in my 2002
12 article to have discussed every state's case law that
13 addresses its execution methods. Otherwise my article
14 would have been 500 pages long.

15 Q In 2002, how many states' Supreme Courts had
16 addressed their protocol, the lethal injection protocol?

17 A I don't know.

18 Q Okay. And basically according to your 2002
19 paper, Eddie Lee Harper was not a botched execution,
20 correct?

21 A According to my article, that's right.

22 Q Thank you.

1 MR. BARRON: Your Honor, is it all right if I
2 ask a couple of questions?

3 THE JUDGE: Well, I thought we were going to do
4 this one lawyer at a time.

5 MR. BARRON: I'm sorry. I think that they --

6 THE JUDGE: Why don't you meet with Mr. Judy and
7 see if there was previously a section --

8 MR. BARRON: Just give me a minute to talk to
9 among themselves. Yes, sir. Go ahead please.

10 BY MR. JUDY:

11 Q I just have four questions. What are you a
12 professor for? Excuse me.

13 A I'm a Professor of Law at Fordham University
14 School of Law.

15 Q What topics?

16 A Criminal Law towards criminal and scientific
17 evidence.

18 Q Throughout your testimony, you state, "We." Who
19 is "We"?

20 A I'm sorry, when I'm referring to what, the
21 study?

22 Q Yes.

1 A I worked with a research assistant on that
2 study.

3 Q So just the two of you.

4 A Yes, that's right.

5 Q You are opposed to the death penalty, aren't
6 you?

7 A I'm opposed to the death penalty as it currently
8 exists. In theory, I'm not opposed.

9 Q But in an article I read, it stated that you
10 were -- yourself describe on the death penalty. Will you
11 dispute that?

12 A I'm not sure what article you're talking about.

13 Q You say Kentucky did not have a protocol in
14 2001. Can you explain how Kentucky executed Eddie Lee
15 Harper in 1999 without a protocol?

16 A We were told by Brenda Presley on March 14,
17 2001, in our notes that the executions would be conducted
18 on a case-by-case basis.

19 Q But you did not know who -- what Brenda
20 Presley's position was at that?

21 A She didn't tell us what her position was.

22 Q Thank you.

1 THE JUDGE: Mr. Barron.

2 REDIRECT EXAMINATION

3 BY MR. BARRON:

4 Q Very briefly, how do you learn of botched
5 executions?

6 A How do we learn of botched executions? We look
7 at newspaper accounts that journalists writes -- write on
8 the executions.

9 Q Could there be botched executions that you are
10 not aware of?

11 A Absolutely. You know, in the history of this
12 country, journalists have typically been excluded from
13 witnessing executions. It's a relatively recent
14 development that they've been allowed to witness them, and
15 not all executions are witnessed or written about.

16 Q Thank you. No further questions.

17 THE JUDGE: Thank you, professor. You may step
18 down now.

19 THE WITNESS: Thank you very much.

20 THE JUDGE: Mr. Shouse.

21 SPEAKER: Tom Campbell, Judge. He is also
22 applicable. I'll call him.

1 THE JUDGE: Sure. Could you ask Mr. Campbell to
2 come in please? You don't expect any help, Professor
3 Denno, she can -- Mr. Campbell, you don't -- Mr. Campbell,
4 why don't you come up here please to be sworn in. You can
5 make it brief.

6 Whereupon,

7 TOM CAMPBELL

8 Was called as a witness and having been first duly sworn,
9 was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SHOUSE:

12 Q Good morning, sir.

13 A Good morning.

14 Q Could you please state your name for the record?

15 A Tom Campbell.

16 Q Okay. And how are you employed, Mr. Campbell?

17 A I'm presently Director of the Louisville Metro
18 Corrections Department.

19 Q Okay. How were you employed before that?

20 A I was retired.

21 Q Okay. From?

22 A Department of Corrections.

1 Q Okay. How were you employed between 1996 and
2 1999?

3 A Deputy Commissioner for the Department of
4 Corrections.

5 Q Deputy Commissioner in charge of --

6 A Adult Institutions.

7 Q Okay. Could you describe what your duties were
8 in that position briefly?

9 A Primarily responsible for the oversight of the
10 different correctional facilities throughout the state. I
11 supervised the two regional directors that supervised the
12 wardens of the facilities.

13 Q Okay. Does that include the Kentucky State
14 Penitentiary at Eddyville?

15 A Yes, sir.

16 Q Okay. Do you recall when Kentucky adopted
17 lethal injection as a method of executing condemned
18 inmates?

19 A Either at '98 or '99.

20 Q Okay. But you have a recollection of when that
21 occurred, maybe not specific by date, but you remember
22 when?

1 A Yes.

2 Q Okay. And you were the Deputy Commissioner for
3 Adult Institutions at that time?

4 A That's correct.

5 Q Okay. What was your role in implementing that
6 regimen? What role did you play in ensuring that the
7 department will be able to carry out that legislative
8 mandate?

9 A Well, the penitentiary staff was primarily
10 responsible for putting together the procedure, but my job
11 as well as the commissioner's was just oversight of that
12 providing any support that we could for the staff --

13 Q Okay.

14 A -- in developing that procedure.

15 Q Did you participate in any meetings, or
16 discussions about drafting a protocol?

17 A I'm sure that I did, but I don't specifically
18 recall.

19 Q Okay. Who would have been primarily responsible
20 for drafting that initial protocol?

21 A It would have been the -- to the best of my
22 memory, the warden and deputy wardens of the facility,

1 general counsel, you know, as far as actually putting
2 together the procedure. I mean, we had a procedure as far
3 as execution is concerned. So it was fine-tuning the
4 procedure as far as the different means of execution.

5 Q Was Phillip Parker the warden at the
6 penitentiary at that time?

7 A Yes, sir.

8 Q Okay. Are you aware if any scientific tests
9 were consulted to determine the best way to implement
10 lethal injection?

11 A No, sir.

12 Q Okay. Are you aware if any doctors were
13 consulted?

14 A Not to my recollection.

15 Q Okay. Are you aware of any scientific
16 literature was consulted?

17 A Not specifically, no.

18 Q Okay. Do you know how many drugs are used in a
19 lethal injection in the Commonwealth?

20 A I believe that there is three.

21 Q Okay. Do you know what those are?

22 A Sodium thiopental, I believe is one. Potassium

1 chloride, I believe, or something like that is the second.
2 I don't remember the third.

3 Q Okay. Do you know why these three drugs were
4 selected?

5 A I know that each one of them has a specific
6 function. What each one of those specifically does, I
7 don't remember, but there were -- each one of them had a
8 function that when they are administered that they would
9 do.

10 Q Okay. I guess what I am asking is, do you know
11 why these three drugs and not three other drugs?

12 A Oh, no. I do not.

13 Q Okay. Do you know why these three drugs and not
14 two other drugs?

15 A I don't remember what -- why we made that
16 decision.

17 Q Okay. Or one?

18 A No, sir.

19 Q Okay. Do you know -- do you know how much, what
20 the amount of each drug injected is?

21 A No, I do not.

22 Q Okay. Do you know how the -- there are amounts,

1 there are set amounts. Do you know how those amounts were
2 arrived at?

3 A No, no sir.

4 Q Okay. Do you -- have you ever discussed with a
5 medical doctor anything about what these drugs do or how
6 they might interact?

7 A I don't recall any discussion with a medical
8 doctor. I mean, somewhere, you know, during that process,
9 we would have discussed what the drugs do and so forth,
10 but I don't remember specifically.

11 Q Okay. Do you know if any other drugs were ever
12 considered?

13 A No, I don't.

14 Q Okay. Now, do you remember witnessing the
15 execution of Mr. Eddie Lee Harper?

16 A Yes.

17 xxxsam

18 Q Okay. Did you -- do you recall witnessing the
19 mixing of the drugs that were injected into Mr. Harper?

20 A No, sir.

21 Q Okay. Now, what's an EOR within the Department
22 of Corrections?

1 A That's the Extraordinary Occurrence Report.

2 Q Okay. And the name is kind of self-explanatory,
3 but what is an EOR? What function does an EOR serve
4 within DoC?

5 A It would be a report prepared by the facility if
6 there was an extraordinary occurrence that occurred such
7 as an assault, or an escape, or something of that nature.

8 Q Would you in your experience with the Department
9 of Corrections expect an EOR to be prepared regarding the
10 execution of Mr. Harper?

11 A Probably, yes, sir.

12 Q Okay. Who would have prepared -- who would have
13 been responsible for preparing an EOR on Mr. Harper's
14 execution?

15 A The warden.

16 Q Okay. And where would that be stored, if you
17 know?

18 A They used to be submitted to my office as the
19 Deputy Commissioner, and then they would be filed.

20 Q Okay, so do you have any recollection of seeing
21 an EOR on Mr. Harper's execution?

22 A No, sir.

1 Q Okay. One final question, do you think that
2 executing the inmate in a humane manner is a goal of an
3 execution?

4 A I think the responsibility of the staff at the
5 penitentiary that has to carry out this task is to do it
6 in the most professional manner possible.

7 Q Okay.

8 A And I think that that's what they do.

9 Q Is being humane encompassed under the title of
10 professional?

11 A I would think so, yes, sir.

12 Q Thank you. I have nothing further, Judge.

13 THE JUDGE: Mr. Middendorf.

14 MR. MIDDENDORF: Yes, sir.

15 CROSS EXAMINATION

16 BY MR. MIDDENDORF:

17 Q Just a few questions, Mr. Campbell, were you
18 in charge at all in ordering the drugs?

19 A No, sir.

20 Q Were you in charge of administrating --
21 administering the drugs during that time, during an
22 execution?

1 A No, sir.

2 Q Okay. And were you ever stationed at the
3 Kentucky State Penitentiary? Was that one of the places
4 that you were ever employed? I know you were employed by
5 the Department of Corrections; however, were you ever down
6 at KSP?

7 A No, sir.

8 Q When was the last time you looked at the
9 protocol, Kentucky's Execution Protocol, where you would
10 be able to reference what type of drugs and the amounts of
11 drugs are administered in the execution?

12 A Prior to the execution in '99.

13 Q So it's been roughly six years since you last
14 looked at that manual?

15 A Yes, sir.

16 Q And you said that you were a witness to the
17 Eddie Lee Harper execution, is that correct?

18 A Yes, sir.

19 Q Okay. And where were you located during that
20 execution?

21 A In the witness room.

22 Q So you were able to see Mr. Harper during that

1 time?

2 A Yes, sir.

3 Q Okay. How far would you estimate you were from
4 him?

5 A About half this distance to the table.

6 Q Okay. Were you able to --

7 A We were able to --

8 Q I know that you all were able to communicate
9 with each other. Were you able to hear when the warden
10 said "proceed"?

11 A Yes, sir.

12 Q Okay. And how long after Phil Parker said,
13 "Proceed" did you witness Mr. Harper close his eyes and
14 appeared to go to sleep?

15 A It was a very short period of time. I am not
16 exactly sure.

17 Q Would you say within a matter of seconds?

18 A I believe, 30 seconds or less.

19 Q Okay. After that 30 seconds when he went to
20 sleep, did you see him make any more movements after that?

21 A No, sir.

22 Q Did he appear to be in any pain?

1 A No, sir.

2 Q Were you able to see where the needles were
3 inserted into Mr. Harper's arm, and also hand?

4 A I was trying to remember that before. I believe
5 that there was a sheet. I really can't remember back, but
6 --

7 Q Okay.

8 A It seems like there may have been a sheet, but I
9 am not sure.

10 Q So do you recall seeing any swelling around the
11 arm where the needles were inserted?

12 A No, sir.

13 Q That's all the questions I have.

14 THE JUDGE: Mr. Shouse.

15 REDIRECT EXAMINATION

16 BY MR. SHOUSE:

17 Q Just a couple of questions. Did you have any
18 medical training, Mr. Campbell?

19 A No, sir.

20 Q Any medical education?

21 A No, sir.

22 Q Any training in anesthesiology?

1 A No, sir.

2 Q You have ever heard something called anesthesia
3 awareness?

4 A No, sir.

5 Q You have ever heard of something called,
6 conscious paralysis?

7 A No, sir.

8 Q Okay. Did you actually see the needles inserted
9 into Mr. Harper?

10 A No, sir.

11 Q And why not?

12 A If I remember right, that was done prior to the
13 curtain being opened.

14 Q Thank you. I have nothing further.

15 THE JUDGE: Anything further?

16 MR. MIDDENDORF: No further questions, Judge.

17 THE JUDGE: Thank you, Mr. Campbell, you're
18 excused, you may step down.

19 (Witness excused.)

20 SPEAKER: Bill Henderson, he is also --

21 THE JUDGE: Sheriff, do you have Mr. Henderson?
22 All right.

1 SPEAKER: Your Honor, is the witness is excused,
2 or he is staying in the courtroom for?

3 THE JUDGE: He is -- he is perfectly free to
4 stay in the courtroom, and perfectly free to leave. He is
5 -- whatever he wants to do. Mr. Henderson, if you'll step
6 up here, please?
7 Whereupon,

8 WILLIAM LEE HENDERSON
9 was called as a witness and, having been first duly sworn,
10 was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. SHOUSE:

13 Q Good morning, sir.

14 A Good morning.

15 Q Will you please state your name for the record?

16 A William Lee Henderson.

17 Q Excuse me. And where do you live Mr. Henderson?

18 A Lyon County.

19 Q How are you employed?

20 A I am retired.

21 Q Okay, from where?

22 A Kentucky State Penitentiary.

1 Q All right. How were you employed from 1996 to
2 2004?

3 A Deputy warden of security -- security at the
4 penitentiary.

5 Q Okay. What's your education, Mr. Henderson?

6 A I have a high school -- I am a high school
7 graduate.

8 Q Okay. Do you have any medical training?

9 A No, I do not.

10 Q Do you have any training in anesthesiology?

11 A No, I do not.

12 Q Okay. Now, do you recall when, and I am not
13 asking for an exact date, I am just asking, do you recall
14 when within the course of your career that the State of
15 Kentucky adopted lethal injection as a form of execution?

16 A If my memory serves me correctly, it was March
17 of '98.

18 Q Okay. And you were the deputy warden for
19 security at that time?

20 A That's correct.

21 Q Okay. Now, were there discussions on how the
22 penitentiary was going to carry out this new mandate?

1 A I guess, and I guess I am interrupting your
2 question there, certainly there was discussions on how we
3 would carry it out and decisions made, protocol adopted,
4 for lack of a better word on how we would accomplish such
5 a task.

6 Q Okay, well, let's back up for a minute, and talk
7 just a little bit about -- because you and I are familiar
8 with these things, but the Court might not be.

9 A Okay.

10 Q What's the command structure at the
11 penitentiary? There is a warden.

12 A There is a warden, and three deputy wardens, and
13 each one of the deputy wardens has then a specific area of
14 responsibility.

15 Q Okay. You were the deputy warden for security?

16 A That's correct.

17 Q What are the duties of the other two deputy
18 wardens?

19 A They change from time to time, but they used to
20 be -- one of them was over Programs, and the other one was
21 over Support Services.

22 Q Okay, Okay. Now, who was the warden at the time

1 Kentucky switched to the -- it didn't switch, but adopted
2 lethal injection?

3 A Phil Parker.

4 Q All right. So were there discussions between
5 you and the other two deputy wardens and Warden Parker
6 about how to make this thing work?

7 A Certainly.

8 Q Okay. Now, was that -- what role did you play
9 in those discussions?

10 A Those discussions occurred over a period of time
11 from actually, I guess, making a suggestion if we're to do
12 this, how we should accomplish this to brainstorming as
13 to how we would accomplish something, evaluate some
14 information we obtained from somebody else. Did how then
15 will I answer your question or not -- but --

16 Q Yes, you have. What kind of source material,
17 you said you evaluated some material, what kind of source
18 material did you look at?

19 A We had gotten information from other states,
20 specifically Indiana, Virginia, Georgia, that I have got
21 knowledge of, and there was some other information that I
22 got from Alabama, well, I mentioned Alabama, and probably

1 some other states that I don't recall.

2 Q Did you all conduct any scientific tests?

3 A In regard=s to -- well, no, I was not involved
4 in it.

5 Q Okay. Do you know if any doctors were
6 consulted?

7 A No, I do not.

8 Q Did you know of any scientific literature, any
9 articles or anything were ever looked at?

10 A Specifically, no.

11 Q Okay. So was the protocols of other states that
12 you were primarily looking at?

13 A Yes.

14 Q Anything else other than other state's
15 protocols?

16 A Well, you know, we looked at their protocol and
17 then certainly we looked at the operation of our facility,
18 I mean which some other state's protocol didn't
19 necessarily fit our institutional operations, so we
20 certainly looked at our institutional operation and the
21 location of equipment buildings, the access, I guess the
22 whole -- all the information we had, we looked at.

1 Q Okay. And all that information was other
2 state's protocols?

3 A No, I am not necessarily saying that. I am
4 saying that we looked at all other states that we had.

5 Q Okay.

6 A I am saying that's all we looked at; that's all
7 I recall we looked at.

8 Q Got it. All you recall is other states'
9 protocols?

10 A And the information that we personally had --
11 the warden personally had, who -- he had worked in other
12 states, he had obtained some other information with, you
13 know, he certainly had a lot of information that he threw
14 out, so

15 Q Okay, so other states' protocol and then of
16 course your own professional experience brought to bear on
17 this?

18 A I guess that will be a fair --

19 Q Okay, Okay.

20 A That'll be a fair answer to my question.

21 Q I understand. So, is it fair to say that you
22 borrowed from some other states' protocol?

1 A I'd say it'd be fair if we borrowed, we adopted,
2 we changed, we added, we certainly utilized all the
3 material that we had, to adopt our protocol.

4 Q All right. How did you get these other states'
5 protocol?

6 A The ones that I know about we actually went to
7 Georgia, Virginia, and Indiana, basically onsite visits.
8 Some of them probably gave us a little bit of written
9 information what they had. By and large we found that
10 most of them did not to have a lot of written information,
11 but they did share with us how they'd done things, so what
12 they gave us in writing we took, what they verbally gave
13 us we certainly made note of, a mental note of, or a note
14 of, and brought it back and then hashed it over and
15 decided to use it, not use it, adapt it just for our
16 specific need.

17 Q Okay. Couple of things there, some states had
18 more printed information than others.

19 A Correct.

20 Q Okay, and then you all collected these other
21 protocols from other states --

22 A We collected some information more than, I mean

1 sort of, they did not write, no institution or no state
2 that I am aware had near what Kentucky developed.

3 Q Okay. All right, so you expanded upon what you
4 were provided by these other states.

5 A I guess that will be a fair answer.

6 Q All right. Who wrote Kentucky's first
7 protocol?

8 A I don't know whether you call it a protocol or
9 not, we had a check list that we made out, and that was a
10 group effort from our own group -- extended period, and I
11 think the time and I am assuming probably still going on
12 to this day because things change, name changes, phone
13 numbers change, the building location changes.

14 We developed that over an ongoing basis and it
15 involved everybody from the Secretary of Justice at that
16 time who was Dan Cherry, down to shift captain to
17 lieutenants, myself and primarily, I guess, the three
18 people or the four people that developed that check list
19 was the warden and the three deputies.

20 Q Okay. Who were the other two deputy wardens
21 other than yourself at that time?

22 A Glen Haeberlin and Steve Bagle (phonetic)

1 initially.

2 Q Okay, and Mr. Haeberlin is the warden now?

3 A That's correct.

4 Q Okay. Are you aware of any medical training any
5 of those other gentlemen may have had?

6 A No, I'm not.

7 Q Okay. All right. Do you know what drugs are
8 used in lethal injections in Kentucky?

9 A I know the names of them, yes.

10 Q Okay, what are they?

11 A Pavulon, potassium chloride, and sodium
12 pentathol.

13 Q Okay. Do you know why those three drugs were
14 chosen?

15 A No, I do not.

16 Q Okay. Do you know what they do? What each one
17 of those does?

18 A Not from a medical stand point of view. I mean
19 I can tell you what I understand that they do, but did I
20 know for a fact what they do, I do not.

21 Q Okay. Now, these drugs are administered in
22 prescribed amounts. Is that correct?

1 A There is a dosage amount, correct.

2 Q That's what I'm getting at. Do you know how
3 that dosage -- how those dosage amounts were selected?

4 A No, I do not.

5 Q Okay. I think I asked you this; did you conduct
6 any scientific tests in coming up with this?

7 A No, none that I am aware of.

8 Q Okay. Now, what determined the length of the
9 protocol that you eventually came up with? I mean was
10 there a page -- self-imposed page limit, or --

11 A I don't remember exactly what we came up with
12 the date, but we started looking at a 30-day one, for lack
13 of a better word. We did an, excuse the word, 30 days
14 out. What would we do from 30 days down to the time of
15 the execution was carried out.

16 So I guess the 30-day wonder was the driving
17 force behind what we would develop, I supposed what we
18 needed to do in addition to normally running an
19 institution and what would you need, specifically, to do
20 an execution that needed to go on that check list.

21 Q Okay. Is it fair to say that only the most
22 important things go in the protocol? You know what I am

1 getting at, do you recall at your deposition you said that
2 if you put everything in there, you would have a book that
3 would fill up a room.

4 A That's correct, but to say that only important
5 things that went in there would be probably incorrect.
6 The important things that needed to be done got in there.
7 There might have been a -- if you went ahead and developed
8 another list of what needed to be done, it might very well
9 be you would generate another list, in other words, you
10 would never stop generating a list if you generated a list
11 of what you needed to get done, and then you generate
12 another list on how you was going to get that done, and
13 you would generate another list on how you were getting
14 all that done, so -- I don't know if all that confused you
15 or not --

16 Q That's okay.

17 A But the point is that, you know, we needed to do
18 this, that might -- got on the list, what all you have to
19 do to get that done did not get on the list.

20 Q Okay. Just one second, please. Let me see if I
21 can find my place here. Okay, so everything that needed
22 to get done, needed to go in the protocol?

1 A Well, I think, that's what our effort was, every
2 major event or thing that we needed to accomplish, we
3 tried to get in that protocol.

4 Q Okay. Hang on a second.

5 MR. MIDDENDORF: Judge, they want to ask him
6 questions about the new protocol. He wasn't there at that
7 time when that protocol was drafted.

8 MR. SHOUSE: No, it's a different --

9 MR. MIDDENDORF: But if they want to ask him
10 about the old protocol; that's one thing.

11 MR. SHOUSE: I am going to ask him about the
12 difference between the protocol that was there and the
13 protocol that's there today.

14 MR. MIDDENDORF: He wasn't there for the thought
15 process of why --

16 THE JUDGE: Well, he might not be asking about
17 the --

18 MR. SHOUSE: No, I am not asking about the
19 protocol.

20 MR. MIDDENDORF: He doesn't know; I'm sure that
21 Mr. Henderson doesn't --

22 MR. SHOUSE: But given our prior agreement

1 before the thing began, I'd like to mark the execution
2 lethal injection revised 12/14/2004, consisting of 9 pages
3 as Plaintiff's Exhibit Number 1.

4 THE JUDGE: Okay, now is that the new --

5 MR. SHOUSE: That's the new one.

6 THE JUDGE: That's the new protocol?

7 MR. MIDDENDORF: That's the current one.

8 (Plaintiff's Exhibit No. 1 was marked for
9 identification.)

10 MR. SHOUSE: Okay. May I approach the witness?

11 THE JUDGE: All right.

12 BY MR. SHOUSE:

13 Q Could you take a look at that, Mr. Henderson.
14 What's the title of that document?

15 A The title?

16 THE JUDGE: Excuse me, Mr. Shouse, is this the
17 new redacted protocol?

18 MR. SHOUSE: This is the new one that has been
19 turned over. There's nothing redacted from this document.

20 THE JUDGE: But this is the document that has
21 been given to you?

22 MR. SHOUSE: Yes, sir.

1 THE JUDGE: Is that correct?

2 MR. MIDDENDORF: Yes, Your Honor.

3 THE JUDGE: Is this the one that's sealed or not
4 sealed?

5 MR. SHOUSE: This is not the sealed.

6 MR. MIDDENDORF: They are all sealed, but this
7 part of the protocol that he is referring to didn't have
8 any redacted portions, I don't believe it did.

9 THE JUDGE: Okay. All right, go ahead.

10 BY MR. SHOUSE:

11 Q I am sorry. What is the title of that document,
12 Mr. Henderson?

13 A (italics) "The Execution Lethal Injection."

14 Q All right. When was this produced? When does
15 it say it was produced, in the upper right hand corner?

16 A It was revised, 12/14/04.

17 Q Okay. Can you turn to page 6 of that document,
18 please?

19 A Page 6?

20 Q Yes, sir, Number 18 on the sequence of events.

21 A Okay.

22 Q Okay. Could you read Number 18 please?

1 A "A designated team member will observe the heart
2 monitor and advice position of cessation of the electro
3 activity of the heart."

4 Q Okay, great. Judge, may I approach again?

5 THE JUDGE: Yes.

6 MR. SHOUSE: Thanks a lot. Let me give that to
7 the court. Thank you. Okay, now, this one I have only
8 got a single copy of.

9 BY MR. SHOUSE:

10 Q What's this document titled?

11 A *(Italics)* "IV team checklist."

12 Q And what's the date up there where it says
13 "revised"?

14 A April 9, '98.

15 Q Okay, and how were you employed in April of '98?

16 A Deputy warden for security.

17 Q All right. Now, I am going to turn to page 14
18 of this one, all right? Okay, when was this revised?

19 A May 14, '99.

20 Q Okay. Were you employed as deputy warden at
21 that time?

22 A That's correct.

1 Q Okay. When was Mr. Harper's execution?

2 A May the 25, '99.

3 Q Okay. Could you read number 66 please?

4 A "A designated team member trained on the use of
5 a heart monitor will observe the heart monitor and advise
6 the position of cessation of electrical activity of the
7 heart."

8 Q Okay, so as of May the 14, of '99, it includes
9 the language, "Team member trained on the use of a heart
10 monitor." Is that correct?

11 A Yes.

12 Q Does that language appear on the current
13 protocol?

14 A As I recall, no.

15 Q No? Okay. Do you have any idea why that
16 language was deleted?

17 A No.

18 Q That's different, right?

19 A Yes.

20 Q And as we just talked about, all the things that
21 need to get done are in the protocol?

22 A I said, we tried to get everything in the

1 protocol. Not necessarily that we did, but that effort
2 was made.

3 Q Okay. So at the time of Mr. Harper's execution,
4 the team member was required to be trained in using a
5 heart monitor?

6 A I don't know. Trained is probably --

7 Q Well, I am sorry.

8 A You know my definition of being trained is
9 somebody who knows how to look at the thing and tell you
10 whether it's operational, you know, whether you are
11 getting a heartbeat or not, and you know what, somebody
12 else's definition of trained may very well be something
13 different, so.

14 Q Well, let me ask you this, do you recall on
15 January the 5th of this year, when I came down to
16 Eddyville and deposed you in the conference room at the
17 penitentiary?

18 A I remember you doing it, yes, sir.

19 Q Okay, all right. Do you remember saying then
20 that you thought that the person who read the heart
21 monitor at least ought to have read the owner's manual?

22 A That's correct. I believe that was my -- I

1 believe, exactly. They ought to have some familiarity
2 with --

3 Q Right. "Reading the owner's manual," I believe
4 was your words. Okay, so in '99, the person had to be
5 trained in how to read a heart monitor?

6 A I mean that was the terminology used, but there
7 again, you know, I don't know what your definition of a
8 "trained," but I think our definition of trained was
9 familiar with how to read it just to the point of being
10 able to say, you know, to me it looks like, you know, the
11 heart is at a point that I need to call a physician, who I
12 think is probably the trained individual.

13 Q Okay.

14 A That certainly could certify death after the
15 heart monitor.

16 Q And in the current protocol, revised in December
17 of last year, that training requirement has been deleted,
18 is that correct?

19 A That word is gone, yes.

20 Q Yes, sir. Can I please enter this 1998
21 Protocol, "IV team checklist" as Plaintiff's Number 2?

22 THE JUDGE: Sure.

1 (Plaintiff's Exhibit No. 2 was marked for
2 identification.)

3 MR. SHOUSE: May I approach?

4 THE JUDGE: Yes.

5 BY MR. SHOUSE:

6 Q Thank you. Okay. Do you think that monitoring
7 the heart monitor, observing the heart monitor is an
8 important part of an execution by lethal injection?

9 A It's important only to the extent of when you
10 are going to call the doctor to come in, rather than the
11 doctor standing there and somebody else comes in and does
12 it.

13 Q Okay.

14 A Is it important? Only to that degree.

15 Q Okay. All right. Were you present for the
16 execution of Mr. Harper, Eddie Lee Harper?

17 A Yes.

18 Q Do you know who supervised the mixing of the
19 drugs that were injected into Mr. Harper?

20 A Yes, and no. By yes, what I mean IV team
21 members.

22 Q Okay, I am not talking about IV team members, I

1 am sorry. Just for purposes, let's be really careful
2 here, Mr. Henderson, do you remember the deposition when I
3 came down on January the 5th?

4 A Yes.

5 Q Do you remember the discussion we had then about
6 not giving names or ranks or any identifying information
7 on anybody who may or may not be a member of the execution
8 team?

9 A Yes.

10 Q Okay. Do you remember how we talked about how
11 we have divided, for purposes of this litigation, that
12 execution team into three components; there's the --

13 A I don't think we discussed that at all.

14 Q Okay. Well, I just want to make sure that you
15 are clear that there's the IV team, well, the execution
16 team as a whole, and then within that there are two
17 subsets, there's the -- what we have come to refer as the
18 executioner and the IV team, Okay? I want to be really
19 clear here. I don't want the names, ranks, I don't even
20 want to know if they are within -- whether they are
21 uniformed members of the Department of Corrections or not.
22 Okay, the people that are on that team, we're not going to

1 talk about them, all right?

2 A Okay.

3 Q Right. I am only talking about the supervisor.
4 Do you know who supervised the mixing of the drugs that
5 were injected into Mr. Harper?

6 A I know the Deputy Commissioner, Tom Campbell
7 went over there and was there when they were put in the
8 syringes, so if you want to call that supervisory, Tom
9 Campbell.

10 Q That's exactly what I was looking for. Thank
11 you. Now, do you know if there were any problems siting
12 the IVs on Mr. Harper?

13 A There was none that I am aware of.

14 Q Well, were they able to get them both within
15 their first choice?

16 A No.

17 Q Okay, that's what I was getting at. Okay.
18 Judge, I am now going to go through with Mr. Henderson
19 what's been labeled, "Controlled Chemical Disposition
20 Record." The Department of Corrections --

21 THE JUDGE: All right.

22 MR. SHOUSE: Page 2. Can we mark that as

1 Plaintiff's 3?

2 THE JUDGE: Sure.

3 (Plaintiff's Exhibit No. 3 was marked for
4 identification.)

5 MR. SHOUSE: May I approach the witness?

6 THE JUDGE: Go ahead.

7 BY MR. SHOUSE:

8 Q Okay, now, again there is -- well, please just
9 answer the questions I ask, Okay?

10 A Uh-huh.

11 Q Okay. Can you turn to page 2 of that three-page
12 document I've just handed you?

13 A Okay.

14 Q Okay. What's page 2 titled?

15 A "Lethal Injection IV Site Poison."

16 Q And what's the date at the top of that?

17 A May 25, '99.

18 Q And is there a name and an inmate number under
19 that?

20 A Yes.

21 Q Whose name and inmate number appears there?

22 A Edward Harper, 32818.

1 Q Okay. And then -- just a moment.

2 MR. SHOUSE: Judge, may I approach?

3 THE JUDGE: Yes. Did you mark this?

4 MR. SHOUSE: He has the marked copy, Judge.

5 THE JUDGE: Okay.

6 MR. SHOUSE: Thank you.

7 BY MR. SHOUSE:

8 Q Okay. And underneath that, what appears?

9 A A diagram or a depiction of the human body, one
10 of them marked front, one of them marked rear.

11 Q Okay. Let's talk about the one marked front
12 first. On what would be the right arm, what is notated
13 there?

14 A Looks like C-18GX, 1-1/4 (inaudible).

15 Q Okay. But then on the arm itself, what's marked
16 there?

17 A "P."

18 Q Okay, and is there a code down there?

19 A Yes.

20 Q And what is that "P" with a circle around it
21 mean, referring to the code?

22 A Lines exactly placed.

1 Q Okay. Now, still looking at the front part on
2 the left arm, what is marked there at the elbow?

3 A An "X" with an "AF."

4 Q AF is next to that, okay. Now, is there any
5 code down there for an "X"?

6 A AF, attempt failed.

7 Q Attempted failed, okay. Now, let's switch over
8 here to the rear side -- the rear diagram. Are you with
9 me?

10 A Uh-huh.

11 Q Okay. On the right hand -- or excuse me, on the
12 -- what would be the left hand, what is notated there?

13 A Just on the hand a "P."

14 Q A "P," okay. And again, we've already gone
15 through this, but then what does the "P" mean?

16 A Lines successfully placed.

17 Q Okay. So does your recollection and does this
18 document support that a line was attempted to be started
19 in Mr. Harper's left elbow that was attempted and failed,
20 and so they switched over to his hand?

21 A That's correct.

22 Q Okay. And is that your recollection of what

1 happened?

2 A That's correct.

3 Q Okay. How long did that take, that failure and
4 moving over there?

5 A A very short period of time, I mean, from my
6 perspective, only one attempt in the left -- then in the
7 left arm --

8 Q Uh-huh.

9 A -- obviously was unsuccessful in getting the
10 vein. They immediately removed that, and moved to the
11 back of the left hand and made an attempt and were
12 successful at getting the IV started.

13 Q Okay. So, there was -- there was at least that
14 problem -- if I can use that word, in siting one of the
15 IV's?

16 A I would say there was a -- yeah, obviously there
17 was an attempt made in the left, and abandoned the left
18 arm, they were unsuccessful. So you call that a problem,
19 if you want.

20 Q Okay.

21 A They removed that one to the back of the left
22 hand and were successful.

1 Q Okay. Now, again with those caveats we talked
2 about earlier as far as names, identifying information and
3 things, do you know that the two members of the IV team
4 who participated in the execution of Mr. Harper had
5 medical training?

6 A It is my understanding that they both did, yes.

7 Q Okay. So, someone with medical training had a
8 problem inserting the IV in Mr. Harper's left arm?

9 A And again, you keep referring to them as a
10 problem. I, you know, I would say it is an unsuccessful
11 attempt. I think it would be better terminology than a
12 problem.

13 Q Okay, someone with medical -- that you know
14 would have had some level of medical training, had an
15 unsuccessful attempt in placing one of the IV's in Mr.
16 Harper?

17 A That's correct.

18 Q Okay. Now, I'd like to refer you to the page 3
19 of that same document; Plaintiff's 3, I think it is. In
20 fact, does a name and an inmate number appear at the top
21 of page 3?

22 A Edward Harper.

1 Q And what's the inmate number?

2 A 32818.

3 Q Okay. And what's the date on that?

4 A May 25, '99.

5 Q Okay. What is this document?

6 A It looks like it's not entirely anything, but it

7 gives you information on when Inmate Harper was escorted

8 into the chamber, what time the IV was started in the left

9 -- the left IV was started, the right IV was started, the

10 injection began and it gives you the list of the chemicals

11 that were used, and then the time that he was pronounced

12 dead.

13 Q Okay. Let's talk about that in some detail for

14 just a moment. Not so much; when he was escorted into the

15 chamber and when the IV's were begun, although those speak

16 for themselves -- where it says "Injection begun," what

17 time is written there?

18 A 07:16 p.m.

19 Q Okay. First of all, and again without any --

20 given any identifying information, do you know who

21 prepared this piece of paper -- who filled in these

22 blanks?

1 A No, I do not.

2 Q Okay. Injection begun, what time again?

3 A 07:16 p.m.

4 Q Okay, and underneath that it's -- there's two

5 columns; first round, second round, right?

6 A Correct.

7 Q And under sodium thiopental, what time did that

8 begin?

9 A First round 07:16 p.m., second round 07:18 p.m.

10 Q Okay. And that 07:16 p.m., that's the same sign

11 -- same time rather as injection begun.

12 A That's correct.

13 Q Okay. Now, jump all the way down. Well, let's

14 go to potassium chloride. When was the last potassium

15 chloride injection given?

16 A In 07:22 p.m.

17 Q Okay, and that is 6 six minutes after the first

18 round of sodium thiopental, is that correct?

19 A That's correct.

20 Q All right. And then, we have "pronounced dead

21 at," and what time is written there?

22 A 07:28 p.m.

1 Q Okay. So from the time the sodium thiopental --
2 the first injection of sodium thiopental began until Mr.
3 Harper was pronounced dead, how much time elapsed?

4 A 12 minutes.

5 Q Okay. Now, again, I'm not going to ask you who
6 it is, but are there initials written next to 07:28 p.m.
7 on pronounced dead?

8 A I don't think that's an initial.

9 Q Or is it p.m.?

10 A I think it's p.m.

11 Q That's p.m.

12 A I believe it is. I --

13 Q Okay.

14 A That's what I would take it as.

15 Q All right, you take it as p.m. Okay, so again,
16 12 minutes for Mr. Harper to die. Is that correct?

17 A Correct.

18 Q Okay. How close to Mr. Harper were you when the
19 chemicals were injected into him?

20 A I was standing in the room with him, I'd say
21 within 2 to 3 feet of him. I mean, I was very close.

22 Q 2 to 3 feet of him. And you watched him die?

1 A That's correct.

2 Q Okay. Just one second please. Did you go to
3 Georgia to research how executions were conducted there?

4 A No, I went to -- yeah, I guess you could call it
5 research. Yes, I went to Georgia.

6 Q Okay. Was an execution conducted while you were
7 at the Penitentiary in Georgia?

8 A No, there was not.

9 Q Okay. Do you know what Georgia's method of
10 execution was when you went there?

11 A I think it was electrocution.

12 Q Electrocution, okay. So Georgia did not play a
13 part in your analysis of how to conduct lethal injections
14 in Kentucky?

15 A Well, there again, the answer is yes, and no. I
16 mean, a lot of the protocols were used to get right up to
17 the point of doing the actual execution. It is the same,
18 but -- you know, some of that stuff is the same whether
19 you are doing an electrocution or lethal injection. Some
20 of the things you got to do with your facility, staff and
21 all, and a lot of other those stuff you got on the
22 checklist is the same. So, --

1 Q Sure, I want to make that --

2 A -- yes, and no.

3 Q I want to make that clear. Sure, thank you for
4 bringing that up. Now, that the two portions of the
5 protocol that had been introduced into the record; the old
6 one and the new one regarding the heart monitor, those are
7 small portions of much larger documents, right?

8 A That's correct.

9 Q Okay. I mean, in fact, --

10 MR. SHOUSE: I mean, in fact, this -- if you,
11 may I approach?

12 THE JUDGE: Sure.

13 BY MR. SHOUSE:

14 Q I mean, there is 16 chapters, if you will, in
15 this document, is that --

16 A Yeah, it looks -- yeah.

17 Q It is a big document. And these portions that
18 I've talked about with you are just much smaller parts of
19 a larger document, right?

20 A That's correct.

21 Q Okay. And there is things in here about
22 internal security which we're not going to talk about.

1 A That's correct.

2 Q And there is things about staffing and dealing
3 with the media.

4 A Absolutely, absolutely.

5 Q Witnesses both for the condemned inmate and for
6 the --

7 A Correct.

8 Q Okay. But the part about how to conduct a
9 lethal injection, Georgia would have had nothing to do
10 with that?

11 A That's correct.

12 Q Okay. Thank you, I have nothing further.

13 MR. MIDDENDORF: Okay, thank you. Just a few
14 questions, Your Honor.

15 THE JUDGE: Okay, Mr. Middendorf.

16 CROSS EXAMINATION

17 BY MR. MIDDENDORF:

18 Q Campbell, how are you today?

19 A Henderson.

20 Q Well, I'm sorry, Mr. Henderson.

21 SPEAKER: Mr. Henderson, I'm giving --

22 THE WITNESS: Time to let over --

1 (Laughter)

2 MR. MIDDENDORF: It's already feeling like a
3 long day now. He would probably like that, wouldn't you?
4 It's feeling like a long day already. Let me ask you just
5 a few quick questions.

6 BY MR. MIDDENDORF:

7 Q Who pronounces death in an execution?

8 A The coroner --

9 Q Okay.

10 A -- and or the doctor, or the doctor and the
11 coroner together do.

12 Q Does the heart monitor pronounce death?

13 A No.

14 Q You testified you didn't considering -- consider
15 the moving to the hand a problem, is that correct?

16 A No.

17 Q Okay. Is it a fair statement to say that the IV
18 team is actually trained to move to the best site?

19 A Yes.

20 Q And these are the individuals that have some
21 medical training?

22 A Yes.

1 Q And so you leave that to the people with medical
2 training on what is the best site, how long they should
3 stay at one place or move to the next?

4 A That's correct.

5 Q And you said, you witnessed the execution of
6 Eddie Lee Harper, is that correct?

7 A That's correct.

8 Q Okay. Where were you located? I think you said
9 couple of feet, is that --

10 A Two to three feet to the side and directly down
11 midway to his body, I mean, he was lying flat and I was
12 midway between probably his waist and his feet, couple of
13 -- 3 feet away from him, --

14 Q Okay.

15 A -- basically looking right at him.

16 Q And let me back up one second. Tom Campbell
17 testified that there was a sheet involved in the
18 execution. Do you recall if Mr. Harper was covered with a
19 sheet?

20 A To my recollection, he was not covered with a
21 sheet.

22 Q Okay. Now, you were able to hear Warden Parker

1 give the command to proceed, correct?

2 A That's correct.

3 Q Okay. Once that command was given, do you
4 recall how long it took Eddie Lee Harper to close his eyes
5 and go to sleep?

6 A My recollection is he didn't close his eyes.
7 His eyes remained -- I mean, when the drugs started being
8 pushed his eyes began to get red -- his eyelids began to
9 move slower and slower and slower. His breath kept
10 shallow, kept getting shallow, and within 15 or 20
11 seconds, in my observation he died.

12 Q So you didn't -- after 15 or 20 seconds, did you
13 see him breathing at all?

14 A No.

15 Q Did you see any other movement during the entire
16 course of the execution after --

17 A No.

18 Q Were you able to see the needles placed in Eddie
19 Lee Harper's arms?

20 A Yes.

21 Q Did you notice any swelling around the sides?

22 A No.

1 Q Notice any leaking?

2 A No.

3 Q Anything out of the ordinary?

4 A No.

5 Q And how often did you all practice as execution
6 team members to do -- to practice for executions?

7 A Monthly.

8 Q Okay. Did you walk through a complete execution
9 during that time?

10 A Yes, and yes.

11 Q Okay. Would you even insert IV lines into
12 volunteers?

13 A Yes.

14 Q And who were typically the volunteers?

15 A The staff that were on the team. From
16 sometimes, it would be the warden, sometimes it would be
17 me, sometimes it would be a team member, but somebody
18 within that group would be -- would play the role of the
19 condemned.

20 MR. MIDDENDORF: No further questions, Judge.

21 THE JUDGE: Mr. Shouse, anything further?

22 MR. SHOUSE: Yes, sir. Just a couple of them.

1 REDIRECT EXAMINATION

2 BY MR. SHOUSE:

3 Q Now, I believe it was the policy of the
4 penitentiary to have monthly practice sessions on
5 conducting executions while you were there; is that
6 correct?

7 A That's correct.

8 Q And did you do the practice sessions the same
9 way every time?

10 A We did the practices the way we would carry out
11 the executions. So did we do in the same way every time,
12 yes and no. Sometimes we would practice with a
13 cooperative docile inmate, sometimes we would practice
14 with an uncooperative inmate. So there again, the answer
15 is yes and no. But did we generally, practice the same
16 way every time? Yes.

17 Q Okay, because you wanted to go, I mean, that's
18 what a practice is. You practice and practice and
19 practice, so it will go the same way when the real event
20 occurs.

21 A That's correct.

22 Q Okay, and again, you have no medical training?

1 A No, none.

2 Q And are you familiar with an expression called
3 anesthesia awareness?

4 A Nothing other than the one I've seen on T.V.
5 And I probably wouldn't call that much of an awareness.

6 MR. SHOUSE: I have no further questions, thank
7 you.

8 SPEAKER: Excuse me, if I have --

9 RE CROSS EXAMINATION

10 BY MR. MIDDENDORF:

11 Q Just real quick, I want to clear up one thing,
12 Mr. Henderson. You said that you would practice with a
13 hostile inmate or somebody that allowed it to take place.

14 A That's correct.

15 Q You don't -- you mean, somebody for training as
16 an inmate, is that correct?

17 A That's correct.

18 Q They were team members that you practiced on?

19 A Yes.

20 Q That's all the questions I have. Thank you,
21 sir.

22 MR. SHOUSE: Judge, given the -- well, I have

1 nothing further.

2 THE JUDGE: Okay. Thank you. Thank you, Mr.
3 Henderson, you can stand step down; you're excused.

4 THE WITNESS: Thank you.

5 (Witness excused.)

6 MR. SHOUSE: Given the fact that the courtroom
7 needs to be used in 15 minutes --

8 SPEAKER: Okay.

9 MR. SHOUSE: -- maybe we should break now to --
10 so our next witness --

11 THE JUDGE: Okay. Who are we -- who are you --

12 MR. SHOUSE: Philip Parker will be our next
13 witness.

14 THE JUDGE: But I thought there was somebody
15 that needed to be called at 01:30 p.m.

16 MR. BARRON: Dr. Corey, we would like to get
17 out; just so you're aware of, Philip Parker came up with
18 Bill Henderson. They drove up from around the Eddyville
19 area together, so if possible I would like to get him in
20 right now.

21 THE JUDGE: Okay, how long do you think it will
22 take with Mr. Parker?

1 Q How are you currently employed?

2 A I am not. I'm retired.

3 Q And what was your position before that?

4 A I was warden of the Kentucky State Penitentiary.

5 Q When did you become the warden?

6 A March 1993.

7 Q And when did you retire?

8 A August 2002.

9 Q What were your responsibilities as warden?

10 A As warden, I was responsible for the overall
11 management and operation of the facility.

12 Q Was lethal injection a method of execution while
13 you were warden there?

14 A Yes, it was.

15 MS. BALLIET: I'm going to give you what we
16 marked as an -- I think that has already been marked, and
17 this one is marked as number 2.

18 THE JUDGE: Could we see that?

19 MS. BALLIET: Yes, you can have that.

20 BY MS. BALLIET:

21 Q I already have it.

22 A Right.

1 Q Plaintiff's number 2.

2 SPEAKER: Judge, go -- through -- just real
3 quick. Before we start going through all of this again,
4 you have these depositions. If we are going to start
5 rehashing exactly what happened during every one of these
6 depositions we took -- I think you've ruled on that.

7 THE JUDGE: We will stick to -- I thought you
8 agreed with the rule that we are going to stick to areas
9 outside the depositions primarily, or just specific
10 questions.

11 MR. SHOUSE: Certainly, primarily we are not
12 rehashing the depositions, but there are differences in
13 what the witnesses have said.

14 THE JUDGE: All right.

15 BY MS. BALLIET:

16 Q Can you identify that document?

17 A This is lethal injection actions to be taken
18 after receiving the execution order.

19 Q Would you agree that's the 1999 Execution
20 Protocol?

21 A Yes, it is, I believe it is.

22 Q Is that the protocol that was in effect at the

1 time of Harper's execution?

2 A It appears to be.

3 Q Were you involved in the December 2002 revisions
4 to the protocol?

5 A December 2002?

6 Q This was after you were retired.

7 A No.

8 Q Not at all. Could you look at the checklist
9 that are attached to the 1999 protocol that you are
10 holding there at the back? Can you tell us why there is a
11 separate IV team checklist? Why that's separate from the
12 protocol?

13 A Well, now you have to --

14 THE JUDGE: What -- where you are at? I'm
15 looking at this, it says IV team checklist Plaintiff's 2,
16 is that right?

17 THE WITNESS: No, Judge.

18 THE JUDGE: Okay.

19 THE WITNESS: That's not what I'm looking at.

20 THE JUDGE: All right.

21 MS. BALLIET: That's part of it too. Yeah, did
22 you find it, Your Honor?

1 THE JUDGE: I've got Plaintiff's 2, I just don't
2 know -- where are you?

3 MS. BALLIET: Look at the back.

4 THE JUDGE: Oh, on the back part.

5 MS. BALLIET: It's in the back, it's --

6 THE JUDGE: Okay.

7 MS. BALLIET: The checklists are at the back of
8 2. They're attached to them.

9 THE JUDGE: I don't know how far back.

10 MS. BALLIET: Well, there is a part of it.

11 THE JUDGE: Okay.

12 MS. BALLIET: I think that's where -- it's
13 attached on --

14 THE JUDGE: I'm with you.

15 BY MS. BALLIET:

16 Q All right, is there a reason why this is
17 separate? It seems to be that it's. Well, if you will
18 look at --

19 A Pre-execution medical actions checklist, is that
20 what you're talking about?

21 Q There is a pre-execution medical actions
22 checklist and there is an IV team checklist. And what I

1 would like -- if I could approach the witness.

2 THE JUDGE: Go right ahead..

3 BY MS. BALLIET:

4 Q If you look at items 4 through 13 on the IV team
5 checklist. Item 4 starts with, "Heart monitor tested,
6 pre-execution medical exam, prepare the execution
7 chemicals," it starts talking about the gurney getting
8 prepared -- when you go through 16 if you can follow me.
9 16 is -- well, 13 is execution complete. So that on this
10 checklist, would you agree that items 4 through 13 are
11 pretty much the kernel of what is the actual lethal
12 injection? Starting with, you know, when they move the
13 inmate into the execution room. I'm just asking if that -
14 - that's what this part of the checklist addresses. It's
15 not a trick question.

16 A No, I wouldn't -- it's not concerning -- well,
17 I'm not sure I understand your question, but if I do I
18 don't think that's all of the execution of what's in these
19 --

20 Q Okay. I'm just -- what I'm getting at is that
21 if you look at the rest of this protocol, and you look at
22 items 44 through 67, they pretty much cover the same

1 thing.

2 A Ma'am, I haven't seen these in years, and years,
3 and years, so --

4 Q Okay. Well, then I will save those questions
5 for the current warden.

6 A Okay. I'm sorry.

7 Q Who mixed the chemicals that were used to
8 execute Eddie Harper?

9 A Well, that would have been --

10 MR. MIDDENDORF: Judge, just so we can jump in
11 here --

12 THE JUDGE: So he doesn't name a name, that's
13 right. We've agreed to that that the IV team and the
14 execution team members outside of the general management
15 of the institution will not be named and their positions.

16 MS. BALLIET: I would accept the IV team as an
17 answer to that.

18 THE JUDGE: That should do.

19 BY MS. BALLIET:

20 Q And who oversaw the IV team when it mixed the
21 drugs for Harper's execution?

22 A That would have been the deputy warden, and I

1 believe the deputy commissioner.

2 Q And are you sure of that? If they denied that
3 they watched the mixing of the chemicals, what would you
4 say?

5 A I would just say that's what I think, that's
6 what I recall.

7 Q Was that written into the protocol at all?

8 A The best I can remember, it was.

9 Q Did you personally see the drugs mixed?

10 A No, I didn't.

11 Q When was the new death house constructed?

12 A Well, when was it finished, or I'd really -- I
13 couldn't remember the days when it started and finished.
14 It was after the Harper execution.

15 Q Was that your project? Were you --

16 A Yes, it was.

17 Q All right.

18 MS. BALLIET: I'd like to have this -- with
19 permission, I'd like to have this marked as the
20 Plaintiff's 4. It's a diagram of the execution -- the new
21 execution building.

22 THE JUDGE: All right.

1 (Plaintiff's Exhibit No. 4 was marked for
2 identification.)

3 MS. BALLIET: This is to you, a copy -- for you.

4 BY MS. BALLIET:

5 Q If you would look at that for a moment, so that
6 you can tell us if that is the execution building that you
7 oversaw.

8 A That's looks like the floor plan. Uh-huh.

9 Q All right. You know what I really need you to
10 do is show us just a little bit about this, and I think I
11 can do this in 10 minutes or less.

12 THE JUDGE: Well, I think we are going to have
13 to then take a recess now, because we've got to move out
14 of here because --

15 MS. BALLIET: Okay. All right.

16 THE JUDGE: -- of the District Court's coming --

17 MS. BALLIET: It's not a good time for the
18 equipment.

19 THE JUDGE: No, it's not a good time for
20 equipment, but you are going to have to take it back down
21 again anyway. We're going to recess until 01:30 p.m. I
22 don't think the warden's going to be that much longer.

1 You could call the other witnesses as soon as the warden's
2 finished, all right?

3 SPEAKER: Yes, Your Honor.

4 THE JUDGE: The court will be in recess, thank
5 you.

6 (Whereupon, a luncheon recess was taken.)

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A F T E R N O O N S E S S I O N

THE JUDGE: Go ahead, please.

DIRECT EXAMINATION (CONTINUED)

BY MS. BALLIET:

Q Thank you, Your Honor. Mr. Parker, I brought your exhibits back and I'm asking you to look now at the - what's been marked as number four, that's the execution building.

A Okay.

Q If you look at that picture, it appears that the execution chamber is pretty much in the middle of the building, and it looks like it's open to witness rooms and the control rooms.

THE JUDGE: Let me just interrupt for one second. I want to check -- is this not broadcasting in the back at all?

SPEAKER: No.

SPEAKER: No.

SPEAKER: No.

THE JUDGE: Well, we're supposed to have the speaker system working some way.

1 MS. BALLIET: I can talk louder.

2 THE JUDGE: Nobody can figure out how -- I don't
3 know and it doesn't show (inaudible) or anything. Okay,
4 can you just speak up?

5 MS. BALLIET: I will speak up.

6 BY MS. BALLIET:

7 Q It's Plaintiff's Exhibit 4 and I say it looks
8 like the execution chamber is open to the witness rooms
9 and the control room, is that the way it is?

10 A Well, except there's glass separating the rooms.

11 Q Is there glass between the execution chamber and
12 the control room?

13 A Yes, there is.

14 Q And between each of the witness rooms and the
15 execution?

16 A Well, from the witness room to the execution
17 chambers, there's a glass partition.

18 Q So would you say that the execution chamber is
19 entirely surrounded by four walls of glass?

20 A The -- for the most part, yes.

21 Q Oh, and what part is it?

22 A Well, I -- it's been a while since I've been in

1 there, but each of the rooms facing the execution chamber
2 has glass. Now, there may be a partition that comes up a
3 few feet or something, but for the most part it's glass.

4 Q Is all that glass one-way glass so that you can
5 only see through it one way or is some of it clear?

6 A Some of it's clear, I believe.

7 Q Which would be clear?

8 A The best I recall the one marked "witness room,"
9 where the media would be is -- that I recall is clear, but
10 it's been a while since I've been in this building.

11 Q I understand. Would that be the only room that
12 has clear glass?

13 A That's the only one I remember.

14 Q That's fair. Where is the prisoner during the
15 execution?

16 A He's in the execution chamber.

17 Q And who is in there with him?

18 A Well, I can only tell you under our past policy
19 or procedures when I was working.

20 Q That's fine.

21 A It would be the warden and deputy warden for
22 security.

1 Q And who was in the control room?

2 A That would be the executioners and someone
3 monitoring the heart monitor.

4 Q How many people would that be in the control
5 room?

6 A At least -- possibly there -- there would be
7 three, as I remember it.

8 Q Okay. Does one of the IV team members monitor
9 the heart monitor?

10 A As best I recall, that's correct and --

11 Q What's the purpose of monitoring the heart
12 monitor?

13 A To create a record and to monitor the person
14 being executed, and it would be used to determine death.

15 Q With the Court's permission I'm marking this as
16 Plaintiff's Number 5.

17 (Plaintiff's Exhibit No. 5 was marked for
18 identification.)

19 THE JUDGE: All right.

20 MS. BALLIET: And I'm going to give the counsel a
21 copy of it, and if you can just look at that for a moment
22 and see if you can identify that for us.

1 THE WITNESS: This appears to be the EKG tape from
2 the execution of Eddie Harper

3 BY MS. BALLIET:

4 Q Okay, thank you. And you said the monitor that
5 creates this document is located in the control room, is
6 that right?

7 A Well, you have to understand, we never used this
8 control room, I can only tell you from -- I don't know how
9 it would be used now, but --

10 Q I see.

11 A You know, it -- this room hasn't been used yet.
12 So --

13 Q Where was it at Eddie Harper's execution?

14 A Well, it would've been in a similar place, it
15 would've been in the -- we didn't call it the control
16 room, but it was where the executioner was stationed.

17 Q Okay --

18 (Tape interruption)

19 THE WITNESS: Yes, the same place.

20 Q Is there -- do any of these glass windows have
21 curtains that can be drawn over them?

22 A Yes.

1 Q Can you tell us which ones?

2 THE JUDGE: Let me ask before we go into this --

3 Mr. Parker is not the warden there now, right?

4 SPEAKER: That's correct, sir.

5 THE JUDGE: Is the warden going to testify that

6 there now is the -- what this building is. I mean, I

7 don't see any sense in asking Mr. Parker about what it is,

8 if we're going to ask somebody else what it is, 'cause Mr.

9 Parker hasn't been at the institution for a while.

10 MS. BALLIET: I can hold these questions --

11 (Tape interruption)

12 THE JUDGE: Well, you're going to ask him again

13 anyway, so, you know, because Warden Parker does this --

14 hasn't been there for a while, so let's just wait and the

15 warden will know.

16 MS. BALLIET: Okay. I'll ask him some questions

17 about the Eddie Harper execution.

18 THE JUDGE: All right.

19 BY MS. BALLIET:

20 Q Where was the IV team during the Eddie Harper

21 execution?

22 A And what -- I mean, you -- I don't know what point

1 you're referring to, during the execution or before the --

2 Q During the actual execution.

3 A They would be just outside the execution chambers,
4 they had other assignments. As I recall, one would be
5 monitoring the heart monitor. Now, I wasn't out there, I
6 was in the execution chamber itself, but they were standing
7 by to the best of my knowledge outside the chamber.

8 Q Were there tubes that went from the execution room
9 where the executioner was to the inmate?

10 A Yes, that's true.

11 Q Okay, and could you describe those?

12 A The tubes?

13 Q Those are one tube or two?

14 A There were two tubes.

15 Q And they went from the executioner, or they were
16 positioned outside the execution area and into -- will you
17 describe it?

18 A Okay. Behind a door, which had one-way glass
19 the executioner was facing with his syringes with the
20 lethal injections. There were as you say two tubes, they
21 went through a small portal in the door and they were
22 attached to IVs to the person being executed, to Eddie

1 Harper.

2 Q How long were those tubes from where the
3 executioner inserted the chemicals to the inmate?

4 A The distance, oh, probably three or four feet.

5 Q And where were you standing during the
6 execution?

7 A I positioned myself at the front of the gurney
8 or in other words next to his head, where his head -- he
9 was lying down on the gurney and I was standing right next
10 to his head, facing the audience.

11 Q Could you see the IV team from where you were?

12 A No, I could not.

13 Q Was anyone -- any of the wardens in a position
14 to watch what they were doing?

15 A During the execution?

16 Q During the execution.

17 A Well, you mean deputy wardens no, I don't think
18 so.

19 Q Some other type of warden?

20 A Well, there was only one warden.

21 Q Okay.

22 A There was three deputy wardens.

1 Q Okay. Well, would some other prison personnel
2 besides the warden be watching the IV teams?

3 A You're referring to during the actual execution?

4 Q During the actual execution?

5 A I don't think so, not that I know of.

6 Q I'm sorry?

7 A Not that I know of.

8 Q And who would watch -- was it -- who mixed the
9 chemicals?

10 A If I recall, the IV team -- members of the IV
11 team or maybe more than one or whatever it was. There was
12 several members of the IV team or maybe the entire IV
13 team, but -- and it was supervised by the deputy warden
14 and the deputy commissioner.

15 Q And if they said that they didn't watch the
16 mixing of the chemicals, would you disagree with that?

17 A Well, I can't clarify that, I know that that was
18 the way we had planned it, and as far as I know I never
19 heard any different; that's the way it went, 'cause I --
20 as far as I know.

21 Q How far away from Harper were you when he died?

22 A Inches, just inches. I was right at his head.

1 Q Who else was there in the room with you and Mr.
2 Harper?

3 A Deputy Warden Bill Henderson.

4 Q Can you tell us what you observed?

5 A I basically had a view of the audience, the
6 media, the witnesses. Of course, I could see my deputy
7 warden in the room, and in my -- I couldn't directly see
8 Eddie Harper's face and head, but I could see it in my
9 peripheral view. I could see his lower torso, in other
10 words, from his waist down, better than I could his upper
11 body, and it was just total silence and I tried not to
12 stare at anyone in the witness room, but just aware of
13 everything going on, and that's -- there wasn't much else
14 to see really.

15 Q Where was the deputy warden standing in relation
16 to Eddie Harper?

17 A I -- the best I recall, he was directly across
18 from me, but he was standing in such a way that he would
19 not block the view of the witnesses, which would mean he
20 would've been between the door and the window and I know
21 that's hard for you to relate, if you're not familiar with
22 it, but out of the way of the witnesses where they could

1 see, but near the exit door and where he was facing Eddie
2 Harper.

3 Q Could Mr. Harper have shed a tear and you
4 wouldn't have seen it?

5 A If he had I would not have seen it, 'cause I
6 only had his face in my peripheral view.

7 Q Have you heard of conscious paralysis?

8 A Not specifically.

9 Q Are you -- you haven't to this day?

10 A No.

11 Q Are you aware that someone who has taken a
12 paralytic drug could be paralyzed and not able to exhibit
13 pain --

14 A And still be conscious?

15 Q During a surgical procedure -- yes.

16 A No, that's -- I don't know of that, I have no
17 knowledge of that.

18 Q So I guess -- were any steps taken to prevent or
19 discover whether or not this was happening with Eddie
20 Harper?

21 A No, this is the first I've heard of it.

22 Q Did you notice Eddie Harper? Did he have any

1 appreciable change in color during the execution?

2 A I did not see any change in color.

3 Q Do you recall your deposition?

4 A Yes, I do. And I don't believe I answered that
5 he had a change in color.

6 Q No, let me look. Did anyone monitor his blood
7 pressure?

8 A No.

9 Q Did you have a BIS machine, "B" like baby -I-S,
10 you know what one is?

11 A No, ma'am, I don't.

12 SPEAKER: She needs to explain what that is.

13 THE JUDGE: You're right.

14 SPEAKER: Do you think you can give us what
15 exactly it is other than "BIS."

16 MS. BALLIET: Well, you know, it was identified
17 to me as a BIS machine, it's a special machine that is
18 designed to monitor consciousness during surgery.

19 THE JUDGE: Was that in the deposition or are
20 you --

21 MS. BALLIET: I'm trying to ask questions
22 outside the deposition.

1 THE JUDGE: Okay, go ahead. Explain what the
2 machine is and then ask him if he had -- if they had one.

3 BY MS. BALLIET:

4 Q A BIS machine is a machine used in surgery to
5 monitor whether or not someone is conscious or what level
6 of sedation the person has attained.

7 A No, we just had a heart monitor.

8 Q Are you aware of potential problems with lethal
9 injection?

10 A Yes.

11 Q Could you tell what those are, the ones you were
12 aware of at the time of Eddie Harper's execution?

13 A Well, I'm trying to think, because the -- some
14 of the problems would be -- could be, failure to find an
15 IV site; a suitable IV site. One of the other potential
16 problems we tried to plan for was after injections had
17 started the IV failing for what we would call just in
18 common language, "the blowout," or "catheter fail" or
19 "come out," by pushing or injecting too vigorously or too
20 hard. So we tried a training plan for that, but those are
21 two that comes to the top of my mind. There are perhaps
22 others, but I'm just not -- they're just not coming to my

1 mind now.

2 Q Do you recall that you were aware of problems
3 that might be related to drug users?

4 A Oh, yes, there's -- we -- some drug users may
5 have scar tissues over the most obvious veins that you
6 would want to use in a -- in an execution and that would
7 create a problem for us if a drug user -- there's a lot of
8 scar tissue and we have difficulties probably, you know,
9 that could cause a problem.

10 Q Were you aware of any problems regarding the
11 size of veins or the location of veins in the body?

12 A Well, in our practices, there were many numerous
13 practices -- we did have trouble at times. When I say,
14 "trouble," we had -- we -- what I consider normal issues
15 in finding veins on some subjects, and fortunately for us
16 we were able to practice with a variety of subjects and we
17 planned for that, and we did occasionally have trouble
18 starting IV on ourselves basically.

19 Q Would nervousness on the part of subjects make a
20 difference in starting an IV?

21 A It was my understanding from the advice I got
22 from other wardens that do this that, yes, nervousness

1 could affect the subject or person that was -- that we're
2 executing, it could.

3 Q Were you aware of problems related to the
4 possibility that you may -- might vomit?

5 A Yes, we were -- matter of fact, I've seen that
6 during the execution, so yes.

7 Q Could there be problems related to the manner in
8 which the executioner performs the execution?

9 A I'm not --

10 MR. MIDDENDORF: Your Honor, I'm going to
11 object.

12 THE JUDGE: I'm going to sustain the objection
13 unless we're -- unless it gets to a specific level.

14 SPEAKER: Okay, Your Honor.

15 BY MS. BALLIET:

16 Q What would happen if the executioner pushed too
17 hard on the syringes?

18 MR. MIDDENDORF: Asked and answered, I object.

19 MS. BALLIET: First time I've asked it, Your
20 Honor.

21 THE JUDGE: Well, go ahead, ma'am.

22 THE WITNESS: I think he told us there was a

1 boil.

2 SPEAKER: Yeah, that --

3 SPEAKER: Yes --

4 THE WITNESS: Okay.

5 SPEAKER: I mean, that should be a problem.

6 BY MS. BALLIET:

7 Q What about problems regarding the staff that are
8 assigned to do the task, you're probably provided with
9 your own staff?

10 A Absolutely, the warden could faint or have a
11 heart attack and so could the executioner or any other
12 member of the team, so we had redundant -- we had someone
13 to take each of our places during the execution.

14 Q Would it be a problem if a volunteer decided
15 that he wanted to stop the execution?

16 A Would it be a problem?

17 Q Someone -- yes.

18 A We had planned for that and we had, as far as I
19 know, those bases covered. We had a new plan -- a plan
20 for a volunteer who'll -- if he had the ability to stop
21 the execution.

22 Q What equipment did you have for that

1 contingency?

2 THE JUDGE: I'm going to sustain. It goes to
3 the security of the institution.

4 BY MS. BALLIET:

5 Q Were you involved in getting lethal injection
6 adopted as the method of execution?

7 A No, I was not involved.

8 Q Did you witness lethal injection in any other
9 state?

10 A Yes, I did.

11 Q Where?

12 A Indiana.

13 Q Any other state?

14 A Not lethal injection.

15 Q In preparing for lethal injection in Kentucky,
16 did you review materials from other states?

17 A Yes, I did.

18 Q And what state, do you recall?

19 MR. MIDDENDORF: Judge, we're going to object to
20 this. This once again has been covered in depositions.
21 We're starting to rehash things we've already spoken
22 about, and we've already agreed that this was going to be

1 limited to just --

2 THE JUDGE: Was this covered in the deposition -
3 -

4 MS. BALLIET: My next question is not and --

5 THE JUDGE: All right.

6 MS. BALLIET: Related to the one that --

7 THE JUDGE: Okay.

8 BY MS. BALLIET:

9 Q In your deposition, you said that you looked at
10 Virginia, Indiana, Ohio, Georgia, Alabama, Texas, Florida,
11 some New England states and New Jersey, does that sound --

12 A I don't remember New Jersey.

13 Q Okay, well, except for New Jersey, do you --

14 A But I said that -- I think I said there was some
15 New England state and I couldn't remember which New
16 England state it was.

17 Q And what year did you look at these materials --

18 A I probably started looking at them when I was
19 the deputy director in Ohio, over a, probably a 12-year
20 time period.

21 Q Would you have -- would your review of these
22 materials have ended with 1998-1999 protocol when you

1 completed that?

2 A I don't recall looking at other states'
3 materials after 1999.

4 Q Were you aware that Georgia adopted -- didn't
5 adopt lethal injection until 2001?

6 Q No, I don't -- I don't know when they did.

7 A And were you aware that Alabama didn't adopt it
8 until 2002.

9 SPEAKER: Your Honor, I would say the Counsel
10 testified.

11 THE JUDGE: Well --

12 SPEAKER: This is direct examination.

13 THE JUDGE: Well, I -- let's -- I understand the
14 need to determine the adoption of protocol, but I'm going
15 to keep us back on track. We were talking about the
16 protocol and the efficacy of the drugs, and the efficiency
17 or the ability to carry out that process, and to that
18 extent, not everything that went into making the decision
19 of how it has taken place is relevant. It was probably
20 taken care of.

21 MS. BALLIET: I only have about four or five
22 more questions, Your Honor.

1 THE JUDGE: All right. Go ahead.

2 MS. BALLIET: All right.

3 BY MS. BALLIET:

4 Q Did you review the chemicals that the other
5 states used?

6 A Yes, we did.

7 Q Are they the same as Kentucky uses?

8 A Best I recall, there were -- all the states that
9 I remember looking at were the same.

10 Q Did you write --

11 A That's the best I recall.

12 Q Did you write the policy naming the three drugs
13 that Kentucky uses?

14 A Yes, I did.

15 Q Do you recall what the drugs are?

16 A I'm bad at recalling the blood pressure
17 measurement I take. I mean, I could probably make a stab
18 at it, but it's been -- I try to forget it, to be honest
19 with you.

20 Q Were any medical experts consulted regarding
21 which chemicals to choose?

22 A Medical experts, you mean to -- before we chose

1 them?

2 Q Right.

3 A No, to the best of my recollection, we went by
4 what other states had successfully used.

5 Q And, well, why did they choose those three
6 drugs?

7 A Because they had been used successfully in
8 Texas, and the other -- some of the other states we've
9 looked at.

10 Q Thank you.

11 THE JUDGE: Thank you, Ms. Balliet. Please
12 stand up. Cross to do. Mr. Middendorf, the point that
13 you --

14 MR. MIDDENDORF: Judge, we have no questions for
15 warden Parker.

16 THE JUDGE: All right. Thank you, warden
17 Parker. Let me ask -- let me ask -- I take it from your
18 last answer is, as you went to other states, you've used
19 basically the protocols and the drugs -- not the
20 protocols, but the drugs that other states have used,
21 you've got the University of Kentucky, University of
22 Louisville, get an anesthesiologist or anybody in or

1 consult with your staff?

2 THE WITNESS: No, sir. And, you know, part of
3 the confusion on one of the answers I had was when --
4 during that 12-year period, when I was warden in those
5 states, we were looking at other states, but some states -
6 - I mean, all that runs together because some states were
7 still doing both, electrocution and as in Kentucky.

8 THE JUDGE: Yeah, as a matter of --

9 THE WITNESS: So we had to be prepared for both,
10 and we will still do.

11 THE JUDGE: Okay.

12 THE WITNESS: But what we did was, as far as the
13 chemicals, we adopted from states who were doing this
14 routinely. That's what they were doing and I didn't have
15 any reason to question that.

16 THE JUDGE: Okay.

17 THE WITNESS: I didn't have the knowledge to
18 question it, but no reason to, because they were doing it
19 on regular basis.

20 THE JUDGE: And I take it no one from the
21 Justice cabinet, or the Corrections Department as such
22 said anything different from that. You were basically the

1 one in charge here developing --

2 THE WITNESS: Yeah, it was pretty much left up
3 to me to come up with this checklist and it was reviewed.
4 You know, this thing was looked at, what, from the
5 Secretary of Justice, even in the Governor's office. I
6 mean, it was looked at at the highest levels of state
7 government --

8 THE JUDGE: Okay.

9 THE WITNESS: -- and it was going over with a
10 fine-tooth comb, many, many, many times before we ever put
11 it in place.

12 THE JUDGE: Okay.

13 THE WITNESS: So if there's been a dispute about
14 that, as far as I recall, everybody looked at it, the
15 chemicals and the amounts were not questioned, as far as I
16 know.

17 THE JUDGE: Okay.

18 MR. MIDDENDORF: Maybe just a couple of
19 questions, Your Honor.

20 THE JUDGE: I guess, I was afraid that he'd do
21 that.

22 MR. MIDDENDORF: I'll -- and I promise only a

1 couple.

2 THE JUDGE: Go ahead.

3 CROSS EXAMINATION

4 BY MR. MIDDENDORF:

5 Q When Ms. Balliet asked you about Georgia, and
6 them not adopting lethal injections till 2001, did they
7 already have electrocution at that time?

8 A Well they were doing electrocution and that's
9 what I'm saying, all this runs together. And we looked at
10 state, "Hey what are you --" you know, we looked at all of
11 it and --

12 Q Would it fair to say, when you traveled to those
13 other states, even if they didn't have lethal injection at
14 that time, that they already had at least an electrocution
15 protocol and things out of that as well?

16 A Oh, yes. We were looking at the -- "what do you
17 do," leading up to the security aspects of it, and law
18 aspects, and some of them were preparing their laws -- in
19 a lot of the states, their laws were changing. We were
20 all -- several of us were trying to get ready at the same
21 time. And so, we were creating a network of -- you know,
22 we had talked to each other and that's part of the

1 benefits of going to some of this training we went to,
2 because I knew the wardens at different facilities and I
3 could pick up the phones, and say, "Hey, what are you
4 doing about this," and if there were problems or issues,
5 we could talk to each other, and sometimes we did.

6 Q That's all the questions I have.

7 THE JUDGE: Anything?

8 MR. SHOUSE: Nothing.

9 MS. BALLIET: No, thank you.

10 THE JUDGE: Thank you, Mr. Parker. You can step
11 down, you're excused.

12 THE WITNESS: Thank you.

13 THE JUDGE: Thank you.

14 (Witness excused)

15 MR. BARRON: Dr. Tracey Corey.

16 THE JUDGE: She asked --

17 MR. BARRON: (inaudible)

18 THE JUDGE: Dr. Corey, the chair.

19 Whereupon,

20 TRACEY COREY

21 was called as a witness and, having been first duly sworn,
22 was examined and testified as follows:

1 THE JUDGE: Mr. Barron.

2 DIRECT EXAMINATION

3 BY MR. BARRON:

4 Q Could you please state your full name for the
5 record, spelling your last name?

6 A My name is Tracey Suzanne Corey. My last name
7 is spelt C-o-r-e-y.

8 Q Where are you currently employed?

9 A I am the chief medical examiner for the State of
10 Kentucky and I'm a professor of pathology with the
11 University of Louisville School of Medicine.

12 Q How long have you been professor?

13 A I believe I'm been a full professor, since --
14 gee -- was it -- I think it was July of last year, I'm not
15 sure, but I've been the University ever since I finished
16 my residency training, either through -- as an instructor
17 and then as an assistant clinical professor, then an
18 associate professor, and then finally a professor.

19 Q What is forensic pathology?

20 A Basically forensic pathology is the medical
21 legal investigation of death. It's the medical
22 examination and documentation of a diseased person to try

1 to answer legal questions.

2 Q How long have you been chief medical examiner?

3 A I've been chief medical examiner since September
4 1, 1997.

5 A Could you tell us what a medical examiner does?

6 Q Well, that varies depending on where you are,
7 what state you're in. The definition of a medical
8 examiner will vary, but in the state of Kentucky, all the
9 medical examiners employed by the state are forensic
10 pathologists.

11 Basically that means we've graduated from
12 medical school, then we've done a residency in anatomic
13 pathology, then we've done a one-year fellowship in
14 forensic pathology, and basically we are there to assist
15 coroners and investigators in documenting and interpreting
16 traumatic injuries and natural disease processes in a
17 deceased persons.

18 Q How do you go about doing that?

19 A Primarily through the performance of the
20 autopsy.

21 Q Do you hold any board certification?

22 A Yes, sir.

1 Q In what?

2 A I'm board certified by the American Board of
3 Pathology in both anatomic and forensic pathology.

4 Q You already discussed forensic pathology. So
5 what is anatomic pathology?

6 A Anatomic pathology is a specialty in medicine
7 and forensic pathology is actually a sub-specialty of
8 that. To give you an analogy, forensic pathology is to
9 anatomic pathology, as, say, internal medicine is to
10 cardiology. One is the sub-specialty or I might have said
11 that backwards, but forensic pathology is the sub-
12 specialty where you do additional training.

13 Anatomic pathology is the study of natural
14 disease processes. For instance, if you go to your family
15 physician and he says, "There's a mole on your back, I
16 think it looks funny, I want to send it to the lab," it is
17 sent to an anatomic pathologist, who will say that's just
18 a mole, or that's cancer. Anytime you have an organ or
19 tissue removed in a hospital, that is sent to an anatomic
20 pathologist to make a diagnosis.

21 Q Is your medical examiner docket accredited?

22 A Yes, sir. It is.

1 Q By whom?

2 A It's accredited by the National Association of
3 Medical Examiners.

4 Q What requirements must be met to become
5 accredited?

6 A There is no easy way to answer that a lot.
7 Basically, what happens when you become accredited is you
8 have to go through an inspection. An inspector comes for
9 a period of one to two days and goes through a checklist,
10 and then your office -- you're going to be accredited.

11 Q Dr. Corey, let's talk briefly about the
12 execution of Edward Harper in 1999. Who performed the
13 autopsy?

14 A I did, sir.

15 Q And what was the function of that autopsy?

16 A That autopsy was performed to collect, analyze
17 documents, and interpret evidence to verify the cause and
18 manner of death.

19 Q Was blood drawn during the autopsy?

20 A Yes, sir.

21 Q And what was the purpose of that drawing of the
22 blood?

1 A In this case, the blood was drawn to analyze the
2 blood -- to have the blood sent to the toxicology
3 laboratory to analyze it for the presence of drug, and
4 also in this particular case, I also sent some of the
5 blood to another laboratory to analyze it for the
6 concentration of potassium.

7 Q Did you put in an autopsy report after you
8 conducted the autopsy?

9 A Yes, sir. I did.

10 Q Did that report incorporate the toxicology
11 results?

12 A Yes, sir. It did.

13 MR. BARRON: Your Honor, may I have permission
14 to mark the autopsy as Plaintiff's Exhibit number 2.

15 THE JUDGE: Yes.

16 (Pleading's Exhibit No. 2 was marked for
17 identification.)

18 MR. BARRON: May I approach the witness?

19 THE JUDGE: Please.

20 BY MR. BARRON:

21 Q Do you recognize these files here?

22 A Yes, sir. It appears to be a copy of my autopsy

1 report.

2 Q Sorry, go ahead.

3 A And also a copy of the toxicology report signed
4 by Mike Ward (phonetic).

5 Q Did you adopt those toxicology findings into
6 this report?

7 A Yes, sir.

8 Q Is that your signature at the bottom of the --
9 what's number page 6 that appears at the very front?

10 A Yes, sir.

11 MR. BARRON: This time I move that Plaintiff's
12 Exhibit 7 be entered into evidence.

13 THE JUDGE: Six or seven?

14 MR. BARRON: Six, I'm sorry. Six. No, I'm
15 sorry, two.

16 (Plaintiff's Exhibit No. 2 was received in
17 evidence.)

18 BY MR. BARRON:

19 Q At really what time did you begin the autopsy?

20 A I began the autopsy at 9:40 a.m. on May 26,
21 1999.

22 Q Who drew the blood?

1 A I either drew it or it was drawn by my autopsy
2 assistant with my direct observation and at my direction.
3 I can't remember specifically in this case, but I would be
4 the one responsible for it.

5 Q Once you drew that blood, how did you store it?

6 A The blood was placed in plastic containers, it
7 was -- which is the standard autopsy -- forensic autopsy
8 toxicology kit protocol. It is placed in that kit with --
9 in the containers with a preservative that's called sodium
10 fluoride. The kit is then sealed and then the kit is
11 mailed to the toxicology laboratory.

12 Q You did mention sodium fluoride. What is that?

13 A Sodium fluoride is the standard preservative
14 that's used in toxic -- postmortem toxicology samples.

15 Q Does that have any effect on the toxicology
16 results?

17 A Basically, what it does is it preserves the
18 blood so that the blood will accurately reflect what was
19 happening to it, the levels of drugs that were in the
20 blood at the time it was drawn. It holds things, so to
21 speak, in their present form.

22 Q Did you add any --

1 A It keeps the blood from degrading.

2 Q Did you add any other chemicals to the blood?

3 A No, sir.

4 Q Can you tell us what an anticoagulant is?

5 A An anticoagulant is a substance that keeps
6 something blood specifically, generally, from clotting.

7 Q Why do you not add that to the blood?

8 A Because in the postmortem state, in general, the
9 blood has already clotted.

10 Q Who conducted the toxicology analysis on
11 Harper's blood?

12 A The toxicology was performed by Mike Ward at the
13 Forensic Toxicology Laboratory in Frankfurt.

14 Q Do you know what his position was at the time?

15 A Specifically what his title was? No. You have
16 to ask him.

17 Q Who sent the blood to that office?

18 A I did.

19 Q How did you send it?

20 A As we discussed, it was mailed.

21 Q Is that the normal protocol of how to label,
22 store, and send blood when a toxicology blood is drawn?

1 A Yes, sir.

2 Q What, if any, effect would the temperature of
3 the blood while transporting have on the reliability of
4 toxicology results?

5 A In general, it won't have any as long as it is
6 in, generally, just, you know, room temperature and as
7 long as your transit time isn't weeks. Storage at a --
8 for a short period of time, one to two days at room
9 temperature is considered fine by the toxicology
10 laboratories and we rely on the toxicology laboratories to
11 indicate to us the way they want their samples
12 transported.

13 Q How many bottles of drug did you sent to the
14 toxicology lab?

15 A I believe I sent three.

16 Q And how many sites did those three bottles of
17 blood come from?

18 A Three.

19 Q Why did you draw it from three sites?

20 A I wanted to verify my results in multiple sites.

21 Q How many sites do you usually draw it from?

22 A Generally, I only take it from one site, but

1 because of the nature of this case, with this being a
2 judicial execution, I wanted to be sure that I -- and with
3 the toxicology being the most important part of this case
4 as opposed to other cases that we might view, for
5 instance, motor vehicle pollution, something like that.
6 Given the nature of this case, I wanted to be sure that I
7 can verify my results and that I had adequately sampled
8 the different sites in this case.

9 Q What part in the body did you draw the blood
10 from?

11 A I drew it from three sites. I drew it from --
12 specifically, as noted on page 6 of the autopsy report, I
13 drew it from the heart. I took it also from the vena
14 cava. The vena cava is the big vein that brings blood
15 from the legs back to the heart. So the blood that's in
16 the vena cava has already gone all the way down to the
17 lower extremities and then it is on its way back up to the
18 heart to go back up to the lungs. And then I also drew it
19 from the right axillary vein. The axillary vein is the
20 vein that runs through your armpit region. So it is
21 coming back from the arm.

22 Q What is peripheral blood?

1 A Peripheral blood is blood from a source other
2 than the heart, is the easiest way to define it by most
3 people.

4 Q Why did you draw it from peripheral blood
5 locations and the heart?

6 A To verify my results. Basically, in most
7 instances, in a lot of toxicology references, they will
8 indicate that blood should be drawn from the peripheral
9 site, if available. The problem is in forensic pathology,
10 sometimes peripheral blood is not available because the
11 person has bled too much. But if peripheral blood is
12 available, it is considered the best site to test for in
13 postmortem specimens.

14 Q So to a reasonable degree of medical certainty,
15 do you believe that peripheral blood is the most reliable
16 indicator of the presence of drugs in the body?

17 A I can't answer that yes or no.

18 Q You just stated that you (inaudible) postmortem
19 blood drawing would be from peripheral sites.

20 A Yes, sir.

21 Q So, would that make it more reliable than a
22 heart location?

1 A It would depend on a particular case and a
2 particular substance. In -- and some blood -- some drugs
3 are stores, for instance, in fat. You know, the product
4 produced by marijuana are stored largely in fat and so I
5 can't make a blanket statement that peripheral blood is
6 always going to be the most reliable source. It is going
7 to depend on your particular case. In general, what we
8 are trained to do is if it is available, we take
9 peripheral blood.

10 Q So when you drew the blood from Harper, you took
11 peripheral blood because you thought that would be a
12 reliable location?

13 A I thought it would be a reliable location and I
14 wanted to be able to compare that also to the level in the
15 heart. I wanted to make sure that I adequately sampled as
16 many sites as I could so -- or as many sites as I thought
17 was necessary so that people could look at the results at
18 a later time and be able to decide for themselves what the
19 levels might be.

20 Q Thank you. We have no further questions at this
21 time.

22 THE JUDGE: Thank you. Mr. Middendorf?

1 CROSS EXAMINATION

2 BY MR. MIDDENDORF:

3 Q Good afternoon, doctor.

4 A Good afternoon.

5 Q Now, as you previously testified, you first did
6 the autopsy for Eddie Lee Harper, correct?

7 A Yes, sir.

8 Q Okay. And you did a complete exam of Eddie Lee
9 Harper. Is that a fair statement?

10 A Yes, sir.

11 Q Did you examine the IV sites on Mr. Harper?

12 A Yes, sir.

13 Q Did you observe any signs of infiltration?

14 A I did not. I would have noted those in my
15 reports, had I observed those.

16 Q Can you please explain to the Court what
17 infiltration is?

18 A Most of the tubes had been in the hospital and
19 had to have an IV -- may have had an infiltration.
20 Basically, it is easy -- the easiest way to describe is if
21 the needle comes out of the vein and so then fluid is
22 still going into the body, but it is not going into the

1 vein anymore. So it infuses the surrounding tissue and so
2 often you'll get a site of swelling in that area.

3 Q It will look like a bruise.

4 A No, it is not a bruise because it is the fluid
5 that is coming down through the IV. And so what you see
6 is mainly just swelling rather than a bruise. Now, you
7 can get a bruise associated with it if the vein is
8 leaking.

9 Q Did that indicate to you that IV was then in the
10 vein properly?

11 A I found no evidence that the IV wasn't in the
12 vein.

13 Q Okay.

14 A That'd be the best way to say that.

15 Q And were you provided with historical
16 information with regard to Mr. Harper's execution?

17 A I was provided with some historical information.

18 Q Okay. And why is it important to go back and
19 find -- I guess, before you do the autopsy, gain
20 historical information in making your findings?

21 A Well, basically, we want to get as much
22 historical information at the beginning as we can. The

1 practice of medicine is based on the performance of a
2 history and physical. My patients, of course, are
3 usually, not always, but usually deceased and so my
4 physical examination is going to be the autopsy. But we
5 still always take a history. It's the -- the analogy I
6 would give is you know, you don't go to your family
7 physician and get up on the examination table and say,
8 "Guess what's wrong with me." You provide your physician
9 with a history, so that he can tailor his examination
10 based on -- on what's wrong. In this particular case, the
11 history coming in, of course, was that this was a judicial
12 execution by lethal injection and therefore the toxicology
13 was going to be the most important to me and that's why I
14 did the different sampling that I would not have normally
15 done.

16 Q And did you receive -- well, what kind of
17 history did you receive?

18 A I received the history that this was a judicial
19 execution by lethal injection. I was told of the
20 quantities of the drugs and the drugs that he would be
21 receiving. And then, when the body was transported to the
22 office of the medical examiner, I was told that it

1 judicial execution and I was not told that anything
2 unusual had occurred in their procedure, I guess, that's
3 the easiest way to say it.

4 Q Okay. And you said that you were able to take
5 blood from different sites.

6 A Uh-huh.

7 Q What does that tell you when you are able to
8 take blood from different sites of the body?

9 A Well, the difference -- I did the different
10 sites in this case, as I said, to verify the different
11 levels of different drugs.

12 Q Does that indicate that the drug circulated
13 throughout the body?

14 A Yes, sir. For me, the presence of having the
15 thiopental and the pancuronium in both the vena cava -- in
16 all three, the vena cave, the heart and the right axillary
17 vein, indicated to me that the drug had gone both above
18 and below the diaphragm, as we say. Because the
19 diaphragms are big breathing muscles so we, kind of,
20 arbitrarily separate the body into the upper half and the
21 lower half using the diaphragm. The vena cava below the
22 diaphragm, that showed me that the blood -- the drug had

1 circulated, had gone down to the lower extremities and
2 were on their way back up.

3 Q If you want to get a drink real quick, go ahead.

4 A Yeah. You can go ahead.

5 Q Okay. Now, are you aware at what time Mr.
6 Harper was executed?

7 A I believe, on the coroner's sheet, let me find
8 it in all this paperwork, I believe it was 7:28 p.m.

9 Q Okay.

10 A I believe so.

11 Q And what time did you perform the autopsy?

12 A 9:40 a.m. the following day.

13 Q So it was some 14 hours later?

14 A Yes, sir.

15 Q Can you tell the court about postmortem
16 redistribution of blood?

17 A Some drugs may exhibit postmortem redistribution
18 in that the levels that we find at autopsy may not be the
19 exact level in the blood stream in that location at the
20 time of death. That is a common phenomenon and that's one
21 thing that forensic pathologists always have to take into
22 account whenever we are trying to interpret toxicology

1 results.

2 Q Okay.

3 MR. MIDDENDORF: Judge, what I would like to
4 mark as -- I keep saying commonwealth's, I apologize.

5 SPEAKER: But that is Exhibit 1.

6 SPEAKER: It can be the Commonwealth's.

7 SPEAKER: I'm going to object for a moment. May
8 we approach, please?

9 THE JUDGE: Oh yes, you may. Or you can argue
10 from there, there is not a jury that is going to be
11 prejudiced.

12 SPEAKER: Is it the reason given.

13 SPEAKER: This article deals with the specific
14 chemicals that are used in lethal injection. It was not
15 to my knowledge here, written by Dr. Corey and she is not
16 an expert at all in pharmacology, postmortem
17 redistribution, or pharmacokinetics. They are bringing in
18 their own expert to talk specifically on that topic. She
19 has been questioned during depositions and it is already
20 stated that she had no basis for any testimony here beyond
21 that of an average layperson or medical examiner. And it
22 goes well beyond the scope of the direct examination

1 questions.

2 SPEAKER: Okay. There's probable cause here. I
3 didn't (inaudible), go ahead.

4 SPEAKER: Well, this was in the American Academy
5 of Forensic Sciences. Dr. Corey can certainly testify.
6 These are actually two case studies from an execution at
7 Oregon. And the thiopental levels at the blood taken at
8 the time of the execution and also at autopsy. So she can
9 certainly testify as to the results that you can find in
10 Forensic science.

11 SPEAKER: Judge, she did testify at her
12 deposition. I know we are not supposed to rehash the
13 depositions here, but she is not an expert in
14 pharmacology, pharmacokinetics, anything like that.

15 SPEAKER: I mean --

16 SPEAKER: This calls for an expertise that is
17 beyond her kin.

18 SPEAKER: I didn't know that we had qualified
19 her as an expert or that under KRE rule we are required to
20 do so anymore. But we've changed that.

21 SPEAKER: Let's listen what the question's going
22 to be and then we'll determine what the answer --

1 SPEAKER: Yes, sir.

2 SPEAKER: Okay. Go ahead.

3 THE JUDGE: Now, what is it that you want to ask
4 the doctor about? Thanks, Sheriff.

5 MR. MIDDENDORF: What she believes are the
6 results or if she can testify as to the results of the
7 levels, how they dropped, explaining postmortem
8 redistribution and the two case studies that were out of
9 Oregon on two people that were executed.

10 SPEAKER: Okay. You know --

11 BY MR. MIDDENDORF:

12 Q Doctor, are you familiar with these studies?

13 A Yes, I am familiar with the data that was
14 presented in the facts round.

15 Q Are you familiar with the process or familiar
16 with the basis of coming to whatever conclusions that --
17 did you reach any conclusions on this at the deposition or
18 did they ask you about it at the deposition?

19 A On this particular paper?

20 Q Yes.

21 A No. But I did, basically, when I got my levels
22 I looked at this paper to see, basically, at how my levels

1 compared to the levels you presented in the paper.

2 SPEAKER: Where did you just find out that
3 according to this --

4 BY MR. MIDDENDORF:

5 Q Can you explain what this article talks about
6 here?

7 A This -- this was a presentation at the annual
8 meeting of the American Academy of Forensic Sciences, held
9 in February in 1998, and it was presented, two cases of
10 execution by lethal injection the toxicology results were
11 presented. What those showed in Case II, under the chart,
12 it showed that the thiopental level at death in the heart
13 blood was 16.7 mg/l, whereas at autopsy the femoral blood
14 level, and this -- the femoral blood level is going to be
15 just a little bit below the vena cave site that I drew,
16 the femoral blood level at autopsy was 1.8 mg/l. So there
17 was a drop, basically, of 10 fold between the heart blood
18 at death and the femoral blood at autopsy. And the
19 particular -- the author of this paper just stated, "The
20 thiopental concentration in Case II femoral blood
21 collected at autopsy is in order of magnitude lower than
22 in the heart blood collected immediately on death. This

1 may be due to rapid distribution of the drug to peripheral
2 tissue and/or to postmortem redistribution." So I -- when
3 I saw my levels I thought that my levels, basically, were
4 pretty close to the levels that the Oregon toxicologist
5 had reported.

6 Q And what were the levels in Mr. Harper's blood?

7 A Now, a part of this is -- well, the level in
8 this --

9 SPEAKER: But this is an autopsy that she said
10 finds out.

11 SPEAKER: The ones he talked to you about,
12 Oregon -- now, with regard to --

13 THE JUDGE: I understand that. Now, if I
14 understand the questioning there, there was blood drawn in
15 Oregon at time of death and then at autopsy --

16 SPEAKER: Yes, sir.

17 SPEAKER: Okay and this -- and all Dr. Corey is
18 talking about is blood drawn at the time of autopsy. That
19 hadn't anything to do with any blood being drawn at the
20 time of death.

21 SPEAKER: That's correct.

22 SPEAKER: Okay. All right.

1 THE WITNESS: Basically, and this paper is a bit
2 -- there's it is hard to compare some of the data because
3 they drew the thiopental level at death from the heart but
4 they didn't draw it from the femoral blood. So I don't
5 know what -- what the level --

6 BY MR. MIDDENDORF:

7 Q So the femoral blood was drawn at autopsy and
8 heart was drawn at death.

9 A Yes, sir.

10 Q Okay.

11 SPEAKER: What --

12 SPEAKER: That is Mr. Shouse's objection that I
13 am going to -- that I'm going to --

14 THE WITNESS: There was a -- it's a -- you have
15 to you know, it's comparing apples to oranges.

16 SPEAKER: Correct. Okay.

17 THE WITNESS: Now, the level that I found in the
18 -- that was reported by the toxicology laboratory from the
19 blood that I took from Mr. Harper's heart showed a
20 thiopental level of 6.5 mg/l.

21 SPEAKER: You got it. And point Mr. Barron's
22 objection of Mr. Shouse's --

1 BY MR. MIDDENDORF:

2 Q What is the standard reference that you would
3 use regarding postmortem drug ranges?

4 A In general, the standard reference -- it's heart
5 that we got to first, that we rely on first in the medical
6 examiner's office is published by Winek, W-i-n-e-k --

7 Q But we do not actually have that here.

8 A You will --

9 SPEAKER: Take it, please. Is that for
10 thiopental?

11 MR. MIDDENDORF: If we could mark that as
12 Exhibit 2, Your Honor?

13 THE JUDGE: Yes.

14 SPEAKER: No objection, Your Honor.

15 (Exhibit No. 2 was marked for identification.)

16 THE WITNESS: Yes, sir.

17 SPEAKER: Actually, Doctor --

18 SPEAKER: Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. BARRON:

21 Q And what is the therapeutic range of sodium
22 thiopental in a postmortem setting?

1 A In this particular reference, Winek lists the
2 therapeutic range from postmortem blood for thiopental as
3 ranging anywhere from 142 mc/mL, which is the same this as
4 our mg/l.

5 Q And Mr. Harper was within that range?

6 A Yes, sir.

7 Q And what does therapeutic mean?

8 A Therapeutic means that the drug is having its
9 desired -- it is at a level where it is having its desired
10 effect.

11 Q Okay, in sodium thiopental, what is the desired
12 effect of that?

13 A The desired effect is unconsciousness.

14 MR. MIDDENDORF: That's all the questions I
15 have.

16 SPEAKER: Is she (inaudible)?

17 SPEAKER: Yes.

18 SPEAKER: Did I get -- Exhibit number 1, did I
19 get that or I don't think that --

20 SPEAKER: Oh, here it is.

21 SPEAKER: Okay. Thank you very much.

22 SPEAKER: I'm sorry.

1 SPEAKER: That's fine.

2 BY MR. MIDDENDORF:

3 Q Dr. Corey, where did you get your training in
4 toxicology?

5 A I got my training in toxicology as it pertains
6 to Forensic Pathology during my forensic pathology
7 scholarship.

8 Q Where did you obtain your training in short and
9 long acting barbiturates?

10 A In medical school.

11 Q You have any expertise in toxicology?

12 A I have expertise in toxicology as it relates and
13 as it is interpreted in forensic pathology. I would not
14 consider myself an expert toxicologist.

15 Q Do you see yourself as an expert pharmacologist?

16 A No, sir.

17 Q How about an expert in pharmacokinetics?

18 A No, sir.

19 Q And expert in pharmacodynamics?

20 A No, sir.

21 Q Do you have any expertise in pain management?

22 A No, sir.

1 Q And specific expertise in postmortem
2 distribution of drugs?

3 A If specific expertise just in that, no, sir. I
4 routinely have to interpret postmortem toxicology results
5 in the context of forensic pathology

6 Q So would you hold yourself out as an expert in
7 that field?

8 A In what field?

9 Q As -- in --

10 A Oh, forensic pathology. Yes.

11 Q Would you hold yourself out as an expert in
12 postmortem redistribution of drugs?

13 A In -- in -- I don't know how -- I routinely have
14 to interpret toxicology results in a postmortem setting.

15 Q Would you consider yourself an expert in the
16 effects of barbiturates on the body?

17 A No, specifically in the field of -- in the field
18 of specific toxicology, no. I certainly am knowledgeable
19 about the effects of barbiturates on the body as a medical
20 doctor, I would consider that I have more knowledge in
21 that area than a layperson but I certainly wouldn't, you
22 know, hang a shingle out as being an expert in that.

1 Q Is there such a thing as a short acting
2 barbiturate?

3 A There are short acting, there are ultra short
4 acting and there are long acting but for the specifics of
5 those, I would defer those questions to an expert in
6 pharmacology.

7 Q Do you know how long it takes for thiopental to
8 cycle through the body?

9 A No, sir.

10 Q How many times have you dealt with autopsies
11 looking for thiopental?

12 A Not very many. As we discussed previously in
13 depositions thiopental comes up in some of our deaths that
14 we autopsies that occur in surgery. Other than that, this
15 is the only case that I can recall.

16 Q You said that it comes up in death that occurs
17 during surgery, can you give an approximate number of how
18 many times?

19 A I would say it is very few. It is certainly --
20 it is very few. You know, I don't know because I've never
21 sat down and pulled out how many deaths we do that occur
22 during surgery. Most of the time though, the effect of

1 the thiopental is not the issue in a death such as that,
2 it is usually a -- and actual surgical complication.

3 Q Can you explain how thiopental breaks down in
4 the body?

5 A No, sir. I know it is metabolized by the liver.
6 For the specific breakdowns, I would refer those to a --
7 to a toxicologist or a pharmacologist.

8 Q You remember the deposition that you gave in
9 this case, right?

10 A Yes, sir.

11 Q And you recall that you testified about how the
12 thiopental is going -- I mean, the blood was going to
13 catch the thiopental from three locations.

14 A Yes, sir.

15 Q And referring that to your discussion on cross
16 about the Oregon data, you recall when you testified at
17 the deposition talking about how everything there shows
18 you that the thiopental in the vena cava was 3 mg/l,
19 thiopental in the right axillary vein was 3 mg/l, what
20 this shows me is that this is pretty reliable, you've got
21 not one peripheral source, but two, showing the same
22 thing.

1 A Yes.

2 Q (inaudible)?

3 A Yes.

4 Q Thank you. No further questions.

5 SPEAKER: (inaudible)?

6 SPEAKER: Just one redirect.

7 SPEAKER: Okay.

8 REXCROSS EXAMINATION

9 BY MR. MIDDENDORF:

10 Q Doctor, based on your training and experience,

11 you have an opinion as to whether Mr. Harper was awake or

12 conscious during the execution?

13 A I have no evidence to indicate to me that he was

14 not.

15 Q All right. Not --

16 A That he was not --

17 Q Awake.

18 A Awake.

19 SPEAKER: All right. That's it.

20 SPEAKER: The -- doctor, you are free to go.

21 THE WITNESS: Thank you, Judge.

22 SPEAKER: Okay.

1 THE WITNESS: Okay.

2 SPEAKER: Thank you. You are excused.

3 SPEAKER: Mr. Mike Ward.

4 SPEAKER: Mike Ward.

5 Whereupon,

6 MIKE WARD

7 was called as a witness and, having been first duly sworn,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BARRON:

11 Q Please state your full name for the record,
12 spell out your last name.

13 A Yes, sir. My name is Mike Ward, W-a-r-d.

14 Q How are you currently employed?

15 A I'm employed as the supervisor of the medical
16 examiner's toxicology lab here in Frankfort.

17 Q How long have you worked there?

18 A I've worked in the lab for nearly 30 years, now.

19 Q What are your responsibilities as supervisor of
20 the toxicology lab?

21 A My responsibilities include not only the
22 extraction of blood, urine and other body components for

1 the analysis for drug and alcohol and poison, but I also
2 serve as the general technical supervisor of the five
3 young people who currently work there with me.

4 Q What is toxicology?

5 A Toxicology is the study of poison and how they
6 get into the body, what happens once they get there and
7 what happens as they leave the body.

8 Q What training is necessary to become a
9 toxicologist?

10 A For the most part, a bachelor's degree in a
11 science, via chemistry. For forensic science, additional
12 training and education is also necessary.

13 Q You've had that training?

14 A Yes, sir. I believe so.

15 Q Are you currently, or have you recently
16 completed any education in toxicology?

17 A At the end of the week, God willing, I'll have a
18 master's in forensic science.

19 Q What about any board certification?

20 A I am certified as a toxicological chemist with
21 the National Registry of Clinical Chemists in Washington,
22 D.C.

1 Q What is the requirement to obtain that
2 certification?

3 A That certification requires experience,
4 educational background, passing a board test, that is then
5 used by the directors.

6 Q Approximately how many toxicology analyses have
7 you conducted?

8 A Over thirty years, I quit counting a long time
9 ago. Thousands.

10 Q Now, let's talk briefly about storing and
11 preservation of blood. Based on your thousands of
12 examples taking toxicology analyses, where should the
13 blood be stored after it was drawn?

14 A After it is drawn, we prefer that it be stored
15 in a refrigerated area subsequent to sending it to the
16 lab.

17 Q In what type of container should the blood be
18 placed?

19 A We prefer containers to have a preservative
20 monosodium fluoride, to simply to protect the integrity of
21 a blood alcohol analysis.

22 Q What is sodium fluoride?

1 A Sodium fluoride is a chemical which is actually
2 an anti-bactericide which presents postmortem production
3 of alcohol in the blood samples.

4 Q But the type of container you put the -- the
5 type of container the blood is placed in prevent additives
6 from seeping in?

7 A I'm not sure I understand that question.

8 Q Does the type of container that the blood is
9 sorted in prevent anything from the air or seeping or
10 getting into the container?

11 A Yes, sir. That's not an issue.

12 Q If the container was not properly sealed, would
13 you note that on your record?

14 A Yes, it was written.

15 Q Was that notation ever made with Edward Harper?

16 A No, sir.

17 Q What, if any, effect did the amount of time it
18 takes for the blood to get to your heart, does it have on
19 the concentration on the chemicals in the blood?

20 A Once the blood specimen has been drawn but the
21 toxicologist or the coroner and placed in that container
22 with that preservative, there is essentially no difference

1 whether it takes a few days or even as much as weeks
2 depending on the storage prior to receiving it in the lab.

3 Q What are barbiturates?

4 A Barbiturates are a class of drugs which are used
5 primarily as -- serves as hypnotics. They are also useful
6 for support of anesthesia, and at least one is used for
7 treating epilepsy.

8 Q Do you regularly conduct toxicology analysis for
9 barbiturates in the blood?

10 A Yes, sir. We do.

11 Q What do you do when you find that there is a
12 barbiturate in the blood?

13 A Like with any other drug, we determine what
14 specific barbiturate is there and how much.

15 Q Can you tell us how you go about conducting that
16 test?

17 A Yes, sir. It's a multi structured test, wherein
18 you use a process known as immunoassay as a preliminary
19 test. From that point, we will then go to gas
20 chromatography, mass spectrometry, to determine
21 specifically what barbiturate is there and again, how
22 much.

1 Q Can you tell us what an amino acid is?

2 A Are you referring to the immunoassay test?

3 Q Yes.

4 A Okay. Yes, sir. Immunoassay is a process
5 wherein because there are certain enzymes that will react
6 with drugs we can take any agent and the person's blood
7 and then combine this to and then look at that measurement
8 in a particular wavelength of light to determine whether
9 or not a barbiturate is present.

10 Q I don't know if I pronounced it right, you also
11 mentioned a chromatograph?

12 A Chromatogram.

13 Q Can you tell us what that is?

14 A Yes, sir. Chromatography is simply the science
15 of separation. The chromo is separation of the graph you
16 use is simply a picture. So what we basically do is get
17 that particular -- analyze that drug out of the blood, put
18 it into a solvent that we can measure from any instrument
19 which will then give us a picture of what is there.

20 Q What is an anti-coagulant?

21 A And anti-coagulant is a compound which is used
22 to prevent clotting of the blood.

1 Q You add that to the process in testing
2 postmortem?

3 A Postmortem? Well no, sir.

4 Q Why not?

5 A Because at that point it is too late. The blood
6 is already (inaudible) and there is no -- there is nothing
7 you can do to prevent having whole blood.

8 Q Does clotting have any effects on postmortem?

9 A No, sir. We can still analyze clots as well as
10 with the blood.

11 Q Does the fact that no anti-coagulant was added
12 to the blood have any effect on the concentration or
13 reliability of a toxicology result?

14 A Not any. No, sir.

15 Q What is plasma?

16 A Plasma is essentially blood without the red
17 blood cells.

18 Q When you check the barbiturates do you test the
19 blood plasma?

20 A We test --

21 Q As plasma?

22 A No, sir. We test the blood as blood.

1 Q Why do you not test for the plasma?

2 A Because plasma is not expressly obtainable from
3 a person who is deceased.

4 Q What is thiopental?

5 A Thiopental is an ultra short acting barbiturates
6 which is used to produce anesthesia.

7 Q Is thiopental a barbiturate?

8 A Yes, sir. It is.

9 Q What, if any, effect does that have then on the
10 blood and plasma have on the concentration of thiopental?

11 A Could you say that for me one more time, please?

12 Q I'm sorry.

13 A Could you repeat that for me, please?

14 Q Yes. You mentioned barbiturates, in general.

15 Is it any different with thiopental as for the reliability
16 of the toxicology results, if you don't test it as plasma?

17 A No, sir.

18 Q What is serum?

19 A Serum is essentially blood without the other
20 components. If you take out the red blood cells, the
21 protein.

22 Q When testing for barbiturates, do you process

1 the blood as serum?

2 A No, sir. Again, it's blood.

3 Q Does not using it as serum have any effect?

4 A No, sir.

5 Q What is whole blood?

6 A Whole blood is the liquid that circulates
7 throughout the human body transporting oxygen and food
8 basically, and eliminating waste products and carbon
9 dioxide.

10 Q Now, let's more specifically about the actual
11 drawing of the blood. As a toxicologist, having conducted
12 more than, I believe you said thousands, of toxicology
13 analyses, is there a location of the body that you prefer
14 the blood to be drawn from?

15 A If we have the choice, we prefer a peripheral
16 site. That is somewhere away from the central cavity of
17 the body.

18 Q Can you tell us what locations in the body would
19 be considered a peripheral site?

20 A The femoral, which is in the leg, the cranium,
21 which is up in the neck, those are two primary sites that
22 are considered very useful in toxicological analyses.

1 Q Is the vena cave one of those?

2 A Yes, sir. They can be used. We can analyze it
3 from any place that they draw it. That is not an issue.
4 It's the interpretation that becomes an issue not where it
5 is drawn.

6 Q What is the difference between an artery and a
7 vein?

8 A One takes blood away from the heart, one takes
9 blood to the heart, with the -- oxygenated blood. That is
10 with the exception, of course, of the pulmonary.

11 Q Now, why would you say that the femoral artery -
12 - the vein blood is the primary location for interpretive
13 purposes?

14 A The femoral vein, typically, is used because it
15 is away from the central cavity, the heart, the lungs, the
16 liver, all of -- in that central cavity. And for
17 interpretation those peripheral sites are preferred due to
18 a phenomenon that is postmortem redistribution.

19 Q Let's talk briefly about the autopsy toxicology
20 and execution of Edward Harper. Do you know where the
21 toxicology analysis was conducted?

22 A Yes, sir.

1 Q Where is that?

2 A Conducted here in Frankfort at the Central
3 Forensic Lab.

4 Q Who conducted that analysis?

5 A I did that myself.

6 Q Did you produce laboratory results?

7 A Yes, sir.

8 Q And did you sign those reports?

9 A Yes, sir. I did.

10 Q What part of the body did you draw the blood
11 from?

12 A I didn't --

13 Q I mean, what part of the body was the blood
14 drawn from?

15 A As I recollect, there was from the axilla, from
16 the heart and, I believe, one other.

17 Q Would seeing your report refresh your
18 recollection?

19 A Probably.

20 SPEAKER: May I approach the witness?

21 THE JUDGE: Yes.

22 BY MR. BARRON:

1 Q You recognize this document?

2 A This appears to be the autopsy report from Dr.
3 Tracy Corey.

4 Q Now, referring you to the last four pages, can
5 you tell us what those are?

6 A Yes, this is a photocopy of the TOX reports that
7 I've prepared and presented to Dr. Corey.

8 Q Is your signature at the bottom of the four
9 pages?

10 A Yes, sir. It is.

11 Q Take a moment to look at all of them.

12 A Okay.

13 Q Has your memory been refreshed from where the
14 blood was drawn from?

15 A Yes.

16 Q And can you tell us where that is?

17 A The vena cava, the heart, and the axilla.

18 Q Is that heart one of the locations that you
19 mentioned which had peripheral blood?

20 A No, sir. The heart is squarely peripheral -- or
21 excuse me, in the in the central region.

22 Q You have any familiarity with the use of

1 thiopental in the use of surgical procedures?

2 A I am not sure how to answer that. I know it is
3 use for that. Have I ever used it? No.

4 Q How did you come to know that it was used in
5 surgical procedures?

6 A Just through the education and training that
7 I've received and learning about drugs, in general.

8 Q In your education and training did you ever
9 learn what concentration of thiopental anesthesiologists
10 would attain to keep a person totally anesthetized for the
11 entire surgical procedure?

12 A Yes. Are you asking what dose versus or what --

13 Q What dose?

14 A Typical dose is between 100 and 250 mgs.

15 Q And what blood level?

16 A The blood level would vary depending on the --
17 on when the blood was drawn. Typically, surgical levels
18 approach perhaps 35 or so mg/l.

19 Q Do you know why 35 mg/l?

20 A Because that is the level that is obtained from
21 that dose. If the blood is taken as that is being
22 administered.

1 Q So could a person with a thiopental level below
2 35, based on your knowledge, wake up in pain?

3 A It depends on how well and for how long they
4 have been unconscious.

5 Q What about a person with 3 mg/l?

6 A Not necessarily.

7 Q Could they?

8 A Any given individual, it is possible.

9 Q If such a person were conscious, would they be
10 able to feel pain?

11 A If they were conscious, yes.

12 Q Do you recall what level of thiopental was found
13 in Harper's vena cava?

14 A As I recall, it was around 3 mgs/l.

15 Q What about the axillary vein?

16 A I guess, I recall about 3 mg/l.

17 Q What about the heart?

18 A I believe that was a little higher, maybe 6 or
19 6.5 mg/l.

20 Q Why is the thiopental concentration in the heart
21 higher than in the auxiliary vein and vena cava?

22 A Because again, the heart is centrally located.

1 And there is that issue of postmortem redistribution.

2 Q Did you conduct Harper's toxicology analysis in
3 accordance with the procedures we discussed earlier for
4 your lab?

5 A Yes, I did.

6 Q So was Harper's blood properly brought and
7 stored?

8 A From the time I received it, yes. Before that,
9 I can't answer.

10 Q Did you have any indication when you received
11 the blood that it was improperly stored beforehand?

12 A No, sir.

13 Q You have any indication that the blood was not
14 refrigerated?

15 A No, sir.

16 Q When you received the blood, was it properly
17 sealed?

18 A Yes, sir. It was.

19 Q Was an anti-coagulant added in Harper's case?

20 A Not to my knowledge, no.

21 Q Was the blood tested for plasma?

22 A No, sir.

1 Q You believe that Harper's blood was correctly
2 tested for the concentration of thiopental, at the time of
3 his death?

4 A Yes, sir. I do.

5 Q No further questions at this time.

6 THE JUDGE: Mr. Middendorf?

7 CROSS EXAMINATION

8 BY MR. JUDY:

9 Q Good afternoon Mr. Ward.

10 A Good afternoon.

11 Q Just a few have a few question for you. Is a
12 single 3-g dose of sodium thiopental typically fatal?

13 A Yes, sir. It is.

14 Q Is a 2 g -- is a 2-g single does typically
15 fatal?

16 A Yes, sir.

17 Q Your finding showed that there were 3 mg/l of
18 concentration of sodium thiopental in the right axia, the
19 vena cave and 6.5 mg/l in the heart. What does those
20 findings indicate to you about the drug circulating in his
21 body?

22 A This indicated to me that that drug is

1 administered first and foremost, that it had in fact
2 entered the circulation, that it has undergone tissue
3 distribution and that level is in fact conducive with
4 being a lethal level under the circumstances.

5 Q Isn't 3 mg/l of sodium thiopental in the blood
6 within the therapeutic level to induce unconsciousness?

7 A Yes, sir. Again, if they are taken immediately
8 after introduction into the system.

9 Q And based upon your findings, in -- the blood of
10 Mr. Harper, your training, experience and knowledge of
11 sodium thiopental, is it your opinion that Mr. Harper was
12 unconscious during his execution?

13 A Yes, sir. Based on this level, that would be my
14 opinion.

15 Q I have no further question.

16 THE JUDGE: (inaudible).

17 REDIRECT EXAMINATION

18 BY MR. BARRON:

19 Q You know, briefly, would more than a therapeutic
20 dose of thiopental take longer to distribute in human
21 tissue?

22 A Due to, generally, the concentration of that

1 particular dose.

2 Q Okay.

3 SPEAKER: That's all we have.

4 RE-CROSS EXAMINATION

5 BY MR. JUDY:

6 Q Let me ask, you indicated that 2 or 3, that 3 g
7 of thiopental would be fatal, correct?

8 A Yes. That's correct.

9 Q Do you have any idea of how long it would take
10 for 2 or 3 g of thiopental to kill? I mean how long --
11 are we talking about two minutes, five minutes or --

12 A The thiopental would begin acting almost
13 immediately, within seconds, as it gets into the central
14 nervous system. That dose would, I believe, almost
15 certainly choke someone within 10 to 15 minutes.

16 Q All right.

17 THE JUDGE: Anything else?

18 MR. JUDY: No further questions, Your Honor.

19 THE JUDGE: Okay. Thank you. Thank you Mr.
20 Ward.

21 SPEAKER: Your Honor, before we take the next
22 witness --

1 THE JUDGE: Yes.

2 SPEAKER: Could we clear something up with the
3 coroner's doctor, Tracy Corey, who is just sitting here at
4 the press table. We all remember from her deposition, she
5 made it pretty clear that Harper would have been
6 unconscious at the time of death. And if the Court will
7 recall, she used that double or triple negatives there at
8 the end in answering --

9 SPEAKER: She -- I asked her -- her opinion at
10 the end was that he was not awake.

11 THE JUDGE: Hey, listen, I asked her. Her
12 opinion at the end was that he was not awake.

13 SPEAKER: Okay, we just want to clear that up --

14 THE JUDGE: I asked her, because it was -- the
15 question, "Was he awake or not awake," or something like
16 that in --

17 SPEAKER: We started to answer the traffic of
18 all of the negatives and we were confused. Thank you.

19 THE JUDGE: Well, I was too, still we got it
20 straightened out. Who is the next witness? And do we
21 need a short break before that?

22 SPEAKER: No, sir, I don't think we do need a

1 break.

2 THE JUDGE: Okay.

3 SPEAKER: Commissioner John Rees. And he's our
4 final witness for the day, Judge.

5 THE JUDGE: All right, call -- tell Commissioner
6 Rees to be --

7 SPEAKER: Not longer than --

8 THE JUDGE: Okay, Commissioner Rees. Raise your
9 right hand please.

10 Whereupon,

11 JOHN REES

12 was called as a witness and, having been first duly sworn,
13 was examined and testified as follows:

14 THE JUDGE: Be seated.

15 DIRECT EXAMINATION

16 BY MS. BALLIET:

17 Q Mr. Rees, could you please state your name for
18 the record and spell your last name?

19 A John Rees, R-e-e-s.

20 Q How are you currently employed Mr. Rees?

21 A I am Commissioner of Corrections for the State
22 of Kentucky.

1 Q How long have you held that position?

2 A Since January of last year.

3 Q Have you ever worked with the Oklahoma
4 Department of Corrections?

5 A Yes, I have.

6 Q When was that?

7 A July of '76, as I recall, to December of '80.

8 Q What was your position there?

9 A I started off as Director of Classification, was
10 subsequently promoted to Assistant Director of
11 Institutions, and then finally to Deputy Commissioner of
12 Programs and Services.

13 Q When you first began working in Oklahoma, what
14 was Oklahoma's method of execution?

15 A Electric chair.

16 Q Did their method of execution change while you
17 were working at the prison in Oklahoma?

18 A I did not work at a prison in Oklahoma. I
19 worked in the central office.

20 Q I'm sorry, while you were working at the central
21 office, did the method change?

22 A As I recall, it did.

1 Q And what did it change to?

2 A Lethal injection.

3 Q What was your participation, if any, in drafting
4 Oklahoma's lethal injection procedure?

5 A As -- and whether I was the Assistant Director
6 of Institutions or Deputy Director at the time, I don't
7 recall, it was a while ago. I would have been involved in
8 putting together a policy and procedure to implement that
9 statute.

10 Q What states did you consult with?

11 A I don't recall.

12 MS. BALLIET: If I could, with the Court's
13 permission mark this as --

14 THE JUDGE: Yes.

15 MS. BALLIET: 7.

16 THE JUDGE: 7.

17 MS. BALLIET: This is number 7.

18 (Plaintiff's Exhibit No. 7 was marked for
19 identification.)

20 MS. BALLIET: Take some time and look at that.

21 SPEAKER: Judge, can we take a second to look at
22 this?

1 THE JUDGE: Sure, okay.

2 SPEAKER: First time we've seen it.

3 THE JUDGE: Okay.

4 SPEAKER: Thank you.

5 BY MS. BALLIET:

6 Q When was the last time you looked at Oklahoma's
7 execution protocol, Mr. Rees?

8 A I have no idea.

9 SPEAKER: Your Honor, we're going to object to
10 the relevance of this document that we've -- this is from
11 1978 and it's signed by somebody other than this witness.
12 And I don't have a hair of a notion what it has to do with
13 what we're here for today. I object.

14 MS. BALLIET: Your Honor, this -- no, this is
15 the -- Professor Denhoe, (phonetic) testified this is the
16 first lethal injection protocol. It's very relevant
17 because of the one that --

18 THE JUDGE: She was just -- she just said that
19 Oklahoma did the first lethal injection. I'm not -- you
20 know, I'm not so sure that -- so that we know this is the
21 first protocol but --

22 MS. BALLIET: It certainly is one of the

1 original protocols on which -- from which all of those
2 other protocols have stemmed and especially with the
3 connection of Mr. Rees having worked in Oklahoma and been
4 involved in it. I think it's very relevant to -- and also
5 being involved in our lethal injection procedure, we feel
6 it's highly relevant.

7 THE JUDGE: Well, what is it in here that we're
8 talking about that is relevant for Charles -- for Rees?

9 MS. BALLIET: Page 4, paragraph F, that
10 describes the execution and that really is the only part
11 that I wanted to ask Mr. Rees about.

12 THE JUDGE: That's fine, let's go straight to
13 that. I'll overrule the objection as it has been -- as
14 long as we're sticking on the -- strictly with the F.

15 BY MS. BALLIET:

16 Q Mr. Rees, I'll just read this one section, it's
17 on page 4. "Specific execution procedures. The execution
18 shall be by means of a continuous intravenous
19 administration of a lethal quantity of sodium thiopental
20 combined with either tubocurarine or succinylcholine
21 chloride or potassium chloride, which is an ultra-short-
22 acting barbiturate combination with a chemical paralytic

1 agent." Do you -- does that refresh your recollection as
2 to Oklahoma's protocol that you've helped write?

3 A Now, wait a minute. It doesn't -- I mean I can
4 read it just as you did, but I am not a pharmacologist,
5 this is a long time ago, and I've worked in a lot of
6 different correctional settings subsequent to this.

7 Q This -- on the front page, it says that it was
8 issued in 1978. Was that not one of the years that you
9 were working there?

10 A Certainly, I worked for the gentleman who signed
11 it and I was involved in drafting this document at the
12 time. Would I have been involved in determining the
13 specifics regarding the pharmacological aspects? I
14 wouldn't have. As it indicates in the policy, the
15 Department's medical director was involved in that
16 process.

17 Q Weren't any lethal injection executions carried
18 out while you were in Oklahoma?

19 A No, they were not.

20 Q What was your participation in drafting
21 Kentucky's lethal injection protocol?

22 A Nothing as -- with regard to the initial

1 drafting of the protocol, like, who's involved in the
2 revisions of the later provisions.

3 Q And when were those later provisions, December
4 of 2004?

5 A Yeah, late last year.

6 MS. BALLIET: Number 1, those are -- number 1,
7 already with the Court.

8 BY MS. BALLIET:

9 Q Who recommended making the changes in 2004?

10 SPEAKER: Objection, Judge.

11 THE JUDGE: Like --

12 SPEAKER: They're kind of start getting in the
13 reasons why things were changes -- changed? You've
14 already ruled on this matter. It doesn't make a
15 difference why they were changed.

16 THE JUDGE: I'll sustain it.

17 SPEAKER: Judge, that's --

18 MS. BALLIET: That's --

19 SPEAKER: Now, my understanding is this Court's
20 ruling applies to one and all. They filed a motion in
21 limine to limit testimony to what Mr. Middendorf just
22 said. I thought every word of the testimony was overruled

1 except those we'd agreed on regarding Professor Denhoe,
2 and -- I'm sorry, I can't recall what number 6 on their
3 list was. They filed a motion in limine saying you can't
4 ask for the Court's to rule -- that you cannot talk about
5 how the decisions -- and what the decision-making process
6 was. And then we -- our counterargument last Friday was
7 that without understanding how we went from Protocol
8 number 1 to the protocol we have today, there can no true
9 understanding of where we are. It's as if it fell from
10 the sky.

11 THE JUDGE: Well, I think what the ruling was is
12 we're going to limit. We're not going to -- into the
13 entire protocol. But I don't mind if you only going into
14 the specific areas of what the changes were, but I -- and
15 in --

16 SPEAKER: Okay, may I have just one second,
17 please?

18 THE JUDGE: Yes.

19 BY MS. BALLIET:

20 Q Who recommended changing from 2 to 3 g of sodium
21 thiopental --

22 SPEAKER: Objection, Judge. We're --

1 THE JUDGE: I'm not going to overrule that. Let
2 him answer that.

3 THE WITNESS: I'm not sure that any one
4 individual recommended changing from 2 to 3 g. There were
5 discussions that took place with various members of the
6 Department. And we were making changes and we knew that
7 there were some jurisdictions that used 2 g, there were
8 some that used 3, but were concerned about the ability of
9 getting more of the chemical into the hypodermic and
10 through the needle so that there would only need to be one
11 injection. We determined that we could get 3 g without
12 changing either the needle size or the number of IV
13 insertions. And so we did it.

14 BY MS. BALLIET:

15 Q Were there any medical personnel consulted on
16 the increase?

17 A No.

18 Q What about the change to allow the IV team to
19 attempt sticking the needle into the inmate for an hour?
20 Who recommended that change?

21 A I think that was my recommendation. I was
22 concerned about the question of a cut down. And we

1 decided that should we be unable to easily locate and be
2 able to properly insert an IV, we would try and if we
3 failed, then we would make the phone call.

4 Q Was there any medical consultation on that
5 change?

6 A Not that I recall.

7 Q Have your responsibilities changed under the new
8 lethal injection protocol?

9 A Not really.

10 Q And what are your responsibilities under that
11 most recent protocol?

12 A I'm an overall manager of and support person for
13 the warden at the penitentiary.

14 Q Will you be present at Eddyville during the
15 lethal injection?

16 A I will not.

17 Q Where will you be?

18 A I will be here in Franklin.

19 Q Are you familiar with the drugs, I presume, in
20 the Kentucky protocol?

21 A By name, yes, I'm familiar with them.

22 Q And why are there three drugs used instead of

1 two?

2 A I'm not a pharmacist or a pharmacologist and I
3 did not develop that protocol, that three-drug cocktail,
4 if you will. That was -- that is the standard drug
5 cocktail that is used in varying jurisdictions across the
6 country, from the Federal Bureau of Prisons to adjoining
7 states.

8 MS. BALLIET: A moment, please.

9 BY MS. BALLIET:

10 Q Are you aware that there are states that use
11 more than 3 g of sodium thiopental?

12 A I think I am -- I knew there were varying
13 amounts.

14 Q And what is your awareness on -- of the states
15 that use more than 3?

16 A I don't know the specifics.

17 Q Just that there are such states?

18 A Yeah.

19 Q Is the needle size determined by the IV team,
20 what size needle they would use in any individual's
21 execution?

22 A I believe it's determined by the directions on

1 the chemical, but I'm not sure of that.

2 Q Do you have any medical background at all?

3 A No, ma'am.

4 Q Did you look at the New Jersey protocol when the
5 changes were made -- all the most recent changes in --

6 A No, I did not.

7 Q -- Kentucky?

8 MS. BALLIET: I have no more questions at this
9 time.

10 THE JUDGE: Mr. Middendorf?

11 SPEAKER: Judge, we have no questions for this
12 witness.

13 THE JUDGE: Thank you, Commissioner. You can
14 step down. There are two --

15 SPEAKER: One moment, sir.

16 THE JUDGE: What? Wait a second, please.

17 MS. BALLIET: Could I ask one more question?

18 THE JUDGE: Certainly, go ahead.

19 BY MS. BALLIET:

20 Q Commissioner Rees, are you aware that some
21 states don't use the same chemicals as Kentucky?

22 A No, I'm not.

1 Q Thank you.

2 THE JUDGE: Thank you, Commissioner. You may
3 step down now. I would say you're excused, but you're at
4 the center of the matter, so whatever you want to -- Mr.
5 Shouse.

6 MR. SHOUSE: Yes, Judge. That's the --
7 technically, the witnesses we have for today.

8 THE JUDGE: All right, what's the expected
9 number of witnesses and time for tomorrow so we can --

10 MR. SHOUSE: Five witnesses.

11 THE JUDGE: Have you given -- Mr. Middendorf, do
12 you know the names of them?

13 MR. SHOUSE: Sure.

14 MR. MIDDENDORF: In know the five unless they
15 intend to call anybody else.

16 MR. SHOUSE: No, I think Mr. Middendorf is aware
17 of Mr. Haverlan, (phonetic), Mr. Purshin, (phonetic) Dr.
18 Hylan, (phonetic) Nurse Hylan (phonetic) and Dr. Hawk,
19 (phonetic) are our expected witnesses for tomorrow.

20 THE JUDGE: Those -- and none of those are the
21 expert witnesses.

22 MR. SHOUSE: No, none of those are the expert

1 witnesses. Everybody on that list is an employee of the
2 Department of Corrections.

3 THE JUDGE: I would expect that would be fairly
4 quick. I would --

5 MR. SHOUSE: Yes.

6 SPEAKER: I would expect we're going to be out
7 of here by noon.

8 MR. SHOUSE: And what time are we --

9 SPEAKER: Then why are we stretched out on the
10 four days if this is --

11 SPEAKER: I think it's all been because of
12 travel arrangements for the various people that are being
13 brought in.

14 MR. SHOUSE: That's sort of right. The
15 secondary consideration was given the Court's ruling on
16 the last Friday, it was argued that to limit our
17 examination of the witnesses, or summary examination by --

18 THE JUDGE: What I'm also going to need from
19 you? I need a list of -- I think we have them all in the
20 file. But I need the list of all of the depositions.

21 MR. SHOUSE: Yes, sir. That's --

22 THE JUDGE: So I've been -- I've read some as

1 they came in. But then I need a list of each one that I
2 can be reading as soon as we conclude this week prior to
3 taking the death penalty, you know.

4 SPEAKER: Yes, sir, that raises the truth how it
5 is you can --

6 (Tape interruption)

7 SPEAKER: To bring up. First of all, my notes
8 indicate that there were seven exhibits introduced into
9 evidence today by the Plaintiffs and taken by the
10 Defendants since that was the 4th.

11 SPEAKER: I thought I had eight by the
12 Plaintiffs --

13 SPEAKER: That's one of them.

14 SPEAKER: I had seven.

15 SPEAKER: Okay, I'm sorry about that.

16 SPEAKER: And I had two from the Commonwealth.

17 SPEAKER: And all of those had been introduced
18 into the record, is that correct?

19 SPEAKER: I'll tell you what. These probably
20 have eight. This has not been introduced. This is the
21 disposition record of the chemicals that was talked about.
22 But --

1 SPEAKER: No, I introduced that through Mr.
2 Henderson.

3 SPEAKER: Well, then it wasn't given a number.

4 SPEAKER: I think maybe Mr. Henderson got the
5 one with the number.

6 SPEAKER: Well, we got 1 through 7 on everything
7 else.

8 SPEAKER: We've -- it's number 3 and --

9 SPEAKER: That's what I had down, number 3.

10 SPEAKER: That's what we have as 3.

11 SPEAKER: We got Plaintiff's 1, Plaintiff's 2,
12 and --

13 SPEAKER: I'm told we have it as 3, Your Honor.

14 SPEAKER: All right, we have that --

15 THE JUDGE: Oh, we have it as it as 3. Yes, we
16 do have it as 3.

17 SPEAKER: This is a separate copy, okay.

18 THE JUDGE: Yeah, I've just got a separate copy,
19 I'm sorry.

20 SPEAKER: Okay, and while I was -- just one
21 second.

22 THE JUDGE: Yeah, I'm going to let you take that

1 back, because I don't want to.

2 SPEAKER: Right, okay, so all of that is in the
3 record?

4 THE JUDGE: I've got six admitted, yes.

5 SPEAKER: Six --

6 THE JUDGE: And you --

7 SPEAKER: Seven right?

8 THE JUDGE: Seven, sorry.

9 SPEAKER: Okay, and Mr. Coleman, (phonetic) is
10 saying 7 and 2.

11 SPEAKER: And they are all entered into
12 evidence.

13 SPEAKER: And those have been entered into
14 evidence.

15 THE JUDGE: 7 was one I had not ruled on. As
16 far as 7's concerned, it was testified to by Dr. Denho.
17 Is that her name?

18 SPEAKER: Yes, it's Denho.

19 THE JUDGE: Professor Denho?

20 SPEAKER: Denho, yes, sir.

21 THE JUDGE: (inaudible) professor, she testified
22 as to the drugs that were developed in Oklahoma, and I

1 believe she testified as to the two drugs. The only
2 difference that I could see is -- in admitting this is it
3 describes what sodium thiopental is, which is the same
4 description that Mr. Ward, (phonetic) gave on it.

5 SPEAKER: So is the document from 1978, Your
6 Honor?

7 THE JUDGE: It's a document from 1978, which I
8 will admit. But I'm going to admit for the purpose of --
9 basically it supports her testimony. I don't know that
10 anything else in the document's relevant to what we're
11 talking about here.

12 SPEAKER: It's at paragraph F, I believe, in the
13 letter --

14 THE JUDGE: Right, okay. All right, thank you.

15 SPEAKER: Now that -- the deposition questions
16 and their responses should be (inaudible) some time.
17 Under the Court's pleasure, I've got a bag full of
18 videotapes here, we can -- that I can introduce into
19 evidence as evidence of the deposition. Or we can go with
20 the transcripts that were prepared by my secretary and
21 reviewed by me for accuracy. Or we can go both, I mean,
22 at the Court's (inaudible).

1 SPEAKER: We can go without --

2 SPEAKER: I think we need to introduce both into
3 the record.

4 SPEAKER: Okay, what I'm asking is that I've
5 only got the originals. If I could have time to make
6 duplicate copies, I can certainly get it in there by May
7 2nd when you start --

8 THE JUDGE: That's fine.

9 SPEAKER: -- is comfortable.

10 THE JUDGE: That sounds -- perhaps, the
11 transcript that your secretary has provided, we have those
12 --

13 SPEAKER: Yes, sir. We should a lot of --

14 THE JUDGE: (inaudible) all of the names and
15 numbers that you have so I'll make sure I have the same
16 names and numbers.

17 SPEAKER: I can do that on Friday and I'll call
18 Mr. Coleman) and make sure that you've got the list. I'll
19 talk to Mr. --

20 THE JUDGE: Okay, if have Mr. Coleman?

21 SPEAKER: Or is (inaudible) done. I don't think
22 he is part of the record, is that correct? You don't

1 intend to call him as a witness --

2 SPEAKER: We don't --

3 SPEAKER: He wasn't even coroner at the time
4 when we took -- he wasn't coroner of Lyon County when Mr.
5 Harper was executed, yet, we sat through the deposition
6 anyway.

7 SPEAKER: I just want to caution all (inaudible)
8 and then I think somehow realized pretty quickly after the
9 first two --

10 SPEAKER: (inaudible).

11 SPEAKER: He wasn't even a coroner at the time
12 of the Harper execution.

13 SPEAKER: We got a bump here, he was someone we
14 didn't even oppose.

15 THE JUDGE: (inaudible)?

16 SPEAKER: That was our belief. He was one of
17 eight that day.

18 SPEAKER: That was one of eight that day.

19 THE JUDGE: All right.

20 SPEAKER: If I recall, (inaudible).

21 THE JUDGE: We're going to start tomorrow at
22 9:30. The District Court will be using this Courtroom

1 from 9:00 until -- approximately 9:30. So that may give
2 us time to complete. If it looks like we're going to get
3 completed by extending through lunch or can go into that,
4 we'll do it.

5 SPEAKER: Yes, sir.

6 THE JUDGE: All right, okay, thank you.

7 SPEAKER: Thank you, sir.

8

9