

1 IN THE FIRST JUDICIAL DISTRICT COURT
2 IN AND FOR THE PARISH OF CADDO
3 STATE OF LOUISIANA
4
5

6 NATHANIEL R. CODE, JR.

7 VS.

NO. 138,860-A

8 BURL CAIN
9
10

11 APPEARANCES:

12 FOR THE STATE:

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14 MS. CATHERINE M. ESTOPINAL
Assistant District Attorneys

15 FOR THE PETITIONER:

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19
20

21 PROCEEDINGS HAD in the above
22 entitled matter before Her Honor,
23 RAMONA L. EMANUEL, Judge
24 of the First Judicial District Court,
25 in and for the Parish of Caddo,
26 State of Louisiana,
27 held February 27th, 2007.
28

29 ARGUMENT ON POST-CONVICTION HEARINGS
30

31 Reported by:

32 Joyce A. Wheeler, BA, RPR, CCR
Official Court Reporter

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1 you know, as regards to the hair evidence, you know,
2 there are some limitations with hair evidence, and those
3 were conceded at trial. They have not kept courts from
4 finding *Brady* violations where there is hair evidence
5 found in the locations that I have described here in
6 Mr. Code's case on the victims' bodies or near the
7 bodies.

8 I believe that's all I have, your Honor. Thank
9 you. Do you have any questions?

10 THE COURT: I don't have any questions.
11 But I do have one request. I have copies of a number of
12 the cases cited by the State. And if the Petitioner has
13 copies of any of the cases that it has mentioned and
14 want to provide to the Court, I would welcome those.
15 But no questions.

16 MR. SWEENEY: Your Honor, may I provide
17 those at another date? I don't actually have them.

18 THE COURT: Yes. As soon as practicable,
19 let me say it that way. I don't need for you to give
20 them to me today. But I'm just mentioning to you, as I
21 go through all of this, it would be helpful to have
22 those copies of cases at hand. And that's certainly not
23 meant to be a criticism. But if you can get those to
24 the Court later, that's fine.

25 MR. SWEENEY: Thank you, your Honor.

26 THE COURT: All right. Mr. Clements.

27 MR. CLEMENTS: Good afternoon, your
28 Honor.

29 ARGUMENT

30 BY MR. CLEMENTS:

31 I am going to present the final argument on the
32 issue of lethal injection, and we will attempt to not

1 rehash the voluminous record that was developed in this
2 case. I would like to make a few points first of all,
3 again, that lethal injection challenges are absolutely
4 permissible under the Louisiana Criminal Code. And I
5 think that the fact that the Louisiana Supreme Court
6 ordered this Court to conduct the hearing on it should
7 stand as sufficiency for the fact that raising this
8 constitutional issue is perfectly proper at this time.

9 And the key to this whole issue is whether one can
10 determine if a method of execution has a foreseeable
11 risk of infliction of suffering, unnecessary suffering.
12 The Furman vs. Georgia case from 1973 basically talks
13 about the fact that the death penalty and which methods
14 may be proper, it's more than just talking about the
15 extinguishing of a life. I mean, there are many, many
16 ways that people -- one person can kill another person,
17 and the State has many options available to them.

18 At this time, our scrutiny is focused upon the
19 lethal injection method; and it is not just a simple
20 question of do they die by doing the procedure that the
21 State uses right now. The question is: How do they
22 die? Is there a foreseeable risk of unnecessary pain
23 involved in this particular method, and is it something
24 that is even predictable?

25 Since the time that this issue was brought in
26 writing before this Court back in 1995, when counsel
27 first filed the lethal injection claim, seven more
28 people -- five more people have been executed by lethal
29 injection, for a total of seven in Louisiana. And on
30 the surface, the State will likely argue that, well,
31 there has never been any problem in any of those
32 executions, and there has been no evidence that there

1 has been any problem in any of those executions. So
2 that alone should be a pretty strong argument to say
3 that everything is working fine and that there really
4 isn't any proper Eighth Amendment challenge here.

5 But, in fact, the evidence that was gathered over
6 quite a number of days from a number of sources, not
7 only people in the Department of Corrections who were
8 directly involved in this, all the way from Warden Burl
9 Cain through prior wardens and other administration
10 officials in the department, including the secretary of
11 the department himself, we had six persons that were
12 deposed, that their deposition testimony has been
13 presented to your Honor. And those are the people that
14 had actual hands-on experience in the execution of the
15 seven inmates in Louisiana from 1993 to 2002.

16 And what has come about this, we feel, is showing
17 that there are a number of deficiencies that still
18 exist. And I would like to also point out, front up,
19 that the State has taken a position that, in fact, no
20 court has found lethal injection as a procedure in any
21 state to be unconstitutional.

22 And as we noted in our reply brief, that's actually
23 not true. Two courts have found that to be the case,
24 two federal district courts have found, both in
25 California and in Missouri, have found that the lethal
26 injection protocols that have been established in those
27 states cannot pass constitutional muster under the
28 Eighth Amendment.

29 And what is so interesting about this is that, in
30 fact, we are now up to 11 states in this country that
31 are not doing lethal injection whatsoever; and these are
32 states that have been involved in executions to one

1 degree or another, not all of them, but 11. And that
2 could not have been said even in the year 2003 when this
3 hearing began. In the space of four years, we have 11
4 states that are wrestling with this issue. And the fact
5 is that in those four states, we have essentially a
6 de facto or de jure moratoria on lethal injection, four
7 of which are in states that have been set up by
8 governors, two by state district courts, and five by
9 federal district courts.

10 And they are not all identical challenges, and they
11 are not all identical findings, and then none of them
12 are finished. But the fact of the matter is that each
13 one of them is finding flaws; and they are finding flaws
14 in some of the very exact same areas that we brought out
15 in testimony in this court. So the relevancy of the
16 experience of those other states are important because
17 it is not a question of how many milligrams here or of
18 this chemical versus that and so forth.

19 It really boils down to one simple principle. Does
20 the inmate experience conscious suffering while going
21 under the process of lethal injection? I'm not talking
22 about the initial pin-prick for inserting the I.V.
23 lines. I'm talking about the chemicals which have a
24 very powerful, painful effect upon the individual,
25 primarily the potassium chloride, and that is the third
26 chemical used in virtually every state in one amount or
27 another.

28 It is a burning sensation. That is not disputed by
29 anyone. That's just the way human beings react when
30 injected with the liquid form of that salt compound.
31 The pancuronium bromide itself causes a painful reaction
32 in the sense that if a conscious person were to be

1 injected with it, they would experience the fact that
2 they are suffocating to death. And that is an issue
3 that needs to be addressed. The assumed procedure of
4 lethal injection in every state -- no one is saying that
5 any state intentionally goes about trying to
6 intentionally inflict painful torture on anybody.

7 But the question is: Do they have any idea what
8 they are really doing? And it appears that in many,
9 many cases that, no, the answer is no, they don't know
10 what they are doing.

11 And in this state, the testimony that we got either
12 on the stand here in open court or in depositions shows
13 that it is really -- not to be disrespectful -- but it
14 is a ship of fools. Folks don't know what they are
15 doing. People who do not have medical background are
16 making final decisions on matters, and they are carrying
17 these things out to the point where you cannot rely upon
18 these things for any kind of assurance that this
19 protocol, that the way they are doing it in Louisiana
20 and that they have been doing it here, can guarantee
21 that they have minimized the risk of suffering that can
22 be inflicted upon a person.

23 And, again, the idea that I think no one in this
24 room would disagree with is that if someone were
25 injected, a conscious person, if I myself were injected
26 as a Death Row inmate with nothing but the final
27 chemical of potassium chloride because that was the way
28 to stop my heart from beating because that was the way
29 the death sentence was being carried out, that that
30 would be, in fact, unconstitutional. No one would
31 really dispute that. Now, the question is: Does the
32 procedure that is used in effect here in Louisiana

1 prevent the possibility that I would feel that? And the
2 answer to that is we cannot guarantee that. It cannot
3 be guaranteed, and there is nothing set in the procedure
4 that exists at this time to make certain that not only
5 would I or anybody else not experience that, but that
6 any inmate already has not experienced that. It is not
7 a question of some gruesome display of an I.V. line
8 popping out, as has happened in what are called botches
9 in other states.

10 The botches in this state or any other state also
11 include those things that look like they ran as smooth
12 as a top, that the person laid down on the gurney, they
13 were hooked up with two I.V. lines; you know, after a
14 number of minutes, they were declared dead. There
15 wasn't a bit of movement. Their eyelids fluttered
16 perhaps, and everyone said they looked like they went to
17 sleep.

18 That's what it will look like either way whether
19 they are getting sufficiently anesthetized and then
20 paralyzed with the second drug and then having their
21 heart stop; or that's the way that if somehow that
22 anesthesia wears off before they are dead, they wake up
23 again, and they still look just like Carol Wehrer
24 testified that she was.

25 She was lying on a gurney during a surgical
26 procedure to remove her eye, and because of deficiencies
27 in the process that was going on with anesthesia, she
28 was conscious of the painful experience of her
29 operation. And yet, outwardly, she could not show it
30 except with finally a Herculean effort she was able to
31 wiggle a little finger; and they just responded to her
32 by giving her more paralytic agent. Things happen.

1 26,000 cases in 2004 of people waking up during surgery
2 around the country, and those are with medical teams.
3 Those are when you have an anesthesiologist present; and
4 that's when you have a nurse anesthetist present; and
5 that's when you have teams of doctors and surgeons
6 available. I mean, the more that you go around in the
7 world today, you will find people that say, yeah, I can
8 tell you some variation of these kind of problems that
9 happen.

10 Where are the deficiencies here in Louisiana? They
11 started with a process. They created a bill that they
12 didn't -- they said, well, we will create a lethal
13 injection protocol, but we'll figure out how to do it in
14 the space of time over several years that they are going
15 to be implementing this project. So before we actually
16 have to give a lethal injection to anybody, we will
17 figure out how to do it. And the testimony was of
18 several of the committee people who actually went to the
19 state of Texas to meet with Warden Pursley there at
20 Huntsville to find out how he did it.

21 And some of the testimony that came out of that is
22 now the stuff of legend in the sense that they then
23 incorporated it into the Human Rights Watch reports that
24 Annette Viator, the head legal counsel for the
25 Department of Corrections, testified that Warden Pursley
26 basically told the committee of four from Louisiana that
27 he didn't really care. He didn't know much details
28 about amounts of chemicals. That wasn't important to
29 him. The important thing was whether the inmate ended
30 up dead or not.

31 And this kind of attitude was very disturbing.
32 After the committee from Louisiana went to Texas, which

1 was the leader, the one who had at that point and still
2 today has done more lethal injections than anybody --
3 people go to them because they figure they must know
4 what they are doing; they do it more than anyone. They
5 came back and still had profound questions. They wrote
6 a -- compiled almost 500 pages of information from
7 protocols from numerous states. And that cover page of
8 that letter that was read into the record here from
9 Warden Whitley basically stated that we still have big
10 questions.

11 What happens? Who can we get involved to make sure
12 this is done in a proper manner? What happens if we
13 have a problem with venous access? In other words, for
14 one of many reasons, they cannot set up two I.V. lines.
15 What can they do? The only way they can do that is, in
16 their mind, was to set up what's called a cut-down
17 procedure, which is to take a scalpel and do that to set
18 up the I.V. line instead. And the only person that can
19 do that is a medical doctor.

20 And they said, well, this is a big conundrum. How
21 are we going to get around it? We can't use doctors
22 because of the Hippocratic oath and the American Medical
23 Association telling doctors not to get involved in
24 executions. But this was the basic assumption of the
25 Department of Corrections from 1990 onward. The answer
26 is that they haven't solved this problem; and they
27 haven't solved this problem in any state yet.

28 It's the reason why in North Carolina, to this day,
29 now there are no more executions being set up. And I am
30 not just talking about liberal California. We are
31 talking about the governor of Tennessee saying that the
32 current protocol language in that state is laden with

1 language set up from the old system and that they have
2 to completely rework it. They have stayed four
3 executions in that state. In North Carolina, the state
4 district court stayed four executions. The governor of
5 the state, Mike Easley, announced last Friday that until
6 the State can untangle this Gordian knot, they were not
7 going to proceed with any more lethal injections.

8 And they meant -- what he meant by that was the
9 conundrum of having the state medical board coming out
10 last month and reiterating that no North Carolina doctor
11 can involve themselves hands-on in any execution to
12 supervise it or else their license might be in trouble.
13 And so they are trying to figure out how to get out of
14 that corner.

15 In South Dakota, Governor Mike Rounds stayed
16 executions back last August. The legislature came up
17 with a new bill in January. And they signed that into
18 law, and they say that by July it will come into effect.
19 All they did in that state, though, was to say that
20 their protocol in the statute said two drugs. Now it
21 says that the Department of Corrections can choose
22 between two drugs and any other method it chooses to do
23 to do lethal injection. It sounds like they may have
24 more problems coming still down the road.

25 Ohio, the governor there has stayed executions for
26 at least a few months starting back in January. As more
27 famously known, Governor Jeb Bush in his last days in
28 office issued a moratorium in Florida because a pretty
29 gruesome event occurred on December the 15th, where a
30 man, Angel Diaz, was executed and just so happened that
31 the I.V. lines both were set up incorrectly, and both of
32 them suffered from not-an-uncommon problem of they

1 pushed the needle in too far. It didn't just go into
2 his vein. It went in one side of his vein and came out
3 the other. And I don't know what the odds of this are,
4 but they did it in both sides. So instead, he got
5 injected. It took 36 minutes for him to die. Instead
6 of the drugs going through his bloodstream, it went into
7 his muscle tissue, and it took a lot longer.

8 And they realized something was wrong on the one
9 line that they did, so they just switched it over to the
10 other side. But they didn't start with the anesthetic
11 agent again, they started in the middle. And they
12 paralyzed him on that side and then gave him the
13 potassium chloride, and that man was reported to be
14 grimacing and so forth, and he had chemical burns
15 visible on both of his arms a foot long.

16 These are things that they will say, well, this
17 never happened in Louisiana. And yet I challenge people
18 to know precisely what has happened in Louisiana because
19 recordkeeping here is so, so deficient. It is -- no one
20 can tell me. I have not seen records. There are no
21 autopsy records; there is no postmortem reports of any
22 nature.

23 There is nothing done in this state. Absolutely no
24 photographs are taken, and so I could not tell you that
25 no one in this state has ever had any of the conditions
26 of chemical burns on their body. I am not saying that
27 it has happened. I am just saying that the best that
28 might be learned is, again, from a newspaper report.
29 And that just isn't the way things ought to be done in a
30 situation so serious as this. There is just simply
31 deficiencies in recordkeeping. We created a protocol
32 that every single person who was deposed, and persons

1 who were on the stand in open court, said they had never
2 seen this protocol. They had never seen any version of
3 it. And then the one that was supposedly the
4 fixer-upper that's going to make everything all better,
5 the five-page more detailed report, there is no date on
6 it. We figured out what the date was, and Annette
7 Viator gave us the clue. It was December 9th through
8 December 11th, 2002, which means it happened over six
9 months after the last execution ever occurred in this
10 state.

11 These kind of things, you might say, well, those --
12 this new protocol will fix everything. But the problem
13 is, it doesn't. It still fails to address key
14 questions. And only by going on and on in more
15 details -- you know, I told your Honor once when there
16 was an objection raised about me going into so much
17 horrific detail and driving everybody insane with this
18 kind of a detailed question here, I said that the devil
19 was in the details; and it is, because that's where we
20 learn to find the keys to these things.

21 What we are finding is that we simply don't know
22 what has happened in Louisiana; and other states are
23 finding that they have never had any idea what has been
24 going on.

25 The State of California, ironically, was set to
26 execute a man on the same day that we were here in court
27 last year, and that was Mr. Morales. Mr. Morales has
28 not been executed, and no one else has been. And the
29 reason for that is that Federal District Judge Jeremy
30 Fogel has taken a very serious look at what has been
31 brought up by the petitioners in those cases. He has
32 heard two lethal injection challenges and denied them

1 both. And he got the third one; and then finally when
2 he got the third one, he started realizing that the
3 stories that were being told by the Department of
4 Corrections and the experts like Dr. Mark Dershwitz that
5 they use, and which the State refers to in its work,
6 that the predictions of these people that sound all so
7 fine and dandy about how many points after
8 zero-percentage certainty that this person is going to
9 be falling asleep and staying unconscious for as long as
10 they can, that the reality of them watching these
11 executions, they don't live up to these ivory tower
12 expectations in how these chemicals are working. They
13 just simply -- it is not doing it the way these
14 scientists are predicting.

15 And so I don't know whether Dr. Heath testified
16 exactly like this or not. But I know that he has told
17 me once -- and it's nothing that is shocking or novel.
18 It is just basically if a theory is, you know, runs into
19 facts that don't fit, then you have to rework the
20 theory. And the theory here is that this three-drug
21 protocol is a perfect solution, is simple to carry out,
22 and it's just like, you know, it's a mantra. You can go
23 to any newspaper article anywhere, and it will tell you
24 that sodium pentothal puts you to sleep; pancuronium
25 bromide stops the lungs from working; and potassium
26 chloride stops the heart. It's a little mantra.

27 The trouble is, that's not what people are seeing
28 happen. And even though there are questions in
29 California, Judge Fogel said that the fact of the matter
30 is, even though we don't have proof that any of the
31 prior lethal injections in California, that the person
32 actually experienced pain, it doesn't matter. It is

1 still chronic. It still qualifies as a violation of the
2 Eighth Amendment. And I will just make a -- I would
3 like to quote from him. This has already been in the
4 reply brief. It says that: "Defendants observe
5 correctly that Plaintiff's burden of proof at the
6 present stage of the instant proceeding is greater than
7 it was earlier and that there still is no definitive
8 evidence that any inmate has been conscious during his
9 execution. Nonetheless, the evidence is more than
10 adequate to establish a constitutional violation.

11 "Given that the State is taking a human life, the
12 pervasive lack of professionalism in the implementation
13 of the protocol at the very least is deeply disturbing.
14 Coupled with the fact that the use of pancuronium
15 bromide masks any outward signs of consciousness, the
16 systemic flaws in the implementation of the protocol
17 make it impossible to determine with any degree of
18 certainty whether one or more inmates may have been
19 conscious during previous executions or whether there is
20 any reasonable assurance going forward that a given
21 inmate will be adequately anesthetized.

22 "The responsibility for this uncertainty falls
23 squarely upon Defendants, and the circumstances clearly
24 implicate the Eighth Amendment."

25 In this state, what is going on right now is that
26 we have, at best, one expert from the State put on, Dr.
27 Nicholas Goeders from LSU, and he basically had the
28 basic proposition that if you give 2000 milligrams of
29 sodium pentothal to the average person, they are going
30 to be unconscious so long that they are never going to
31 wake up before they are dead in a normal lethal
32 injection procedure. If Dr. Heath didn't testify to

1 that exact idea, then I will state for you that that is
2 what he has said in others. We do not have a dispute on
3 that idea that 2000 milligrams is sufficient to knock
4 somebody out so long that they are never going to feel a
5 thing.

6 The question is: Is the human implementation of
7 this system guaranteed that the risk of that is
8 acceptable that they are going to avoid pain in this
9 process? In other words, is less than 2000 milligrams
10 going to enter into the human body, the blood system of
11 the inmate that's being executed? And the system that
12 exists right now is so full of holes and contradictions
13 that there is no way you can do it.

14 John Doe No. 5 is one of the important deponents in
15 this entire case right now. He did not have a role of
16 setting up I.V. lines. He did not have a role of
17 pushing the syringe. He denied all aspects. He was a
18 supervisor, to put it more simply. And the thing that
19 was so interesting -- and I had a fairly detailed, you
20 know, dialogue with him in his examination -- is that he
21 described a procedure that isn't written down anywhere.
22 And he says that that's the way they do it every time,
23 and he had been there most of them. Most of the seven
24 he had been present at.

25 And he said that there were always two
26 syringe-pushing persons and that they sort of, you know,
27 did the equivalent of flip a coin right when they went
28 in the door to decide who was going to do what and at
29 which point, and that they did it intentionally vaguely
30 so that they would diffuse a sense of responsibility as
31 to which one of those syringe-pushers was actually doing
32 the deed. And, I mean, I went through this with him for

1 several pages of the transcript to try to drag that out
2 of him and make sure I was not mistaking anything. And
3 he described that very, very clearly, and that that was
4 the purpose of it. The problem with his story is that
5 none of the other witnesses describe such a thing. The
6 ones who actually did it didn't say they ever had a
7 backup person. Nobody else, not a word in any protocol,
8 let alone the last one that this came out in 2002. That
9 doesn't describe anything like this.

10 On one hand, you have a system that spends pages
11 and pages telling you how six different people are going
12 to be able to escort that inmate from the last holding
13 cell that he is in to the gurney and that each one of
14 them, you know, straps a Velcro strap around the right
15 arm, on the left arm, the head, the legs, and so forth.
16 It is -- you know, that is where detail comes in ad
17 nauseam.

18 When you come to the actual, quote, scientific and
19 medical part of this thing, it's, you know, they flip a
20 coin. And they do it behind a curtain and do it behind
21 a wall with a one-way mirror so nobody can actually see
22 them.

23 These are the things that are being criticized in
24 other states. The State of Florida had a commission
25 that just submitted its final days of hearing last
26 Friday; and they said that they are going to have a
27 report to the governor of Florida on Thursday, two days
28 from now. And that report is going to make several
29 recommendations; and one of them is that they have two
30 extra or special State witnesses, one in the audience
31 where the general official witnesses observe, and one in
32 the secret back room to observe what things are going on

1 there. They are going to install -- they are going to
2 recommend installation of closed-circuit cameras to
3 watch both the face of the inmate and the I.V. setups on
4 each hand or each arm or wherever they are located to
5 make certain that there is constant observation of
6 things. They are going to set up a process by which
7 they say that they have to guarantee that after the
8 initial injection of the anesthetic agent, same thing,
9 sodium pentothal is given, that they are going to have
10 to take affirmative steps to determine that the person
11 is unconscious, and they are going to need to be able to
12 make sure that they do it, to maintain, you know,
13 figuring out whether the person is unconscious. But
14 they are taking specific steps.

15 In this state, we don't even have anything close to
16 that. We don't even have a piece of paper that says
17 exactly what happened. When did they give the first
18 injection? I have no idea. You know, I read that in
19 the newspaper, at best, that at 12:01, you know,
20 so-and-so was escorted into the death chamber. That's
21 about as close as I can come.

22 And, you know, like Will Rogers said, all I know is
23 what I read in the newspaper. You know, we cannot
24 depend upon things like that. We have to have something
25 that rises to a level that has got some sort of
26 scientific and dignified approach to this.

27 The State has taken depositions several times that
28 I may be or that we are criticizing or accusing any of
29 the State actors of being undignified. That's not at
30 all the case. I haven't met a single person here --
31 except maybe John Doe No. 4's comment about, you know,
32 eating cookies and drinking Coke in the back room, you

1 know, before he started setting up the I.V. lines --
2 that showed that anybody was not paying the utmost
3 respect to this whole process. But the difficulty is
4 that it isn't a question of just trying to look serious
5 and solemn and respectful. The question is -- those
6 things don't add up to a hill of beans if you don't have
7 some way to guarantee that what physical actions they
8 are taking are going to guarantee that that person is
9 protected from feeling the pain of those second and
10 third chemicals; and the protocol certainly doesn't
11 provide it in any fashion in this state right now, and
12 there is nothing that the State can really point to to
13 prove that.

14 And I think that their sole witness, Dr. Goeders
15 from LSU, was actually more telling than anything
16 because, you know, I asked him about, well, he was in
17 the process of doing analysis with animals and doing
18 drug research. That is the main work that he did. And
19 then just the way things go, you know, after working
20 with lab rats after they have done the experiments with
21 them, they euthanize them.

22 And I said, well, can you just do any old thing to
23 euthanize them? And he was like, no. We have a very,
24 very detailed process. I can't get a dollar of grant
25 money unless I prove to them on reams of paper that the
26 process with which I am going to euthanize these animals
27 is done in a humane manner. And those mean that they
28 have to do scientific studies that they have done to
29 guarantee as best as they can that what steps they are
30 going to take are done in a way that guarantees the
31 results of their best possibility. They don't have that
32 here. They just don't have that here with the lethal

1 injection protocol. The people who set it up don't --
2 didn't know what they were doing. They had questions.
3 Those questions haven't been answered since 1991. And
4 what we are still going through right now is we are
5 starting to see that the -- you know, the light has been
6 shined on both this state, the processes and the
7 deficiencies that exist here, as well as in other
8 states.

9 The State of Missouri has come up with a proposal.
10 The federal district court judge said that basically you
11 are going to have to have an anesthesiologist present to
12 supervise what goes on in the execution process if you
13 are going to use the same three chemicals that you
14 always did. And the State of Missouri sent out letters
15 to close to 300 anesthesiologists. Every single one of
16 them in Missouri they got back with a letter saying, no,
17 we are not going to participate.

18 The reason that the execution of Mr. Morales in
19 California didn't occur last February, a year ago, is
20 because they did find two anesthesiologists who were
21 going to be present because the State chose that option
22 to use the same three chemicals. And the judge said,
23 well, that you are going to have to prove to me that you
24 can guarantee that this person is still unconscious. So
25 I am going to, you know, demand that you have two
26 anesthesiologists present if you are going to use the
27 same three chemicals; and the State said okay. They
28 found two.

29 And then two days before the execution, the judge
30 said that, well, I am going to make certain that you
31 understand, doctors, that if something goes wrong, you
32 have to step in and take over. And at that point, the

1 two doctors threw up their hands and said, wait a
2 minute, that's not what -- we didn't understand that.
3 And they have not found a doctor that's willing to step
4 in and do that at this point. But the State has other
5 options, and they have promised -- Governor
6 Schwarzenegger has promised that by May 15th, he will
7 come up with a new plan. And on Friday, Federal Judge
8 Fogel said that he is now going to give Mr. Morales's
9 attorneys time to look at what Governor Schwarzenegger's
10 people come up with after May 15th, and they are going
11 to study that and go back and forth.

12 There was a big tussle as to whether Freedom of
13 Information should have allowed them to see what the
14 State was doing every second as they were planning this
15 new plan in California. The judge said, look, let's
16 just cool things down a bit, everybody study this
17 problem, and go forward.

18 The problem in Louisiana is we don't have anything
19 even close to these kinds of solutions being thought of.
20 They don't think there is a problem. The State's
21 argument basically boils down to the fact that nobody
22 has ever said it is unconstitutional before. It's the
23 most humane way; all of the stuff about animal
24 euthanasia is irrelevant, things of this nature.

25 And, you know, none of that is really accurate.
26 The fact is that animal euthanasia procedures are
27 important simply, if for no other reason, than the fact
28 that they have scientists figuring out how to do things.
29 In this state, you had allegedly from Deputy Warden
30 Peabody the assertion that, oh, yeah, there was a doctor
31 who did it and another doctor -- one doctor, Vance
32 Byers, and another doctor. I don't remember who that

1 was. But he couldn't remember what they said about it,
2 and he had no personal knowledge as to why any of the
3 protocol language was chosen the way it was. His
4 testimony was contradicted Donald Courts, the
5 pharmacist, who said no, no, no, no, no. I figured out
6 how to do the protocol as far as the volume of chemicals
7 is concerned. I picked it with John Doe No. 1, who was
8 the EMT expert for the State. And the two of us are the
9 ones that came up with this plan. Don Courts said: I
10 talked to people in Texas too. I talked to their
11 pharmacist and said: Why are you using a different
12 amount, 5000 grams [sic] instead of 2000? And he says,
13 oh, it's just because I got a 5000-gram [sic] bottle the
14 first time. And I decided, what the heck, why should I
15 fill out all that important, you know, government
16 controlled dangerous substance paperwork on wasting this
17 stuff. So I'll just give it all to him.

18 It is just a sloppy, sloppy mess that once people
19 start seeing it they start wondering what the heck is
20 really going on. In Missouri, the doctor who was doing
21 up the drugs turned out to be dyslexic and was getting
22 the numbers inverted on how he was doing the -- setting
23 up how much anesthesia he was giving to people. They
24 say, whoop, you are out of here. You are not going to
25 be allowed to do this anymore. And they still haven't
26 solved the problem in Missouri.

27 The problem that we have here is that, in fact, we
28 don't have any better situation. We don't know for
29 one-hundred-percent certain what the amount of chemicals
30 that are being injected because all we have is scrap
31 paper notes from Donald Courts saying that this is what
32 people were given. And he didn't even have results of

1 -- he had it for the last three executions, but not for
2 prior to that. No one can explain why their paperwork
3 still has two different amounts on the checklist which
4 says that this is one of amount of the drugs we are
5 supposed to give, and on this side it is another one.
6 And, you know, the best I got was from Donald Courts
7 saying, oh, it must have been a typo, but had never
8 submitted anything new to us to show us that they have
9 corrected any typos or which ones they are going by.

10 The fact that this -- this issue is going to be
11 with us, I believe, for some time; and it is something
12 that is very, very important in the moment that we are
13 at. At the moment, Mr. Code does not have an execution
14 date in front of him so, yes, there is time to try to
15 resolve these matters.

16 But this Court needs to be able to look carefully
17 at all of the evidence that was presented to see that,
18 in fact, that the testimony of Dr. Mark Heath was
19 absolutely clear as to pointing out the deficiencies
20 that he saw and in the written protocols and the
21 statements he heard from the participants up to that
22 point. And the fact that if you look into reports from
23 other states, you are going to see that his involvement
24 has been in virtually every one of these cases; and that
25 does not mean that he is a biased person. That means
26 he knows how these states are doing their processes and
27 that there are problems in all of them.

28 And right now, 11 other states have found it
29 sufficient and necessary to stop everything and try to
30 work it out. And Missouri and California are the only
31 ones that have come out to the point of saying that
32 these are absolute unconstitutional violations of the

1 Eighth Amendment because they have so much risk of
2 people waking up. If you have any questions, your
3 Honor, I will be happy to answer them.

4 THE COURT: I have no questions.

5 MS. ESTOPINAL: Your Honor, if I could
6 have a drink of water?

7 THE COURT: You may.

8 MS. ESTOPINAL: Thank you, your Honor.
9 The first thing I want to do is to correct a
10 typographical error in my memorandum; and I am grateful
11 to Counsel for pointing that out in their reply brief.
12 On page 43 of the memorandum, I referred to the
13 deposition of John Doe No. 1, pages 41 to 43. It should
14 be John Doe No. 3.

15 THE COURT: Duly noted.

16 MS. ESTOPINAL: Thank you, your Honor.

17 ARGUMENT

18 BY MS. ESTOPINAL:

19 Mr. Clements has talked about the procedural
20 objection that I made; and I want to make clear that
21 that objection was not to the lethal injection Eighth
22 Amendment claim. Of course, that is very much
23 addressable on post-conviction relief.

24 The procedural objection I had was to Petitioner's
25 regulatory procedures claims that the protocol had to be
26 done a certain way or had to follow certain things.
27 That is not -- our position is that is not an Eighth
28 Amendment claim of cruel and unusual punishment. When
29 it comes to the death penalty, there are no guarantees
30 that a defendant will be executed without pain, and no
31 guarantees are required. Going back to electrocutions
32 in a Louisiana case, Francis vs. Resweber, 67 S.Ct. 374,

1 1947, Mr. Francis was condemned to die by electrocution.
2 When the time came for his sentence to be carried out,
3 there was a malfunction of the electric chair, and he
4 was subjected to a nonlethal current of electricity
5 passing through his body. When a new death warrant was
6 issued, he filed for writs with the U.S. Supreme Court
7 claiming that it would be a violation of the Eighth
8 Amendment prohibition against cruel and unusual
9 punishment to subject him to a second electrocution. He
10 also made a double jeopardy claim that was rejected.

11 The Supreme Court, however, found that cruelty
12 against which the Constitution protects a convicted man
13 is cruelty inherent in the method of punishment, not the
14 necessary suffering involved in any method employed to
15 extinguish life humanely. The fact that an unforeseen
16 accident prevented the consummation of the sentence
17 cannot, it seems to us, add an element of cruelty to a
18 subsequent execution. There is no purpose to inflict
19 unnecessary pain nor any unnecessary pain involved in
20 the proposed execution.

21 And that still holds true today, and that was the
22 Supreme Court's last pronouncement on the Eighth
23 Amendment and the death penalty. But other courts more
24 recently, of course, have cited *Francis*. And the method
25 of execution is viewed as cruel and unusual punishment
26 under the Eighth Amendment when the procedure for
27 execution creates a substantial risk of wanton and
28 unnecessary pain, torture, or lingering death. A
29 substantial risk of wanton and unnecessary infliction of
30 pain, torture, or lingering death. Well, that is what
31 we have been trying to find out, what they have been
32 trying to prove. And actually what they have proved is

1 that -- and it is their burden to prove it -- is that
2 our State officeholders and employees at Angola do their
3 level best to make sure that everything goes right, that
4 everything is done right. In the evidentiary hearing,
5 the depositions showed that the chemicals are mixed by
6 the director of the pharmacy himself. And there is no
7 reason to doubt his testimony that he prepares the drugs
8 in the same amount every time; and there is no reason to
9 doubt that he knows how to prepare those drugs. There
10 are procedures to ensure that all the drugs are timely,
11 they have not expired. He checks that. They have
12 inventories. Some of the John Does, those who are EMTs,
13 also check that. They are often there to help him when
14 he mixes the drugs and there to pick up the loaded
15 syringes.

16 Now, in his original claim, Petitioner alleged that
17 unqualified persons may be involved in the insertion of
18 the I.V.s which can lead to problems, and we will talk
19 about some of those later. But during the course of our
20 hearings and depositions, it was established the I.V.
21 lines are inserted by senior and highly-experienced
22 EMTs.

23 And unlike the Diaz case in Florida, there are two
24 different EMTs, one on each arm. Now, these men are
25 highly experienced; and there has never been any
26 indication that they were not ultimately able to find a
27 vein in each arm. One time they had to go to a
28 collarbone, but they still found the appropriate vein.
29 Part of the proof of that is that the executions have
30 been quick. Mr. Diaz took 34 minutes to die. The
31 testimony at the hearing and the depositions, it is five
32 to seven minutes or so. Now, Counsel referred to some

1 newspaper articles. He didn't provide those in his
2 reply brief. I have gone to the Morning Advocate's
3 website and obtained some copies. Each article I could
4 find on lethal injection execution -- if there is no
5 objection, I would like to file it in the record. I
6 have a copy for your Honor.

7 THE COURT: Any objection? Is the
8 Petitioner just getting a chance to see that?

9 MR. CLEMENTS: If I could -- it is okay.
10 I can --

11 THE COURT: I will give you a moment.
12 But I was just asking, any objection to the filing of
13 that into the record?

14 MR. CLEMENTS: Oh, I'm sorry. No
15 objection.

16 THE COURT: All right. Admitted.

17 MS. ESTOPINAL: Thank you. Your Honor,
18 in these articles, the reporters detailed the events
19 that happened at the executions, and they often detail
20 the time that the inmate is pronounced dead. Now, the
21 earlier executions did start at midnight. Then they
22 were moved to around 8:00 p.m. Now they have been moved
23 to 6:00 p.m. for logistical reasons.

24 In each of these, though, the inmate was pronounced
25 dead within a very short time frame. John Brown was
26 pronounced dead at 12:12 a.m., but the reporter noted
27 that Brown was dead within seconds after the lethal
28 chemical began to flow. Within seconds. Thomas Ward's
29 execution was also complete by 12:12 a.m. Feltus
30 Taylor, he was pronounced dead 16 minutes after he was
31 brought into the execution chamber. Leslie Dale Martin,
32 also 16 minutes. Dobie Gillis Williams, the entirety of

1 the execution was longer because he is the one that had
2 to have the I.V. inserted into his neck. It is unclear
3 what time he was brought into the chamber. There is no
4 indication that he was not fully anesthetized or that he
5 made any motions, any gagging reflexes, trying to talk,
6 or any of those indications that have been found in some
7 other states.

8 A part of Petitioner's reply brief has been
9 complaining about my estimates as to how long it took
10 for death to occur. And those were based not just on
11 what Warden Cain said, but on the John Does: John Doe
12 No. 3, John Doe No. 2, and John Doe No. 6 all testified
13 it took between a minute -- 30 seconds and a minute to
14 inject the first syringe, then the line was flushed for
15 about 30 seconds; another 30 seconds to a minute, the
16 second syringe, and so on. And just one or two minutes
17 after the last injection is when inmates were pronounced
18 dead.

19 Now, I'm glad to hear that Dr. Heath now agrees
20 that 2 grams of sodium pentothal should keep someone
21 unconscious for a long time because he was pretty cagey
22 about it. When he testified, he said several minutes.
23 And I have looked at it, and he said several minutes, 2
24 grams.

25 The effects of sodium pentothal are noted
26 immediately. That verifies that the drugs were properly
27 mixed and properly administered when that happens. Now,
28 Warden Cain has been in the room with each of the last
29 six men executed. And he observed that all but one took
30 only two breaths after the sodium pentothal began, and
31 then all breathing stopped. The other apparently didn't
32 take any breaths at all; and that was John Brown who

1 said wow, and then a slight tremor or wave passed over
2 his body and nothing more. So it acted so quickly in
3 him that he didn't have time for the two breaths. And
4 Warden Cain also noted that Brown and Leslie Dale Martin
5 started to turn a pale shade of blue. They were not
6 breathing. That's why you turn blue. That means that
7 the sodium pentothal was working.

8 Now, I would like to -- I am going to talk about
9 some of the other problems in other states and say that
10 we have not noticed anything; and Warden Cain is right
11 there looking at the inmate. Sometimes he is holding
12 their hand. And he is very observant, as I am sure your
13 Honor noticed when he testified. He is very observant
14 of what is going on there, as he should be. He has
15 never noticed any of the lips moving, trying to speak,
16 or any other indication of consciousness such as
17 happened in the Diaz case. No indication that the I.V.s
18 were ever improperly inserted, no leaks, no dripping, or
19 anything of that nature.

20 The inmate is set up not just with the two I.V.
21 lines but also with an EKG or heart monitor and a pulse
22 oximeter that helps them determine when a death has
23 finally occurred.

24 When I turn to these other states, I want to say
25 one thing, and that is I think it is very misleading.
26 In reply brief, Petitioner said that other states have
27 held lethal injection to be unconstitutional. That's
28 not quite accurate. What they have held is that the
29 lethal injection, as it is administered in that state,
30 has a risk of being unconstitutional. That is a big
31 difference. In Missouri, this is a shocking case where
32 a doctor who is dyslexic mixed and administered the

1 lethal drugs, and he admitted that he made a lot of
2 mistakes. Now, that is in the opinion of Taylor vs.
3 Crawford, and it's 2006 Westlaw 1779035, came down in
4 June of last year. And the doctor admitted he had
5 basically total discretion of the protocol. There was
6 nobody in the room with the inmate to monitor his
7 movements. He decreased the dosage of sodium pentothal
8 when he wanted to. And the control chamber where the
9 syringe-pushing actually occurred was so dark that the
10 syringe-pusher had to use a flashlight to set up the
11 saline bag and do the injections. Well, that's
12 ridiculous.

13 There was no oversight, and that disturbed the
14 federal court, and I certainly can't blame them. In
15 addition to the fact there was no oversight, the
16 responsibility for making the changes and the
17 adjustments was completely vested in that doctor; and
18 the Court had concerns about his qualifications. Well,
19 of course they did.

20 Now, that is not the case here. We have got clouds
21 of witnesses. Besides Cain in the room looking at the
22 prisoner, giving the signal, the EMTs are in the control
23 room. The Department of Corrections -- the head of the
24 Department of Corrections, Secretary Stalder, is there
25 every time to make sure everything goes well and
26 everything is handled appropriately and with dignity.

27 Another supervisor, John Doe No. 5, is also in
28 there to supervise the EMTs. The syringe-pushers,
29 whether there is one or two, they are in there as well.
30 There has never been any complaint that the room was too
31 small. Warden Cain said it was bigger than it looked on
32 the diagram we referred to. So there is not one person

1 with dubious abilities in charge, so that the Missouri
2 case is distinguishable. *Morales*, that is the case
3 where the federal court ordered that the State could
4 execute Mr. Morales only if two anesthesiologists were
5 in attendance. And, of course, nobody thought that was
6 ever going to happen.

7 But in *Morales*, there were indications that many
8 inmates had continued to breathe long after they should
9 have ceased to do so; and, therefore, there was doubt
10 that the protocol was functioning as intended. There
11 haven't been any such indications here.

12 Also in California, there was a lack of oversight.
13 There was insufficient screening of execution team
14 members. One of them had smuggled illegal drugs into
15 San Quentin. Lack of training of the team members,
16 there was unreliable recordkeeping regarding the drugs,
17 improper mixing of the drugs, inadequate lighting,
18 poorly-designed facilities, together with the fact that
19 the inmates continued to breathe long after they should
20 have ceased.

21 We don't have those factors here. The men who
22 insert the I.V.s are senior EMTs, highly experienced.
23 The syringe pushers have been senior members of staff
24 who have been trained by the EMTs. They have done
25 everything they can to ensure that everything goes as it
26 should. Nobody in the Louisiana Department of
27 Corrections wants an inmate to be executed painfully.
28 Everyone knew how shocked Ms. Viator was by the attitude
29 of the Texas warden.

30 Now, in North Dakota -- I mean, I'm sorry -- North
31 Carolina that Mr. Clements was just talking about, Brown
32 vs. Beck is that case. The attorneys for the executed

1 people had filed affidavits claiming they witnessed the
2 inmates writhing, convulsing, and gagging during lethal
3 injection executions. We haven't received anything like
4 that here. Denise LeBoeuf, who used to be with the
5 Capital Post-Conviction Project, testified she watched
6 John Brown's execution, and she didn't see anything of
7 that sort. The blue color and the ripple or wave that
8 passed over Mr. Brown as the drugs hit his bloodstream,
9 Dr. Heath said that did not mean that he felt any pain.
10 There was certainly no writhing, convulsing, or gagging.

11 Now, in that case, the State had alerted the Court
12 it would not administer the two secondary drugs, the
13 pancuronium bromide and potassium chloride, until total
14 unconsciousness was achieved as shown through the use of
15 a BIS monitor, B-I-S monitor.

16 I went on the Internet and I copied some
17 information regarding the BIS monitor, which I thought I
18 had numerous copies of, but I actually only have one. I
19 would file this into evidence.

20 But the BIS monitor actually is similar to an EEG.
21 It's an external sensor that allows surgeons to assess a
22 consciousness and sedation of a patient during surgery.
23 A BIS is from zero to a hundred. A hundred is when a
24 patient is fully awake; zero, absence of brain activity,
25 AKA death. And the lower numbers are varying levels of
26 consciousness or unconsciousness. And I apologize.
27 Maybe I can find some more copies of that.

28 THE COURT: It would be fine if you need
29 to provide that later. Do you have something to file
30 into the record now, or are you just showing it to
31 Petitioner's counsel?

32 MS. ESTOPINAL: Yes, ma'am. I will do

1 that. I will provide it later.

2 THE COURT: All right.

3 MS. ESTOPINAL: And I will file this
4 right now. But this BIS monitor was proposed to be used
5 in North Carolina. And that is at 445 F.3d 752, and it
6 is 2006. The district court noted though -- the North
7 Carolina Federal Court for the Eastern District of North
8 Carolina said that: "Even if the Court were to hold an
9 evidentiary hearing and Plaintiff were to prevail, he
10 would remain under a sentence of death. Neither the
11 death penalty nor lethal injection as a means of
12 execution would be abolished. At best, Plaintiff would
13 be entitled to injunctive relief requiring the State to
14 modify its lethal injection protocol to correct the
15 flaws Plaintiff has alleged."

16 And in Petitioner's reply brief, he asked the Court
17 to declare use of lethal injection to be
18 unconstitutional. And I think he was overreaching on
19 that. It is whether this protocol, as it is
20 administered in Louisiana, creates an undue risk or is
21 reckless.

22 Now, in Alabama, Mr. Nelson had filed a last-minute
23 challenge to his execution because he anticipated they
24 might use a cut-down procedure. I think in Alabama they
25 had stated they were going to routinely use a cut-down
26 procedure. The courts didn't reach the merits because
27 it was last-minute. It hasn't been ruled on.

28 In Indiana, they complained that the protocol was
29 developed without input from a person trained in
30 clinical anesthesiology; and the Indiana Supreme Court
31 said that is without merit, that they hadn't shown that
32 the protocol presents an unacceptable risk of a

1 lingering death or wanton infliction of pain in his
2 case. Here we know that the head pharmacist, the senior
3 EMT, doctors, the secretary of the department, and the
4 warden investigated the protocol. Mr. Clements
5 complains that Don Courts said he came up with the
6 amount of drugs. But Dr. Heath apparently has conceded
7 2 grams of sodium pentothal is enough to keep someone
8 sedated for long enough to be executed without feeling
9 pain from the subsequent injections.

10 The fact that several states are investigating
11 whether their lethal injection protocols are proper or
12 improperly administered doesn't mean that they are going
13 to find that they are. Some have found that they are.
14 Some have not. And in Maryland, Oken vs. State has
15 found that lethal injection is not cruel and unusual
16 punishment. That's in 2004.

17 Other states who are waiting for preliminary
18 injunction to resolve that had been requested in
19 Florida, and that was Hill vs. Crosby and Hill vs.
20 McDonough. The Supreme Court denied the stay of
21 execution on that, and Mr. Hill was executed.

22 Then the unfortunate incident of Angel Diaz's
23 execution, which was an example of what happens when an
24 inmate is apparently not fully sedated, as Mr. Clements
25 said, it appears that the I.V. needles were pushed past
26 the veins, and his lips appeared to be moving as if he
27 tried to speak. And that definitely is a worst-case
28 scenario. It took 34 minutes for him to die.

29 Nothing of that sort has happened in Louisiana; and
30 we don't anticipate that it will because of the care
31 that is taken with the use of the drugs, the insertion
32 of the I.V. needles, the oversight by its senior staff.

1 It is obvious that they are dedicated, and they want to
2 make sure that they do it right. They are not sending
3 in the dyslexic doctor. They are not sending in a
4 prison guard who smuggles drugs into San Quentin. They
5 make sure their people are experienced and trained. And
6 that is the most that they can do.

7 Now, there are some possibilities now with this BIS
8 monitor that was talked about in Maryland or North
9 Carolina that when that monitor is used, they will be
10 able to tell when the inmate is fully sedated. And that
11 could be an extra tool, certainly, as something
12 definitive that could be utilized to make sure that
13 there is no pain.

14 But there is no guarantee. Human endeavors are by
15 nature flawed and subject to mistakes and accidents.
16 But the Eighth Amendment doesn't require totally
17 painless death. It requires only that the State not
18 intend to cause a painful death and not be wantonly
19 reckless as to whether the death is humane or not. That
20 is all that is required.

21 Without a showing that there has been some
22 situation where an inmate was not properly anesthetized,
23 Petitioner has failed in their burden. They haven't
24 shown recklessness; they haven't shown a wanton
25 disregard. They haven't shown a foreseeable risk of
26 unnecessary suffering because the protocol that was
27 testified to by numerous participants is careful, one,
28 with backups as far as I.V.s in each line by different
29 EMTs. The EMTs are watching in the control room,
30 watching the inmate, watching the injection port,
31 watching the syringe-pusher. Senior administration
32 officials are there at every execution. There is no

1 indication that in California, Florida, or Missouri
2 anybody bothers to show their face down there except the
3 folks that have to. Here, the secretary himself is
4 there. The warden himself is there. You are not going
5 to have a lot of messing around. You are not going to
6 have a dyslexic doctor getting the numbers mixed up on
7 the syringes because there is so many safeguards.

8 The protocol, the lethal injection chemicals are
9 designed to ensure a swift and humane and painless
10 death. And Petitioner hasn't shown that it doesn't do
11 that as administered in the state of Louisiana. That's
12 what he has got to show. He hasn't shown that.

13 The whole animal euthanasia thing, the AVMA --
14 Animal Veterinary Medical Association -- and AAALAC --
15 the Association for the Assessment and Accreditation of
16 Laboratory Animal Care -- basically, they forbid
17 euthanasia of a laboratory animal by the use of a
18 paralytic alone.

19 That's not what we are doing. We are not using a
20 paralytic. And the AVMA had, as I attached to my reply
21 brief, they have issued a statement that says that their
22 animal euthanasia guidelines are not appropriate and are
23 not properly applied to lethal injection protocols. The
24 drugs are not the same. The issues are not the same.
25 And, really, they don't want to be mixed up in it.

26 But what they forbid is the use -- if we were only
27 to use the pancuronium bromide, that would be very
28 painful, and that would be a violation of the Eighth
29 Amendment. We don't do that. The AVMA prohibits the
30 use of a paralytic or anything similar to pancuronium
31 bromide. But it is really just a smoke screen. It is
32 not even a relevant issue because we don't use just the

1 pancuronium bromide. It's 2 grams of sodium pentothal,
2 which is three to eight times the clinical dosage. And,
3 of course, doctors use less because they want their
4 patients to wake up afterwards. That's why Dr. Heath's
5 experience with sodium pentothal is somewhat limited.
6 The patient wakes up in a few minutes. Well, if he has
7 300 milligrams, he does.

8 Dr. Goeders testified that according to a 1980
9 study that actually studied not just theory, they
10 actually studied how long does it take someone to wake
11 up after they had received a 1- or 2-gram dose of sodium
12 pentothal; and it was hours. It was hours. This wasn't
13 theory. This wasn't, you know, speculation of the
14 best-case scenario. They actually did the research
15 because the sodium pentothal in that large amount goes
16 through the entire body. The whole body is diffused
17 with it. So it takes a lot longer for it to dissipate.
18 Hours. And I think Mr. Clements has agreed that that is
19 the case.

20 So they haven't shown that lethal injection is
21 wanton disregard. They haven't shown that it purports
22 to inflict pain and suffering. They have not satisfied
23 their burden.

24 MR. CLEMENTS: A few responses, your
25 Honor.

26 THE COURT: Briefly, Mr. Clements. You
27 may proceed, sir.

28 MR. CLEMENTS: Thank you.

29 REBUTTAL

30 BY MR. CLEMENTS:

31 Newspaper reports indicate that the commission in
32 Florida that investigated their sloppy people that

1 supposedly did this, that the person that actually set
2 up the I.V. lines is still denying that he did anything
3 wrong; and he had involved himself in 84 executions. So
4 he wasn't somebody without experience. The commission
5 themselves has determined that in 15 percent of the
6 cases, they estimate that they will find problems with
7 the veins being pierced through. These were the
8 different commission members. These were bipartisan
9 and, you know, across-the-board blue ribbon commission
10 set up by the governor.

11 So I am saying that the problems that are dismissed
12 as being never-going-to-be-a-problem-here are -- just as
13 Secretary Stalder said we are never going to have a
14 problem with I.V. access. In fact, they came perilously
15 close to them in Dobie Gillis Williams' execution in
16 1999, where it took them quite a while to find a second
17 vein; and in the execution of Antonio James, it took
18 them time to find a second vein -- and only with his
19 cooperation and suggestions did they actually find a
20 second I.V. site.

21 So two out of seven executions have come fairly
22 close to having the problems where we are talking about
23 an alternative. Admittedly, I.V. lines were set up on
24 two sites on each one of those, and they proceeded.
25 However, to say that these things do not constitute
26 problems and that they have everything set up and every
27 contingency planned for is blinking reality because the
28 protocol does not provide for anything in these cases.

29 They say, well, we need a doctor to do the
30 cut-down. Well, where is their doctor? Well, the
31 doctor is on a standby, somebody says. But Secretary
32 Stalder says, no, there is never going to be a doctor

1 because we determined there never will be a problem.
2 This is blinking reality on the department's part. And
3 I beg to differ with the State's observation that
4 somebody turning blue means that sodium pentothal is
5 working. Turning blue has nothing to do with somebody
6 being awake or asleep. It has to do with the fact that
7 they are not breathing, which is probably the result
8 more of the second chemical, of the pancuronium bromide
9 paralyzing the diaphragm and preventing their ability to
10 breathe.

11 However, the question is: Are they conscious
12 during this time? If you are paralyzed, you can't look
13 for lips fluttering, eyelids fluttering, arms moving,
14 people screaming, people grimacing. They are not going
15 to be able to show that. That's the problem.

16 Mr. Diaz didn't even get his dosage of the
17 paralytic agent given to him in a fashion that
18 circulated it quickly through his body; therefore, he
19 did have the ability to move around and make sounds and
20 so forth.

21 But if the paralytic agent is successfully
22 introduced into the body, then there is going to be no
23 way. It is the chemical veil which Dr. Heath talked
24 about and which have been challenged in many states.

25 In the issue of the BIS monitor, I can provide
26 more, I think. But I think it is important to note that
27 the expert that the State pointed out, Dr. Mark
28 Derschwitz, has given absolutely contradictory and polar
29 opposite viewpoints on the effectiveness of the BIS
30 monitor in several -- in two different states that he
31 has testified for the prosecution in those states. And
32 in the first state, he said that it was not going to be

1 a proper tool to do because when you give certain of the
2 chemicals, probably the potassium chloride itself, the
3 electrolytes in the body are going to react with the
4 monitoring equipment such that it will just basically
5 short-circuit the machine and make it unable to give any
6 kind of a valid reading of any level. They do not give
7 these -- they do not hook these monitors up in a
8 surgical setting and then proceed to inject the kind of
9 chemicals that we are talking about here.

10 Therefore, this -- and the machine owner, the BIS
11 monitor company, came out and told the State of North
12 Carolina that they absolutely wanted to get their
13 machine back because they felt it was terrible that they
14 were being used in this fashion, that they were never
15 designed to be used in this way.

16 Again, it's an attempt by various people to find an
17 easy solution, a machine that registers a number from 0
18 to 100. What could be simpler? Even a moron could look
19 at that and figure out if the person was awake or not.
20 It's not that simple.

21 If it was that simple, Dr. Heath and every
22 anesthesiologist in this country would be out of
23 business. And then you can be damned sure that medical
24 insurance companies would be hooking up, you know,
25 morons with the BIS monitors in every surgery in the
26 country so that they could save a lot of money in
27 medical costs. That's not the way it gets done.

28 And I think it is important, and I will provide
29 this Court with a copy of the Ninth Circuit decision in
30 a case called Vasquez v. Fierro, which had to do with
31 the challenge of the gas chamber system, which they
32 eventually after that case dropped and went to lethal

1 injection. And in that, they talked about the fact of
2 the person, you know, that the courts found that it was
3 important to note that two minutes of a person
4 consciously suffering the kinds of pain that they were
5 going in in the asphyxiation of the gas chamber process
6 was a violation of the Eighth Amendment there. And that
7 is what changed that entire system in that state.

8 So we are not talking about gross amounts of time.
9 As far as time measurements are going, it is -- again,
10 the State is saying with relative assurance that, yeah,
11 Mr. Martin, Leslie Martin on May 10th, 2002, died in 16
12 minutes. The trouble is, he died at 8:16; but we don't
13 know what the beginning time was. That's the problem.
14 So, you know, maybe he died in five minutes. I don't
15 know.

16 But I can't say and nobody can say because this
17 state doesn't keep records. They kept 269 pages of
18 Leslie Martin's records of the last two months of his
19 life when they had him on suicide watch at Angola.
20 Every 15 minutes, a guard came up and wrote down the
21 same thing. He's asleep in cell, asleep in cell; he's
22 awake; he's reading a book; he's doing this; he's doing
23 that.

24 At 7:50 on the night of his execution, those notes
25 stopped because that's when he got picked up and moved
26 out of his cell; and 26 minutes later, he was pronounced
27 dead. When did it really start? I don't know. They
28 don't keep records about that. They can keep 269 pages
29 of handwritten notes on him when he is sitting in his
30 cell, but they can't keep one page of records of him in
31 his -- when he is on the gurney and getting lethally
32 injected. That's the problem in this state right now.

1 It is not a question of people being evil or trying to
2 hurt Mr. Martin or somebody else. They just want to go
3 through it. But they don't know what they are doing.
4 They are not doctors. Warden Cain is not a doctor. And
5 every doctor that we had who was an official witness at
6 this execution said they had absolutely no role in the
7 process. They didn't help plan it and to set up the
8 procedure. They didn't carry it out. They didn't do
9 anything.

10 The first medical person that we had that was an
11 official medical witness said he brought his
12 stethoscope. That's it. And if anything had gone wrong
13 or they had been called in, they would not have been
14 prepared. They didn't have the means to do anything
15 that goes wrong. There is no planning for
16 contingencies. The idea is that, oh, it will never
17 happen. There will never be a problem.

18 And the problem is we don't even know what has
19 happened. But the risk that is being pulled out of
20 other states, you know, we say -- the State says here
21 that we have highly-experienced people.

22 What we have right now is John Doe No. 4, who
23 doesn't even want to take the time to look at the inmate
24 being strapped down. He is too busy drinking Coke and
25 eating cookies in the secret room.

26 We have a situation where I asked him, well, let's
27 just assume that you are the last person who has
28 actually done a lethal injection that's still employed
29 by the State, you know, and then you are asked to start,
30 you know, running the show. Could you do it yourself?
31 No, I couldn't. Where would you go to get information?
32 I would go to the warden. He is not a doctor. He

1 doesn't know anything. I would go to the pharmacist.
2 He is not a doctor. He doesn't know it. I would go to
3 the medical director. The medical director is
4 different. He doesn't even -- he has never even been on
5 Angola's grounds during any execution.

6 There is no process, no procedure. It is a
7 terrible collection of oral tradition passed on that has
8 been found deficient in several other states. And to
9 say that that's good enough just because they don't mean
10 any harm is just blinking the reality that we have a
11 serious issue here.

12 They are trying to use what looks like a pretty
13 scientific procedure or a pretty medical procedure to
14 give everybody comfort. But, in fact, they have no idea
15 if it is really working that way or not. Thank you.

16 THE COURT: As I have indicated, just the
17 cases that you have cited during your arguments today,
18 if you haven't previously supplied the Court with copies
19 of them, I welcome or request that you do those, get
20 those copies to the Court as soon as practicable. And
21 with that, I believe everything else is in the record
22 that previously we discussed may or may not have been.

23 Is there anything else we need to do? As far as
24 the Court is concerned, the Court takes this matter
25 under advisement at this time.

26 MS. ESTOPINAL: Your Honor, the only
27 thing that we request is that Mr. Code be remanded to
28 Angola.

29 THE COURT: That would be the next thing.
30 But any evidentiary or any procedural or -- I think we
31 have properly covered everything. But with that and on
32 the State's request, the Court orders Mr. Code remanded

1 and returned to Angola forthwith.

2 (END OF PROCEEDINGS.)

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1 REPORTER'S CERTIFICATE

2
3 STATE OF LOUISIANA:

4 PARISH OF CADDO:

5
6 I, Joyce A. Wheeler, Registered Professional
7 Reporter, Certified Court Reporter, and Official Court
8 Reporter in and for the First Judicial District Court of
9 Caddo Parish, State of Louisiana, do hereby certify that
10 the foregoing represents a true and accurate
11 transcription of the proceedings had in said court and
12 were reported by me to the best of my knowledge and
13 ability.

14 SUBSCRIBED AND SWORN TO on this the 17th day of
15 April, 2007.

16
17
18 Joyce A. Wheeler
19 Joyce A. Wheeler, BA, RPR, CCR
20 Official Court Reporter

