

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

CHARLES R. RHINES

Petitioner,

vs.

DOUGLAS WEBER, Warden, South
Dakota State Penitentiary,

Respondent.

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* IN CIRCUIT COURT
* SEVENTH JUDICIAL CIRCUIT
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* CIV. 02-924
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* NOTICE OF ADOPTION OF
* REVISED EXECUTION POLICY
* AND PROTOCOL
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Respondent Douglas Weber, by and through his counsel Paul S. Swedlund, Assistant Attorney General for the State of South Dakota, hereby files notice, as earlier requested by this court, of the method of execution policy and protocol prepared and adopted by respondent for use in the executions by lethal injection of condemned inmates in the State of South Dakota, including Charles R. Rhines. Respondent adopted this policy and protocol on October 19 and 13, 2011 respectively. The policy and protocol are modeled on, and are substantially similar to, one approved by the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008).

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

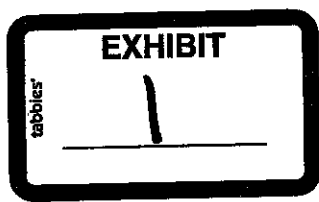


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FILED
IN CIRCUIT COURT

OCT 24 2011

Ranae Truman, Clerk of Courts
By _____ Deputy



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of October 2011 a true and correct copy of the foregoing notice of adoption of revised execution policy and protocol was served by United States mail, first class, postage prepaid, on Jana Miner, Assistant Federal Public Defender, 101 South Pierre Street, Pierre, SD 57501.



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ASSISTANT ATTORNEY GENERAL

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ERM A.12(B) Capital Punishment Final Days Procedures

A. GENERAL

1. The punishment of death shall be inflicted within the walls of a building at the State Penitentiary. SDCL §23A-27A-32, 23A-27A-33. The South Dakota State Penitentiary (hereinafter SDSP) shall provide all proper equipment and appliances for the infliction of such punishment. SDCL §23A-27A-32, 23A-27A-33. The necessary setup includes a room, hereinafter referred to as the "Chemical Room," equipped with a one-way mirror that allows occupants to observe the Execution Chamber and the inmate after he is strapped to a gurney in the execution chamber.
2. Death shall be inflicted by administering intravenous injections of a substance or substances in a lethal quantity. The substance or substances and manner of execution shall be and remain consistent with state and federal constitutional requirements as identified herein.
3. The Warden or designee is responsible for having the chemicals for lethal injection and any other necessary items for use on the scheduled date of execution. Under the direction of the Warden or designee two complete sets of the substance or substances used to conduct an execution shall be kept in separate secure locations.
4. The Warden shall arrange for the attendance of South Dakota Department of Corrections (hereinafter SDDOC) staff, law enforcement officers and other persons he/she deems necessary and proper to perform the functions involved in conducting a scheduled execution. This shall include all those required by South Dakota statute to attend.
5. If at any time during the execution process the Governor stays, pardons, or commutes the sentence of the condemned person or if a court of competent jurisdiction issues a stay after an execution has commenced, the execution team shall stop the execution. Ambulance staff equipped with advanced life support capabilities, including a heart defibrillator and such supplies and equipment as would be needed to attempt to revive an individual who has been injected with one or more of the substances identified in Section D, shall be on standby at the SDSP.

B. QUALIFICATIONS OF EXECUTION TEAM MEMBERS

1. An execution carried out by intravenous injection shall be performed by person(s) trained to perform venipuncture and to administer intravenous injections. The person(s) shall be selected by the Warden and approved by the Secretary of Corrections. SDCL 23A-27A-32.
2. The person(s) selected by the Warden to mix the drugs and prepare the syringes shall demonstrate proficiency through relevant training and two years' experience in the preparation of syringes for intravenous administration and mixing and preparation of drugs for such administration.
3. The person(s) selected by the Warden to insert the intravenous needles into the veins of the prisoner and connect, monitor, and maintain intravenous lines shall be certified or licensed and have at least two (2) years' professional experience as one of the following: medical or osteopathic physician, physician assistant, registered nurse, certified medical assistant, licensed practical nurse, phlebotomist, paramedic, emergency medical technician, or military corpsman.
4. The person(s) selected by the Warden to administer the injections shall demonstrate proficiency through relevant training and two years' experience in the administration of drugs by intravenous injection.

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C. PREPARATION OF CHEMICALS

1. The following identifies the contents of each syringe used in the course of the 3-Drug or 2-Drug executions.

SYRINGE LABELED/MARKED	CONTENTS
#1	Sodium Thiopental (1.5 grams in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution)
#2	Sodium Thiopental (1.5 grams in a 60 cc solution provided Syringe #1 is also 1.5 grams of Sodium Thiopental in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution provided Syringe #1 is also 2.5 grams of Pentobarbital in a 50 cc solution)
#3	Normal Saline (25 ml)
#4	Pancuronium Bromide (100 mg of 2 mg/ml concentration in a 50 cc solution)
#5	Normal Saline (25 ml)
#6	Potassium Chloride (120 mEq. in a 60 cc solution)
#7	Potassium Chloride (120 mEq. in a 60 cc solution)
Backup syringes (if needed):	
#8	Normal Saline (25 ml)
#9	Sodium Thiopental (1.5 grams in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution)
#10	Sodium Thiopental (1.5 grams in a 60 cc solution provided Syringe #1 is also 1.5 grams of Sodium Thiopental in a 60 cc solution) or Pentobarbital (2.5 grams in a 50 cc solution provided Syringe #1 is also 2.5 grams of Pentobarbital in a 50 cc solution)
#11	Normal Saline (25 ml)
#12	Pancuronium Bromide (100 mg of 2 mg/ml concentration in a 50 cc solution)
#13	Normal Saline (25 ml)
#14	Potassium Chloride (120 mEq. in a 60 cc solution)
#15	Potassium Chloride (120 mEq. in a 60 cc solution)

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2. The following identifies the contents of each syringe used in the course of the 1-Drug execution using Sodium Thiopental.

SYRINGE Labeled/Marked	Contents
#1	Sodium Thiopental (1.25 grams in a 50 cc solution)
#2	Sodium Thiopental (1.25 grams in a 50 cc solution)
#3	Sodium Thiopental (1.25 grams in a 50 cc solution)
#4	Sodium Thiopental (1.25 grams in a 50 cc solution)
#5	Normal Saline (25 ml)
Backup syringes (if needed):	
#6	Sodium Thiopental (1.25 grams in a 50 cc solution)
#7	Sodium Thiopental (1.25 grams in a 50 cc solution)
#8	Sodium Thiopental (1.25 grams in a 50 cc solution)
#9	Sodium Thiopental (1.25 grams in a 50 cc solution)

3. The following identifies the contents of each syringe used in the course of the 1-Drug execution using Pentobarbital.

SYRINGE Labeled/Marked	Contents
#1	Pentobarbital (2.5 grams in a 50 cc solution)
#2	Pentobarbital (2.5 grams in a 50 cc solution)
#3	Normal Saline (25 ml)
Backup syringes (if needed):	
#4	Pentobarbital (2.5 grams in a 50 cc solution)
#5	Pentobarbital (2.5 grams in a 50 cc solution)

4. Any person sentenced to death prior to July 1, 2007, may choose to be executed by the 3- or 1-Drug protocol set forth in this document, provided the SDDOC possesses the necessary substance or substances for the method chosen at the time scheduled for the inmate's execution, or in the manner provided by South Dakota law at the time of the person's conviction (2-Drug protocol set forth in this document). Any person sentenced to death prior to July 1, 2007, shall be executed using the 3- or 1-Drug protocol provided in this document using the substance or substances in the SDDOC's possession unless the inmate requests in writing to the Warden not less than seven (7) days prior to the scheduled execution date that the inmate wishes to be executed by the 2-Drug protocol set forth herein in accordance with South Dakota law as it existed prior to July 1, 2007.

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5. For any inmate sentenced to death after July 1, 2007, the Warden shall elect the method of execution from one of the foregoing 3-, 2-, or 1-Drug methods for which the SDDOC possesses the necessary substance or substances at the time scheduled for the inmate's execution. The Warden will give consideration to, and make the effort to accommodate, the inmate's method of preference, provided the inmate selects 3-, 2-, or 1-Drug methods for which the SDDOC possesses the necessary substance or substances at the time scheduled for the inmate's execution.

D. PREPARATION FOR EXECUTION

1. The SDDOC staff selected to participate in the execution shall drill at least weekly for six to eight weeks prior to the scheduled date of execution. The warden shall schedule additional drills the week of the scheduled execution.
2. Not less than seven (7) days prior to the execution week announced in the Warrant of Death Sentence and Execution, a physician or other medical professional qualified to assess venous access shall examine the inmate. A written report shall be prepared describing the inmate's physical condition and any medical condition of the inmate that may lead to potential problems establishing an IV site. This report, along with a copy of the lethal injection protocol, shall be provided to the executioner(s) for review and consideration no later than one day before the scheduled date of execution.
3. All substances will be mixed or prepared as necessary no more than 8 hours prior to the execution and shall thereafter be maintained in accordance with manufacturers' instructions in temperatures not in excess of 22°C/71.6°F, or such temperature specifically called for by the manufacturer, until ready for use. All substances will be mixed or prepared in bright, un-dimmed light.
4. To provide notification of any last minute stay or appeal, arrangements shall be made to provide direct telephone access between the Warden, the chemical room, the Governor's office, the Chief Justice of the South Dakota Supreme Court or designee, and the Attorney General's office. The Governor, the Chief Justice, and Attorney General or their designees shall be provided with phone numbers to the Warden's office, the chemical room, and multiple backup phone numbers (such as personal cell phone numbers of the Warden and Deputy Warden). In addition, the Warden and Deputy Warden shall be equipped with SDSP issued radios.
5. On the date of the scheduled execution, the prisoner shall be escorted to the execution chamber and strapped to the gurney by the Tie Down Team.
6. On the date of execution, the chemical room shall be kept clear of all persons except for the Executioners, the Warden, and any SDDOC staff selected by the Warden to assist with the execution of the sentence of death.
7. The Tie Down Team Leader shall verify that all restraints are secure and so advise the Warden, at which time the Tie Down Team shall move to the hallway and stand by.
8. The IV team shall enter the chamber and establish two independent IV lines to the inmate's veins. The IV team will establish IV lines only in peripheral veins located in the inmate's arms, hands, legs, or feet, preferably one in each arm. In the event the IV team cannot establish peripheral vein lines, the IV team will establish central vein lines by percutaneous methods, but only if the IV team member establishing the central vein line can demonstrate current training, credentialing, and proficiency in establishing IV lines in central veins by percutaneous methods. The IV team will establish and secure the IV lines in such a way as to leave them visible for monitoring.

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9. The gurney shall at all times be placed so that the inmate's head and face are visible to the Warden and to those in the chemical room. If the inmate desires, and if it will not interfere with the efficacy of the substance or substances being used for the execution, the inmate's head will be propped up by a firm, foam wedge-shaped cushion to better permit IV team members in the chemical room to see the inmate's face during the procedure.
10. Every effort will be extended to ensure that no unnecessary pain or suffering is inflicted on the inmate.
11. If the IV team cannot secure one (1) or more sites within one (1) hour, the Governor's Office shall be contacted by the Secretary and a request shall be made that the execution be scheduled for a later date during the week of the execution, as set forth in the Warrant of Death Sentence and Execution.
12. The IV team shall start a saline flow and a sufficient quantity of saline solution shall be injected to confirm that the IV lines have been properly inserted and are not obstructed. IV team members will continue to monitor IV functioning from within the chemical room.

E. INJECTION PROCEDURES—3 DRUG PROTOCOL

1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
4. Syringe #1
5. Syringe #2
6. Syringe #3
7. If it appears to the Warden that the prisoner is not unconscious within three (3) minutes after administration of the sodium thiopental or pentobarbital, the Warden shall order the flow of chemicals ceased into the primary site. The backup IV shall be used with a new flow of sodium thiopental or pentobarbital.
8. The Warden and IV team shall assess and monitor the inmate's lack of consciousness by using all steps in a graded consciousness check – a sequence of increasingly strong stimulations to assess consciousness – starting with checking for movement, eyelash reflex, response to verbal commands and culminating in a physical stimulation that would be painful if the inmate were awake. If possible, a currently certified EMT or other medical professional qualified in assessing consciousness, whose identity may, at the Warden's discretion, remain confidential, will be in the execution chamber with the Warden to assist the Warden in determining that the inmate is unconscious following the injection of the sodium thiopental or pentobarbital and prior to the administration of the pancuronium bromide and potassium chloride.

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9. The Warden and IV team shall continuously monitor the IV and infusion sites. If the Inmate appears unconscious three (3) minutes after the initial or backup flow of sodium thiopental or pentobarbital is complete, the executioner(s) shall commence the rapid flow of the remaining chemicals as follows.
 10. Syringe #4
 11. Syringe #5
 12. Syringe #6
 13. Syringe #7
 14. Ten (10) minutes after the third drug is administered, the person(s) responsible for pronouncing death shall examine the inmate in order to confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If the inmate's death is confirmed, the person(s) shall inform the Warden. If that person(s) is unable to confirm the inmate's death, the Warden shall order injection of the remaining backup syringes.
 15. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
 16. The microphone shall be turned off and the curtains/blinds shall be drawn.
 17. The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.
- F. INJECTION PROCEDURES—2 DRUG PROTOCOL
1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
 2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
 3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
 4. Syringe #1
 5. Syringe #2
 6. Syringe #3
 7. If it appears to the Warden that the prisoner is not unconscious within three (3) minutes after administration of the sodium thiopental or pentobarbital the Warden shall order the flow of chemicals ceased into the primary site. The backup IV shall be used with a new flow of sodium thiopental or pentobarbital.

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8. The Warden and IV team shall assess and monitor the inmate's lack of consciousness by using all steps in a graded consciousness check – a sequence of increasingly strong stimulations to assess consciousness – starting with checking for movement, eyelash reflex, response to verbal commands and culminating in a physical stimulation that would be painful if the inmate were awake. If possible, a currently certified EMT or other medical professional qualified in assessing consciousness, whose identity may, at the Warden's discretion, remain confidential, will be in the execution chamber with the Warden to assist the Warden in determining that the inmate is unconscious following the injection of the sodium thiopental or pentobarbital and prior to the administration of the pancuronium bromide and potassium chloride.
 9. The Warden and IV team shall continuously monitor the IV and infusion sites. If the inmate appears unconscious three (3) minutes after the initial or backup flow of sodium thiopental or pentobarbital is complete, the executioner(s) shall commence the rapid flow of the remaining chemicals as follows.
 10. Syringe #4
 11. Syringe #5
 12. Ten (10) minutes after the second drug is administered, the person(s) responsible for pronouncing death shall examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If that person(s) is not able to pronounce death, the Warden shall order injection of the remaining backup syringes.
 13. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
 14. The microphone shall be turned off and the curtains/blinds shall be drawn.
 15. The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.
- G. INJECTION PROCEDURES – 1 DRUG PROTOCOL (Sodium Thiopental)
1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
 2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
 3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
 4. Syringe #1
 5. Syringe #2
 6. Syringe #3
 7. Syringe #4
 8. Syringe #5

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9. Ten (10) minutes after the drug is administered, the person(s) responsible for pronouncing death shall examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If that person(s) is not able to pronounce death, the Warden shall order a second set of chemicals to be administered in the following order.
10. Syringe #6
11. Syringe #7
12. Syringe #8
13. Syringe #9
14. Ten (10) minutes after the second round of the drug is administered, the person(s) responsible for pronouncing death shall again examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils.
15. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
16. The microphone shall be turned off and the curtains/blinds shall be drawn.

The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.

H. INJECTION PROCEDURES – 1 DRUG PROTOCOL (Pentobarbital)

1. The Warden shall make a final check with those authorities cited in Section D(4) to ensure no last minute appeals or stays have been filed.
2. Upon completion of preparation for execution (D. above), the Warden or designee shall order that blinds in front of witness rooms be opened and that the microphone in front of the inmate's mouth be turned on. The Warden or designee shall ask the prisoner if he/she has any last words to say. Upon completion of the prisoner's last words, or in the discretion of the Warden, the Warden shall order that the execution proceed.
3. Upon the Warden's order to proceed, a designated team member will begin a rapid flow of lethal chemicals in the following order.
4. Syringe #1
5. Syringe #2
6. Syringe #3

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7. Ten (10) minutes after the drug is administered, the person(s) responsible for pronouncing death shall examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils. If that person(s) is not able to pronounce death, the Warden shall order a second set of chemicals to be administered in the following order.
8. Syringe #4
9. Syringe #5
10. Ten (10) minutes after the second round of the drug is administered, the person(s) responsible for pronouncing death shall again examine the inmate. The person(s) responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse and pupils.
11. Once the person(s) responsible for pronouncing death has confirmed the inmate's death, the Warden shall announce "At approximately _____ a.m./p.m. the execution of [inmate's name] was carried out in accordance with the laws of the State of South Dakota" or a similar statement to that effect.
12. The microphone shall be turned off and the curtains/blinds shall be drawn.

The witnesses shall be escorted out of the witness rooms and shall sign the Certificate of Execution as required by South Dakota law.

Douglas L. Weber

Douglas L. Weber, Chief Warden and Director of Prison Operations

October 13, 2011

Date

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1.3.D.3 Execution of an Inmate

I Policy Index:



Date Signed: 10/19/2011
Distribution: Public
Replaces Policy: N/A
Supersedes Policy Dated: 03/22/2011
Affected Units: Adult Institutions
Effective Date: 10/19/2011
Scheduled Revision Date: July 2012
Revision Number: 7
Office of Primary Responsibility: DOC Administration

II Policy:

The Department of Corrections (DOC) will carry out the execution of an inmate in accordance with SDCL Chapter § 23A-27A. The execution will be conducted in a professional, humane and dignified manner.

III Definitions:

Lethal Injection:

The intravenous injection (IV) of a substance or substances in a lethal quantity (See SDCL § 23A-27A-32).

Witnesses:

People authorized to attend an execution as referenced in SDCL §§ 23A-27A-34 and 23A-27A-34.2.

IV Procedures:

1. General Provisions:

A. Inmate executions are carried out by means of lethal injection. (See SDCL § 23A-27A-32)

1. At no time will any medical professional(s) employed at a South Dakota Department of Corrections facility participate in the execution process.
2. Lethal injection is not the practice of medicine in South Dakota (See SDCL § 23A-27A-32).
3. The inmate who is to be executed will be connected to two (2) IV lines, normally one (1) in each arm. One (1) IV line will be the primary line for the lethal injection and the other IV line is designated as a backup.
4. The lethal injection process involves the administration of drugs s, each in a lethal quantity, pursuant to a 3-Drug, 2-Drug, or 1-Drug protocol, depending on the date of the inmate's conviction and the availability of the necessary drugs:
 - a. 3-Drug Protocol

- i. The first drug, Sodium Pentothal (aka Sodium Thiopental) or Pentobarbital, is administered in a quantity sufficient to ensure the inmate is not subjected to the unnecessary and wanton infliction of pain.
 - ii. The second drug, Pancuronium Bromide, stops the inmate's breathing.
 - iii. The third drug, Potassium Chloride, stops the inmate's heart.
 - b. 2-Drug Protocol
 - i. The first drug, Sodium Pentothal (aka Sodium Thiopental) or Pentobarbital, is administered in a quantity sufficient to ensure the inmate is not subjected to the unnecessary and wanton infliction of pain.
 - ii. The second drug, Pancuronium Bromide, stops the inmate's breathing.
 - c. 1-Drug Protocol - Sodium Pentothal (aka Sodium Thiopental) or Pentobarbital is administered in a lethal quantity sufficient to ensure the inmate is executed without the unnecessary and wanton infliction of pain.
5. Any person convicted of a capital offense or sentenced to death prior to July 1, 2007 may choose to be executed in the manner provided in this policy or in the manner provided by South Dakota law at the time of the person's conviction or sentence (SDCL § 23A-27A-32.1).
 - a. The inmate will indicate their choice in writing to the Warden not less than seven (7) days prior to the scheduled week of execution.
 - b. If the inmate fails or refuses to choose in the time provided, then the inmate will be executed as provided by state law at the time of the execution (See SDCL § 23A-27A-32.1).
- B. The execution is conducted under the direction of the SDSP Warden.
 1. The Warden will select qualified staff to participate in the execution.
 2. The Warden will identify one (1) or more individuals trained to administer intravenous injections to carry out the lethal injection.
 - a. The Warden will present information regarding the individual(s) qualifications to the Secretary of Corrections for final approval (See SDCL § 23A-27A-32).
 - b. The individual(s) qualifications must demonstrate adequate training to competently carry out each technical step of the lethal injection (See *Baze v. Rees*, 553 U.S. 35 (2008) and *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir. 2007).
 - c. The name, address, or other identifying information relating to the identity of any person or entity supplying drugs for use in intravenous injections under SDCL § 23A-27A is confidential and disclosure of such information may not be authorized except pursuant to the terms of a court order.
 - d. The name, address, qualifications and other identifying information relating to the identity of any person administering the intravenous injections under SDCL § 23A-27A is confidential and disclosure of such information may not be authorized or ordered. Disclosure of this information is a Class 2 Misdemeanor (See, SDCL § 23A-27A-31.2).

- C. Male inmates sentenced to death will be housed in the SDSP or the Jameson Prison Annex. Female inmates sentenced to death will be housed at the South Dakota Women's Prison (See DOC policy 1.3.D.2 - *Capital Punishment Housing*).
1. Inmates sentenced to death are segregated from other inmates and single celled (See SDCL § 23A-27A-31.1).
 2. Physical access to an inmate sentenced to death is limited to family, attorney(s), clergy, DOC staff, other state or contractual staff stationed at the respective prison, people authorized by the respective Warden or any other person authorized to access the inmate through a court order (See SDCL § 23A-27A-31.1).
- D. The Governor may investigate the circumstances of the case of the inmate sentenced to death in a manner he deems appropriate and may require the assistance of the Attorney General (See SDCL § 23A-27A-19). The Governor has the power to reprieve or suspend the execution for up to ninety (90) days to complete his investigation (See SDCL § 23A-27A-20).
- E. If there is a question on an inmate's mental competence to proceed with the execution, the Warden will notify the Governor, Secretary of Corrections and the sentencing court. If the sentencing court determines that there is a substantial threshold showing of incompetence to be executed, the sentencing court will conduct hearings and order mental examinations. (See SDCL § 23A-27A-22, through § 23A-27A-26). As long as an inmate is considered incompetent, that inmate may not be executed (See SDCL §§ 23A-27A-24 and 23A-27A-26).
- F. The death penalty cannot be imposed on a person who was mentally retarded at the time of the commission of the offense and whose condition was manifested and documented before the age of eighteen (18) (See SDCL §§ 23A-27A-26.1 through 23A-27A-26.7).
- G. A pregnant women may not be executed (See SDCL §§ 23A-27A-27 through 23A-27A-29).
- H. The death penalty cannot be imposed on a person who committed an act punishable by death while under eighteen (18) years of age (See SDCL § 23A-27A-42).
- I. Inmate appeals regarding the death penalty are outside the responsibility of the DOC. Inquiries on the status of any inmate appeal(s) should be directed to the Office of the Attorney General or the defense attorney(s).

2. Warrant of Execution:

- A. The sentencing judge (or successor in office) will have a signed and certified Warrant of Death Sentence and Execution provided to the Warden of the state penitentiary (See SDCL §§ 23A-27A-15 and 23A-27A-16).
- B. The Warrant of Death Sentence and Execution will set the week within which the inmate is to be executed (See SDCL § 23A-27A-15).
- C. The Warden of the state penitentiary may carry out the execution at any time within the week stated in the Warrant of Death Sentence and Execution. (See, SDCL §§ 23A-27A-15 and 23A-27A-16).

3. Time and Place of Execution:

- A. All executions will take place at the SDSP (See SDCL § 23A-27A-32).

- B. The day and hour set by the Warden of the state penitentiary for the execution will be kept secret and only divulged to those invited or requested to be present at the execution (See SDCL § 23A-27A-37).
- C. No person will divulge the day and hour set for the execution prior to the Warden's public announcement (See SDCL § 23A-27A-37).
- D. The Warden of the state penitentiary will publicly announce the day and hour of the execution not less than forty-eight (48) hours in advance (See SDCL § 23A-27A-17).

4. Selection of Witnesses:

- A. No person under the age of eighteen (18) will be allowed to witness an execution (See SDCL § 23A-27A-36).
- B. Only persons authorized by the Warden of the state penitentiary, and witnesses authorized by SDCL §§ 23A-27A-32, 23A-27A-34, 23A-27A-34.1, 23A-27A-34.2 and 23A-27A-36 are allowed to attend the execution.
 - 1. The following witnesses are required to be invited to witness the execution by state law (See SDCL § 23A-27A-34):
 - a. The Attorney General of South Dakota.
 - b. The trial judge before whom the conviction occurred or his/her successor in office.
 - c. The State's Attorney of the county where the crime was committed.
 - d. The Sheriff of the county where the crime was committed.
- C. The Warden of the state penitentiary will select a number of reputable adult citizens to witness the execution and two (2) members of the media (See section on Media Relations).
 - 1. Space and seating for witnesses is limited by the size of the rooms, the viewing windows and concerns for the safety and security of the witnesses.
 - 2. Preference will be given to accommodating as many representatives of the victim as possible given the space constraints and the requirements in state law that other persons also serve as witnesses.
- D. There are no specific statutory requirements for how the Warden of the state penitentiary selects which representatives of the victim(s) may witness the execution.
 - 1. The victim's family or families may suggest the names of individuals who should attend.
 - 2. In the event the victim's family or families cannot or will not prioritize their list of individuals, the Warden of the state penitentiary will make the choice in the following manner:
 - a. Close relatives of victim(s) are given preference to witness the execution. A "close relative" is determined in the following order of preference:
 - 1). Spouse.
 - 2). Parent(s) or stepparent(s).
 - 3). Adult children, including stepchildren.
 - 4). Brother(s) or sister(s).
 - 5). Other family members (grandparents, aunts, uncles, nieces, nephews, cousins, etc.).
 - b. Friends of the victim (if there are less than five close relatives of a victim attending).

- E. The Warden of the state penitentiary has final approval of all witnesses not specifically required by law to be invited.
- F. All witnesses other than the Attorney General, trial judge, States Attorney and Sheriff are subject to the same background check as a regular visitor, unless exempted by the Warden of the state penitentiary.
- G. The inmate is allowed to request the attendance of up to five (5) persons to serve as witnesses. These persons may include but are not limited to legal counsel, members of the clergy, relatives or friends (See SDCL § 23A-27A-34.2). All the requested witnesses shall be on the inmate's visit list and at least eighteen (18) years of age (See DOC policy 1.5.D.1 *Inmate Visiting*).

5. Witness Behavior:

- A. Because the execution will take place inside a facility where many other inmates and staff will be present or in close proximity, all witnesses are expected to follow the rules and procedures of SDSP and the orders of escorting staff for the safety and security of all involved.
 - 1. Failure to comply with the rules and procedures of SDSP or the orders of escorting staff may result in denial of entry or removal of the witness from the facility.
 - 2. Witnesses are expected to follow the dress code for visitation. The witnesses will be provided this specific information in advance of the execution (See DOC policy 1.5.D.1 *Inmate Visiting*).
 - 3. Witnesses are subject to search by both a stationary and hand-held metal detector, and pat searches at any time (See DOC policy 1.3.A.5 *Searches - Adult Institutions*).
 - a. Witnesses may be searched more than one (1) time prior to the execution.
 - b. To the extent possible, pat searches will be conducted by a staff member of the same sex as the witness.
 - 4. Most personal property items are not allowed inside the SDSP.
 - a. For example, purses, cameras, pictures, pocketknives, pagers, watches, cell phones, signs, recording devices, other electronic equipment, etc. are not permitted. These items should be left in the vehicle or lockers that are available for storage of personal property in the SDSP lobby (See DOC policy 1.3.A.10 - *Restrictions on Electronic Equipment*).
 - b. No drugs, alcohol, tobacco products or firearms are allowed inside SDSP. Anyone suspected of being under the influence of drugs or alcohol will be denied entry or removed from the facility.
- B. All witnesses are cautioned to refrain from verbal outbursts or inappropriate action while inside the SDSP.
- C. No cameras or recording devices of any type are allowed inside the SDSP, the witness area or the area surrounding the execution chamber.

6. Media Relations:

- A. Requests for execution information (other than appeal issues) or interviews from media representatives are to be made either to the DOC Communications and Information Manager or to the respective Warden (See DOC policy 1.1.A.4 *Relationship with News Media, Public and Other Agencies*).

1. The Warden (or designee) can discuss procedures under the control of SDSP that affect an execution. Examples of procedures which may be discussed:
 - a. The timelines of the execution, from issuance of the warrant of execution to the certificate of execution, return of the deceased inmate's body and the burial.
 - b. The various steps that go along with the execution; i.e. sequence of events, last meal, last words, etc.
 - c. Witness information (See sections on Selection of Witnesses and Witness Behavior).
 - d. A description of the regular visit procedures inside the security perimeter.
2. Questions on the process of the Governor to investigate the circumstances of the case will be directed to the Governor's Office or to the Attorney General's Office.
- B. The decision to grant tours of the execution chamber is at the total discretion of the Warden of the state penitentiary.
- C. The decision to grant photo/video of the execution chamber is subject to the approval of the Secretary of DOC.
- D. The two (2) media witnesses who will attend the execution will be selected as follows:
 1. The first media representative will be selected from the Associated Press.
 2. The second media representative will be selected from a media outlet located in the proximity of where the crime took place.
- E. No cameras or recording devices of any type are allowed in the witness area or the surrounding area of the execution chamber.
 1. Each media witness attending the execution may have writing material in the waiting area but must leave those materials behind when moved to the witness area.
 2. Each media witness attending the execution will be given paper and a pencil once he/she arrives in the witness area.

7. Final Visit Arrangements:

- A. Reasonable accommodations for visits by immediate family will be made after the inmate has been moved to a holding cell near the execution chamber.
 1. Visits are allowed between 8:00 AM and 8:00 PM, except for the day of the execution (See Item "E" in this section).
 2. All personal visits will be Class II (non-contact) (See DOC policy 1.5.D.1 *Inmate Visiting*).
 3. Telephone calls may be substituted for personal visits.
- B. Visits will be supervised by DOC staff and must be arranged in advance through the Warden or Deputy Warden.
 1. Visitors are subject to search by both a stationary and hand-held metal detector, and pat searches at any time (See DOC policy 1.3.A.5 *Searches - Adult Institutions*).
 2. Visitors must abide by the rules and regulations of the SDSP and the DOC.

3. Failure to abide by the rules and regulations of the SDSP and the DOC may result in termination of a current visit and denial of future visits.
- C. Visitors will be escorted and supervised at all times.
- D. The following members of the inmate's immediate family are allowed Class II visits with the inmate: father, mother, stepfather, stepmother, brother(s), sister(s), stepbrother(s), stepsister(s), biological children and spouse.
- E. Visits with immediate family will cease at least six (6) hours prior to the scheduled time of execution.
- F. Attorney access will be accommodated as much as possible.
 1. Attorneys are subject to all the visit arrangements/restrictions listed in this section .
 2. Any documents that need to be shared with the inmate will be passed to SDSP staff, inspected for contraband and if approved, the documents will be given to the inmate.
 3. Attorney(s) must leave the holding cell area at least one (1) hour before the scheduled execution time.
- G. Clergy will be allowed additional visits with the inmate until one (1) hour before the scheduled execution time.

8. The Execution:

- A. An execution involves strict security procedures that are intended to protect the witnesses, staff, other inmates and the public at large. These security procedures are confidential and will not be discussed.
- B. The Governor, Attorney General and Chief Justice of the State Supreme Court or their designees will be provided with the telephone numbers of the Warden's Office, the chemical room and multiple backup telephone numbers including personal cell phone numbers of the Warden and Deputy Warden for the purpose of emergency or last minute notification. The Warden and Deputy Warden will also be equipped with SDSP-issue radios.
- C. After confirming with the Governor's Office, the Attorney General and the Chief Justice of the State Supreme Court that no last minute appeals have been initiated and that no stays have been ordered, the inmate will be moved to the execution chamber and secured to the table.
- D. Two (2) intravenous injection (IV) sites will be prepared and inserted, normally one (1) in each of the inmate's arms.
- E. A bag of sterile saline solution will be connected to each IV site. Each IV will be checked and verified as running properly before witnesses are escorted into the viewing rooms.
- F. The witnesses will be brought into the respective witness rooms one (1) group at a time.
- G. The curtains outside the witness rooms will remain closed until the Warden is satisfied, everything is ready and orders them opened.
- H. The Warden will give the inmate an opportunity to make a final statement. A transcript will be made of the inmate's statement and the transcript will be made public.
- I. For 3-Drug or 2-Drug protocol executions, the Sodium Pentothal or Pentobarbital will be administered and allowed to take effect prior to administering the subsequent drugs.

- J. After the lethal injections have been administered, the Warden will wait a brief period before summoning a person capable of examining the inmate for the presence of respirations and heartbeat and if appropriate to pronounce death, including the time of death.
 - 1. If the county coroner is on the premises, the Warden will ask the county coroner to certify death, including the time of death and then take charge of the body.
 - 2. If the county coroner is not on the premises, the Warden will direct the inmate's body to be taken to a nearby morgue, where the county coroner will be summoned to examine it and certify death.
- K. After death has been pronounced, the curtains of the witness rooms will be closed and the witness groups will be escorted away from the area separately.

9. Post-Execution Procedures:

- A. The certificate of execution and return will be prepared and signed by the Warden and the certificate of execution will also be signed by all witnesses present and witnessing the execution (See SDCL §§ 23A-27A-34, 23A-27A-34.2 and 23A-27A-40.1).
- B. The Warden will ensure the county coroner is permitted to investigate the death pursuant to SDCL §§ 23-14-18(3) and 24-1-27
 - 1. If the county coroner is on the premises, the body of the executed inmate will not be removed from the execution chamber until after the county coroner has certified the death of the inmate.
- C. After the county coroner has completed the investigation, the body of the executed inmate (unless claimed by some relative), will be interred in a cemetery within Minnehaha County (Also see SDCL § 23A-27A-39 and DOC policy 1.4.E.6 - *Management of Offender Deaths*).
- D. After the execution has been completed, the DOC Communication and Information Manager will announce the fact in a press briefing that will be conducted elsewhere on the SDSP grounds.
- E. Media representatives present at the execution are required to attend the post-execution press conference to share information about the execution with other media.
- F. Within ten (10) days following the execution, the certificate of execution and return will be filed with the Clerk of Courts of the county where the offense occurred. (See SDCL § 23A-27A-40.1)

V Related Directives:

- SDCL chapter 23-14, chapter 23A-27A and 24-1-27
- Baze v. Rees, 553 U.S. 35 (2008)
- Taylor v. Crawford, 487 F. 3d 1072 (8th Cir. 2007)
- DOC policy 1.1.A.4 *Relationship with News Media, Public and Other Agencies*
- DOC policy 1.3.A.5 -- *Searches - Adult Institutions*
- DOC policy 1.3.A.10 -- *Restrictions on Electronic Equipment*
- DOC policy 1.3.D.2 -- *Capital Punishment Housing*
- DOC policy 1.5.D.1 -- *Inmate Visiting*
- DOC policy 1.4.E.6 -- *Management of Offender Deaths*

VI Revision Log:

August 2006: New policy.

June 2007: Revised the policy statement. Revised the definition of lethal injection. Removed medical doctors as witnesses required to be invited to the execution. Deleted references and

procedures related to SDCL § 23A-27A-38. **Revised** the post-execution procedures. **Moved** some information from the section on Media Relations and placed it in a new section titled The Execution. **Added** a reference to DOC policy 1.3.A.10. **Added** language about death penalty appeals. **Added** a statement regarding security measures. **Added** the circumstances in which an inmate may choose the current lethal injection procedures or revert back to existing law at the time of conviction or sentence. **Clarified** which individuals the victim's family may request as witnesses. **Added** a statement on the trained individuals' experience and qualifications. **Added** more specific procedures on administering the lethal dosages. **Added** a reference to *Taylor v. Crawford*.

August 2007: **Changed** "medical procedure" to "technical procedure" to avoid any possibility of confusion regarding an execution being considered the practice of medicine. **Updated** the procedures involving the county coroner in the section on The Execution.

June 2008: **Revised** formatting of policy in accordance with 1.1.A.2. **Changed** policy because of recent law changes to the capital punishment chapter, SDCL 23A-27A by the SD Legislature, 2008, SB 53 and the United States Supreme Court in *Baze v. Rees*, 553US 35, (2008). **Revised** definition of Lethal Injection. **Changed** "through" to "and" and "36" to "34-2" in definition of Witnesses. **Deleted** reference to DOH policy in subsection (ss) (A1), **revised** wording in ss (A2), **added** "each in a lethal quantity" in ss (A4), **deleted** comment about remaining unconscious in ss (A4a), **replaced** "person" with "inmate" in ss (5A and B), **added** comment about state statute and statute 32-1 in ss (5B), **replaced** "at least two (2)" to "one (1) or more" in ss (B2), **revised** section reading properly trained to read adequately trained and referenced court cases in ss (B2b), **clarified** on the information that is to remain confidential for those assisting with administering the intravenous injection in ss (b2c), **revised** wording of how inmates are housed and **replaced** statute 16 with 31.1 in ss (C1), **replaced** statute 16 with 31.1 in ss (C2), **added** that the Secretary of DOC and sentencing court will be notified regarding any question regarding an inmate's mental competence and **replaced** statement regarding a commission may be appointed with language from statute 22 through 26, and **replaced** statutes in ss (E) and **deleted** "/exaction" and "and/" in ss (I), of General Provisions section. **Revised** statement regarding sentencing judge in ss (A), **replaced** "delivered" with "provided in ss (A), **added** "Death Sentence and" to "Execution" regarding the certified Warrant in ss (A, B and C) and **added** statute 16 in ss (A and C) of Warrant of Execution section. **Replaced** "the witnesses" with "those" in ss (B), **revised** ss (C) to state no person will divulge within Time and Place of Execution section. **Added** statute 36 in ss (A), **replaced** "DOC staff, law enforcement officers" with "persons", **added** statute 32, 24-2, 36 and **replaced** 35 with 34.1 in ss (B), **deleted** former ss (B2), **replaced** "no more than ten (10)" with "a number of" in ss (C), **deleted** ss (C1), **moved** ss (C2) to above ss (C), **added** new ss (C1 and C2), **revised** wording regarding selection of witnesses in ss (D, D1, D2 and D2a), **deleted** former ss (D2c) regarding multiple victims, **deleted** "(Attorney General, trial judge, states attorney and sheriff)" in ss (E) and **added** ss (G) in Selection of Witnesses section. **Clarified** that no cameras or recording devices are allowed inside SDSP or area surrounding the execution chamber in ss (C) of Witness Behavior section. **Revised** wording in ss (A), **deleted** statement regarding photo requests of the execution chamber in ss (B) and **added** a new ss (C) regarding requests to take photos of the execution chamber, of the Media Relations section. **Deleted** statement regarding pursuant to SDCL 23A-27A-35 in ss (G) of Final Visit Arrangements section. **Revised** ss (D) to include two intravenous injection (IV) sites will be prepared and inserted, **added** "site" when referencing IV in ss (E), **added** "the transcript" in ss (H), **deleted** "to render the inmate unconscious" in ss (I), **replaced** "EMT" with "a person capable of examining" and **added** "for the presence of respirations and heartbeat and if appropriate" to ss (J), **deleted** statement about county coroner examining the inmate and **added** statement about taking charge of the body in ss (J2) and **deleted** statement regarding EMT and county coroner and **added** statement about death being pronounced ss (K) of The Execution section. **Replaced** "persons" with "witnesses", **deleted** statute 40, **added** statutes 34, 34.2, 40.1 in ss (A), **added** statute 24-1-27 in ss (B), **replaced** "declared" with "certified" in ss (B1) **added** statute 40.1 in ss (F) and **revised** bullets to read accordingly within the Post-Execution Procedures section. **Added** *Baze v. Rees*, 553 US 35, (2008), *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir., 2007) and DOC policy when referencing policies throughout policy. **Revised** other grammatical, spacing and sentence structure throughout policy.

July 2009: Added site code to Baze v Rees throughout policy. Added hyperlinks throughout policy. Deleted SDCL 23A-27A-30 in ss (G of General Provisions).

July 2010: Revised formatting of Section 1. Replaced SDSP with SD DOC in ss (A1 of General Provisions).

September 2011: Reviewed with no changes.

October 2011: Deleted "a" in IV.1.A. Added 3-Drug, 2-Drug, and 1-Drug protocol descriptions in Part IV.1.A.4. Added IV.1.B.1.c. Moved former IV.1.B.2.c. to IV.1.B.2.d. Updated Baze cites to published U.S. citation throughout. Deleted "Pancuronium Bromide and Potassium Chloride" from IV.8.I and added "For 3-Drug or 2-Drug protocol executions" and "subsequent drugs." Deleted "dosages of Sodium Pentathol, Pancuronium Bromide and Potassium Chloride" from IV.8.J. and added "injections."



Denny Kaemingk

Denny Kaemingk, Secretary of Corrections

10/19/2011

Date

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

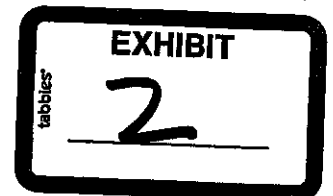
SEVENTH JUDICIAL CIRCUIT

CHARLES RUSSELL RHINES,)
Petitioner,)
v.)
DOUGLAS WEBER, Warden,)
South Dakota State)
Penitentiary,)
Respondent)

Civ. 02-924
FIRST AMENDED
PETITION FOR WRIT
OF HABEAS CORPUS AND
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Charles R. Rhines, for his First Amended Petition for Writ of Habeas Corpus and
Complaint for Declaratory and Injunctive Relief states and alleges as follows:

- 1. Petitioner is currently in prison in the South Dakota Department of Corrections at
Sioux Falls, SD. Petitioner is under a Judgment of Conviction entered in Circuit Court, Seventh
Judicial Circuit, Pennington County, South Dakota. The Judgment of Conviction and Sentence
of Death was entered on January 29, 1993. A copy of the Judgment was attached to Rhines'
First Application for Writ of Habeas Corpus.
- 2. Charles R. Rhines appealed to the South Dakota Supreme Court, which affirmed his
Conviction and Sentence of Death.
- 3. Charles R. Rhines filed a Petition for Writ of Certiorari, but the United States
Supreme Court denied further review on December 2, 1996.
- 4. Charles R. Rhines applied for Writ of Habeas Corpus in State Court on December 5,



1996.

5. Charles R. Rhines' Habeas Petition was denied by the Trial Court on October 8, 1998.

6. A Certificate of Probable Cause was granted, and the matter was appealed to the South Dakota Supreme Court.

7. The South Dakota Supreme Court affirmed the denial of the Petition for Writ of Habeas Corpus on February 9, 2000.

8. On February 22, 2000, Charles R. Rhines filed a Petition for Writ of Habeas Corpus in Federal District Court, District of South Dakota pursuant to 28 U.S.C. § 2254.

9. An Amended Petition for Writ of Habeas Corpus was filed on behalf of Charles R. Rhines on November 20, 2000.

10. The Respondent, Douglas Weber, alleged that several of the grounds raised by Charles R. Rhines in his Amended Petition for Writ of Habeas Corpus had not been exhausted and were, therefore, procedurally defaulted.

11. On July 3, 2002, the United States District Court, District of South Dakota, Western Division, found that Charles R. Rhines' grounds for relief numbers two (B), six (E), nine (B), (H), (I), and (J), twelve and thirteen were unexhausted.

12. The United States District Court for the District of South Dakota, Western Division, stayed the Petition pending exhaustion of Charles R. Rhines' State Court remedies on the condition that Rhines file a Petition for Habeas review in State Court within sixty (60) days and return to Federal Court within sixty (60) days of completing the State proceedings.

13. Respondent, Douglas Weber, appealed to the Eighth Circuit.

14. On direct appeal, the Eighth Circuit Court of Appeals vacated the stay and remanded the case to the United States District Court, District of South Dakota, Western Division, so that the District Court could determine whether Charles R. Rhines could proceed by dismissing the unexhausted claims from his Petition.

15. Charles R. Rhines filed a Petition for Writ of Certiorari with the United States Supreme Court to determine whether a District Court may issue an Order of Stay and Abeyance in a mixed petition for a Habeas Corpus Petition.

16. The United States Supreme Court held that the stay and abeyance procedure in a mixed petition for Petition for Writ of Habeas Corpus is permissible under certain circumstances. The case was remanded to the Eighth Court of Appeals so that it could determine whether the District Court abused its discretion in granting the stay and abeyance.

17. Because the District Court did not have the benefit of the controlling Supreme Court authority when it issued the Order of Stay and Abeyance in 2002, the Eighth Circuit Court of Appeals remanded the case to the District Court to analyze the Petition for Writ of Habeas Corpus under the tests enunciated in the United States Supreme Court case of Rhines v. Weber, 125 S. Ct. 1528, 161 LED 2nd 440, (2002).

18. Charles R. Rhines filed his initial Application for Writ of Habeas Corpus in the Circuit Court of South Dakota, Seventh Judicial Circuit, County of Pennington, on August 22, 2002.

19. On December 19, 2005, the United States District Court, the District of South Dakota, Western Division, entered its Order that the Petition for Habeas Corpus filed with the District Court was stayed pending exhaustion of various issues in State Court, conditioned upon the petition of returning to the District Court within thirty days of completing said exhaustion.

20. The officer by whom Charles R. Rhines is so imprisoned and so restrained is Douglas Weber, Warden of the South Dakota State Penitentiary.

GROUND ONE

21. The rights of Charles R. Rhines to due process, an impartial jury, and equal protection of the law were violated by exclusion for cause of the prospective juror Jack Meyer.

GROUND TWO

22. Charles R. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota Capital Punishment Statutes in that the South Dakota Death Penalty Statutes in SDCL 23A-27A-1, mandate that the court "shall consider, or shall include in instructions to the jury" death penalty provisions "in all cases in for which the death penalty may be authorized," which is all Class A felonies under SDCL 22-6-1.

GROUND THREE

23. Charles R. Rhines' Fifth Amendment rights under the United States Constitution, and his corresponding rights under the South Dakota Constitution, including, but not limited to Article XI, Sections 7, 9, and 10, to due process of law, and the Sixth Amendment rights under the United States Constitution, and his corresponding rights under the South Dakota Constitution, including, but not limited to Article VI, Section 6 and 7, to assistance of counsel were violated through the ineffective assistance of his trial counsel. The ineffective assistance of trial counsel prejudiced Charles R. Rhines, and manifested itself in multiple ways including:

- a. The tepid presentation of evidence during the penalty phrase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses – including, but

not limited to John Fouske, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase;

b. The failure to catch and correct onerous and false, highly prejudicial, testimony of Glen Wishard.

c. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert. — *missed only find — re: aggravating factors mitigation expert would not be able to mitigate element of killing a witness or victim for monetary gain.*

d. The failure of trial counsel to register objections to keep out irrelevant prejudicial testimony such as Rhines having access to a gun, a statement by Rhines at the victim's funeral.

GROUND FOUR

in violation of due process

24. The due process and equal protection rights of Charles R. Rhines under both the United States Constitution and the South Dakota Constitution were violated by various acts of prosecutorial misconduct. The prosecutor committed prosecutorial misconduct in, among other things, ^①maintaining that the victim's hands were tied prior to the fatal wound, when the evidence was to the effect that they were tied afterwards; ^②in referring to the victim being "guttled" in the assault when there was no such evidence; ^③using and arguing from false and erroneous testimony from witness Glen Wishard; ^④and using the improper tactic of eliminating all jurors with any misgivings about imposition of the death penalty.

GROUND FIVE

in violation of due process

25. Charles R. Rhines was deprived his rights to due process of law, equal protection of the laws and the doctrine of separation of powers as provided by the state and federal constitutions in that the judgment and sentence of death resulted from a failure to follow the

what felony is

procedure outlined in SDCL Ch. 23A – 27A. These violations are based on the following

reasons: *... unmentioned being included in*

a. Charles R. Rhines contends that the State's attorney has only the discretion to charge a Class A Felony, but that once such decision is made the punishment for any such offense lies solely within the province of the judicial branch.

what punishment same if they were violated

b. SDCL Chapter 23A-27A has been applied unconstitutionally throughout the state in a manner so as to allow a state's attorney to charge under Ch. 23A – 27A, but

what punishment violation of

also to allow the state's attorney the unfettered discretion, with no guidelines, whether to seek the death penalty.

discret

c. Other persons who have been charged with Class A felonies have been

it allowed to enter into plea bargains in which state's attorneys have made promises of life imprisonment in return for a guilty plea to the Class A felony.

but how come it violated because in law you'd find a way that violates statute but does not claim by how

d. Under SDCL Ch 23A–27A, as interpreted, the jury may choose not to impose a death penalty even if aggravating circumstances are found for any reason or without any reason. Because of the discretion given to the jury under South Dakota's statutory scheme, selecting a jury that is "death qualified" skews the composition of the jury pool and eliminates from it those persons who are able to follow the circuit court's instructions but would nonetheless choose not to impose the death penalty.

major

e. Because the punishment that may be imposed for a Class A felony lies solely

the province

legislative within the province of the judicial branch, the proper pool for proportionality analysis consists of all persons who entered guilty pleas or who were convicted of Class A felonies, regardless of whether the death penalty was imposed.

violate I

GROUND SIX

26. The South Dakota Supreme Court conducted its statutorily mandated proportionality review based only upon those cases in which a death penalty was imposed instead of all cases in which a death penalty might be imposed in violation of the terms of SDCL Ch 23A-27A, and deprived Charles R. Rhines of his rights to due process of law as provided by the state and federal constitutions.

GROUND SEVEN

27. The process by which Charles R. Rhines was charged, convicted and sentenced to death deprived him of his right to due process under the federal and state constitutions in that:

a. The death penalty under Chapter 23A-27A is a sentencing enhancement in all cases for which the death penalty may be authorized.

b. The due process clause of the Fifth Amendment and the notice and jury guarantee of the Sixth Amendment of the United States Constitution and the corresponding sections of the South Dakota Constitution require that any fact that increases the maximum penalty for a crime must be charged in an indictment, or, in the case of state actions, in an indictment or information.

c. The federal constitutional rights apply to Charles R. Rhines under the Fourteenth Amendment.

d. The aggravating circumstances under which Charles R. Rhines sentence of death was based were not alleged in the indictment or in any information.

GROUND EIGHT

28. The manner of execution as provided by SDCL 23A-27A-32 as in effect at the time of Charles R. Rhines conviction violates his rights to due process law and constitutes cruel and

unusual punishment under the Eighth Amendment of the United States Constitution and the corresponding Article under the South Dakota Constitution:

a. Executions are constitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

b. Where pain is inflicted in an execution results from something more than the mere extinguishment of life, the United States Constitution Eighth Amendment and the corresponding South Dakota articles prohibition against cruel and unusual punishment are implicated.

c. Given the two chemicals specified in SDCL 23A-27A-32 in effect at the time of Charles R. Rhines' conviction and the absence of a person trained to administer and monitor anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution in violation of the Eighth Amendment and the corresponding South Dakota Amendment.

d. An execution pursuant to SDCL 23A-27A-23 as codified on the date of Charles R. Rhines' conviction violates the United States Constitution and the South Dakota Constitution prohibition against cruel and unusual punishment and is therefore unconstitutional.

GROUND NINE

29. That Charles R. Rhines' rights to due process of law and his rights to assistance of counsel under the United States Constitution and the South Dakota Constitution were further violated through the ineffective assistance of his trial counsel in that they failed to allege and argue as part of the direct appeal to the South Dakota Supreme Court the issues raised in grounds 1 through 8, inclusive, of this Petition, thereby prejudicing the Petitioner.

GROUND TEN

30. Charles R. Rhines' right to due process of law and his right to assistance of counsel guaranteed under the United States Constitution and the South Dakota Constitution were violated through the ineffective assistance of his habeas corpus counsel, in that counsel failed to raise the issues set forth in grounds 1 through 9, inclusive, of this Petition, in the Petition for Writ of Habeas Corpus initially filed, and the subsequent appeal to the South Dakota Supreme Court.

GROUND ELEVEN

31. The execution of Charles R. Rhines by lethal injection, as set forth in the present SDCL 23A-27A-32 violates Rhines' rights to due process under law and his rights against cruel and unusual punishment guaranteed under the United States Constitution and the South Dakota Constitution.

- a. SDCL 23A-27A-32 was amended by the South Dakota Legislature during the 2007 legislature session.
- b. On information and belief, the South Dakota Legislature rejected proposed amendments requiring executions be carried out in the most humane manner possible.
- c. SDCL 23A-27A-32 removes the requirement of a physician participation in the execution process.
- d. Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.
- e. Where pain is inflicted in an execution results from something more than the mere extinguishment of life, the constitutions of the United States and South Dakota. South Dakota Articles prohibition against cruel and unusual punishment are implicated.

32. Upon information and belief, the protocol presently in effect for lethal injection execution uses a three drug cocktail.

33. With the three drug cocktail presently believed to be used in executions, in the absence of a person trained to administer and monitor an anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution in violation of the Constitutions of the United States and South Dakota.

34. An execution pursuant to the present SDCL 23A-27A-32 violates the United States Constitution and the South Dakota Constitution's prohibition against cruel and unusual punishment and it is therefore unconstitutional.

GROUND TWELVE

35. Charles R. Rhines' right to due process of law against cruel and unusual punishment is guaranteed under the United States Constitution and the South Dakota Constitution is violated by the statutory procedure set forth in 23A-27A-32.

a. SDCL 23A-27A-32 was passed by the South Dakota legislature during the 2007 South Dakota legislative session.

b. SDCL 23a-27A-32 was amended in two specific areas: it removed the specifications of the two drug cocktail to be used in the lethal injection by the prior statute, and substituted in its place the requirement that the warden should determine the substances and the quantity of substances used for the punishment of death. The statute provided no other detail recording the warden's decision. The second change was that a physician was no longer required to participate in the execution process.

36. Executions are unconstitutional if they involve unnecessary and want an infliction of pain or torture or lingering death.

a. Pain inflicted in an execution results from something more than the mere extinguishment of life, the United States Constitution and the South Dakota Constitution is prohibition against cruel and unusual punishment is implicated.

b. An information and belief, the South Dakota legislature rejected proposed amendments requiring executions to be carried out in the most humane manner possible.

37. Given the fact that the warden is given no guidance as to the type of substances used or the quality of substances used for the punishment of death, and there is no requirement by law that the execution be carried out in a humane manner, and the absence of a person trained to administer and monitor an anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution, as allowed under the present statute.

38. An execution pursuant to the present SDCL 23A-27A-32 violates the United States Constitution and the South Dakota Constitution prohibition against cruel and unusual punishment and therefore is unconstitutional.

GROUND THIRTEEN

39. The present SDCL 23A-27A-32 constitutes an unconstitutional bill of attainder, and an unconstitutional ex post facto law as applied to Charles R. Rhines.

a. SDCL 23A-27A-32, as codified on the date of Charles R. Rhines' convictions is unconstitutional, for reasons previously stated.

b. SDCL 23A-27A-14 requires a condemned inmate to be sentenced to life in prison if the death penalty is declared unconstitutional.

c. Because Charles R. Rhines must be sentenced to life in prison as a result to the unconstitutionality of SDCL 23A-27A-32 as codified at the time of his conviction, and as a result of the application of SDCL 23A-27A-14, SDCL 23A-27A-32, as presently codified, constitutes an unconstitutional bill of attainder and an unconstitutional ex post fact law, as applied to Charles R. Rhines.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Charles R. Rhines is presently incarcerated at the South Dakota Penitentiary. Defendant Douglas Weber is a resident of Sioux Falls, South Dakota and is employed by the State of South Dakota as a warden at the South Dakota State Penitentiary.
2. This is an action for declaratory and injunctive relief brought pursuant to the laws of the State of South Dakota.
3. This action is brought alternatively to Charles R. Rhines' Petition for Writ of Habeas Corpus.
4. The mandatory execution protocol provided by SDCL 23A-27A-32 as codified at the time of Charles R. Rhines' conviction required an intravenous injection by lethal quantity of an ultra short acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until convict was pronounced dead by a licensed physician according to the standards of medical practice.
5. SDCL 23A-27A-32 was amended by the South Dakota legislature during the 2007 South Dakota legislative session.
6. Given the two chemical specified in SDCL 23A-27A-32 in effect at the time Charles R. Rhines' conviction and the absence of a physician trained to administer and monitor an anesthesia, it is reasonable foreseeable that Charles R. Rhines may experience suffocation and

excruciating pain during his execution in violation of the constitutions of the United States and the State of South Dakota.

7. An execution pursuant to SDCL 23A-27A-32 as codified on the date of Charles R. Rhines' conviction violates the constitutions of the State of South Dakota and the United States prohibition against cruel and unusual punishment and is therefore unconstitutional.

8. SDCL 23A-27A-14 requires a condemned inmate be sentenced to life in prison if the death penalty is declared unconstitutional.

9. Because Charles R. Rhines must be sentenced to life in prison as a result of the application of SDCL 23A-27A-14, the present SDCL 23A-27A-32 constitutes an unconstitutional bill of attainder as applied to Charles R. Rhines.

10. Because Charles R. Rhines must be sentenced to life in prison as a result of the application of SDCL 23A-27A-14, the present SDCL 23A-27A-32 constitutes unconstitutional ex post facto laws as applied to Charles R. Rhines.

WHEREFORE, Petitioner Charles R. Rhines prays for the following relief:

1. That this court allow discovery and hold an evidentiary hearing on Petitioner's First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory Injunctive Relief;
2. An Order granting Petitioner relief on his First Amended Petition for Writ Habeas Corpus on any and all grounds 1 through 12 inclusive;
3. A declaration that a execution carried out by means of the two drug cocktail provided in SDCL 23A-27A-32 in effect at the time of Charles R. Rhines' conviction constitutes cruel and unusual punishment in violation of the constitutions of the State of South Dakota and the United States as well as depriving Rhines of his right to due process of law, and is therefore unconstitutional;

4. a declaration that because SDCL 23A-27A in effect at the time of Rhines' conviction is unconstitutional, that Charles R. Rhines must be sentenced to life in prison;

5. A declaration that SDCL 23A-27A-32, as presently codified, and as applied to Charles R. Rhines, constitutes an unconstitutional bill of attainder and an unconstitutional ex post facto law and deprives Rhines of his right to due process of the law;

6. An injunction requiring the State of South Dakota to sentence Charles R. Rhines to life in prison pursuant to SDCL 23A-27A-14; and

7. For such other and further relief as to the court seems just and appropriate.

Dated this 19th day of February, 2008.


Stuart, Gerry & Schlingen, Prof. LLC:

By: 

John A. Schlingen
507 W. 10th Street
PO Box 966
Sioux Falls, SD 57101-0966
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Pennington County, SD
FILED
IN CIRCUIT COURT

FEB 21 2008

Renee Truman, Clerk of Courts
By  Deputy

X2

DR. MARK DERSHWITZ-12/3/12

Page 1

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
2 COUNTY OF PENNINGTON) SEVENTH JUDICIAL COURT
3 CIV. NO. 02-924
4 CHARLES RUSSELL RHINES,)
) Petitioner,)
5)
))
6)
))
7 DOUGLAS WEBER, Warden,)
) South Dakota State)
8 Penitentiary,)
) Respondent.)

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10
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VIDEOTAPED DEPOSITION OF DR. MARK DERSHWITZ,
13 taken before Kristin M. Stedman, a Registered
Professional Reporter and Notary Public in and for
14 the Commonwealth of Massachusetts, at the Office of
the Federal Public Defender, 51 Sleeper Street, 5th
15 Floor, Boston, Massachusetts, on Monday, December 3,
2012, at 12:29 p.m.

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KACZYNSKI REPORTING
72 CHANDLER STREET
BOSTON, MA 02116
(617) 426-6060

KACZYNSKI REPORTING

EXHIBIT
3

DR. MARK DERSHWITZ-12/3/12

Page 2	Page 4
<p>1 APPEARANCES: 2 ON BEHALF OF THE PETITIONER: 3 NEIL FULTON, ESQ. Office of the Federal Public Defender Districts of South Dakota and North Dakota 101 South Pierre Street, 3rd Floor 5 P.O. Box 1258 Pierre, SD 57501 6 (605) 224-0009 7 ON BEHALF OF THE RESPONDENT: 8 PAUL S. SWEDLUND, ESQ. State of South Dakota Office of Attorney General 1302 E. Highway 14, Suite 1 10 Pierre, SD 57501-8501 (605) 773-3215 11 THE VIDEOGRAPHER: 12 STEVEN GARCIA National Video Reporters, Inc. 7 Cedar Drive 14 Woburn, MA 01801 (781) 937-9900 15 16 17 18 19 20 21 22 23 24</p>	<p>1 PROCEEDINGS 2 ----- 3 THE VIDEOGRAPHER: We are now recording 4 and on the record. My name is Steven Garcia. I am 5 a legal video specialist for National Video 6 Reporters, Inc. Our business address is 7 Cedar 7 Drive, Woburn, Massachusetts, 01801. 8 Today is December 3, 2012, and the time 9 is 12:29 p.m. This is the deposition of Dr. Mark 10 Dershwitz in the matter of Charles Russell Rhines, 11 plaintiff, versus Douglas Weber, defendant, in the 12 Circuit Court, Seventh Judicial Court, State of 13 South Dakota, County of Pennington, Civil Action 14 Number 02-924. 15 This deposition is being taken at 51 16 Sleeper Street, Boston, Massachusetts on behalf of 17 the plaintiff. The court reporter is Kristin M. 18 Stedman of Kaczynski Court Reporting. 19 Counsel will state their appearances, 20 and the court reporter will administer the oath. 21 MR. SWEDLUND: Paul Swedlund on behalf 22 of the respondent. 23 MR. FULTON: Neil Fulton on behalf of 24 the petitioner.</p>

Page 3	Page 5
<p>1 INDEX 2 EXAMINATION BY MR. SWEDLUND.....Page 5,34 3 EXAMINATION BY MR. FULTON.....Page 22 4 5 6 7 8 9 10 EXHIBITS 11 No. Description Page No. 12 None marked. 13 14 15 16 17 18 19 20 21 22 23 24</p>	<p>1 ----- 2 DR. MARK DERSHWITZ, 3 having first been satisfactorily identified and 4 duly sworn by the Notary Public, 5 was examined and testified as follows: 6 ----- 7 EXAMINATION BY MR. SWEDLUND: 8 Q. Could you state your name, please, for the 9 record. 10 A. Mark Dershwitz. 11 Q. And, doctor, you are here today to provide 12 expert testimony in the case of Rhines v. Weber, do 13 you understand that? 14 A. Yes. 15 Q. And do you understand that all the answers 16 that you give must be given to a reasonable degree 17 of professional certainty for your profession? 18 A. Yes. 19 Q. Could you describe your qualifications for 20 the court, your background and training that allows 21 you to testify as an expert here in this case today? 22 A. Well, in college I have a bachelor's degree 23 in chemistry, I then went to medical school at 24 Northwestern University, and also obtained a Ph.D.</p>

2 (Pages 2 to 5)

KACZYNSKI REPORTING

DR. MARK DERSHWITZ-12/3/12

Page 6

1 In pharmacology from Northwestern. I then did a
 2 residency in anesthesiology at Massachusetts General
 3 Hospital in Boston, followed by a research
 4 fellowship, and I have worked in academic
 5 anesthesiology since 1986, from 1986 through 2000 at
 6 Massachusetts General Hospital in Boston and Harvard
 7 Medical School, and since 2000, at the University of
 8 Massachusetts Medical School in Worcester.

9 **Q. You mentioned the field of pharmacology,**
 10 **can you describe for the court what is that field?**

11 A. Pharmacology is a basic medical science
 12 that, broadly speaking, studies the effects of
 13 chemicals on biological systems, and more
 14 specifically, the effects of drugs on human beings.

15 **Q. And there are a couple of terms there,**
 16 **pharmacodynamics and pharmacokinetics, can you also**
 17 **describe those for the court?**

18 A. Pharmacodynamics is the study of the
 19 mechanism of action of how drugs actually work,
 20 whereas pharmacokinetics is the time course of
 21 medications, how long does the drug actions last and
 22 how long does the drug last in the body.

23 **Q. So dynamics would be the effect of the drug**
 24 **on a person and the kinetics would be the duration**

Page 7

1 of the drugs?

2 A. Yes.

3 **Q. Doctor, can you describe for the court your**
 4 **background as an expert witness in terms of the**
 5 **testimony that you have provided in cases either for**
 6 **the government or against the government?**

7 A. Well, with regard to the cases involving
 8 lethal injection, I have been an expert on behalf of
 9 the, either the attorney general's office or the
 10 department of corrections in about a dozen and a
 11 half states.

12 **Q. And while I am thinking about it, were you**
 13 **also an expert in the Baze case?**

14 A. Yes.

15 **Q. And for whom did you testify in Baze?**

16 A. On behalf of the Commonwealth of Kentucky.

17 **Q. Have you also at times outside of the**
 18 **context of lethal-injection protocols, testified on**
 19 **behalf of defendants in criminal cases?**

20 A. There's been a couple of cases where I
 21 testified on behalf of defendants. The one that
 22 comes to mind is I was an expert on behalf of
 23 defendant Richard Reid, who was perhaps more
 24 commonly known as the Shoe Bomber.

Page 8

1 **Q. And what was the nature of your testimony**
 2 **in that case?**

3 A. The charges against him were that he tried
 4 to blow up a plane, and when the passengers realized
 5 what he was trying to do, they restrained him
 6 physically, and then some physicians on the plane
 7 opened up the medical kit on the plane and they gave
 8 him some sedating medications, including diazepam,
 9 which is more commonly known as Valium, and when the
 10 plane was diverted here to Boston, shortly after his
 11 arrest, he was interrogated and he confessed, and
 12 the question was whether or not somebody is capable
 13 of understanding their Miranda rights when they
 14 confess after being given a medication like
 15 diazepam, which produces what is called anterograde
 16 amnesia, which means amnesia for things that happen
 17 after the medication is given, and it was my belief
 18 that it was improper to accept a confession from
 19 somebody who had been medicated against his will
 20 with a medication that prohibited him from
 21 understanding his Miranda rights.

22 **Q. So the Reid case involved both questions of**
 23 **dynamics and kinetics?**

24 A. Correct.

Page 9

1 **Q. Doctor, you have previously submitted**
 2 **affidavits in this case, one dated 18 September,**
 3 **2012, and another dated 9 February, 2012, and I will**
 4 **show those to you briefly.**

5 MR. FULTON: February and September?

6 MR. SWEDLUND: February and September,
 7 correct.

8 **Q. Doctor, do those affidavits contain**
 9 **opinions that you have held about the protocol at**
 10 **issue in this case?**

11 A. Yes.

12 **Q. And are those opinions still current?**

13 A. Yes.

14 **Q. If you would please, doctor, could you**
 15 **explain the effects of 5 grams of pentobarbital**
 16 **administered as set forth in South Dakota's lethal**
 17 **injection protocol, what dynamic effect and what**
 18 **kinetic effect would that drug have?**

19 A. First of all, from a kinetic point of view,
 20 when pentobarbital is injected intravenously, it has
 21 an onset of effect that is almost immediate. Within
 22 thirty to forty-five seconds after the drug reaches
 23 the brain, the person would be expected to lose
 24 consciousness.

3 (Pages 6 to 9)

Page 10

1 In addition, there are profound effects
2 caused by pentobarbital on the circulatory system,
3 and it's going to cause dilation of the blood
4 vessels, which means relaxation of the blood vessels
5 that is going to cause a reduction in blood
6 pressure, and there's going to be effect on the
7 heart to decrease the strength of the heart's
8 ability to beat, so with a dose as large as 5000
9 milligrams or 5 grams, within a short period of time
10 not only is the person as deeply unconscious as can
11 be measured with the instruments that we have, that
12 person's blood pressure is going to be
13 extraordinarily low, possibly unmeasurable, and
14 there will be extremely little, if any, circulation
15 throughout the body.

16 **Q. And in this unconscious state, can an**
17 **inmate feel pain?**

18 A. No.

19 **Q. Why not?**

20 A. In the level of anesthesia that 5000
21 milligrams of pentobarbital produces, this is
22 actually a state much deeper than the state of
23 surgical anesthesia that we anesthesiologists
24 produce during anesthesia for surgical procedures.

Page 11

1 **Q. So as the inmate goes into respiratory**
2 **arrest, suffocates, the inmate is not feeling any**
3 **pain?**

4 A. Yeah, that is correct. So the
5 pentobarbital will have this profound effect to
6 decrease circulation, it will stop breathing
7 typically within a minute or two of its
8 administration, and the person will die due to the
9 effects of decreased oxygen delivery to critical
10 organs in the body, the heart and the brain, and
11 there is a decreased delivery of oxygen, both
12 because the person is not breathing and exchanging
13 oxygen, as well as the fact that the circulation is
14 depressed.

15 **Q. Doctor, I have previously provided you with**
16 **affidavits from the respondent in this case, Doug**
17 **Weber, one dated the 22nd of October, 2012, the**
18 **second dated 1st of November, 2012. I will show**
19 **these to you, do you recognize those affidavits?**

20 A. Yes.

21 **Q. Have you reviewed them?**

22 A. Yes.

23 **Q. And can you describe for the court the**
24 **outward physical, I guess behaviors exhibited by the**

Page 12

1 **two inmates at issue in those affidavits?**

2 A. Well, to summarize what Warden Weber said
3 was shortly after the drug was administered, the
4 inmates took a last breath, typically a deep breath,
5 and then were immobile.

6 **Q. Did the inmates snore?**

7 A. I think he said that there was one that
8 took a, the last breath was like a snoring-type
9 breath. Let me just -- in the case of Robert, his
10 last breath he described as expelling a snore.

11 **Q. Would a snore be consistent with the onset**
12 **of unconsciousness?**

13 A. It probably came afterward.

14 **Q. And then, doctor, could you describe for**
15 **the court, in your practice, have you seen instances**
16 **where patients have their eyes open still after they**
17 **have been administered anesthesia?**

18 A. Yes, sometimes eyes remain open, even in a
19 person who is deeply anesthetized, there may be
20 mechanical reasons why the eyelids don't cover the
21 eyes when the person loses consciousness, and as an
22 anesthesiologist, since one of my responsibilities
23 is to protect the eyes, I often tape or cover them
24 during surgery in order to protect them.

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1 **Q. What mechanical issues are you talking**
2 **about might account for a patient not closing their**
3 **eyes even though they are under anesthesia?**

4 A. So when a person is lying on their back,
5 gravity does not pull the eyelid down, and the
6 residual muscle tone in both the muscles that raise
7 the eyelid and lower the eyelid may be balanced in
8 such a way that the eyelid does not cover the eye.

9 **Q. If a patient, or in this case a condemned**
10 **inmate's eyes are open, is that any indication that**
11 **the patient is conscious and feeling pain?**

12 A. Not at all.

13 **Q. If an anesthetized patient, or in this case**
14 **an inmate, a condemned inmate has, takes final deep**
15 **breaths, or if one were to characterize those as**
16 **gasps, would those be an indication that the inmate**
17 **is experiencing pain?**

18 A. No.

19 **Q. Why not?**

20 A. When somebody has drug-induced respiratory
21 arrest, it is actually common that the last breath
22 they take before becoming apneic, which is the
23 cessation of ventilation, that last breath is very
24 often a very deep one, and I see that regularly in

4 (Pages 10 to 13)

KACZYNSKI REPORTING

DR. MARK DERSHWITZ-12/3/12

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1 you are using on a patient is pure, affective and
 2 sterile?
 3 A. Yes.
 4 Q. And again, your standard of care in your
 5 profession does not require you to go back behind
 6 the licensure and make sure that that licensing was
 7 validly given by the FDA before you would use a
 8 drug?
 9 A. Well, I believe the pharmacies are not
 10 licensed by FDA, they're licensed by the state, but
 11 yes, I rely on the local authorities to make sure
 12 that the supply chain is indeed safe.
 13 Q. That would be for the compounding
 14 pharmacist?
 15 A. Yes.
 16 Q. You rely on the state pharmacy board to
 17 properly license the pharmacist from whom you
 18 acquire your drugs?
 19 A. Yes.
 20 Q. And you rely on the FDA to properly license
 21 the drug manufacturer, suppliers from whom you
 22 receive your drugs?
 23 A. Yes.
 24 Q. Doctor, have you had an opportunity to

Page 19

1 review South Dakota's lethal injection protocol?
 2 A. Yes.
 3 Q. And I will provide you a copy. At least, I
 4 think I will. Where is my copy?
 5 MR. FULTON: I have that one marked if
 6 you want to use it, Paul.
 7 MR. SWEDLUND: Yes, if I could. Thank
 8 you. It's supposed to be right here.
 9 Q. Do you have the protocol ERMA.12.B before
 10 you?
 11 A. Yes.
 12 Q. And you reviewed that and you recognize it?
 13 A. Yes.
 14 Q. Do you have an opinion regarding whether
 15 ERMA.12.B if performed as written would provide a
 16 painless and humane death for a condemned inmate in
 17 South Dakota?
 18 A. It would.
 19 Q. And what is it about the protocol that
 20 provides you the assurance that the inmate to whom
 21 the protocol is administered would experience a
 22 painless and humane death?
 23 A. Does this apply to all versions of the --
 24 Q. We're talking only about the one drug

Page 20

1 pentobarbital protocol.
 2 A. Yeah, so with regard to the one-drug
 3 protocol with pentobarbital, the protocol simply
 4 states that 5000 milligrams will be injected, and
 5 after a period of time has elapsed, then the inmate
 6 will be examined for the presence of death.
 7 Q. And does the protocol in your opinion
 8 provide sufficient assurance regarding the
 9 qualifications of the persons who will set and
 10 administer the drugs?
 11 A. I believe so, although that is actually an
 12 area that is outside of my expertise in terms of
 13 vetting other individuals, but the fact that they
 14 are healthcare providers who do these procedures in
 15 their normal job is appropriate.
 16 Q. So for example, the person who sets the IV
 17 line is an EMT by profession and currently certified
 18 and licensed, that person would in your opinion be
 19 capable of setting an IV line?
 20 MR. FULTON: I would just before you
 21 answer, doctor, object to foundation given that he
 22 stated it's beyond his area of expertise. Sorry to
 23 interrupt him.
 24 Q. Go ahead.

Page 21

1 A. I think in general when one considers the
 2 broad population of EMTs, many of them are trained
 3 to insert intravenous catheters. I have no specific
 4 knowledge of the person who may do it based upon
 5 this protocol.
 6 Q. Okay. In the operation-room setting, who
 7 are the people that set an IV line for anesthesia?
 8 A. It could be one of two or three populations
 9 of people, it could be the attending
 10 anesthesiologist, it could be the resident
 11 anesthesiologist or nurse anesthetist who is working
 12 under the direction of the anesthesiologist, or it
 13 could be a nurse who is preparing the patient before
 14 they're transported to the operating room.
 15 Q. And while we have you here, doctor, if you
 16 could look at the two-drug protocol as well, and I
 17 assume that that would be administered using
 18 pentobarbital in a combined with a paralytic agent,
 19 are your opinions the same as regards to the ability
 20 of South Dakota's two-drug protocol to provide a
 21 painless and humane death for an inmate?
 22 A. Yes.
 23 MR. SWEDLUND: I have nothing further.
 24 THE WITNESS: Before we go on, could we

6 (Pages 18 to 21)

KACZYNSKI REPORTING

Seventh Judicial Circuit Court

PO Box 230
Rapid City SD 57709-0230
(605) 394-2571

CIRCUIT JUDGES

Jeff W. Davis
Wally Eklund
Janine M. Kern
Robert A. Mandel
Craig Pfeifle
Thomas L. Trimble

MAGISTRATE JUDGES

Scott M. Bogue
Heidi Linngron
Shawn J. Pahlke

COURT ADMINISTRATOR

Kristi K. Wammen
STAFF ATTORNEY
Marya V. Tellinghuisen

February 27, 2013

Mr. Paul Swedlund
Sheri Wald Sundem
Attorney General's Office
1302 E. Hwy. 14 #1
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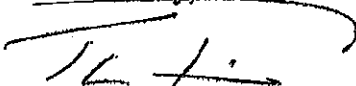
Mr. Neil Fulton
Federal Public Defender's Office
P.O. Box 1258
Pierre, SD 57501

Re: Decision (Civ. File 02-924)

Dear Counsel:

Enclosed please find my amended final decision in the Rhines' matter. Please prepare the appropriate findings of fact, objections and proposed Orders related to the decision.

Sincerely,


Thomas L. Trimble
Circuit Judge
Seventh Judicial Circuit

TLT*mvt

Pennington County, SD
FILED
IN CIRCUIT COURT

FEB 27 2013

Ranae Truman, Clerk of Courts
By  Deputy

EXHIBIT

4

tabbies

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. Civ. 02-924

CHARLES RUSSELL RHINES)
)
Petitioner,)
)
)
)
)
DOUGLAS WEBER, Warden, South)
Dakota State Penitentiary,)
)
Respondent.)

**AMENDED
MEMORANDUM DECISION
ON CHALLENGE TO
SOUTH DAKOTA'S
EXECUTION PROTOCOL
AND ORDER**

I. PROCEDURAL AND FACTUAL BACKGROUND

The extensive procedural and factual background of this habeas petition was set forth in the Motion to Dismiss/Summary Judgment decision filed on September 17, 2012. Summary Judgment was denied as to Petitioner's Counts 8, 11 and 12. On December 18, 2012, a hearing was held for the purpose of receiving evidence as to those remaining claims. Both parties submitted exhibits including deposition testimony. Petitioner's objections to Exhibits 7R, 8R, 9R, 10R, and 25R are sustained. The admission of this evidence was not stipulated to by the parties nor was the information elicited from any witness. No live witnesses were called at the hearing. Most of the exhibits referenced in this decision are all sealed; therefore, references will be to the numbers/letters in the sealed court file. The issues remaining are:

Ground Eight:

¶28 The manner of execution as provided by SDCL 23A-27A-32 as in effect at the time Charles R. Rhines' conviction violated his rights to due process of law and constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution and the corresponding Article under the South Dakota Constitution:

a. Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

b. Where pain is inflicted in an execution results from something more than the mere extinguishment of life, the United States Constitution Eighth Amendment and the corresponding South Dakota articles' prohibition against cruel and unusual punishment are implicated.

c. Given the two chemicals specified in SDCL 23A-27A-32 in effect at the time of Charles R. Rhines' conviction and the absence of a person trained to administer and monitor

anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution in violation of the Eighth Amendment and the corresponding South Dakota Amendment.

d. An execution pursuant to SDCL 23A-27A-23 as codified on the date of Charles R. Rhines' conviction violates the United States Constitution and the South Dakota Constitution prohibition against cruel and unusual punishment and is therefore unconstitutional.

Ground Eleven:

¶ 31 The execution of Charles R. Rhines by lethal injection as set forth in the present SDCL 23A-27A-32 violates Rhines' rights to due process under law and his rights against cruel and unusual punishment guaranteed under the United States Constitution and the South Dakota Constitution.

a. SDCL 23A-27A-32 was amended by the South Dakota Legislature during the 2007 legislative session.

b. On information and belief, the South Dakota Legislature rejected proposed amendments requiring executions be carried out in the most humane manner possible.

c. SDCL 23A-27A-32 removes the requirement of a physician participation in the execution process.

d. Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

e. Where pain inflicted in an execution results from something more than the mere extinguishment of life, the constitutions of the United States and South Dakota, South Dakota Articles prohibition against cruel and unusual punishment are implicated.

¶ 32 Upon information and belief, the protocol presently in effect for lethal injection execution uses a three drug cocktail.

¶ 33 With the three drug cocktail presently believed to be used in executions, in the absence of a person trained to administer and monitor an anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution in violation of the Constitutions of the United States and South Dakota.

¶ 34 An execution pursuant to the present SDCL 23A-27A-32 violates the United States Constitution and the South Dakota Constitution's prohibition against cruel and unusual punishment and it is therefore unconstitutional.

Ground Twelve:

¶35 Charles R. Rhines' right to due process of law against cruel and unusual punishment is guaranteed under the United States Constitution and the South Dakota Constitution is violated by the statutory procedure set forth in 23A-27A-32.

a. SDCL 23A-27A-32 was passed by the South Dakota legislature during the 2007 legislative session.

b. SDCL 23A-27A-32 was amended in two specific areas: it removed the specifications of the two drug cocktail to be used in the lethal injection by the prior statute, and substituted in its place the requirement that the Warden should determine the substances and the quantity of substances used for the punishment of death. The statute provided no other detail recording the Warden's decision. The second change was that a physician was no longer required to participate in the execution process.

¶36 Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

a. Pain inflicted in an execution results from something more than the mere extinguishment of life, the United States Constitution and the South Dakota Constitution is prohibition against cruel and unusual punishment is implicated.

b. On information and belief, the South Dakota legislature rejected proposed amendments requiring executions to be carried out in the most humane manner possible.

¶37 Given the fact that the Warden is given no guidance as to the type of substances used or the quality of substances used for the punishment of death, and there is no requirement by law that the execution be carried out in a humane manner, and the absence of a person trained to administer and monitor an anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution, as allowed under the present statute.

¶38 An execution pursuant to the present SDCL 23A-27A-32 violates the United States Constitution and the South Dakota Constitution prohibition against cruel and unusual punishment and therefore is unconstitutional.

Essentially, Petitioner's claims can be summarized into two issues. First, whether the lethal injection protocol adopted and implemented by the State of South Dakota complies with the mandates of the United States Supreme Court as set forth in the *Baze v. Rees* case? And, secondly, whether the lethal injection protocol violates Article VI, §23 of the South Dakota Constitution? The Petitioner's claims will be addressed separately below. All other issues raised by Petitioner in his Writ of Habeas Corpus have been addressed in the Memorandum Decision On Motion To Dismiss Or For Summary Judgment issued in September, 2012.

II. ANALYSIS

History of the Death Penalty and its application in South Dakota

Over South Dakota's history as both a territory and a state, 18 men have been executed. When South Dakota was first settled and was still Dakota Territory, hangings were the preferred method of execution. Between 1877 and 1915, 14 men were executed by hanging in South Dakota. See Dept. of Corrections, <http://doc.sd.gov/about/faq/capitolpunishment.aspx>. The first was Jack McCall, the killer of Wild Bill Hickok, who was hanged in 1877. While hanging was the most "universal method of execution" in the United States during this time, the Governor of New York commissioned a panel to find:

the most humane and practical method known to modern science of carrying into effect the sentence of death,' " New York became the first State to authorize electrocution as a form of capital punishment. *Glass v. Louisiana*, 471 U.S. 1080, 1082, and n. 4, 105 S.Ct. 2159, 85 L.Ed.2d 514 (1985) (Brennan, J., dissenting from denial of certiorari); *Denno*, supra, at 373. By 1915, 11 other States had followed suit, motivated by the "well-grounded belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185, 35 S.Ct. 507, 59 L.Ed. 905 (1915).

Baze v. Rees, 553 U.S. 35, 42, 128 S.Ct. 1520, 1526 (2008).

Executions by hanging continued in South Dakota until the death penalty was abolished in 1915. See, 1915 S.L. Ch. 158, H.B. 21. In 1933, the death penalty was reinstated and the electric chair became the sole method of execution. In 1947, George Sitts was convicted of murdering DCI agent Tom Matthews who was attempting to arrest Sitts on a fugitive warrant from Minnesota. He also killed Butte County Sheriff Dave Malcolm; however, he was first tried for Matthew's murder and after he was sentenced to death, the state did not try him for Malcolm's murder. See, *State v. Sitts*, 71 S.D. 494, 26 N.W.2d 187 (1947). He was the first and only person executed by electric chair in South Dakota.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court held a Georgia death penalty statute violated the 8th and 14th Amendments prohibiting cruel and unusual punishment:

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga.Code Ann. s 26-1005 (Supp.1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E.2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga.Code Ann. s 26-1302 (Supp.1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S.E.2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Vernon's Tex.Penal Code, Art. 1189 (1961). 447 S.W.2d 932 (Ct.Crim.App.1969). Certiorari was granted limited to the following question: 'Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' 403 U.S. 952, 91 S.Ct. 2287, 29 L.Ed.2d 863 (1971). The Court holds that the imposition and carrying out of the death penalty in

these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

Id. (emphasis added.) The court issued a per curiam decision which was less than one page long which reversed the imposition of the death penalty on the three consolidated cases. Justices Douglas, Brennan, Stewart, White and Marshall each wrote separate opinions in support of the judgments. Justices Blackmun, Powell and Renquist each filed separate dissents. The problem the Court had in the *Furman* case was that there were no standards for a jury to apply to the death penalty determination:

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

Furman v. Georgia, 408 U.S. 238, 257, 92 S.Ct. 2726, 2736 (Ga. 1972) Justice Douglas concurring.

This case led to a de facto nationwide moratorium on the death penalty for 9 years. See, *Baze v. Rees*, 553 U.S. 35, 42, 128 S.Ct. 1520, 1526. That moratorium ended with the United States Supreme Court's decision in *Gregg v. Georgia*. 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *Id.* That decision held that the "statutory system under which Gregg was sentenced to death does not violate the Constitution." *Gregg*, 428 U.S. 207, 96 S.Ct. 2941. As a result of the *Gregg* case, state legislatures began reexamining electrocution as a "means of assuring a humane death." *Baze*, 553 U.S. 42, 128 S.Ct. 1526. In order to eliminate the issues the Court found in the *Furman* case, Georgia enacted a statutory scheme for the imposition of the death penalty. *Gregg*, 428 U.S. 161, 96 S.Ct. 2920. The trial was bifurcated into the guilt or innocence phase by either a judge or jury. *Id.* After a guilty verdict or finding, a presentence hearing was conducted before whoever made the guilt determination. *Id.*

"(T)he judge (or jury) shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge (or jury) shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed." s 27-2503. (Supp.1975).

The defendant is accorded substantial latitude as to the types of evidence that he may introduce. See *Brown v. State*, 235 Ga. 644, 647-650, 220 S.Ed.2d 922, 925-926 (1975). Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted. *Eberheart v. State*, 232 Ga. 247, 253, 206 S.E.2d 12, 17 (1974).

Gregg, 428 U.S. 163-164, 96 S.Ct. 2920-21.

Furthermore, under the statutory scheme, the jury or court must have also found beyond a reasonable doubt, at least one aggravating circumstance as found in the statute. The statutory scheme also included an expedited direct review by the Georgia Supreme Court. If the Court affirmed the death sentence, then it was required to reference similar cases it took into consideration. *Gregg*, 428 U.S. 167, 96 S.Ct. 2922.

Interestingly, part of the Supreme Court's decision in *Gregg* looked at the history of the death penalty:

It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, *Supra*, 356 U.S. at 101, 78 S.Ct., at 598. See also *Jackson v. Bishop*, 404 F.2d 571, 579 (CA 8 1968). Cf. *Robinson v. California*, *supra*, 370 U.S., at 666, 82 S.Ct., at 1420. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, see *Infra*, at 2926-2927, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

Gregg, 428 U.S. 173, 96 S.Ct. 2925. The Court further examined the role of the judiciary in determining the constitutionality of a legislative enactment:

But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

"Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis v. United States*, 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring in affirmance of judgment).

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not

cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Gregg, 428 U.S. 175, 96 S.Ct. 2926.

Ultimately, the *Gregg* court upheld Georgia's death penalty statutes:

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. 195, 96 S.Ct. 2935.

Following the *Gregg* decision, a new version of the death penalty was enacted in South Dakota in 1979. See 1979 SB 53; see former SDCL 22-6-1 (1979); SDCL 22-16-9 (1979). SDCL 22-19-1 (1979). This statutory scheme embraced the dictates of *Gregg* and provided for aggravating circumstances, a mitigation hearing, an expedited direct review and a proportionality review of the sentence. No one in South Dakota was executed between the 1947 electrocution of Sitts and the 2007 execution of Elijah Page by lethal injection.

The South Dakota legislature amended SDCL 23A-27A-32 in 2007 to provide for execution "by the intravenous injection of a substance or substances in a lethal quantity." The statute instructed the "Warden, subject to the approval of the secretary of corrections, [to] determine the substances and quantity of substances used for the punishment of death." SDCL 23A-27A-32.

Per the directives given to him by SDCL 23A-27A-32, the Warden promulgated a policy effective June 14, 2007, providing for execution by: (1) "Sodium Pentothal, (aka Sodium Thiopental) ...in a quantity sufficient to ensure the inmate is and remains unconscious and is not subjected to the unnecessary and wanton infliction of pain;" (2) Pancuronium Bromide to stop the inmate's breathing, and; (3) Potassium Chloride to stop the inmate's heart. See Exhibit 3.

Subsequent to formulating the June 14, 2007, protocol, the United States Supreme Court's *Baze* decision detailed the safeguards the court deemed constitutionally sufficient to protect condemned inmates from anesthetic maladministration. *Baze v. Rees*, 553 U.S. 54-61, 128 S.Ct. 1533-1538. As a result, the Warden consulted with legal counsel to determine what changes should be made to the June 2007 policy: The DOC revised the policy in August 2010 to incorporate further safeguards against anesthetic maladministration mandated by *Baze*. See Weber Affidavit, Exhibit 3R, ¶¶ 6-8. The revised protocol called for execution by the same three chemicals as originally specified in the June 14, 2007, protocol, but with newly specified dosages. *Id.* at ¶8.

In response to emerging judicial acceptance of pentobarbital as an execution anesthetic, the Warden again modified the protocol in October of 2011 to provide for execution via a one-drug, pentobarbital protocol for all prospective executions. *Id.* at ¶9. South Dakota has now joined Ohio, Washington, Idaho, Oklahoma and Pennsylvania with having a one drug protocol. While the October 13, 2011, protocol retains three and two drug options utilizing sodium thiopental, those exist as backup procedures should future circumstances require DOC to revert to those earlier procedures.

After the executions of Eric Robert and Donald Moeller in October 2012, the Warden modified the protocol slightly to provide inmates with express assurance that any compounded execution drugs would be prepared according to the governing standards of the United States Pharmacopeia. The November 2012 protocol retains *Baze's* safeguards for the proper administration of the anesthetic. See Exhibit 2R.

Issue One

Whether Petitioner's challenge to the lethal injection protocol adopted and implemented by the State of South Dakota as set forth in detail in Petitioner's Habeas Petition Grounds 8, 11 and 12, complies with the mandates of the United States Supreme Court as set forth in the *Baze v. Rees* and the Eighth Amendment to the United States Constitution?

A. *Baze v. Rees* and Substantial Risk of Serious Harm and Suffering

Petitioner claims that the lethal injection protocol adopted and implemented by South Dakota "does not adequately guard against substantial risk of serious harm and suffering." See Petitioner's Pretrial Brief, p. 1. Petitioner further argues that South Dakota has not "chosen individuals to carry out the execution who have adequate and appropriate training and experience to guard against that risk." *Id.*

Like *Baze*, where the United States Supreme Court addressed whether Kentucky's three-drug lethal injection method of capital punishment posed an unacceptable risk of significant pain and was cruel and unusual punishment under the Eighth Amendment, Rhines' argument centers on the risk of serious harm and suffering. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008). Ultimately, the Court held that Kentucky's method of capital punishment satisfied the Eighth Amendment:

The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, see *Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted.**" We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. See 428 U.S., at 177, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.). It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the

prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

(*emphasis added*), *Id.*, 553 U.S. 47, 128 S.Ct. 1529. Thus, Rhines does not challenge lethal injection per se. Rather, the challenge is to the protocol and the manner in which the execution is carried out. Petitioner argues that there is a significant risk that the drugs will not be properly administered which will lead to severe pain when the other chemicals are administered and therefore, the possibility of improper administration of the drugs would be violative of the Eighth Amendment. However, the Supreme Court has held that in order to prevail on a claim of cruel and unusual punishment there must be "substantial risk of serious harm":

To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (*emphasis added*). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Baze v. Rees, 553 U.S. 49-50, 128 S.Ct. 1530-31. The Court further explained that "simply because an execution method may result in pain...does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id.* It is important to note that following *Baze*, no federal appellate court has invalidated a lethal injection protocol under the Eighth Amendment. *Cooley v. Strickland*, 589 F.3d 210, 221 (6th Cir. 2009); *Nooner v. Norris*, 594 F.3d 592, 596 (8th Cir. 2010); *Clemens v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2007).

The *Cooley* court explained in detail what *Baze* does not require:

In thinking about what *Baze* requires, it is helpful to remember what it does not. The opinion contains several controlling premises within which *Biros* must formulate his challenge: Capital punishment is constitutional, see *id.* at 1529; death-row inmates cannot use method-of-execution challenges to prohibit what the Constitution allows, *id.*; "the Constitution does not demand" a pain-free execution, *id.* at 1529, 1537; and an inmate cannot question a state's execution protocol without providing "feasible, readily implemented" alternatives that "significantly reduce a substantial risk of severe pain," see *id.* at 1532 (*emphasis added*); *id.* at 1531 ("[A] condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."). Significantly, the Constitution does not allow the federal courts to act as a best-practices board empowered to demand that states adopt the least risky execution protocol possible. See *id.* at 1529, 1531. Within this framework, the Supreme Court has never held that an inmate met the "heavy burden" of demonstrating that a state's execution protocol is "cruelly inhumane" in violation of the Constitution. See *id.* at 1533 (citing *Gregg*, 428 U.S. at 175, 96 S.Ct. 2909); see also *id.* at 1529, 1531; *Harbison*, 571 F.3d at 535 (rejecting a challenge to Tennessee's lethal injection protocol after *Baze*).

With these standards in mind, the next step is to compare the *Baze* requirements with South Dakota's protocol to determine whether they are substantially similar and thus, constitutional.

B. South Dakota's Lethal Injection Protocol is Substantially Similar to *Baze* and is Constitutional on its Face

After *Baze* was decided by the United States Supreme Court in 2008, South Dakota's Warden consulted with legal counsel to determine what changes, if any, should be made to South Dakota's existing protocol in order for it to be compliant with the mandates of *Baze*. Department of Corrections revised its existing protocol in August 2010. Weber Protocol Affidavit, Exhibit 3R, ¶¶ 11-14. This revised protocol used the same three-drug protocol approved in *Baze*. In response to emerging judicial acceptance of pentobarbital as an execution anesthetic, South Dakota's Warden again modified the protocol in October of 2011 to provide for execution via a one-drug, pentobarbital protocol for all prospective executions. Exhibit 2R, ERM A.12(B)(H), Weber Protocol Affidavit, Exhibit 3R, ¶14. At that time, South Dakota joined Ohio and Washington in moving to a one-drug protocol. Since then, Idaho, Oklahoma, and Pennsylvania have also adopted a one-drug, pentobarbital protocol.

After the executions of Eric Robert and Donald Moeller in October, 2012, the South Dakota Warden modified the protocol slightly to provide inmates with express assurance that any compounded execution drugs would be prepared according to the governing standards of the United States Pharmacopeia. The November 2012 protocol retains *Baze*'s safeguards for the proper administration of the anesthetic. Exhibit 2R, ERM A.12(B)(D)(1). Those are:

1. The execution is performed under the oversight and command of the Warden, who, by statute and policy is charged with numerous duties to ensure a humane execution. Exhibit 3R, Weber Protocol Affidavit, ¶ 2.
2. The Warden assures that two complete sets of pentobarbital syringes are prepared for the execution. Exhibit 3R, Exhibit 2R, ERM A.12(B)(A)(3).
3. Ambulance staff equipped with advanced life support capabilities, including a heart defibrillator and such supplies and equipment as would be needed to attempt to revive an individual who has been injected with pentobarbital shall be on standby at the SDSP. Exhibit 3R, Exhibit 2R, ERM A.12(B)(A)(5).
4. Execution team members must be qualified to carry out their functions. Persons responsible for inserting the needles and establishing IV lines must be "trained to perform venipuncture and to administer intravenous injections." To meet qualifications, the persons who "connect, monitor, and maintain intravenous lines" must be "certified or licensed and have at least two (2) years professional experience" as one of the following: "medical or osteopathic physician, physician assistant, registered nurse, certified medical assistant, licensed practical

nurse, phlebotomist, paramedic, emergency medical technical, or military corpsman." Exhibit 2R, ERM A.12(B)(B)(1)(3).

5. The person responsible for mixing the drugs, preparing the syringes, and administering the injections must "demonstrate proficiency through relevant training and two years' experience in the administration of drugs by intravenous injection; preparation of syringes for such administration; and mixing and preparing of drugs for such administration." Exhibit 2R, ERM A.12(B)(B)(2).

6. The two sets of chemicals are labeled and contained in numbered syringes. Exhibit 2R, ERM A.12(B)(C)(1).

7. The pentobarbital is mixed or prepared in accordance with USP 797 and is thereafter maintained in accordance with manufacturer's instructions. The pentobarbital must be mixed or prepared in bright, undimmed light. Exhibit 2R, ERM A.12(B)(D)(3); Exhibit 4R, at ¶¶6, 9, 11; Exhibit 5R, Deponent #1 Affidavit at ¶1, Exhibit 3R, Weber Protocol Affidavit, at ¶ 9.

8. DOC staff responsible for performing the execution is required to "drill at least weekly for six to eight weeks prior to the scheduled date of execution," as well as to perform "additional drills the week of the scheduled execution" at the Warden's direction. Exhibit 2R, ERM A.12(B)(D)(1).

9. At least one week prior to the execution, a medical provider examines the inmate and prepares a report "describing the inmate's physical condition and any medical condition of the inmate that may lead to potential problems establishing the IV site." Exhibit 2R, ERM A.12(B)(D)(2).

10. The protocol requires that every effort be made to ensure that no unnecessary pain is inflicted on the inmate. Exhibit 2R, ERM A.12(B)(D)(10).

11. The inmate is secured to the execution gurney in such a position that "at all times" his "head and face are visible to the Warden and to those in the chemical room." Exhibit 2R, ERM A.12(B)(D)(9).

12. The IV team shall establish "two independent IV lines to the inmate's veins. The IV team will establish IV lines only in peripheral veins located in the inmate's arms, hands, legs or feet, preferably one in each arm." Exhibit 2R, ERM A.12(B)(D)(8). The lines must be secured "in such a way as to leave them visible for monitoring."

13. If the IV team "cannot secure one (1) or more sites within one (1) hour," the execution will cease and a request shall be made that the execution be "scheduled for a later date during the week of the execution." Exhibit 2R, ERM A.12(B)(D)(11).

14. The IV team will "start a saline flow and a sufficient quantity of saline solution shall be injected to confirm that the IV lines have been properly inserted and are not obstructed." Exhibit 2R, ERM A.12(B)(D)(12).

15. The Warden stands in the execution chamber with the condemned and issues the order for the execution to proceed from there. Exhibit 2R, ERM A.12(B)(E)(2).

16. The executioner then administers syringe #1 containing 2.5 grams of pentobarbital in a 50 cc solution followed by syringe #2 containing 2.5 grams of pentobarbital in a 50 cc solution followed by syringe #3 containing 25 ml. of normal saline. Exhibit 2R, ERM A.12(B)(C)(3); ERM A.12(B)(H)(4)-(6).

17. The person responsible for pronouncing death monitors the IV lines and the inmate's response to the injection over the next 15 minutes. If the person responsible for pronouncing death is not able to do so after 15 minutes, "the Warden shall order a second set of chemicals to be administered." Exhibit 2R, ERM A.12(B)(H)(7).

18. Ten minutes after the second round of the drug is administered, "[t]he person responsible for pronouncing death shall enter the chamber and confirm death by checking the inmate's heartbeat, breathing, pulse, and pupils." Exhibit 2R, ERM A.12(B)(H)(10).

ERM A.12(B), compare with *Baze*, 553 U.S. at 44-46, 51, 55-56, 128 S.Ct. at 1528, 1531, 1533-34 and *Baze* Protocol, Exhibit 2R, ERM A.12(B).

A comparison of South Dakota's ERM A.12(B) protocol with the *Baze* decision reveals that South Dakota's lethal injection protocol is "substantially similar" to, and in many respects more protective than Kentucky's as set forth in *Baze* and is therefore, constitutional on its face. *Id.* Petitioner has failed to show that the lethal injection protocol adopted by South Dakota "does not adequately guard against substantial risk of serious harm and suffering." Consequently, Rhines' argument set forth in Grounds 8, 11 and 12 that the lethal injection protocol adopted by South Dakota is unconstitutional and violates the 8th Amendment of the United States must fail.

C.

South Dakota Implements its Protocol in a Constitutional Manner

Rhine's also argues in Grounds 8, 11 and 12 of the habeas petition that the manner in which the lethal injection protocol is implemented is unconstitutional. More specifically, Rhines argues:

1) the execution team member known as Witness #3 does not have adequate training and experience to administer the lethal injection protocol; and

2) that execution team member Witness #3 does not have adequate experience and is not placed properly in the execution chamber, to recognize infiltration of the IV line which can result in reduced efficacy of the IV; and

3) that execution team member Witness #3 does not have proper experience and placement to ensure that the IV line is properly set at the outset, to monitor the IV lines in operation, or to place a central line in, if needed, and as called for under the protocol; and

4) that execution team member Witness #2 is charged with administering the lethal injection from a control room separated from the execution chamber; and

5) that execution team member Witness #2 has limited experience in administration of intravenous drugs; and

6) that execution team member Witness #2 lacks the training and experience to recognize if drugs are being taken up by the body in a proper fashion, to monitor the effect of the drugs, to recognize a proper administration rate or to understand the proper handling and administration of barbiturates like pentobarbital; and

7) that the compounded drug is not reliably pure and potent; and

8) that the execution protocol does not guarantee adequate medical monitoring and does not require that individuals with adequate training or experience select the members of the team; and

9) that the protocol creates a system that impermissibly increases the risk of error or mishap which can result in a cruel and unusual execution.

See Petitioner's Pretrial Brief, p. 1-2. Each of these arguments will be addressed below.

**i. Witness #3
IV Setter**

Witness #3 (also referred to as Deponent #3) is the person responsible for setting the IV lines. ERM A.12(B)(3) describes the qualifications:

The person(s) selected by the Warden to insert the intravenous needles into the veins of the prisoner and connect, monitor, and maintain intravenous lines shall be certified or licensed and have at least two (2) years' professional experience as one of the following: medical or osteopathic physician, physician assistant, registered nurse, certified medical assistant, licensed practical nurse, phlebotomist, paramedic, emergency medical technician, or military corpsman.

These qualifications are consistent with, and even exceed, those set forth in *Baze*. *Baze* approved Kentucky's requirement that the IV setter have one year of professional experience as an EMT. *Baze*, 553 U.S. at 55, 128 S.Ct. at 1533. Kentucky met this requirement by employing an EMT who had "daily experience establishing IV lines for inmates," but neither the Kentucky protocol nor the *Baze* decision require "daily" experience.

Witness #3 who was part of the execution team for the Page, Robert and Moeller executions has a bachelor's degree in health education. Exhibit I at p. 8, line 12. Prior to obtaining his bachelor's degree, he received two years of paramedic training from an accredited institution. Exhibit I at p. 10, lines 3-11. That training included setting IV lines and administering IV drugs. Exhibit I at p. 10, line 15; p. 11, line 2. Witness #3 also worked for 15 years as a field supervisor and response medic on an ambulance. Exhibit I at p. 12, line 11. He then worked as an ambulance response medic before assuming supervisory duties. Exhibit I p. 12, line 19; p. 13, line 6. As part of his job, he is required to go on ambulance calls and to maintain his paramedic certification. Exhibit I at p. 15, line 20.

Witness #3 has been a state certified paramedic for 29 years. Exhibit I at p. 14, line 20, p. 15, line 3, p. 106, line 4. During that time, he has set thousands of IV lines. Exhibit I at p. 106, line 4. He has also participated in numerous executions. Exhibit I at p. 44, line 14. Witness #3 testified that he has never had a complication arise during an execution. Exhibit I at p. 41, line 15. He is also trained to recognize signs of IV malfunctioning, such as swelling, leaking, or discoloration in the lines. Exhibit I at p. 77, line 7; p. 86, lines 10-21; p. 87, line 14-88, 25; p. 89, lines 15-25; p. 100, line 7. If an IV line was malfunctioning, Witness #3 testified that he would switch to the secondary line or start a new one. Exhibit I at p. 81, line 12; p.87, line 4. Witness #3 stated that in the executions he has participated in, the inmate very quickly becomes lethargic, goes unconscious, takes some labored respirations, then goes into respiratory arrest. Exhibit I at p. 45, line 21; p.101, line 24. Signs of respiratory arrest are no chest wall movement and no air way sounds. Exhibit I at p. 46, line 7.

Witness #3 clearly is qualified under ERM A.12(B)(3) and the *Baze* decision. Thus, Rhines' arguments that Witness #3 does not have adequate training and experience to administer the lethal injection protocol, does not have adequate experience to recognize infiltration of the IV line and that Witness #3 does not have proper experience and placement to ensure that the IV line is properly set at the outset, to monitor the IV lines in operation, or to place a central line if, if needed, and as called for under the protocol are all without merit.

ii. Witness #2 Drug Administer

Witness #2 is the person responsible for administering the injections. ERM A.12(B)(4) provides:

The person(s) selected by the Warden to administer the injections shall demonstrate proficiency through relevant training and two years' experience in the administration of drugs by intravenous injection.

Again, as with Witness #3, the qualifications required of Witness #2 are consistent with *Baze*. Witness #2 testified that approximately 11 years ago, he began several months of training to administer lethal injection drugs. Exhibit H at p. 18, line 12; p. 19, line 8. Witness #2 received his training from a fellow correctional officer who was experienced in performing lethal injections. Exhibit H at p. 18, line 24. He observed several executions before participating in one. Exhibit H at p. 48, line 10. Since first participating in an execution more than ten years

ago, he has performed numerous executions without complication, including executions using pentobarbital. Exhibit H at p. 112, line 5; p.20, line 1; p. 36, line 8; p. 103, line 13.

When performing an execution, Witness #2 consults the protocol to learn the drugs which will be used and the concentration. Exhibit H at p. 29, line 22. He checks the drug labels and compares them with the protocol to ensure that he has the correct drugs. Exhibit H at p. 30, line 2; p. 30, line 19. He testified he would not administer a drug that was not in the protocol. Exhibit H at p. 77, line 10; p. 93, line 14. He inspects the condition of the drugs to be administered to make sure they have been stored properly (temperature, sealed, appearance) and also checks the seals on the syringes and IV tubes. Exhibit H at p. 25, line 7; p. 70, line 13; p. 71, line 14; p. 86, line 9. He is also trained to detect catheter site swelling and back pressure on syringes that would suggest poor flow. Exhibit H at p. 105, line 14; p. 106, line 5; p. 106, line 15; p. 107, line 4, 20.

Each time he has administered pentobarbital, Witness #2 has observed no signs that an inmate experienced pain. Exhibit H at p. 83, line 17. He expects to participate in drills prior to performing an execution in South Dakota. Exhibit H at p. 83, line 17.

Witness #2 clearly is qualified under ERM A.12(B)(4) and the *Baze* decision. Rhines' arguments that execution team member Witness #2 is inexperienced and lacks training to recognize if drugs are being taken up by the body in a proper fashion, to monitor the effect of the drugs, to recognize a proper administration rate or to understand the proper handling and administration of barbiturates like pentobarbital are unfounded.

Drug Compounding and Pharmacist Qualifications

Rhines argues that the compounded drug is not reliably pure and potent and therefore, the administration of the protocol poses a substantial risk of severe pain to the inmate. He also argues that the pharmacist is incompetent to compound pentobarbital.

iii. Drug Compounding

At the December hearing, Rhines introduced the trial deposition of Dr. Mark Heath who testified that he was not a pharmacist and that he did not have a high level of expertise in the mechanics of compounding. Trial Exhibit 9 at p. 14, lines 16-25; p. 15, lines 2-6. He stated that his opinions were related to the effect the drug would have if compounded incorrectly. Trial Exhibit 9 at p. 15, line 18. He went on to explain the areas where he believes errors could occur:

In a broad level I think there are two main areas that things can go wrong. One would be that there's a chemical accidentally or inadvertently introduced or formed in the material that could cause an undesired reaction or response, in other words, having an extra thing that sound [sic] shouldn't be there. And the other realm of problem is that should happen to degrade the drug, the pentobarbital that is there so that the amount there is inadequate.

Trial Exhibit 9 at p. 16, lines 3-12. When asked specifically about whether South Dakota's protocol for implementing lethal injection posed a "substantial risk of severe pain to an individual," Dr. Heath testified as follows:

But to clarify, when I talk about a substantial risk, it factored in several things, also the likelihood of it happening and also the gravity or severity of the event were it to occur and also how easily it is to obviate or eliminate the risk. So it's a factor of things, a mix of things. And in this instance, there's a risk of terrible thing [sic] happening. I think everybody would agree that nobody wants the prisoner to end up brain damaged. They wouldn't—probably wouldn't even execute them if that the outcome of an attempted execution. It's unlikely, but it's a terrible thing to have happen, and nothing is a hundred percent preventable. It's more preventable than it currently is. In those terms I would say, it's a substantial risk—unlikely, severe, preventable.

The trial court has great discretion when it comes to the weight to be given to any witness' testimony. Dr. Heath's does not give any testimony regarding the actual compounding of the pentobarbital but rather focuses on the physiological effects that could occur if the drug was compounded incorrectly. But as is shown in his testimony quoted above, he testified that the risk was unlikely.

We have often said that fact finders are not required to accept an expert's opinion. As with all witnesses, it falls on the trier of fact to decide whether to believe all, part, or none of an expert's testimony. *Sauer v. Tiffany Laundry & Dry Cleaners*, 2001 SD 24, ¶ 14, 622 N.W.2d 741, 745 (citations omitted); *Lewton v. McCauley*, 460 N.W.2d 728, 732 (S.D.1990) (citation omitted).

Great Western Bank v. H & E Enterprises, LLP, 2007 S.D. 38, 731 N.W.2d 207. This court does not find Dr. Heath's testimony on whether South Dakota's protocol for implementing lethal injection poses a "substantial risk of severe pain to an individual" to be relevant or useful.

Rhines also relies on the Declaration of Dr. Sarah Sellers who was an expert in the Donald Moeller case. Dr. Sellers is the executive director and consultant for Q-Vigilance, LLC. See Trial Exhibits 1 and 2. She stated that her work focuses on the public health risks of drug compounding. In her opinion, "this pentobarbital sodium API formulated under the indicated ...recipe cannot be used for compounding as doing so would result in risk of serious harm to Mr. Moeller." See Trial Exhibit 2, p. 15, ¶ 5. She did not testify live at Rhines' hearing.

In contrast to Dr. Sellers' testimony, Respondent introduced the trial deposition of Dr. Mark Dershwitz. See Exhibit 26R0. Dr. Dershwitz has a bachelor's degree in chemistry, went to medical school at Northwestern University and also obtained a Ph.D. in pharmacology. Exhibit 26R at p.5, lines 22-24; p. 6, line 1. He did his residency in anesthesiology followed by a research fellowship and he worked in academic anesthesiology since 1986 teaching at Massachusetts General Hospital, Harvard Medical School and Massachusetts Medical School. When asked about the practice of compounding drugs he testified as follows:

Q: Were you aware of allegations in that case [Moeller] by Mr. Moeller's attorneys that compounding drugs was somehow a fringe occupation or an unusual practice in the practice of either pharmacy or medicine:

A: I have heard that allegation, and at least with regard to anesthetic drugs and in my practice, that is just not true.

Q: Insofar as you use compounded drugs in the practice of anesthesia, does the standard of care require you or any other anesthesiologists to trace the drug back to its origins of manufacture before you use it?

A: No, I rely on the pharmacy to properly prepare the medication and label it before they send it to the hospital.

Q: And the standard of care in the practice of anesthesiology permits you to rely on a licensed pharmacist in good standing to provide you with an effective, potent and sterile drug?

A: Yes.

Q: And doctor, does the licensure of a drug supplier, whether they're either a manufacturer or merely a wholesaler, does the FDA licensure of that manufacturer, supplier provide you with sufficient assurance as an anesthesiologist that the drug that you are using on a patient is pure, effective and sterile?

A: Yes.

Exhibit 26R p. 16, lines 23-24-p.18, line 3. Dr. Dershwitz also opined that ERM A.12 (B) if performed as written would provide a painless and humane death. Exhibit 26R, p. 19, line 18. Like Dr. Heath's testimony, this Court does not find Dr. Sellers' testimony to be particularly reliable, relevant or useful. Rather, this Court finds Dr. Dershwitz's, who is an anesthesiologist and has a degree in pharmacology, to be more credible and believable.

We give deference to circuit courts in determining the credibility of a witness. *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 26, 784 N.W.2d 499, 511 (reiterating that "the credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and we give due regard to the trial court's opportunity to observe the witnesses and examine the evidence.").

Nemec v. Goeman, 2012 S.D. 14, ¶24, 810 N.W.2d 443, 449. Petitioner has not submitted any credible evidence that the compounded drug is not reliably pure and potent and poses a substantial risk of severe pain to the inmate. In fact, post-compounding testing of pentobarbital used in the Robert and Moeller executions proved that it was, in fact, compounded into a sterile, USP-compliant injectable solution. Exhibit 11R, at ¶V(G); Exhibit 4R, ¶¶9, 11, 12; Exhibit 3R, Weber/Moeller Affidavit at ¶6; Exhibit 5R, Deponent #1 Affidavit at ¶1. Therefore, Rhines'

argument that the compounding of pentobarbital results in a drug that is not reliably pure and potent must fail.

iv. Witness #1 Compounding Pharmacist

Rhines further argues that the pharmacist hired to compound the pentobarbital is incompetent. Again, the pharmacist employed for the Robert and Moeller executions meets and surpasses the minimum qualification thresholds set by *Baze*. Witness #1 has a bachelor's degree in pharmaceutical science. His education program required five years of undergraduate/graduate education. Exhibit G, p. 25-28. He also obtains approximately 20 hours a year in continuing education. Exhibit G, p. 25-28. He has specialized training in sterile compounding. Exhibit G, p. 86. He is licensed and registered with a Board of Pharmacy. His pharmacy license and registration are current. Exhibit G, p. 21-22. He has never been investigated for improper compounding practices. Exhibit G, p. 38, 57. He has many years of experience as a working compounding pharmacist. Exhibit G, p. 22, 28. Witness #1 testified that compounded drugs do not require FDA approval like commercial drugs. Exhibit G, p. 41, 155. His pharmacy complies with USP guidelines for sterile compounding. Exhibit G, p. 86, 133-135, 152.

Witness #1 is qualified under ERM A.12(B) and the *Baze* decision. Rhines' argument that the compounded drug is not reliably pure and potent and that the pharmacist is incompetent to compound pentobarbital are without merit.

Issue Two

Whether Petitioner's challenge to the lethal injection protocol adopted and implemented by the State of South Dakota as set forth in detail in Petitioner's Habeas Petition Grounds 8, 11 and 12, violates Article VI, §23 of the South Dakota Constitution prohibition against Cruel and Unusual Punishment?

Rhines' final argument is that the South Dakota State Constitution, Article VI, §23 provides greater protection than the United States Constitution. He further argues that the South Dakota Supreme Court has not addressed the issue of the manner of carrying out the death penalty. The South Dakota Constitution provides in Article VI, §23:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishments inflicted.

While Rhines' argument focuses on the manner of carrying out the death penalty instead of whether the death penalty is unconstitutional, it is clear that the South Dakota Supreme Court has addressed the issue of the death penalty:

The South Dakota Constitution employs slightly different language in limiting the government's power to impose criminal penalties. Article VI, § 23, of the South Dakota Constitution states: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishments inflicted." (Emphasis supplied.) Moeller argues that South Dakota's

constitutional prohibition on "cruel punishments" is a greater restriction on government power than its federal counterpart prohibiting "cruel and unusual punishments." He contends that the death penalty is invariably a "cruel punishment" in violation of this state's constitutional provision.

We note that a state constitution may be interpreted to provide an individual with greater protection than the federal constitution. *State v. Opperman*, 247 N.W.2d 673, 674 (S.D.1976). Additionally, "capital punishment is a matter of particular state interest or local concern and does not require a uniform national policy." *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 209 (1987). See also James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 *Vanderbilt LRev* 1299 (1989).

Cognizant of this Court's independent authority to invalidate capital punishment as a matter of state law, we begin our analysis by focusing on our own state's legal and historical precedent. Importantly, the very same constitutional document that prohibits the infliction of cruel punishment contains provisions implicitly recognizing the appropriateness of the death penalty. S.D. Const.Art. VI, § 8, states in part: "All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great." (Emphasis supplied.) Article VI, § 2, provides in pertinent part: "No person shall be deprived of life ... without due process of law."

In addition to constitutional recognition, capital punishment has received legislative approval. The death penalty has been in effect for most of this state's history. Capital punishment existed from statehood until it was abolished in 1915. *Opinion of the Judges*, 83 S.D. 477, 479, 161 N.W.2d 706, 708 (1968). It was reinstated in 1939 and continued until 1972, when the United States Supreme Court effectively invalidated the then-existing capital sentencing scheme. Reed C. Richards & Stephen C. Hoffman, *Death Among the Shifting Standards: Capital Punishment After Furman*, 26 *SDLRev* 243 (Spring 1981). The legislature reenacted the death penalty in 1979, and it has remained in effect to the present. Richards & Hoffman, *supra*, at 243; 1979 S.D.Sess.L. ch. 160; 1981 S.D.Sess.L. ch. 186. Eleven individuals have been executed in South Dakota. Richards & Hoffman, *supra*, at 243.

State v. Moeller, 1996 S.D. 60, ¶¶ 97- 101, 548 N.W.2d 465, 487. The South Dakota Supreme Court adopted the test set forth in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976):

Historical and legislative acceptance of the death penalty is significant, but not dispositive. See *State v. Black*, 815 S.W.2d 166, 188 (Tenn.1991). Constitutional analysis is dynamic and evolving; it cannot rest solely on historical underpinnings. We therefore adopt a three-part analytical framework derived from the United States Supreme Court's plurality decision in *Gregg*. To survive constitutional scrutiny, the death penalty: (1) must comport with contemporary standards of decency; (2) must not be excessive in light of the crime committed; and (3) must serve a legitimate penological objective. *Gregg*, 428 U.S. at 173-83, 96 S.Ct. at 2924-30, 49 L.Ed.2d at 874-80.

Moeller, p. 487-488, ¶102. The South Dakota Supreme Court went on to hold that South Dakota's capital punishment was constitutional and met the three part test set forth in *Gregg*.

We conclude that capital punishment meets all three of these requirements. To begin with, the death penalty comports with South Dakotans' contemporary standards of decency. Because the legislative branch is most representative of the views of the people, legislative enactments are one of the most accurate indicators of societal mores. *Gregg*, 428 U.S. at 179-81, 96 S.Ct. at 2928-29, 49 L.Ed.2d at 878-79; *Commonwealth v. Zettlemyer*, 500 Pa. 16, 454 A.2d 937, 968 (1982), cert. denied, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); Black, 815 S.W.2d at 189; *State v. Campbell*, 103 Wash.2d 1, 691 P.2d 929, 948 (1984), cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). The South Dakota Legislature reenacted the death penalty in 1979, and has made occasional amendments to the statutory scheme since that time. 1979 S.D.Sess.L. ch. 160; 1981 S.D.Sess.L. ch. 186; 1989 S.D.Sess.L. ch. 206; 1992 S.D.Sess.L. ch. 173; 1994 S.D.Sess.L. ch. 178; 1995 S.D.Sess.L. ch. 132. These statutes have remained undisturbed by the electorate, despite the power of the people to vote death penalty proponents out of office or to reject legislative enactments through a referendum election. This public acquiescence is strong evidence that capital punishment reflects the will of the people of South Dakota.

As noted in *Baze*, States have long explored using lethal injection as a manner of assuring humane method of execution. *Baze*, 553 U.S. 35, 42, 128 S.Ct. 1526-1527. At the time *Baze* was decided in 2008, 36 states had adopted lethal injection as the exclusive or primary means of implementing the death penalty. *Id.* It is also the method used by the Federal Government. *Id.* See 18 USC § 3591 *et seq.* (2000 ed. and Supp.V).

In South Dakota, the Supreme Court has found the death penalty to be Constitutional under both the United States Constitution and the South Dakota Constitution. In this Court's opinion, lethal injection is the most humane manner of implementing the death penalty and therefore, it is constitutional under the South Dakota Constitution.

III. CONCLUSION

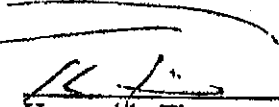
For the reasons set forth above, the Court hereby denies Petitioner's Writ of Habeas in its entirety.

ORDER

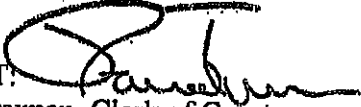
ACCORDINGLY, it is hereby ORDERED that Petitioner's Writ of Habeas Corpus is denied and Respondent shall submit Findings of Fact and Conclusions of Law in accordance with this decision.

Dated this 27 day of February, 2013 at Rapid City, Pennington County, South Dakota.

BY THE COURT



Honorable Thomas L. Trimble
Circuit Judge, Seventh Judicial Circuit

ATTEST: 
Ranae Truman, Clerk of Courts

By: 
Deputy Clerk

(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT

FEB 27 2013

Ranae Truman, Clerk of Courts
By:  Deputy

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL 17 2013

Shirley A. Johnson-Lopez
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

CHARLES RUSSELL RHINES,
Petitioner,

vs.

DOUGLAS WEBER, Warden,
South Dakota State
Penitentiary,
Respondent.

) ORDER DENYING MOTION FOR
) CERTIFICATE OF PROBABLE CAUSE

) #26673
)
)
)
)
)
)
)

Petitioner having served and filed a motion for a certificate of probable cause to appeal from a final order entered by the trial court in the above-entitled habeas corpus proceeding on April 29, 2013, and respondent having served and filed a response thereto, and the Court having considered the motion and response and having determined that probable cause that an appealable issue exists has not been demonstrated, now, therefore, it is

ORDERED that the motion for a certificate of probable cause be and it is hereby denied.

DATED at Pierre, South Dakota, this 17th day of July, 2013.

BY THE COURT:

David Gilbertson

David Gilbertson, Chief Justice

ATTEST

[Signature]
Clerk of the Supreme Court
(SEAL)

(Justices John K. Konenkamp and Lori S. Wilbur disqualified.)

PARTICIPATING: Chief Justice David Gilbertson and Justices Steven L. Zinter, Glen A. Severson, Circuit Court Judge Scott P. Myren and Retired Justice Robert A. Miller.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES,

CIV 00-5020-KES

Petitioner,

PETITIONER'S RESPONSE
TO STATE'S MOTION FOR
SUMMARY JUDGMENT

vs.

DARIN YOUNG, Warden,
South Dakota State Penitentiary,

Respondent.

**I. RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DOES NOT
CONFORM WITH LOCAL RULE 56.1A AND SHOULD BE DENIED.**

Respondent has filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Under Local Rule 56.1A, Respondent was required to submit with its motion "a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact will be presented in a separate numbered statement with an appropriate citation to the record in the case." Respondent has filed no such statement of allegedly undisputed material facts.

"The purpose of local rule like Local Rule 56.1A 'is to distill to a manageable volume the matters that must be reviewed by a court undertaking to decide whether a genuine issue of fact exists for trial.'" *Sancom, Inc. v. Qwest Communications Corp.*, 2010 WL 299477, *1 (D.S.D. 2010) (unpublished). Thus,



II. “Method of Execution Challenge”

Respondent devotes some fifty pages of his Brief in Support of Respondent’s Motion for Summary Judgment to an issue which is not before the Court. (Doc. No. 215, pp. 111-161). As Respondent notes in the “Procedural History” section of Doc. No. 215, after being denied relief on the grounds raised in his initial state habeas corpus petition, Mr. Rhines “filed his petition herein in which he alleged new unexhausted grounds for *habeas corpus* relief in addition to all of the claims he had exhausted in the state courts.” (*Id.* at 1-2. *See* Doc. No. 73 (First Amended Petition)). After extended briefing by the parties, the Court entered its Order (Doc. No. 116) denying without prejudice Respondents’ motion to dismiss (Doc. No. 77); finding that Grounds Two(A), Three, Four and Ten of the First Amended Petition had been exhausted and would be considered on their merits; finding that Grounds Two(B), Six(E), Nine(B), (H), (I) and (J), Twelve and Thirteen were unexhausted; and staying the petition pending exhausting state court remedies of those claims. (Doc. No. 116 at 9-10). That Order was appealed to the United States Court of Appeals for the Eighth Circuit, which reversed and remanded. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003). The United States Supreme Court granted certiorari “to resolve a split in the Circuits regarding the

District Court's 'stay-and-abeyance' procedure," *Rhines v. Weber*, 544 U.S. 269, 273 (2005), vacated the Eighth Circuit's judgment and remanded the case to that court to consider whether this Court's grant of a stay constituted an abuse of discretion. *Id.* at 279. The Eighth Circuit remanded the case to this Court to determine whether there was good cause for failure to exhaust the claims in state court, whether any unexhausted claims were plainly meritless and whether Mr. Rhines had engaged in "abusive litigation tactics or intentional delay." *Rhines v. Weber*, 409 F.3d 982 (8th Cir. 2005).

After further briefing and argument by the parties, this Court entered its Order Granting Motion for Stay and Abeyance (Doc. No. 150), finding that Mr. Rhines had good cause for failing to exhaust the claims, that the claims – with the exception of claim Thirteen, which Mr. Rhines subsequently withdrew and dismissed (*see* Doc. No. 152) – were not plainly meritless, and that Mr. Rhines had not engaged in intentionally dilatory litigation tactics. Therefore, the Court stayed the petition for habeas corpus pending exhaustion of Grounds Two(B), Six(E), Nine(B), (H), (I), (J), and Twelve in state court. (Doc. No. 150 at 19).

None of the claims in the original or the First Amended Petition for Writ of Habeas Corpus, exhausted or unexhausted, concerned the manner of execution.

Therefore the issue of manner of execution, which was included in the latest litigation in the state court, and which was discussed at such length in Respondent's brief, is not before this Court, and this Court cannot issue any sort of judgment concerning that issue.

III. Ground One: Admission of Petitioner's Confession

A. Insufficiency of *Miranda* Warnings.

In Ground One Mr. Rhines contends that his multiple confessions were admitted in violation of the Fifth and Fourteenth Amendments. Specifically Mr. Rhines alleges that law enforcement failed to give adequate warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny. *Miranda* requires that before a person in custody may be subjected to interrogation,

[h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.

384 U.S. at 479. After such warning have been given, the individual may waive these rights. *Id.* "But unless and until such warnings and waiver are demonstrated

AFFIDAVIT OF MARK DERSHWITZ, M.D., Ph.D.

COMMONWEALTH OF MASSACHUSETTS)
)
COUNTY OF WORCESTER) ss:

I, Dr. Mark Dershwitz, of lawful age, being first duly sworn upon oath, state:

1. I have been asked to prepare this expert report by attorneys for the defense in the case of Moeller v Weber. I have previously submitted affidavits in this case on 31 May 2011 and 12 September 2011.
2. I am a medical doctor with a Ph. D. in Pharmacology. A true and accurate copy of my curriculum vitae is attached as Exhibit A. I am licensed to practice medicine in the states of Massachusetts and Maine. I am currently an anesthesiologist at the University of Massachusetts and I am certified by the American Board of Anesthesiology. I am currently Professor of Anesthesiology and Biochemistry & Molecular Pharmacology at the University of Massachusetts.
3. I have done extensive research and written numerous review articles and research papers on the use of anesthetics and I regularly practice medicine in that capacity. My research includes the study of pharmacodynamics and the pharmacokinetics of drugs. Pharmacokinetics is the study of the time course of a drug, while pharmacodynamics refers to the effects of a drug. Prior to my current appointment at the University of Massachusetts, I was an Instructor,



Assistant Professor and Associate Professor at Harvard Medical School.

4. I have testified as an expert witness concerning the pharmacokinetics and the pharmacodynamics of anesthetic drugs and other medications. I have testified in court as an expert witness on twenty-four occasions. I have given fifty-three depositions as an expert witness. The list of cases in which I have testified is attached as Exhibit B.
5. I have reviewed the protocols for lethal injection used in the states of Arkansas, Alabama, Arizona, California, Delaware, Florida, Georgia, Kentucky, Maryland, Missouri, Montana, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas Virginia, and Washington and by the federal government. Most of the states (and the federal government) employ similar three-drug protocols for carrying out lethal injection. While the protocols and the jurisdictions differ in terms of the doses and identities of the three medications used, each of these protocols, when implemented as written, will render an inmate unconscious quickly and cause the inmate's rapid and painless death.
6. I have reviewed a document entitled, "ERM A.12(B) Capital Punishment Final Days Procedures," dated 13 October 2011. The document contains instructions for using *either* thiopental or pentobarbital as the first drug, or as the only drug, in the protocol. I have been informed by attorneys for the defense in this case that the State of South Dakota intends to use pentobarbital as the first drug, or as the only drug, in the lethal injection protocol. Exhibit C is a copy of the analysis of the lot of pentobarbital vials that the State of South Dakota intends to use for lethal injection. This analysis demonstrates that the pentobarbital meets the

standards set forth by the United States Pharmacopeial Convention.

7. The document, "ERM A.12(B)" states that medications will be administered as follows in the three-drug protocol:
 - a. Two intravenous catheters will be inserted.
 - b. Syringes 1 and 2, each containing 2.5 grams of pentobarbital in a volume of 50 mL, for a total dose of 5 grams, will be injected.
 - c. Syringe #3 containing 25 mL of saline solution will be injected to flush the intravenous line.
 - d. The warden will confirm that the inmate is unconscious.
 - e. Syringe 4 containing 100 mg of pancuronium bromide in a volume of 50 mL will be injected.
 - f. Syringe #5 containing 25 mL of saline solution will be injected to flush the intravenous line.
 - g. Syringes 6 and 7, each containing 120 mEq of potassium chloride in a volume of 60 mL, for a total dose of 240 mEq, will be injected.
8. It is expected that a 5-gram dose of pentobarbital will cause the inmate's electroencephalogram (EEG or recording of brain waves) to become flat. This is the deepest level of anesthesia that can be measured with the brain monitors available today, and is much deeper than barbiturate coma that is in turn deeper than surgical anesthesia.
9. Pentobarbital is commonly used to produce barbiturate coma in the attempt to decrease the degree of brain damage following head trauma, stroke, and other causes of brain damage. It is also used to prevent brain damage during surgical

procedures in which there will be the planned and deliberate interruption of blood flow to the brain. A typical dosing regimen for the institution and maintenance of barbiturate coma is as follows:

- a. Pentobarbital, 10 mg/kg, (or 800 mg in an average 80-kg adult) is given by intravenous infusion over 30 minutes.
 - b. A continuous infusion of pentobarbital at a rate of 5 mg/kg/hr (or 400 mg/hr in an average 80-kg adult) is given for 3 hr.
 - c. The patient's EEG is monitored for the presence of "burst suppression." The appearance of "burst suppression" on the EEG means that there are *intermittent* periods of electrical inactivity (i.e., flat-line).
 - d. The pentobarbital infusion rate is then adjusted between 1 - 5 mg/kg/hr (or 80 - 400 mg/hr in an average 80-kg adult) to maintain the presence of burst suppression on the EEG.
 - e. Because this dose of pentobarbital results in apnea, i.e., the cessation of breathing, the patient is mechanically ventilated.
10. Using the above regimen in an 80-kg adult, it would take between 11 - 41 hr to achieve the administration of 5,000 mg of pentobarbital. There are two reasons that pentobarbital is not given more rapidly or at a higher dose to induce barbiturate coma. First, the dose regimen described in Paragraph 8 is adequate to induce and maintain burst suppression on the EEG. Second, more rapid administration of pentobarbital causes severe and dangerous decreases in blood pressure that might be fatal to the patient.
11. The use of pentobarbital in barbiturate coma has been part of medical practice

from the mid-1970's until the present day. It is neither a novel nor an archaic medical therapy. I have attached two journal articles, one from 1979 and the other from 2010, as Exhibits D and E, respectively, to demonstrate this point.

12. The end-point of burst suppression on the EEG is a deeper level of general anesthesia than is needed for any surgical procedure. Therefore, since the protocol for lethal injection described in Paragraph 7 describes a dose of pentobarbital far in excess of that used to induce and maintain barbiturate coma, and since this is a depth of anesthesia far greater than that needed for any surgical procedure, once 5,000 mg of pentobarbital have been administered intravenously to an inmate, there is, to a reasonable degree of medical certainty, an exceedingly remote chance that the inmate could experience the effects of the subsequently administered pancuronium bromide or potassium chloride.
13. A dose of 5,000 mg of pentobarbital will cause virtually all persons to stop breathing. In addition, a dose of 5,000 mg of pentobarbital will cause the blood pressure to decrease to such a degree that perfusion of blood to organs will cease or decline such that it is inadequate to sustain life. Thus, although the subsequent administration of pancuronium bromide, a paralytic agent, would have the effect of paralyzing the person and preventing him or her from being able to breathe, virtually every person given 5,000 mg of pentobarbital will have stopped breathing prior to the administration of pancuronium bromide. Thus, even in the absence of the administration of pancuronium bromide and potassium chloride, the administration of 5,000 mg of pentobarbital by itself would cause death in almost everyone.

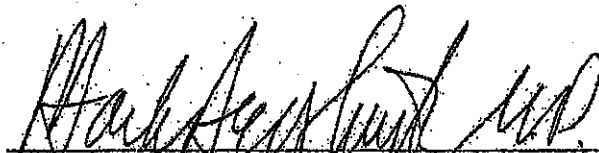
14. Pentobarbital is the most common agent used in the euthanasia of pet cats and dogs by veterinarians. The usual dose is 40 mg/kg. The use of a dose of 5,000 mg in an 80-kg inmate as part of the lethal injection protocol is greater than a 50% increase as compared to the dose used in animal euthanasia.
15. Therefore, it is my opinion to a reasonable degree of medical certainty that there is an exceedingly remote chance that a condemned inmate to whom 5,000 mg of pentobarbital is properly administered pursuant to the lethal injection protocol of the State of South Dakota would experience any pain and suffering associated with the administration of lethal doses of pancuronium bromide and potassium chloride.
16. An inmate sentenced to death in South Dakota may under some circumstances elect the two-drug protocol. The two-drug protocol is identical to the procedure described in Paragraph 7 except that the syringes of potassium chloride are not injected. It is my opinion to a reasonable degree of medical certainty that there is an exceedingly remote chance that a condemned inmate to whom 5,000 mg of pentobarbital is properly administered pursuant to the lethal injection protocol of the State of South Dakota would experience any pain and suffering associated with the administration of a lethal dose of pancuronium bromide.
17. An inmate sentenced to death in South Dakota may under some circumstances elect the one-drug protocol. In this protocol, the inmate is administered a 5-gram dose of pentobarbital alone. It is my opinion to a reasonable degree of medical certainty that there is an exceedingly remote chance that a condemned inmate to whom 5,000 mg of pentobarbital is properly administered pursuant to the lethal

injection protocol of the State of South Dakota would experience any pain and suffering.

18. I am being compensated at the rate of \$450 per hour.

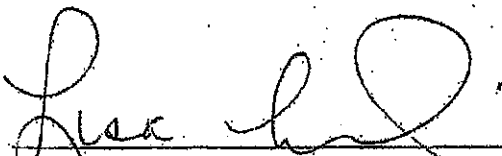
FURTHER AFFLIANT SAIETH NOT.

Dated this 9th day of February, 2012.

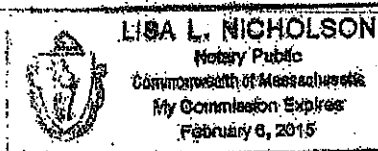


Mark Dershwitz, M.D., Ph.D.

Subscribed and sworn to before me this 9th day of February, 2012.



Notary Public



Mark Heath, M.D.

New York, NY

December 1, 2012

Page 1

1 Mark Heath, M.D.

2 STATE OF SOUTH DAKOTA

3 COUNTY OF PENNINGTON

4 IN CIRCUIT COURT

5 SEVENTH JUDICIAL CIRCUIT

6 CIV. 02-924

7 -----

8

9 CHARLES RUSSELL RHINES,

10 Petitioner,

11 vs.

12 DOUGLAS WEBER, Warden, South

13 Dakota State Penitentiary,

14 Respondent.

15 -----

16

17

18 Videotaped Deposition Transcript of

19 MARK HEATH, M.D., in the above-entitled matter, as

20 taken by and before, DEBRA GOODFRIEND, a Certified

21 Shorthand Reporter and Notary Public for the State of

22 New York, held at the offices of Federal Defenders of

23 New York, 52 Duane Street, New York, New York, on

24 December 1, 2012, commencing at 9:45 a.m.

25

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Mark Heath, M.D.

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Page 2	Page 4
<p>1 Mark Heath, M.D. 2 APPEARANCES: 3 4 FEDERAL PUBLIC DEFENDER DISTRICT 5 OF SOUTH DAKOTA AND NORTH DAKOTA 6 ATTORNEYS FOR PETITIONER 7 101 South Pierre Street, 3rd Floor 8 Pierre, South Dakota 57501 9 (605)224-0009 10 BY: NEIL FULTON, ESQ. 11 12 13 14 STATE OF SOUTH DAKOTA 15 OFFICE OF ATTORNEY GENERAL 16 ATTORNEYS FOR RESPONDENT 17 1302 East Highway 14, Suite 1 18 Pierre, South Dakota 57501-8501 19 BY: PAUL S. SWEDLUND, ESQ. 20 (605) 773-3215 21 paul.swedlund@state.sd.us 22 23 ALSO PRESENT: 24 Marcelo Rivera, Videographer 25</p>	<p>1 Mark Heath, M.D. 2 THE VIDEOGRAPHER: This is DVD No. 1 3 of the video deposition of Dr. Mark Heath in the 4 matter, Rhines vs. Weber. This deposition is being 5 held at 52 Duane Street, New York, New York on 6 December 1st, 2012 at approximately 9:53 a.m. 7 My name is Marcelo Rivera from 8 Alderson Court Reporter. 9 Will the present counsel please 10 introduce themselves, for the record. 11 MR. FULTON: Neil Fulton, from the 12 Federal Public Defender's office, for the plaintiff. 13 MR. SWEDLUND: Paul Swedlund, the 14 South Dakota Attorney Generals Office, for the 15 defendant. 16 THE VIDEOGRAPHER: Will the court 17 reporter please swear in the witness. 18 MARK HEATH, M.D., having been first 19 duly sworn by a Notary Public from the State of New 20 York was examined and testified as follows: 21 DIRECT EXAMINATION BY MR. FULTON: 22 Q. Can you start out by telling us your 23 name? 24 A. My name is Mark Heath. 25 Q. And Dr. Heath, I'm going to refer to you</p>
Page 3	Page 5
<p>1 Mark Heath, M.D. 2 3 INDEX 4 5 WITNESS PAGE 6 7 MARK HEATH, M.D. 8 By Mr. Fulton 4 9 By Mr. Swedlund 63 10 11 12 13 EXHIBITS 14 15 (No Exhibits Marked By Reporter.) 16 17 18 19 20 21 22 23 24 25</p>	<p>1 Mark Heath, M.D. 2 as Dr. Heath today, and not be so informal as to call 3 you Mark. Can you tell us how you're employed? 4 A. I'm an anesthesiologist. I work at 5 Columbia University Medical Center in New York City. 6 Q. I want to go back through your education 7 just a little bit. Perhaps the easiest way to do is 8 that you have in front of you something marked Exhibit 9 3. What is that document? 10 A. It's my curriculum vitae. 11 Q. Can you tell us the highlights of your 12 professional education. We don't need to go all the 13 way back to high school, but where you did your 14 medical education and residency? 15 A. I did my medical education at University 16 of North Carolina in Chapel Hill. After that I did a 17 one-year internship in internal medicine in Washington 18 D.C., and then I did an internship in anesthesiology 19 at Columbia University Medical Center in New York 20 City. I then did a fellowship that was a mixture of 21 research and specializing in cardiac anesthesia for 22 about a year-and-a-half, again at Columbia. And then 23 I joined the faculty of Columbia University as an 24 anesthesiologist and a staff member of the hospital. 25 Q. When was that, that you joined the</p>

2 (Pages 2 to 5)

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<p style="text-align: right;">Page 18</p> <p>1 Mark Heath, M.D. 2 A. Correct. 3 Q. So for one way to think about it, you 4 could have a contaminant that made the process 5 unintendedly painful or improper on the way to death 6 or something that happens after an interrupted 7 execution? 8 A. Right. 9 MR. SWEDLUND: Can I ask a question. 10 Were you talking about introduction of a contaminant 11 at what stage were you talking about? 12 Q. Doctor, we're not talking about you 13 being the expert on how and when the drugs are 14 compounded, correct? 15 A. Correct. I think that's correct. 16 That's up to you, but yes. 17 Q. But you have in your practice 18 administered compounded drugs? 19 A. I've administered drugs where I've mixed 20 the drug myself and I've used drugs that have been 21 compounded by the pharmacy at the hospital. 22 Q. Okay. And to sort of address Paul's 23 question, I mean, you have some understanding of how 24 the compounding process works? 25 A. Yes.</p>	<p style="text-align: right;">Page 20</p> <p>1 Mark Heath, M.D. 2 will be a contaminant introduced, you're just saying 3 it's a potential that exists? 4 A. Yes. 5 Q. And it's a potential that can make the 6 execution less humane? 7 A. Yes. 8 Q. Let's talk, specifically, if we can, 9 about the drug pentobarbital. Is that a drug that 10 you're familiar with? 11 A. Yes. 12 Q. Tell us a little bit about what it is? 13 A. It's a drug in a class called 14 barbiturates or barbitalurates. The spelling is the 15 same but people pronounce it differently. 16 Barbiturates are drugs that when they reach the brain 17 cause depression of the brain, and if they're given in 18 sufficient dose will cause drowsiness and then 19 unconsciousness. 20 Q. Is it a drug that you administered in 21 your practice? 22 A. I have, yes. 23 Q. What is it typically used for in 24 anesthesiology? 25 A. It's not used very often at all in</p>
<p style="text-align: right;">Page 19</p> <p>1 Mark Heath, M.D. 2 Q. Tell us a little bit about points in the 3 process where based on your experience you see the 4 potential for contaminants potentially to be 5 introduced? 6 A. Well, it can happen anywhere from the 7 assembly of the ingredients for the actual chemical, 8 the turning or synthesis that those ingredients into 9 the chemical that is going to be the drug, the 10 shipping, handling, storage of that chemical, then the 11 preparation of that chemical, that chemical which is 12 going to be the drug, into the actual package drug 13 form, and then the transport of that to the place of 14 storage or place of use. Problems can happen during 15 storage, after it's removed from storage. Problems 16 can happen during the drawing up of the drug into a 17 syringe at its point of use. Basically anywhere in 18 the full chain from the precursor molecules involved 19 in the synthesis of the chemical throughout the 20 process of turning that chemical into an actual drug 21 and the handling of the drug in preparation for 22 administration. 23 Q. To be fair in drawing the boundary about 24 your opinion, you are not identifying a specific point 25 in South Dakota's protocol where you're saying there</p>	<p style="text-align: right;">Page 21</p> <p>1 Mark Heath, M.D. 2 anesthesiology. The main use would be in a clinical 3 situation where there was a need to greatly reduce the 4 activity of the brain because either the brain has 5 received trauma or is going to be subjected to injury 6 as a result of a surgical procedure. 7 Q. In terms of its operation, can you 8 compare the speed, the nature in which it operates 9 with other barbiturates a little bit? 10 A. Yes. Barbiturates are typically divided 11 into classes, depending on how rapidly they exert 12 their action and for how long they exert their action. 13 So the classes, there are different ways that people 14 do it, but typically they talk about ultra short, 15 ultra-fast-acting barbiturates, and then short-acting 16 barbiturates, and medium-acting barbiturates and 17 long-acting barbiturates. And pentobarbital is 18 typically put into the short or medium-acting 19 categories depending on which author is referring to 20 it. 21 Q. And being a short or medium-acting 22 barbiturate, what does that mean in terms that a 23 layperson can understand in terms of its effect on the 24 person that's being anesthetized? 25 A. I'll just start by comparing ultra-short</p>

6 (Pages 18 to 21)

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Page 22	Page 24
<p>1 Mark Heath, M.D. 2 and ultra-fast acting barbiturates which will enter 3 the brain very quickly in a matter of tenths of 4 seconds, and will also leave the brain very quickly 5 and be taken up by other parts of the body, the fat 6 areas of the body. By contrast -- and those drugs 7 would be the class of drug would be thiopental, for 8 example, and another would be a drug called 9 methohexital. By contrast, pentobarbital is slower to 10 take effect and lasts for longer. So instead of 11 wearing-off in a matter of a couple of minutes, 12 pentobarbital would typically last for hours. 13 Q. You have reviewed the protocol and have 14 an understanding at least a paper level of how the 15 State of South Dakota intends to use pentobarbital as 16 a lethal injection drug, yes? 17 A. Yes. 18 Q. And tell us a little bit based on your 19 training and experience how that drug would operate in 20 an execution carried forward with no outside problems, 21 it goes according to plan, so to speak? 22 A. Just to be clear, I've never seen it 23 used in an execution, so I'm a little bit speculating. 24 But I have read about executions where it's been used 25 and I can speculate based on my knowledge about</p>	<p>1 Mark Heath, M.D. 2 activity, but at that point the person would be 3 legally dead. 4 Q. In our discussion of compounding you 5 mentioned the potential for a drug to be less 6 efficacious than it should. Now, based on your review 7 of the protocol if a -- how would the administration 8 of a less than appropriately efficacious amount of 9 pentobarbital manifest to result in an inhumane 10 execution? 11 A. My concern would be that the prisoner 12 would be administered a dose that would impair 13 respiration or temporarily prevent respiration, but it 14 does sub-lethal and did not effectively kill the 15 person. And in that instance, which happens in 16 barbiturate overdose, when people try to commit 17 suicide or accidentally ingest it or ingestion 18 barbiturates for illicit recreational purposes, the 19 person can spend a period of time breathing 20 inadequately or not at all, but it is not such a time 21 that they actually die from that. When the drug wears 22 off the person can be left with a brain injury or 23 brain damage or also injury to other organs in the 24 body. 25 Q. So you would end up in a situation where</p>
Page 23	Page 25
<p>1 Mark Heath, M.D. 2 barbiturates and pentobarbital and human physiology 3 and drug interactions in general. If the intended 4 dose of pentobarbital were to be successfully 5 delivered into the circulation of a person and carried 6 to their brain in this dose it would cause complete 7 depression of all the brain activity such that there 8 would be no electrical activity in the brain 9 whatsoever. The electrical activity of the brain 10 sustains many important bodily functions, but in 11 particular it sustained respiration, the rhythmic 12 breathing that we do all the time and when 13 pentobarbital or any barbiturate would stop all 14 activity in the brain, it without stop what we call 15 the respiratory drive. It would stop breathing from 16 occurring. When an animal or person doesn't breathe 17 then after a period of several minutes the brain 18 starts to sustain injury from lack of oxygen and then 19 it starts to sustain permanent death of the neurons, 20 which are the cells that carry information to the 21 brain. At some point after a number of minutes the 22 neurons in the brain will be irreversibly damaged 23 and/or dead, the condition that we call brain death, 24 and that is legally a type of death, a form of death. 25 It's possible that the heart might be still sustaining</p>	<p>1 Mark Heath, M.D. 2 a person had received too little or not effective 3 enough pentobarbital to actually complete the process 4 of killing them, but too much to simply anesthetize 5 them so they can be simply brought back of the 6 anesthetized state? 7 A. I'm sorry, can you say that again. Not 8 enough -- 9 Q. You've given too much to them to just 10 anesthetize them and not enough to fill them? 11 A. You've given them an amount that would 12 be anesthetic, they probably would be unconscious and 13 not feel anything. They would be not breathing very 14 much, very low amount of respiration. They would be 15 in that state for a period of time until the drug wore 16 off. And when the drug wore off they would be left 17 with brain injury. 18 Q. If I can have you look at page 4 of your 19 September 13th, 2012 declaration. It's Exhibit 6. 20 You mention in paragraph 60, that as a medical 21 practitioner, you would be, quote, highly reluctant, 22 close quote, to use an anesthetic agent that would be 23 handled and compounded in the manner described and 24 complicated by the SD DOC. 25 When you make that statement I assume</p>

7 (Pages 22 to 25)

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<p>1 Mark Heath, M.D. 2 here today, do you hold those to a reasonable degree 3 of medical certainty? 4 A. Yes, I do. 5 Q. And you've had an opportunity to review 6 before today Exhibits 4, 5 and 6 which are your 7 declarations in the Moeller litigation? 8 A. Yes. 9 Q. The opinions expressed in there are also 10 to a reasonable degree of medical certainty? 11 A. The medical opinions are, yes. 12 Q. Although we've not gone through them all 13 today, based on your review you still hold the 14 opinions expressed in Exhibits 4, 5 and 6? 15 A. Yeah. Except where I provided more 16 information and changed it as to the more recent 17 affidavits. 18 MR. FULTON: Doctor, those are the 19 questions I have. Mr. Swedlund is going to have 20 some questions he's going to ask you, too. 21 MR. SWEDLUND: Could we take a break. 22 THE VIDEOGRAPHER: The time is 23 11:19 a.m. and we're going off the record. 24 (There was a break in the 25 proceedings.)</p>	<p>1 Mark Heath, M.D. 2 Q. So I'm going to look at your testimony 3 in a case that you gave, the Evans versus Star case. 4 Do you recall testifying in that case? 5 A. What state is that? 6 Q. That's in Maryland. 7 A. Okay. 8 Q. You were asked; do you disapprove of 9 executions in general. And your answer was; yes. 10 Question: So all manner of executions 11 that have taken place legally in the United States 12 you disapprove of? 13 And you say: The only qualification 14 is that I think there's theoretical exigent 15 circumstances where I think it might be necessary to 16 execute somebody because the alternative would be 17 worse. But putting that theoretical situation 18 aside, yes, it's correct that I at the present time 19 do not approve of elected executions of people. 20 Is that still your position today? 21 A. Yes. 22 Q. Or have you changed it? 23 A. I'm sure it's, it's a fluid thing but I 24 agree with those statements. 25 Q. Again, in the Rivera case do you recall</p>
Page 63	Page 65
<p>1 Mark Heath, M.D. 2 The time is 11:37a.m. and we're back 3 on the record. 4 EXAMINATION BY MR. SWEDLUND: 5 Q. Doctor, I wanted to cover something with 6 you here that I wasn't entirely clear on. You are 7 opposed to the death penalty; is that correct? 8 A. The way it's being practiced in the 9 United States now, yes. 10 Q. Well, your opposition goes beyond just 11 how it's practiced, you oppose the very idea of the 12 death penalty? 13 A. You know, I don't really think about the 14 extracted idea of the death penalty, just what I see 15 from participating in this litigation and by, when I 16 read about many of the cases I think that society 17 would be better off if we did not do this. 18 Q. So clarify then for me please, doctor. 19 Are you saying that you oppose it only as it is 20 practiced or you have a deeper moral opposition to the 21 death penalty? 22 A. Opposition is the wrong word. I have a 23 lot of concerns about it because I feel that it's hard 24 to know with certainty in all cases that it's really a 25 guilty person on death row.</p>	<p>1 Mark Heath, M.D. 2 testifying in that case? 3 A. You have to tell me what state it was. 4 Q. Ohio. 5 A. I don't specifically recall, but by that 6 name, but I'll accept that. 7 Q. And you were asked: As it currently 8 exists you are against the death penalty in whatever 9 form it exists at this time. 10 Answer: I'm opposed to the carrying 11 out of the death penalty. 12 Question: Then that would be the same 13 no matter how painless it would be? 14 Answer: That's correct. Even if it 15 were done in a completely painless way I'm very 16 uncomfortable with killing a person in any way. 17 That was a statement you made in 18 Rivera. Do you remember that now? 19 A. I don't remember it, but I agree with 20 it. 21 Q. You agree with it? 22 A. Yes. 23 Q. So your misgivings about the death 24 penalty go beyond merely how it is performed you have 25 a moral objection to it, as well?</p>

17 (Pages 62 to 65)

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<p style="text-align: right;">Page 66</p> <p>1 Mark Heath, M.D. 2 A. I'm not sure moral is the right word for 3 it. I don't think that as it's currently practiced in 4 the U.S. or probably anywhere else in the world, 5 although I don't really know about its practice 6 elsewhere, I think it's a mistake. 7 Q. And you were asked: You never found an 8 acceptable lethal injection protocol for human beings? 9 And your answer: That's correct. 10 Is that still true today? 11 A. Yes, South Dakota is better than the 12 great majority of other jurisdictions, but it still 13 has flaws and they're correctable and they should be 14 corrected. 15 Q. But you have to this day you have never 16 found a lethal injection protocol that you considered 17 acceptable? 18 A. Not for humans. For veterinary 19 euthanasia, yes, but for lethal injection, as has been 20 carried out for legal proceedings, no. 21 Q. Whether your objection to the death 22 penalty is moral or merely to the mechanics of it, do 23 your opinions about the death penalty in any way color 24 your objectivity about your review of protocols? 25 A. I do my best to go beyond any bias that</p>	<p style="text-align: right;">Page 68</p> <p>1 Mark Heath, M.D. 2 of it in terms of assessing -- of preparing the drugs, 3 administering the drugs, setting up the equipment, 4 monitoring the effects of the drugs and being able to 5 detect and intervene if a problem is occurring, then I 6 think they should be held to that standard. 7 Q. Because you said in some of your answers 8 that, for example, the pusher and I don't mean to use 9 those terms to denigrate what he does and I use them 10 because they bring clarity to the role that the person 11 plays, but in reference to the pusher you stated that 12 this person wouldn't have qualifications to be hired 13 in a clinical setting. Do you recall saying that? 14 A. I don't specifically recall it, but I 15 agree with it as you say it now. Do you mean in this 16 deposition here or the affidavit? 17 Q. Yes. 18 A. I agree with the statement. 19 Q. Are you aware of case authorities which 20 state that a lethal injection is not a medical 21 procedure and is not held to those standards? 22 A. I think you mean by case authorities 23 legal decisions? 24 Q. Correct. 25 A. Not specifically. I understand the</p>
<p style="text-align: right;">Page 67</p> <p>1 Mark Heath, M.D. 2 I might have but the definition of subconscious bias 3 is one can't know when one has one. So I try to 4 eliminate conscious bias as much as possible, but I 5 can't speak to subconscious bias, because anybody who 6 claims they can doesn't understand what that is. 7 Q. So some bias may enter into your 8 evaluation of a protocol or how it's used? 9 A. Yes, subconscious bias certainly could 10 be there. 11 Q. Doctor, if I understand your position on 12 this as well from your previous testimony, it's your 13 belief that a surgical standard of care applies to a 14 lethal injection proceeding whether it's one drug or 15 three drugs? 16 A. I wouldn't use the word surgical 17 standard of care. Clinical standard of care should 18 apply if one wants to have the same reliability as a 19 clinical procedure. 20 Q. Let me ask it a different way. Do you 21 believe that the persons who perform a lethal 22 injection should be held in the same standards as 23 persons who administer anesthesia in the operating 24 room? 25 A. Not necessarily. But for the key parts</p>	<p style="text-align: right;">Page 69</p> <p>1 Mark Heath, M.D. 2 general framework that you're talking about. I know 3 legislatively some states have explicitly carved out 4 the activity as being deemed a medical procedure. And 5 I believe, although I can't think of any specific 6 examples of courts where they do not view it as a 7 medical procedure, but it's also my view that whether 8 or not something is a medical procedure exists both as 9 a legal point of view and also as a medical point of 10 view. And this is an example of using medical 11 procedures to carry out in ideally or the intention of 12 a euthanasia, which is a medical procedure. 13 Q. So to the extent the courts have said 14 that optimum medical standards do not need to apply in 15 a lethal injection setting, you would disagree with 16 those opinions? 17 A. I'm not sure that courts say that 18 optimum medical standards don't need to apply. You 19 have to give me a specific example. 20 Q. Well, that -- 21 A. Optimum medical standards don't apply 22 anywhere. They don't apply in medicine. It's always 23 below optimum in medicine. 24 Q. But to the extent that courts have said 25 that a lethal injection is not a medical procedure,</p>

18 (Pages 66 to 69)

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<p>1 Mark Heath, M.D. 2 completely inappropriate to participate in the 3 procedure, as has been evidenced in numerous lethal 4 injection cases around the country. 5 Q. Now, in Baze, the Supreme Court believed 6 that a provision requiring the hiring of a person with 7 one-year professional experience, and let's talk about 8 an EMT since that's what South Dakota has used, so an 9 EMT with one-year professional experience with that 10 provision was adequate. Do you know what South 11 Dakota's protocol provides? 12 A. In terms of professional experience, two 13 years. 14 Q. So South Dakota's protocol requires more 15 experience than the Baze, than the provision approved 16 in Baze? 17 A. Correct. 18 Q. Now, doctor, I would like to have 19 something on the record here. Could you just explain 20 anesthesia and particularly in this context. Let's 21 say someone is given 5 gram dose of pentobarbital. 22 What's the body going to go through, assuming that 23 it's all successfully delivered, what's going to 24 happen to the body? 25 A. The drug will enter the vein let's say</p>	<p>1 Mark Heath, M.D. 2 of the brain as it binds to the neurons it begins to 3 depress the functioning of those cells and depress the 4 electrical activity of the brain and the functioning 5 of the brain. So that's the point where the brain 6 begins to be disrupted and at some point the 7 disruption becomes severe enough that consciousness is 8 not sustained. 9 Q. Once the inmate loses consciousness the 10 inmate no longer feels or is conscious of pain? 11 A. Well, that's not accurate. The person 12 who's been rendered unconscious by a sedative or 13 anesthetic drug, if they're not deeply anesthetized 14 can be aroused by pain just as in an analogous way to 15 how a sleeping person can be, sleeping in a conscious 16 person can be aroused in that state and then 17 experience pain. 18 Q. But that's more in the circumstance of a 19 surgery where you've had a titrated dose. I'm talking 20 about a 5 gram dose of pentobarbital here. No one is 21 going to wake up from that, are they? 22 A. Right. I thought we were talking about, 23 you asked me at what point in the process do they lose 24 consciousness. During the process their loss of 25 consciousness is initially minimal. They are not in a</p>
Page 79	Page 81
<p>1 Mark Heath, M.D. 2 in the arm, it has to it is carried by the circulation 3 to the heart. Heart actually has two sides, the right 4 side and the left side. The right side of the heart 5 will pump the blood through the lungs. The drug will 6 thus be pumped through the lungs, and return to the 7 left side of the heart. And then the left side of the 8 heart will pump the blood which now has the drug in it 9 throughout the body, including in the case of 10 pentobarbital, the thing we're interested in is it 11 being carried to the brain. So it will flow in the 12 blood into the vessels in the brain and then it will 13 travel out of the blood vessels across the wall of the 14 blood vessels into the tissue of the brain. It will 15 then bind or stick to molecules on the surface of 16 neurons in the brain, and as a result of that those 17 neurons will stop firing electrical activity. In the 18 doses that are being talked about here, it all goes in 19 and circulates as planned, that will shut down 20 basically all electrical activity or all detectable 21 electrical activity in the brain. 22 Q. Let me jump in here real quick. At what 23 point does the inmate lose consciousness? 24 A. In the sequence that I gave, it's as the 25 drug is passing from the blood vessels into the tissue</p>	<p>1 Mark Heath, M.D. 2 state of deep unconsciousness where they're 3 unarousable. They're initially in a state of light 4 unconsciousness where they can still be aroused. As 5 the drug's concentration of the brain tissue increases 6 their level of unconsciousness will get deeper and 7 deeper and by that I mean will become increasingly 8 difficult to arouse and then impossible to arouse. 9 Q. So certainly by the time that 10 respiratory arrest takes place the inmate is in an 11 anesthetic state of or surgical plane of anesthesia 12 and no longer capable of being in pain or being 13 consciously aware of being in pain? 14 A. I don't want to quibble about the 15 language because you said at the point respiratory 16 arrest occurs - what we see with pentobarbital is 17 change in respiration. And then you don't know what 18 the last breath is until some period of time after it 19 is taken. So if you want to call respiratory arrest 20 something where say 60 seconds to the time they're not 21 breathing, and we'll call that respiratory arrest, 22 then I'll agree with that, in this context. Right at 23 the time where they're taking halting breaths or 24 yawning or snoring, we don't know that's respiratory 25 arrest until after the fact. When they are in that</p>

21 (Pages 78 to 81)

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Mark Heath, M.D.

December 1, 2012

New York, NY

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<p>1 Mark Heath, M.D.</p> <p>2 anesthetist, for example, very few are able to do</p> <p>3 administering drugs and detect assessing levels of</p> <p>4 sedation and unconsciousness. And if they're properly</p> <p>5 positioned, they'll be able to know if things are done</p> <p>6 wrong.</p> <p>7 Q. How about an EMT?</p> <p>8 A. Again, we had EMT's in general typically</p> <p>9 are not specialized and experienced in assessing</p> <p>10 levels of sedation from anesthetic drugs, but it is an</p> <p>11 activity that they sometimes confront because</p> <p>12 sometimes they are called to a situation where a</p> <p>13 person has taken an overdose of drugs or alcohol.</p> <p>14 Q. Well, the -- in the lethal injection</p> <p>15 setting, is the necessity of experience measuring</p> <p>16 anesthetic depth very important when you're only using</p> <p>17 a one-drug pentobarbital protocol?</p> <p>18 A. You don't have to call it anesthetic</p> <p>19 depth, but being able to assess the level of</p> <p>20 intoxication, the level of sedation, the level of</p> <p>21 impairment of the nervous system functioning, yes,</p> <p>22 that's important.</p> <p>23 Q. Why is that important if the inmate has</p> <p>24 stopped breathing within 60 seconds, why is it</p> <p>25 important for the EMT to have any further experience</p>	<p>1 Mark Heath, M.D.</p> <p>2 wrong with the drug itself or the administration of</p> <p>3 the drug that something was not going right if as we</p> <p>4 discussed if 5 grams didn't lead to comatose state</p> <p>5 with no breathing, did not lead to death, then</p> <p>6 something is wrong in the process somewhere.</p> <p>7 Q. So if the first round didn't take it</p> <p>8 might be because there was infiltration and not an</p> <p>9 inadequate dose --</p> <p>10 A. It could be --</p> <p>11 Q. Just answer the question I asked. That</p> <p>12 might be one reason that the drug didn't work because</p> <p>13 it infiltrated --</p> <p>14 A. Circulation, yes.</p> <p>15 Q. And another reason might be because the</p> <p>16 drug wasn't sufficiently potent?</p> <p>17 A. Correct.</p> <p>18 Q. Any other reason?</p> <p>19 A. The tubing leaked somewhere, so it's not</p> <p>20 on the tissue, it's on the floor.</p> <p>21 Q. But people are going to see if there's a</p> <p>22 puddle of medication on the floor, right?</p> <p>23 A. I don't know. They might miss it. I</p> <p>24 don't know if it's leaking from right at the hub and</p> <p>25 going down the side of the wrist and onto the gurney</p>
Page 87	Page 89
<p>1 Mark Heath, M.D.</p> <p>2 with measuring anesthetic depth?</p> <p>3 A. If in fact they have stopped breathing</p> <p>4 within 60 seconds then you're right there would not be</p> <p>5 a need for that in the case of the single-drug</p> <p>6 protocol using a barbiturate.</p> <p>7 Q. But if they haven't stopped breathing --</p> <p>8 A. You have to understand that shallow</p> <p>9 breathing can be missed by a person who is</p> <p>10 inexperienced. So this is sometimes a problem even in</p> <p>11 veterinary euthanasia, with inexperienced</p> <p>12 practitioners that they fail to recognize failed</p> <p>13 euthanasia procedure.</p> <p>14 Q. If the procedure fails, what do you do?</p> <p>15 A. If the procedure is in the process of</p> <p>16 failing, in other words, I presume you mean by that</p> <p>17 the prisoner is not dead, the procedure calls for</p> <p>18 more, for one more round of pentobarbital to be given.</p> <p>19 Q. Right. You just give more drug until it</p> <p>20 takes, correct?</p> <p>21 A. Not until it takes. They have set for</p> <p>22 one more round of drug and there's nothing specified</p> <p>23 for after that. And I think it would, everybody would</p> <p>24 agree if the first round hadn't worked then I would</p> <p>25 have to be very concerned that there was something</p>	<p>1 Mark Heath, M.D.</p> <p>2 then you might not see it.</p> <p>3 Q. So those are the three possibilities for</p> <p>4 why the inmate might not expire as quickly as you</p> <p>5 would expect. It could be because there's leakage,</p> <p>6 there is a sub-potent drug or infiltration?</p> <p>7 A. We're talking about things going wrong.</p> <p>8 They didn't inject the dose, they decided to take half</p> <p>9 of it home and have fun with it. Or the powder that</p> <p>10 was, they thought they were mixing was, or the</p> <p>11 solution they thought they had was pentobarbital could</p> <p>12 be substituted by someone who wanted to take it home</p> <p>13 and have fun with it. There are a variety of ways</p> <p>14 that fix what one is actually doing.</p> <p>15 Q. But in terms of the adequacy of the</p> <p>16 protocol, doctor, that's what we're talking about</p> <p>17 here, the protection afforded by first of all the</p> <p>18 presumption that people are going to do their jobs,</p> <p>19 and the amount of drug that is called for in the</p> <p>20 protocol, namely 5 grams, those protections would</p> <p>21 provide reasonable assurance that the individual would</p> <p>22 be executed by a humane and painless process, would</p> <p>23 you agree?</p> <p>24 A. Pretty broad question with a lot of</p> <p>25 compounds, but I certainly agree if the protocol is</p>

23 (Pages 86 to 89)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VERNON EVANS, JR.,
Plaintiff

v.

MARY ANN SAAR, Secretary, Department
of Public Safety and Correctional
Services, FRANK C. SIZER, JR.,
Commissioner, Maryland Division of
Correction, LEHRMAN DOTSON, Warden,
Maryland Correctional Adjustment
Center, GARY HORNBAKER, Warden,
Metropolitan Transition Center and,
JOHN DOES,
Defendants

: CIVIL ACTION NO.
: L-06-149

* * *
August 29, 2006
* * *

ORAL DEPOSITION of MARK HEATH, M.D., taken
pursuant to notice, held at the Law Offices of
Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 399 Park
Avenue, New York, New York, commencing at 11:27 a.m.,
before Renee Schumann, Court Reporter - Commissioner
of Deeds there being present:

EVANS REPORTING SERVICE



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1 Q. Let me ask you this, do you agree with
 2 that or not?
 3 A. I would need to see the context in
 4 which it was said. The definition of death is --
 5 there are many operating definitions of death, and so
 6 for it -- I agree that it would -- If three grams of
 7 Thiopental were effectively delivered into the
 8 circulation it would kill the person. Would they be
 9 dead in 60 seconds, I, in just a general proposition,
 10 disagree with that, but I need to see the context of
 11 how the language was phrased.
 12 Q. Okay.
 13 A. ~~If he didn't do anything to resuscitate~~
 14 ~~them, they would with certainty die. It's a lethal~~
 15 ~~dose of Thiopental. In terms of when they are dead,~~
 16 ~~I think 60 seconds is on the early side for the~~
 17 ~~majority of human beings.~~
 18 Q. Well, you've seen Dr. Dershwitz's
 19 report; haven't you?
 20 A. Yes.
 21 Q. And Dr. Dershwitz says that there's a

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1 would certainly cause death in 60 seconds in
 2 everybody.
 3 BY MS. MULLALLY:
 4 Q. Do you think it would take a little
 5 longer perhaps in some people?
 6 A. I'm sure that it does take longer in
 7 many -- In most people.
 8 Q. All right. Now, you don't mention in
 9 your report at all titration of any of the drugs?
 10 A. I think that's right, yes.
 11 Q. Do you think titration is at all
 12 relevant in lethal injection since the goal is to
 13 execute the individual?
 14 A. Could you define what you mean by
 15 titration?
 16 Q. Changing or selecting an amount of a
 17 drug given based on an individual's sex, height,
 18 weight, age, things like that?
 19 A. It's slightly complicated. If you want
 20 to get every prisoner the identical safety margin
 21 then you would need to factor in those types of

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1 good possibility that an individual who is given
 2 three grams of Thiopental could be -- could be dead
 3 within 60 seconds?
 4 MS. GERAGHTY: And again, I am going to
 5 object to you asking him questions about --
 6 THE WITNESS: I don't recall him
 7 specifically saying that in his report, but I
 8 think that's similar to what I'm saying, in
 9 some people it could stop their heart
 10 basically as soon as it's perfused with the
 11 muscle of the heart, which depending on the
 12 rate of injection, all that kind of stuff,
 13 could be 60 seconds.
 14 But I also think that in many -- and I
 15 had said it before getting evidence, before
 16 actually seeing EKG records and stuff like
 17 that, I could have gone along with that
 18 statement, but now I've seen evidence that
 19 doesn't -- would not normally be available or
 20 isn't available to other people that leads me
 21 to disagree with a sweeping statement that it

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1 things that you mentioned. If you don't care about
 2 doing that, it is, in my opinion, reasonable to give
 3 a dose that if it's effectively delivered will ensure
 4 a surgical pint of anesthesia in everybody.
 5 By not titrating what happens is if
 6 something occurs, if not all of the dose goes in,
 7 then you put some groups at more risk than others.
 8 Q. Now, do you believe that the injection
 9 of the potassium chloride stops the heart and kills
 10 an inmate in a lethal injection situation; is that
 11 correct?
 12 A. In the great majority of executions
 13 that is what actually stops the heart, it's the
 14 potassium.
 15 Q. And why do you believe that?
 16 A. From reviewing EKG records and in
 17 conjunction with witness descriptions and logs hard
 18 data, the best data that we have from executions,
 19 which again, is not collected in my opinion in a good
 20 scientific fashion, but it's the best we have and
 21 it's pretty good.

Westlaw

2009 WL 6686346 (S.D. Ohio)

Page 1

For Opinion See 2011 WL 2681193, 2011 WL 320166, 2010 WL 3769213, 2010 WL 3238972, 2010 WL 3212079, 2010 WL 1882263, 2010 WL 1610608, 2010 WL 1434312, 2009 WL 4842393, 610 F.Supp.2d 853, 72 Fed.R.Serv.3d 161, 2008 WL 4411391, 2008 WL 4411393, 2008 WL 4411395, 2008 WL 4065811, 2008 WL 4065812, 2008 WL 4065808, 2008 WL 4065809, 2008 WL 4065813, 2008 WL 4065815, 2008 WL 4065826, 2008 WL 4065828, 2008 WL 4065830, 2008 WL 4065832, 2008 WL 4065833, 2008 WL 4065836, 2008 WL 4065838, 2008 WL 4065841, 2008 WL 4065842, 2008 WL 4065844, 2008 WL 4065862, 2008 WL 4065876, 2008 WL 471536, 2007 WL 2688249, 2007 WL 2607583, 2007 WL 1831115, 2007 WL 1202718, 2007 WL 582486, 2007 WL 582490, 2006 WL 3762133, 2006 WL 3526424, 2006 WL 3391001, 2006 WL 3793308, 2006 WL 3043116, 2006 WL 2709775, 2006 WL 1705177, 430 F.Supp.2d 702, 2005 WL 5253337

United States District Court, S.D. Ohio,
Eastern Division.
COOBY,

v.
STRICKLAND, et al.
No. 2:04-CV-1156.
March 26, 2009.

Testimony of Mark Heath, M.D.

Case Type: Civil Rights & Constitutional Law >>
Section 1983

Jurisdiction: S.D. Ohio

Name of Expert: Mark J. S. Heath, M.D.

Area of Expertise: Health Care-Physicians &
Health Professionals >>Anesthesiologist

Representing: Plaintiff

Appearances of Counsel:

For the Plaintiff: Timothy F. Sweeney, Esquire
John P. Parker, Esquire.

For the Defendant: Charles L. Wille, Esquire.

Before the Honorable Gregory L. Frost United
States District Judge.

COLUMBUS, OHIO

(VOLUME I)

EXCERPT OF TRANSCRIPT OF PROCEEDINGS

Denise N. Errett, RMR, CRR

Official Court Reporter

85 Marconi Boulevard

Room 260

Columbus, Ohio 43215

(614) 719-3029.

TABLE

THE COURT: All right. Mr. Sweeney, you may be-
gin your direct examination.

MARK HEATH, M.D. AFTER HAVING BEEN
FIRST DULY SWORN, TESTIFIED AS FOL-
LOWS:

DIRECT EXAMINATION

BY MR. SWEENEY:

Q. Good afternoon, Doctor. Please state your name.

A. Mark Heath.

Q. What do you do for a living?

A. I'm an anesthesiologist.

Q. And where at?

A. In New York City, at Columbia University.

Q. Tell the Court, if you would, about your -- you

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Q. That kind of transparency, do you see that in other states, at least some transparency where you can review the process to know whether the execution was, you know, what -- medically at least make some judgment as to whether it was humane or not?

A. Well, there are states where I believe there is a conscientious physician assessing anesthetic depth throughout. That doesn't prove that they're not deliberately misleading, but I am willing -- you know, I fully accept that a conscientious physician is going to be doing their job and ensuring that the prisoner is anesthetized.

Is it a total guarantee? No. There are no guarantees in life on anything, but I think it certainly meets any reasonable standard.

Q. The issue of transparency, though. And what are the things you, as a physician, would need to know or want to know so that you can make a judgment as to -- reliable judgment within the scope of, you know, reasonable human endeavor as to whether or not an execution is being carried out in a way that's humane, a person is not suffering pain from it?

A. You're talking about a hypothetical. If I were to review an execution record and there was an EKG tracing showing that the heart rate hadn't gone up and blood pressure is showing that it had not gone up -- it probably would have gone way down if the thiopental got in -- and a person who understood how to assess anesthetic depth had been observing the procedure, then I would be comfortable that -- even though the prisoner was paralyzed, I would be pretty comfortable that they had had a humane execution. I can look at an anesthesia record and could be pretty comfortable that the patient was properly asleep, or see that they weren't asleep.

It's much more difficult with pancuronium. If you really want transparency, you should do it like the veterinarians do it, where they don't use a paralyzing drug. If the dog or the cat is in pain or suffering, it will struggle or bark or move in some way, and the owner of the pet will see that. The veteri-

arian will see that and will fix it. That's why veterinarians don't use pancuronium. That's why, in Ohio, animal shelters aren't allowed to use paralyzing drugs. It's because they don't want to mask that problem.

Q. It's your understanding that that restriction on veterinarians, is that a statutory one, or do you know?

A. I know animal shelters in Ohio are only allowed to use pentobarbital; which is -- you can think of pentobarbital like Pentothal, except that, instead of wearing off quickly, it lasts for a very, very long time, which makes sense. You want the animal to be dead. So it makes sense to use something long-acting. They're not -- animal shelters don't use anything other than that. At least they're not supposed to in Ohio.

Q. Could the use of one drug, such as in the euthanasia context involving animals, could that, in your opinion, be effectively used in an execution setting?

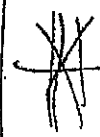
A. What works for all other vertebrate animals, all other mammals, is going to, in massive overdoses, is going to work in human beings also.

Q. Do you have any sense as a medical professional as to how long an execution would take using massive doses of sodium thiopental?

A. Which would be the same as using massive doses of some other anesthetic. Yeah.

Q. True.

A. The reason one would die in that context is going to be because of not breathing. The drug will take away the respiratory drive. And in a healthy person, I think that would take probably around ten minutes. It's very variable. You will have severe brain injury and brain death after around four minutes. And, so, a person could be considered brain dead before their heart actually stops working because their brain would have -- all the neurons in



their brain would have died irreparably, and that's brain death. And that's legal death, also. It will take longer, probably, for the heart to stop having electrical activity.

Q. Christopher Newton's execution, it appeared, took what, according to that chart, anyway, based on the timeline? Do you see that? I think it's the last column.

A. I think it's 14 minutes.

Q. In your opinion, would the use of one drug, massive dose of sodium thiopental or some other barbiturate, take more or less time than that?

A. If you -- you know, if you give a massive dose of pentobarbital, which can be done very quickly, in all likelihood the person is going to be legally dead in less time than that.

THE COURT: Well, you keep changing. He keeps talking about sodium thiopental, and you keep saying -- I guess -- excuse me -- what I'm reading from you is that you would suggest going to that other drug?

THE WITNESS: I'm uncomfortable suggesting things, as a physician, proactively designing a protocol, because professional ethics --

THE COURT: What do you think you're doing here?

THE WITNESS: Well, I'm trying to -- that's a very good question, and it's difficult. I am trying to, you know, say what I think the main problems are, but in terms of giving specific recipes, I will -- in terms of the difference between pentobarbital and thiopental that you're asking about --

THE COURT: That's right.

THE WITNESS: -- thiopental is given in large volumes, and so it takes a long time. It can take longer to get it in. One can give a comparable or a larger dose of pentobarbital more quickly. So that

affects how the timing would unfold.

BY MR. SWEENEY:

Q. With the dose, massive dose, of whichever drug, sodium thiopental, pentobarbital, whichever one is used, if that is used in place of a three-drug protocol, in your opinion, the I.V.-access issues and infiltration issues, are those problems any longer?

A. If all you're using is an anesthetic-only technique, which is what veterinarians use --

Q. Right.

A. -- the chance of causing an inhumane death is exceedingly remote. Again, you're using a drug that all it does is make you get sleepy and then make you go to sleep and then make you stop breathing and make you die. The worst that could happen is you don't get enough in right away, which is what happened to Mr. Clark, or whatever, and you give more, and you give more until the person does get sleepy and until they do die. That's really the worst thing that can happen.

Without -- if you remove the drugs that can cause excruciating pain, there's no way of having excruciating pain, or any pain. You still have to worry about getting the I.V. in. You know, what happened to Mr. Clark should never have happened, that his neck was being needled, especially when he was sitting up. You have to worry about those things also, but in terms of the drugs that you use, if you just use a massive overdose of an anesthetic, it will stop the breathing, and it will cause death, and it will not be able to cause pain, because all anesthetics do is make you go to sleep.

Q. The pancuronium, does it perform any medical function at all in an execution?

A. No medical function whatsoever.

Q. Back to the protocol. I want to wrap that up. Does the Ohio protocol address the contingency for what to do in the event peripheral I.V. access is un-

Q. But you mentioned toxicology, Doctor. In fact, didn't you say in your deposition that the toxicological reports that you have examined indicates that in most circumstances an adequate dosage of thiopental was administered? Did you not say that?

A. In other states, yes, in the states where I'm able to look. So, again, many states, you can't use the numbers. But in the states where I can use the numbers, most of the time they are.

Q. And didn't you say in your deposition, in fact, that you spoke to a laboratory technician or a laboratory director in North Carolina, and he indicated to you that the samples, the toxicological reports from those samples taken, the samples on which those reports were based, were improperly drawn and couldn't be used to do scientific conclusions?

A. That's not exactly what he said, That's why I don't use numbers from North Carolina to draw robust conclusions.

Q. And you are aware, Doctor, that this court, in previously granting a preliminary injunction, thought that the North Carolina possible evidence of improper thiopental was a significant piece of information, which it was at the time? Are you aware of that?

A. I've been told by attorneys that that was one of the issues you had raised. And I think I saw it in a motion to dismiss or some such motion that you wrote, and that's exactly why I did my very best, both before and after the publication, to try to express the concern that I have about those numbers.

Q. Isn't it true, Doctor, that you're opposed to the death penalty? That's true, isn't it?

A. Yes.

Q. And isn't it true that, because you're opposed to the death penalty, you don't really need any substantial evidence that inmates suffered severe pain in order to testify or render an expert opinion that there's a risk that they could?

~~A. That's completely untrue. Again, if Ohio were to use a veterinary standard of lethal injection or to bring in a experienced professional who could ensure anesthetic depth when the prisoners are paralyzed and being given potassium, then there would be no litigation, or at least I would not participate in the litigation, or I would work for your side to say that I think this is a safe and humane procedure.~~

Q. Isn't it true, Doctor --

THE COURT: They can't afford you.

THE WITNESS: Dr. Dershwitz charges more. So --

MR. WILLE: Thank you, Your Honor. I have no more questions.

THE COURT: Thank you. Actually, it doesn't matter. It's all fungible, I think.

MR. SWEENEY: One question?

THE COURT: Yeah. You said one.

MR. SWEENEY: I think it will be one.

REDIRECT EXAMINATION

BY MR. SWEENEY:

Q. You were about to describe three factors you use to assess substantial risk. Explain to the judge your three factors and how you apply it.

THE COURT: Yeah. That's never been testified to.

MR. SWEENEY: I don't think it has.

THE COURT: No, it has not. No. I said it has not been testified to, but it was brought up on cross.

BY MR. SWEENEY:

Q. Could you go ahead and explain the three factors?

THE COURT: The asteroid hitting the foot, apparently, something going on there. I haven't quite