

The Governor's Commission on Administration of Lethal Injection

John W. "Bill" Jennings
Senator Victor Crist
Rodney Doss
Harley Lappin
Honorable Stan Morris
Dr. Steve Morris



Dennis Ross
Harry K. Singletary
Dr. Peter Springer
Carolyn Snurkowski
Dr. David Varlotta

February 5, 2007
10:00 am – 3:00 pm
Office of the Florida Bar
Suite C49
Meeting Room C

Agenda

- I. Call to Order
- II. Video Presentation
- III. Testimony of Witnesses
- IV. Scheduling Matters
 - a. DOC Visit
 - b. Public Comments
 - c. Additional Witnesses and Information Needed
- V. Next Commission Meeting – February 9, 2007
 - a. Anticipated Witness Testimony
 - b. Preliminary Report
- VI. New Business
- VII. Adjourn

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February 1, 2007

PRELIMINARY REPORT OF FINDINGS AND RECOMMENDATIONS

Overview

Pursuant to Executive Order 06-260 issued by Governor Bush on December 15, 2006, the Governor's Commission on Administration of Lethal Injection was created to "review the method in which the lethal injection protocols are administered by the Department of Corrections, and to make findings and recommendations as to how administration of the procedures and protocols can be revised so that Floridians, including those persons who are sentenced to death, can be assured that the State continues to take reasonable and appropriate measures to ensure that the administration of death by lethal injection comports with the United States and Florida Constitutions, as interpreted by current case law."

Upon the finalization of the Commission membership, the Chair, appointed by the Governor's Office, called the first meeting of the Commission which was held Monday, January 29, 2007, in Tampa, Florida. All Commission members were in attendance with the exception of Mr. Doss who participated telephonically. An agenda was provided and the proceedings were recorded. The following documents were provided each Commission member, specifically: an agenda of the January 29, 2007, meeting; a copy of the Executive Order 06-260; a copy of the December 20, 2006, Summary of the Findings of the Department of Corrections' Task Force Regarding the December 13, 2006, Execution of Angel Diaz submitted by Secretary James R. McDonough, Secretary of the Florida Department of Corrections; a copy of the Department of Corrections' most recent Execution by Lethal Injection Protocols effective for executions after August 16, 2006, and a copy of the Preliminary Autopsy Findings dated December 14, 2006, signed by Dr. William F. Hamilton.

Following introductory remarks and introduction of the Commission members to the audience, the Chair presented a brief summary of the Commission's charge per the Executive Order. The Chair then called four witnesses, all of which made statements and were responsive to inquiries by various members of the Commission.

Neil Dupree, CCRC South, was called first and presented eye-witness testimony as to what he observed at the December 13, 2006, execution of Angel Diaz. Randall Bryant, Warden, Florida State Prison, discussed his role during an execution, the Department protocols and his observations and account of the December 13, 2006, execution of Angel Diaz. Randall Polk, Assistant Warden, Florida State Prison, discussed his role during an execution and his observations and account of the December 13, 2006, execution of Angel Diaz. Finally William Matthews, a physician's assistant, was called and discussed his observations regarding the December 13, 2006, execution of Angel Diaz and answered inquiries from Commission members as to the intravenous lines and other medical matters.

Upon completion of the testimony of scheduled witnesses, the Commission discussed generally what additional information and witnesses were needed and determined the scheduling for future meetings on February 5th and February 9th, 2007, in Tampa, Florida. It was specifically noted that the final autopsy report had not issued regarding the December 13, 2006, Angel Diaz execution and that the Commission was unable to assess fully what occurred without the final autopsy report and the testimony of the medical examiner. There was also discussion that Commission members might elect to do an onsite visit of the execution chamber site on Monday February 12, 2007, in order to better understand its configuration. The Department agreed to provide a schematic and other visual evidence of the execution chamber site. Commission members were also asked to provide the names of any persons they wished to hear testimony from and provide any written information that might be informative.

Actions Taken and Strategic Plan

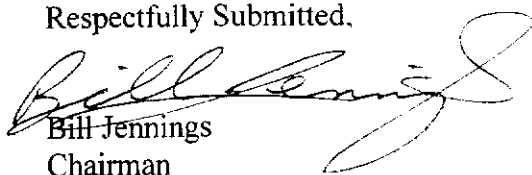
As a result of the January 29, 2007, meeting, the Commission voted to submit a preliminary report on February 1, 2007, pursuant to the Executive Order, discussing what transpired thus far, and to submit an interim report on February 15, 2007, presenting, in more detail, findings based on additional meetings of the Commission. The Commission's belief is that additional information is needed in order to generate any meaningful recommendations and its intent is to gather this information through written documentation and testimony of other Department personnel, and others, regarding the lethal injection protocols during next two meetings.

It is contemplated that the Commission's charge will be completed on March 1, 2007, and a final report and recommendation will be submitted on that date.

Recommendations

At the present time, the Commission has no specific recommendations to report in light of the Commission's action that additional information is required before any conclusion can be drawn.

Respectfully Submitted,


Bill Jennings
Chairman

§ 922.10. Execution of death sentence; executioner

A death sentence shall be executed by electrocution or lethal injection in accordance with s. 922.105. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.105. Execution of death sentence; prohibition against reduction of death sentence as a result of determination that a method of execution is unconstitutional

(1) A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution. The sentence shall be executed under the direction of the Secretary of Corrections or the secretary's designee.

(2) A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by electrocution. The election for death by electrocution is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility within 30 days after the issuance of mandate pursuant to a decision by the Florida Supreme Court affirming the sentence of death or, if mandate issued before the effective date of this act, the election must be made and delivered to the warden within 30 days after the effective date of this act. If a warrant of execution is pending on the effective date of this act, or if a warrant is issued within 30 days after the effective date of this act, the person sentenced to death who is the subject of the warrant shall have waived election of electrocution as the method of execution unless a written election signed by the person is submitted to the warden of the correctional facility no later than 48 hours after a new date for execution of the death sentence is set by the Governor under s. 922.06.

(3) If electrocution or lethal injection is held to be unconstitutional by the Florida Supreme Court under the State Constitution, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding a method of execution to be unconstitutional under the United States Constitution made by the Florida Supreme Court or the United States Court of Appeals that has jurisdiction over Florida, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.

(4) The provisions of the opinion and all points of law decided by the United States Supreme Court in *Malloy v. South Carolina*, 237 U.S. 180 (1915), finding that the Ex Post Facto Clause of the United States Constitution is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders, are adopted by the Legislature as the law of this state.

(5) A change in the method of execution does not increase the punishment or modify the penalty of

death for capital murder. Any legislative change to the method of execution for the crime of capital murder does not violate s. 10, Art. I or s. 9, Art. X of the State Constitution.

(6) Notwithstanding any law to the contrary, a person authorized by state law to prescribe medication and designated by the Department of Corrections may prescribe the drug or drugs necessary to compound a lethal injection. Notwithstanding any law to the contrary, a person authorized by state law to prepare, compound, or dispense medication and designated by the Department of Corrections may prepare, compound, or dispense a lethal injection. Notwithstanding chapter 401, chapter 458, chapter 459, chapter 464, chapter 465, or any other law to the contrary, for purposes of this section, prescription, preparation, compounding, dispensing, and administration of a lethal injection does not constitute the practice of medicine, nursing, or pharmacy.

(7) The policies and procedures of the Department of Corrections for execution of persons sentenced to death shall be exempt from chapter 120.

(8) Notwithstanding s. 775.082(2), s. 775.15(1), or s. 790.161(4), or any other provision to the contrary, no sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the State Constitution or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

(9) Nothing contained in this chapter is intended to require any physician, nurse, pharmacist, or employee of the Department of Corrections or any other person to assist in any aspect of an execution which is contrary to the person's moral or ethical beliefs.

§ 922.11. Regulation of execution

(1) The warden of the state prison or a deputy designated by him or her shall be present at the execution. The warden shall set the day for execution within the week designated by the Governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of religion requested by the convicted person may be present. Representatives of news media may be present under rules approved by the Secretary of Corrections. All other persons, except prison officers and correctional officers, shall be excluded during the execution.

(3) The body of the executed person shall be delivered to the medical examiner for an autopsy. After completion of the autopsy, the body shall be prepared for burial and, if requested, released to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or to be disposed of in the same manner as are bodies of prisoners dying in the state prison.

STATE OF FLORIDA

ss.

COUNTY OF LEON

AFFIDAVIT OF NEAL A. DUPREE

COMES NOW THE AFFIANT, NEAL A. DUPREE, WHO, UNDER PENALTY OF PERJURY, HEREBY SWEARS AND AFFIRMS AS FOLLOWS:

1. My name is Neal A. Dupree, and I have been a licensed Florida attorney since 1980. I currently serve as the Capital Collateral Regional Counsel for South Florida, and I have held that position since August, 1998.

2. During my tenure as Capital Collateral Regional Counsel-South (CCRC-South), my office has continually represented Angel Diaz during his post-conviction appeals. It was in my capacity as CCRC-South that I witnessed the execution of Mr. Diaz at Florida State Prison on December 13, 2006.

3. The curtains to the execution chamber were opened at 6:00 p.m. From my seat in the front row of the observation room, I was located approximately six (6) to seven (7) feet from Mr. Diaz. Initially, I observed Mr. Diaz laying on a gurney covered by a white sheet. He was strapped to the gurney, and his right arm was held in place by a leather strap. Additionally, Mr. Diaz had some type of tape or gauze holding his right hand in place, and an intravenous needle had been placed in his right arm where his elbow would bend. There appeared to be two separate lines that ran beneath the gurney hooking into the intravenous line, and those two lines traveled into a prepared space in the wall behind the gurney.

4. Mr. Diaz was asked if he had any last words, and he was permitted to give a brief speech in Spanish. Having met Mr. Diaz before, it appeared to me that he was sedated in some manner, as his speech was slower and somewhat slurred.

5. Within a few minutes, Mr. Diaz became agitated, and it appeared to me that he was speaking to the members of the Department of Corrections staff. They did not appear to respond to him and I was unable to hear his part of the conversation because the intercom between the execution chamber and the observation room had been turned off. During the time Mr. Diaz appeared to be speaking, it was my observation that he was in pain. His face was contorted, and he grimaced on several occasions. His Adams Apple bobbed up and down continually, and his jaw was clenched.

6. I could observe some type of fluid flowing through the intravenous tube, and Mr. Diaz head rolled to the right. A strap had been placed across his forehead, and a member

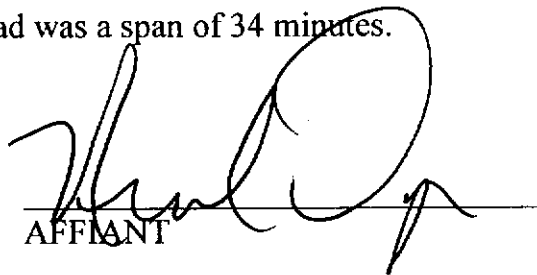
of the DOC staff held the strap. I observed Mr. Diaz' right eye to close, but his left eye remained open. His mouth opened, and Mr. Diaz appeared to be gasping for air for at least 10-12 minutes. It was apparent that the complete drug cycle had been given to Mr. Diaz, however, on several occasions over the next twenty minutes I observed movement from Mr. Diaz, and he continued to gasp heavily for air.

7. Approximately twenty minutes into the procedure, I observed two members of the DOC staff, one large black male, and a slightly smaller white male have several conversations into two separate phones. The black male had been on one phone since the initiation of the procedure, and I observed him hand that phone to the white male two times. After speaking into the first phone, the white male picked up a second phone, and had another conversation. It was apparent that something was wrong, and it was my observation that the other DOC staff members in the room looked uncomfortable at that time.

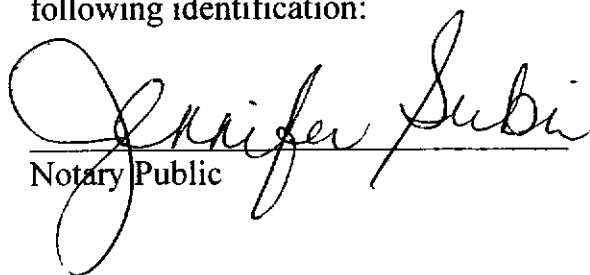
8. After a total of 25-30 minutes, Mr. Diaz' breathing appeared to get shallower. His face became slack, and his skin had a grayish pallor. During the last 5-6 minutes, both of his eyes opened and his Adam's apple slowly stopped bobbing.

9. I next observed a person wearing a purple suit (somewhat like a beekeepers outfit) enter the room. He flashed a light into the opened eyes of Mr. Diaz, and then checked his heart rate. That person left the room, and another person similarly garbed entered the room. He also checked Mr. Diaz' eyes and his heart rate. Mr. Diaz was then pronounced deceased by DOC personnel at 6:36 p.m. The time from when Mr. Diaz finished speaking, until the time he was pronounced dead was a span of 34 minutes.

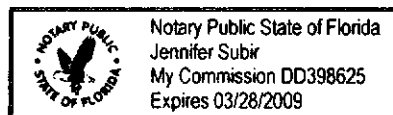
FURTHER AFFIANT SAYETH NAUGHT.


AFFIANT

Sworn to and subscribed before me, the undersigned authority, this 15th day of December, 2006, by Neal A. Dupree, who is personally known to me or produced the following identification:


Notary Public

Seal:



THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

COREY DUANE HAMILTON,

Plaintiff,

vs.

Case No. CIV-06-1193-F

JUSTIN JONES, in his capacity
as director of Oklahoma
Department of Corrections,
et al.,

Defendants.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE
DECEMBER 28, 2006

APPEARANCES:

FOR THE PLAINTIFF: MR. ROBERT R. NIGH, JR.
Attorney at Law

FOR THE DEFENDANTS: MR. RICHARD N. MANN
MR. GREGORY THOMAS METCALFE
Office of Attorney General
State of Oklahoma

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1 familiarity with the matter.

2 I've also undertaken – given the urgency of the matter,

3 I've undertaken some independent research as to the legal

4 issues and am, on that basis, prepared to proceed.

5 Mr. Nigh, so that I'll have some understanding of what to

6 expect today from your presentation, I would invite you to the

7 lectern to give me just a brief overview of your – of who you

8 plan to – who and what you plan to present by way of

9 evidence.

10 I think the filings on behalf of the plaintiff that I have

11 just referred to suffice amply as an opening statement, so I

12 don't need an opening statement, but if you would give me a

13 brief overview of, if you will, your lineup of witnesses so

14 that I'll have some understanding as to how the matter will

15 unfold today.

16 MR. NIGH: Yes, Your Honor. I would intend to admit

17 Plaintiff's Exhibit Number 1, which is the current protocol and

18 the protocol that I'm informed is intended to be utilized in

19 Mr. Hamilton's execution scheduled for January 9, 2007. Then

20 it would be my intention to call, via telephone, Neal Dupree,

21 the attorney from Florida who witnessed the Diaz execution and

22 present his testimony and during the course of his testimony

23 offer two exhibits. Then I would intend to call Melissa

24 Holderby, an attorney from my office who took photographs of

25 the execution chamber at McAlester and the anteroom or the drug

1 THE COURT: We're here in Civil 06-1193, Corey Duane

2 Hamilton v. Justin Jones and others, and specifically in

3 connection with the plaintiff's motion for preliminary

4 injunction.

5 Counsel will please give your appearances.

6 MR. NIGH: Rob Nigh on behalf of Corey Hamilton, Your

7 Honor. With me at counsel table is Melissa Holderby. She is

8 not an attorney representing Mr. Hamilton in the case, but I

9 would ask the Court's permission for her to be able to sit at

10 counsel table.

11 THE COURT: Very well.

12 MR. MANN: Richard Mann. With me is Greg Metcalfe on

13 behalf of the state and Marty Simmons, who is a named defendant

14 and is the warden of Oklahoma state prison.

15 THE COURT: Very well. I have – just so that

16 counsel will have some understanding of where I stand in

17 preparation for today's hearing, I have reviewed the complaint

18 and the attachments; the answer filed by the defendants on

19 December 4th; the motion for preliminary injunction filed on

20 December 14th; the supplement to the motion, which was filed on

21 December 15th; the second supplement to the motion, which was

22 filed on December 27th, yesterday; the response to the motion,

23 which was filed yesterday; and the motion to strike, which was,

24 likewise, filed yesterday. I have reviewed all those materials

25 and all of the attachments, so I have that degree of

1 room adjacent to the execution room and introduce, through her

2 testimony, a series of photographs which depict that

3 arrangement. And then, finally, to call Warden Simmons – not

4 finally – call Warden Simmons and then call Corey Hamilton,

5 via telephone, from the Oklahoma State Penitentiary.

6 THE COURT: Have you made arrangements to have

7 Mr. Hamilton ready and available to – obviously, there are

8 probably some logistical arrangements which would keep you from

9 calling him on a few minutes' notice, but aside from that, have

10 you made the necessary arrangements to have him available to

11 testify by telephone?

12 MR. NIGH: I have done so, Your Honor.

13 THE COURT: Very well. Mr. Mann, bearing in mind

14 that what I invited from Mr. Nigh was not an opening statement,

15 and, in fact, was not an opening statement, if you have

16 anything that you would like to tell the Court so far as the

17 State's anticipated presentation, you're certainly welcome to

18 do so.

19 MR. MANN: Just very briefly, Your Honor. I believe

20 that counsel for the plaintiff has agreed to a stipulation as

21 to the date Mr. Hamilton was notified of the completion of his

22 administrative – exhaustion of his administrative remedies of

23 May 23, 2006, that was I believe –

24 MR. NIGH: That's correct, Your Honor.

25 MR. MANN: And I believe the – our case will

1 primarily be covered with Mr. Simmons. We do have one witness
2 listed, a gentleman named Kameron Harvenak, who is a deputy
3 warden, and at this point in time do not actually anticipate
4 the need to put him on the stand, but we do have him listed --
5 I think we even listed him as rebuttal.

6 THE COURT: If I understand the stipulation, then,
7 the stipulation is that Mr. Hamilton was, on May 23, 2006,
8 notified that he had exhausted his administrative remedies with
9 respect to method of execution?

10 MR. MANN: Yes, Your Honor.

11 THE COURT: And that is the stipulation?

12 MR. NIGH: It is, Your Honor.

13 THE COURT: Very well. That stipulation will be
14 accepted.

15 Mr. Nigh, you may proceed.

16 MR. NIGH: Thank you, Your Honor. At this point, I
17 would move for the admission of Plaintiff's Exhibit Number 1,
18 which is the protocol that has been represented to me to be the
19 protocol intended to be utilized on January 7, 2007, for the --
20 January 9, 2007, for the execution of Mr. Hamilton.

21 MR. MANN: We have no objection, Your Honor, other
22 than what we had mentioned before, this is not the redacted
23 version, but I understand that will be addressed later on in
24 the day.

25 THE COURT: On that basis, it is received.

1 MR. NIGH: Your Honor, I have a set of all of the
2 plaintiff's exhibits that I intend to offer into evidence, and
3 while I realize the Court may not accept them all, would it be
4 useful for the Court to have them or a copy of them at the
5 Court's disposal for reference?

6 THE COURT: Please give them to the clerk. We'll
7 proceed on that basis.

8 Okay. So Plaintiff's Exhibit 1, I take it, is the
9 protocol, and it will be received on the basis we discussed,
10 specifically, the -- those portions that the defendants
11 consider to be sensitive from a security standpoint will be
12 redacted in any version of the exhibit which is made available
13 to the public. And so Plaintiff's Exhibit 1 is received.

14 MR. NIGH: Thank you, Your Honor. At this point, I
15 would like to call Neal Dupree, via telephone, and his
16 telephone number where he can be reached is area code (954)
17 713-1284. And he is anticipating our call.

18 THE COURT: Mr. Mann.

19 MR. MANN: Yes, Your Honor. We'd object to
20 Mr. Dupree being called to testify, not in the mindset of
21 the -- by telephone, but on the basis of relevancy, as well as
22 -- I believe relevancy was the only point with Mr. Dupree.

23 THE COURT: I have -- I've reviewed the second
24 supplement that was filed yesterday, and to some degree, that
25 contains a proffer of the testimony of Mr. Dupree. I've also

1 reviewed the motion to strike or alternatively to limit
2 evidence to be offered by the plaintiff that was filed
3 yesterday. Mindful of the nature of the matter, the urgency of
4 the matter, and of the exigencies that accompany this, as well
5 as a good many other preliminary injunction motions, the
6 defendants' objection will be overruled and the motion to
7 strike we have at Document Number 42 will be denied.

8 By way of brief explanation, and I don't think anymore
9 than brief explanation is necessary, but by way of brief
10 explanation, we are here on somewhat of an expedited basis,
11 this, on one hand, is not the final trial on the merits; on the
12 other hand, obviously denial of relief today is likely
13 tantamount to conclusion of the case.

14 I am guided by the decision of the Tenth Circuit Court of
15 Appeals in Heideman v. South Salt Lake City, 348 F.3d 1182, a
16 decision from November of 2003, where the Court stated, at page
17 1188, without qualification that, "A hearing for preliminary
18 injunction is generally a restricted proceeding often conducted
19 under pressured time constraints on limited evidence and
20 expedited briefing schedules. The Federal Rules of Evidence do
21 not apply to preliminary injunction hearings."

22 That is entirely consistent with the discussion to be
23 found in Volume 13 of Moore's Federal Practice, Section 65.23,
24 where the treatise discusses, for instance, the admissibility
25 of affidavits in support of a motion for preliminary injunction

1 and contains the observation that even the standard applicable
2 to summary judgment affidavits is not applicable with respect
3 to affidavits submitted in support of a motion for preliminary
4 injunction.

5 So on that basis and in my discretion, I do deny the
6 motion filed yesterday; we will hear the testimony of
7 Mr. Dupree.

8 You may proceed.

9 MR. NIGH: Thank you, Your Honor.
10 (MR. DUPREE CONTACTED VIA TELEPHONE.)
11 NEAL DUPREE,
12 (WITNESS SWORN)

13 THE COURT: You may proceed.

14 MR. NIGH: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. NIGH:

17 Q. Mr. Dupree, this is Rob Nigh. Can you hear me?

18 A. Can you move closer to the microphone?

19 (THE TELEPHONE IS MOVED CLOSER TO THE SPEAKER BOX.)

20 THE COURT: We've rearranged the speaker and
21 telephone. Mr. Nigh, you may proceed.

22 Q. (BY MR. NIGH) Mr. Dupree, can you hear me better now?

23 A. Yes, sir.

24 Q. Please tell the Court what your current position is.

25 A. I currently serve as the capital collateral regional

1 counsel for South Florida. Our office represents death
2 sentence inmates in their post-conviction collateral appeals
3 from the time it comes from the Florida Supreme Court until a
4 person has either got a death warrant signed or relief is
5 granted.

6 Q. Mr. Dupree, I'm going to ask you to speak a little bit
7 slower because of the speaker phone that we're using.

8 A. Okay.

9 Q. How long have you held that position?

10 A. Eight and a half years. I've been doing this since August
11 4th of 1998.

12 Q. And how long have you been an attorney, sir?

13 A. Twenty-six years.

14 Q. Mr. Dupree, in your capacity as capital collateral
15 regional counsel for South Florida, were you a witness to the
16 execution of Angel Diaz on December 13, 2006?

17 A. Yes, sir, I was.

18 Q. If you would, please give the Court a brief description of
19 the setup of the execution chamber and the witness viewing
20 area.

21 THE COURT: Mr. Dupree, I'm going to just remind you,
22 once again, because of the acoustics we have here and the
23 arrangement with the telephone and the speaker, please be very
24 mindful of the need to go slowly.

25 THE WITNESS: I will do my best.

1 When you come into the execution viewing area, there are
2 several rows of seats. I was seated in the front row, there's
3 a window that opens up so that you can see into the execution
4 chamber. That window was probably about 3 and a half feet high
5 and 8 to 10 feet wide. I was in the front row on the far left
6 seat.

7 When the curtains opened up -- the curtains opened up
8 promptly at six o'clock. I was able to see Mr. Diaz. He was
9 strapped to a gurney. He had his right arm extended from one
10 of the paddles that came out from the gurney itself. There was
11 a leather strap that was over his forehead. There was a sheet
12 that was covering his body. He still appeared to be wearing a
13 white shirt.

14 There was a person -- if you could picture the gurney, it
15 was lengthwise to us. There was a DOC guard at his head, there
16 was another DOC guard next to where his waist would have been,
17 and there was a third DOC guard that was set off by his feet
18 but further back, probably about 3 to 4 feet from the gurney.

19 There were two other people I later learned were the
20 warden and the assistant warden. There were two phones that
21 were by those two gentlemen.

22 Q. (BY MR. NIGH) Let me stop you for a moment. You said you
23 could see his right arm strapped to the paddle. Were you able
24 to see his left arm?

25 A. No, sir, I could not; I was blocked by his body.

1 Q. And how far were you from Mr. Diaz?

2 A. No more than 6 or 7 feet. Like I said, I was in the front
3 row. I was up by his head.

4 Q. Were you able to see the IV insertion site in Mr. Diaz's
5 right arm?

6 A. I could see that it was in where you would bend your
7 elbow, if you normally got blood taken out, you know, for just
8 an annual physical, there was obviously a needle inserted
9 there. It was very heavily taped, as was his right hand. His
10 right hand was palms up and it was strapped to the paddle, and
11 it was heavily, heavily taped. And then there was also a
12 leather strap above where the IV needle had been inserted into
13 his arm. There was a leather strap above that.

14 Q. Were you able to see the tubing running from the IV
15 insertion site into some other portion of the room?

16 A. Yes. There was an IV tube ran from his arm -- it was
17 taped to the gurney itself and then loosely fell underneath the
18 gurney and then it appeared to go into the wall. There were
19 two IV tubes that appeared to be in the back of the wall in
20 what looked like a little port that was, I don't know, 6 inches
21 by 5 inches.

22 Q. Were you able to see any IV tubing from his left arm?

23 A. No, sir, I could not.

24 Q. Were you able to see any fluid flowing from -- through the
25 IV tube?

1 A. At some point in time during the execution procedure, I --
2 it was a sudden rush, because you could see bubbles, but that
3 was further into the procedure, it was well after the procedure
4 initially appeared to start, right then, that's when it became
5 noticeable to me.

6 Q. If you would, please describe for the Court, and please be
7 mindful again of our speaker system here, so please go slowly.

8 A. I will.

9 Q. What happened after the curtain was opened and the
10 execution began?

11 A. As I said, it opened promptly at six o'clock. The warden
12 came forward -- a person I later learned to be the warden, I
13 did not know that at the time, and asked if Mr. Diaz had any
14 last words. Mr. Diaz turned his head toward the audience and
15 spoke in Spanish very briefly. I'm not totally fluent in
16 Spanish; I understood some of what he said. And then that was
17 it.

18 Then the guard that was at his head put the leather
19 restraint across his head, which he held manually. The warden
20 stepped back toward the two phones that were in the corner.
21 And I had expected that somebody was going to say something or
22 give some kind of indication the procedure was going to start.
23 I did not hear the warden say anything. I really didn't notice
24 him make any kind of a signal.

25 I guess their protocol is they turn off the system once

1 the execution starts. Once that occurred, within just a few
 2 minutes, I noticed that Mr. Diaz appeared to be mouthing
 3 words. I do not know what he was saying; I could not hear
 4 him. But he appeared to be speaking to the man that was
 5 holding the leather strap over his forehead. He was grimacing,
 6 his jaw was clenching, his Adam's apple, which was pretty
 7 prominent, was bobbing up and down furiously, and he just
 8 appeared to me to be in a lot of pain. His body appeared to be
 9 rigid. And, again, he talked for at least a minute and maybe
 10 more, but he was obviously trying to communicate something to
 11 somebody; again, I just don't know what he was saying.
 12 Within a couple of minutes after that, his head slowly
 13 started to roll to the right, his right eye closed, his left
 14 eye remained open. He just appeared to be, you know, slowly --
 15 I don't know if "going to sleep" is the right word, but he just
 16 appeared to slowly be a little bit more relaxed. And then I
 17 noticed that his Adam's apple started bobbing even more
 18 furiously, his jaw became clenched again, and then he started
 19 gasping for air. And the gasping for air took a good ten to 12
 20 minutes, where he was literally gasping.
 21 And the only thing I could liken it to is my father died
 22 of lung cancer five years ago and the last minute of his
 23 life -- we were there for it, my family was there -- and at the
 24 last minute, he was doing the same type of gasping, where he
 25 really appeared to be almost a fish out of water because he was

1 gasping so heavily for air.
 2 It appeared to me that Mr. Diaz -- his body was rigid at
 3 points in time. And that's basically my observation through
 4 what I saw until I saw the warden go to the phone, there was an
 5 open line -- there was a black gentleman and a white
 6 gentleman. The black gentleman was the assistant warden. And
 7 there was an open line on the wall. The warden took the phone,
 8 spoke into it, gave the phone back to the black gentleman,
 9 turned around, maybe for another minute or two, took the phone
 10 again, and then he went to another phone and picked up that
 11 phone. I don't know who he was speaking to, obviously. And
 12 then he went back to his place where he was standing.
 13 It appeared to me that the DOC personnel were extremely
 14 uncomfortable. Clearly something was not going right.
 15 Mr. Diaz continued to move, he continued to gasp. And you
 16 could see the DOC personnel were kind of -- their eyes were
 17 going back and forth to each other.
 18 Eventually what happened is that Mr. Diaz -- slowly his
 19 pallor changed. He was a -- being from Puerto Rico, he was
 20 more tanned, he appeared to get very grayish, his breathing got
 21 more and more shallow, his Adam's apple stopped bobbing, and
 22 then, oddly enough, his right eye, which had been closed,
 23 opened during that time, so now both of his eyes were open.
 24 They then had -- there was a metal door. The metal door
 25 opened and a gentleman -- I guess I couldn't say a gentleman,

1 but a person who was garbed in purple from head to toe, it
 2 looked like a HAZMAT suit with a beekeeper's mask, almost,
 3 except for -- I don't know if everybody can picture a welder
 4 with a little slit for their eyes --
 5 Q. Mr. Dupree, please slow down.
 6 A. Okay. It appeared to me to be -- that the only thing you
 7 could see on this person was his eyes, because it was almost
 8 like a welder's suit, where you have that little part where you
 9 can see through the eyes.
 10 That person came in. He shined a light into Mr. Diaz's
 11 eyes, took out a stethoscope and checked his heart rate, and
 12 nodded to the warden, went back in. And I thought it was the
 13 second person that came out, did the same thing, where they
 14 checked his pupils, checked with a stethoscope, and then walked
 15 back in the room. At that point in time, the warden came in
 16 and announced that Mr. Diaz had, in fact, expired. And that's
 17 what I observed.
 18 Q. How long did the execution process take from the time that
 19 it began until the time that Mr. Diaz was pronounced dead?
 20 A. From the time that he stopped speaking, it would be 34
 21 minutes.
 22 Q. Thirty-four minutes?
 23 A. Yes, sir.
 24 Q. Are you familiar with the State of Florida's execution
 25 protocol?

1 A. Yes, I am.
 2 Q. And do you have a copy in front of you?
 3 A. I do.
 4 MR. NIGH: Your Honor, I would move for the admission
 5 of Defendants' Exhibit -- I'm sorry, Plaintiff's Exhibit Number
 6 2, which is a copy of the Florida Department of Corrections
 7 lethal injection protocol.
 8 MR. MANN: Objection on relevancy, Your Honor.
 9 THE COURT: It is received.
 10 Q. (BY MR. NIGH) Mr. Dupree, have you studied that document?
 11 A. I've read through it several times.
 12 Q. Would you tell the Court, if you would, whether the
 13 protocol requires the warden of the institution to provide the
 14 protocol to the executioners?
 15 A. Yes, it does.
 16 Q. And does it provide for training and qualifications for
 17 the executioners?
 18 A. It does. It talks about the selection of the execution
 19 team and the training of execution team, but it does not go
 20 into what the training consists of. It's -- one sentence in
 21 the protocol says the warden or his or her designee will
 22 conduct simulations of the execution process on a quarterly
 23 basis. That's the training.
 24 Q. And does it also require a licensure or certification to
 25 serve as an executioner in the State of Florida?

1 A. What it says, basically, is that the warden is supposed to
2 make sure that the person is qualified to do whatever job he's
3 to perform, but it doesn't go into licensing, doesn't go into
4 training, doesn't go into anything like that.

5 Q. Does the protocol require practice runs on a quarterly
6 basis?

7 A. That's what it says. It's a one line -- under the
8 training of the execution team, that's the one line that I just
9 read you.

10 Q. Does it call for an examination of the inmate one week
11 prior to the execution to make sure that he is suitable for
12 intravenous injection?

13 A. That's what it says.

14 Q. Under the Florida protocol, is it true that a total of
15 5 grams of sodium pentothal are administered as an anesthetic
16 agent prior to the time the lethal chemicals are injected?

17 A. Yes, that's what the protocol calls for.

18 Q. Does the protocol call for two sets of IVs, one to be
19 inserted into the inmate's right arm and one to be inserted
20 into the inmate's left arm?

21 A. Yes, sir.

22 Q. And does the protocol indicate that the primary IV site
23 will be designated as A and will be the one that's intended to
24 be used to administer both the anesthetic and also the lethal
25 chemicals?

1 A. Yes, sir.

2 Q. And that IV site B is essentially a backup?

3 A. Yes, sir, that's correct.

4 Q. Now, prior to the execution itself, does the protocol
5 require that the chemicals be mixed and clearly labeled and
6 placed in racks, one marked "A" and one marked "B"?

7 A. That's what it calls for, yes, sir.

8 Q. During Mr. Diaz's execution, were you able to see anything
9 unusual occurring around the IV site in the right arm? In
10 other words, did you see any swelling, discoloration or
11 anything of that nature?

12 A. Not from my vantage point. I think I would have had to
13 stand above him because of where the IV was inserted, and,
14 plus, it was very heavily taped, so I did not see that, no, but
15 from the autopsy, apparently, that's what it showed.

16 MR. MANN: I object to that on the basis of hearsay.
17 He's now relating to what the autopsy may or may not have
18 said.

19 THE COURT: Be overruled.

20 Q. (BY MR. NIGH) We were talking a moment ago about the
21 requirement for training and selection of the execution team by
22 the warden. Do you know whether or not the executioners are
23 EMPTs or emergency medical technician paramedics?

24 A. No, that's not covered by the protocol. All it says,
25 basically, is that the warden has to ensure that whatever job

1 that person has, they're qualified to do that job.

2 Q. Now, after Mr. Diaz's -- let me ask you this, Mr. Dupree:
3 Did you formulate an opinion about whether or not the execution
4 had proceeded as anticipated for Mr. Diaz?

5 A. I did.

6 MR. MANN: Objection, Your Honor, calls for
7 speculation.

8 THE COURT: Overruled.

9 Q. (BY MR. NIGH) And what is your opinion about that?

10 A. My opinion is it did not go anywhere near planned. It is
11 clear that he was awake way too long, that he was moving,
12 grimacing, that he was in pain, that he was not fully
13 unconscious, that, you know, the whole thing was botched.

14 Q. You said that you formed the opinion that he was in pain.
15 How long, in your opinion, was Mr. Diaz in pain during this
16 procedure?

17 A. Well, watching him struggle for breath for ten to 12
18 minutes, watching him move, I would say that at least half the
19 procedure he had some very noticeable body movements that would
20 indicate to me that he was struggling to breathe, that he was
21 grimacing, that his jaw was clenching, that he was attempting
22 to move in some fashion.

23 Q. So is your opinion that he was in pain for that half of
24 the time?

25 A. Yes.

1 Q. After Mr. Diaz's execution, did the governor of Florida
2 take some action?

3 A. Yes, he did. He issued an executive order, it's Number
4 06-260, and what he did is he created a commission to study the
5 lethal injection procedure in Florida. It's supposed to be an
6 11-member commission. There's going to be five members of the
7 commission that will be appointed by the governor, including
8 the chairman; there will be three that will be appointed by the
9 attorney general; there will be one appointed by the president
10 of the senate; one by the Speaker of the House; and the other
11 would be by the chief justice of the Florida Supreme Court.

12 They will meet no fewer than three times, and they are going to
13 make a report that goes to the governor no later than February
14 1st and there's supposed to be a final report on March 1st of
15 2007.

16 Q. Did the governor issue a moratorium on lethal injection
17 executions in the State of Florida until after the commission
18 does its work?

19 A. Yes, he did. Under Section 8, it says until the
20 commission has issued its findings and recommendations and the
21 appropriate revisions to the Department of Corrections'
22 procedures and protocols have been adopted or until further
23 executive order, no further death warrants shall be signed.

24 MR. NIGH: Your Honor, I would move for the admission
25 of Plaintiff's Exhibit Number 3, which is the State of Florida

1 Office of the Governor Order Number 06-260.
 2 MR. MANN: Object on the basis of relevancy, Your
 3 Honor.
 4 THE COURT: Overruled. It is received.
 5 Q. (BY MR. NIGH) Did -- did you become aware of public
 6 statements made by the medical examiner for the State of
 7 Florida in reference to the execution of Mr. Diaz?
 8 A. Yes.
 9 Q. Did a preliminary examination of Mr. Diaz occur after the
 10 execution?
 11 A. Yes, there was an autopsy that was performed the next
 12 day.
 13 Q. And did the medical examiner, speaking on behalf of the
 14 State of Florida, make statements concerning the insertion of
 15 the IVs into Mr. Diaz's arms?
 16 A. Yes, he did.
 17 Q. What did he say about that?
 18 A. He said the needles had gone completely through the veins,
 19 as did all the chemicals, as part of the execution protocol,
 20 had gone into his soft tissue and that created burns about a
 21 foot long on each arm.
 22 Q. Did that occur in one arm or in both the right arm and in
 23 the left arm?
 24 A. Both arms.
 25 Q. And so according to the medical examiner, the IV sites had

1 failed in both arms?
 2 A. Yes, sir.
 3 MR. NIGH: Thank you very much, Mr. Dupree. That's
 4 all the questions that I have. I'm sure that counsel for the
 5 State will have some questions.
 6 THE WITNESS: Okay.
 7 THE COURT: Cross-examination, Mr. Mann.
 8 CROSS-EXAMINATION
 9 BY MR. MANN:
 10 Q. Mr. Dupree, it's Richard Mann. Can you hear me, sir?
 11 A. Perfectly.
 12 Q. All right.
 13 THE COURT: Mr. Mann, let me interrupt for just a
 14 moment to ask one -- the Court will ask one clarifying question
 15 of Mr. Dupree. Aside from -- with respect to the reported
 16 physical reasons for the apparent mishap with respect to the
 17 execution of Mr. Diaz, and aside from the preliminary comments
 18 by corrections personnel, which, as I understand it, alluded to
 19 the possibility of liver problems which, based on testimony
 20 this Court received last August seems improbable as a cause
 21 for -- with the difficulties that were encountered with
 22 Mr. Diaz, so aside from that, has there been any report in
 23 Florida from any authoritative source that would cast doubt on
 24 what you have described as the medical examiner's finding that
 25 both needles penetrated entirely through both veins?

1 THE WITNESS: I don't know of anything that
 2 contradicts that, Your Honor.
 3 THE COURT: Very well.
 4 Mr. Mann, you may proceed.
 5 MR. MANN: Thank you.
 6 Q. (BY MR. MANN) Mr. Dupree, do you recall speaking with me
 7 by phone yesterday?
 8 A. I do.
 9 Q. When is the first time you saw the protocol for the State
 10 of Florida?
 11 A. Probably about a week to ten days before the execution.
 12 Q. All right. Have you ever seen the Oklahoma protocol?
 13 A. No, sir, I have not.
 14 Q. You have no knowledge about the Oklahoma protocol; is that
 15 correct?
 16 A. The only thing I read was the petition in this case and
 17 that's the only thing I know about the Oklahoma procedure.
 18 Q. All right. This was the first execution that you've ever
 19 seen, correct?
 20 A. Yes, sir.
 21 Q. And you could not see the intravenous line in the left
 22 arm, but you understand that there was one there because of the
 23 statements from the medical examiner, correct?
 24 A. Yes, sir. And I guess because of their protocol, also,
 25 their protocol says that's what they are supposed to do.

1 Q. Okay. Is it your understanding the State of Florida
 2 correctional officials gave Mr -- is it Diaz or Diaz?
 3 A. I pronounce it Diaz.
 4 Q. Is it your understanding that the State of Florida
 5 Department of Correction officials gave Mr. Diaz a Valium
 6 before his execution?
 7 A. They gave him -- it was my observation -- I met Mr. Diaz
 8 on one occasion probably about a week before the execution with
 9 the lead attorney on the case, because I was going to be the
 10 person that witnessed the execution. It was my observation at
 11 that time that he was a fairly animated gentleman, and when he
 12 was giving his statement, even though I'm not fluent in
 13 Spanish, it just appeared to me that he was slower than when I
 14 spoke with him before. He just appeared, to me, at that point
 15 in time, to be under the influence of something. And I know
 16 the protocol says that if somebody wants something, they'll
 17 give him diazepam or some agent to, I guess, make you calmer.
 18 It was my observation that he just appeared slower than I had
 19 seen him before.
 20 Q. All right. And I understand from your earlier testimony
 21 here just a few minutes ago that you have no knowledge as to
 22 the qualifications of the individual for the Florida DOC who
 23 inserts the intravenous catheters into the arms of any
 24 condemned inmate for that matter; is that correct?
 25 A. That would be a correct statement.



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E-2.06 Capital Punishment

An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.

Physician participation in an execution includes, but is not limited to, the following actions: prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution.

In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

The following actions do not constitute physician participation in execution: (1) testifying as to medical history and diagnoses or mental state as they relate to competence to stand trial, testifying as to relevant medical evidence during trial, testifying as to medical aspects of aggravating or mitigating circumstances during the penalty phase of a capital case, or testifying as to medical diagnoses as they relate to the legal assessment of competence for execution; (2) certifying death, provided that the condemned has been declared dead by another person; (3) witnessing an execution in a totally nonprofessional capacity; (4) witnessing an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity; and (5) relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution.

Physicians should not determine legal competence to be executed. A physician's medical opinion should be merely one aspect of the information taken into account by a legal decision maker such as a judge or hearing officer. When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner for the purpose of restoring competence unless a commutation order is issued before treatment begins. The task of re-evaluating the prisoner should be performed by an independent physician examiner. If the incompetent prisoner is undergoing extreme suffering as a result of psychosis or any other illness, medical intervention intended to mitigate the level of suffering is ethically permissible. No physician should be compelled to participate in the process of establishing a prisoner's competence or be involved with treatment of an incompetent, condemned prisoner if such activity is contrary to the physician's personal beliefs. Under those circumstances, physicians should be permitted to transfer care of

the prisoner to another physician.

Organ donation by condemned prisoners is permissible only if (1) the decision to donate was made before the prisoner's conviction, (2) the donated tissue is harvested after the prisoner has been pronounced dead and the body removed from the death chamber, and (3) physicians do not provide advice on modifying the method of execution for any individual to facilitate donation. (I) Issued July 1980. Updated June 1994 based on the report "Physician Participation in Capital Punishment," adopted December 1992, (JAMA. 1993; 270: 365-368); updated June 1996 based on the report "Physician Participation in Capital Punishment: Evaluations of Prisoner Competence to be Executed; Treatment to Restore Competence to be Executed," adopted in June 1995; Updated December 1999; and Updated June 2000 based on the report "Defining Physician Participation in State Executions," adopted June 1998.

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D-140.982 Physician Participation in Execution

Our AMA shall expand efforts to educate the medical profession regarding this ethic. (Res. 10, A-02)

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D-140.991 Continuing Efforts to Exclude Physicians from State Executions Protocols

Our AMA will remind all state medical societies to review their state execution statutes to ensure that physician participation is not required. (Res. 3, A-00)

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H-140.963 Secrecy and Physician Participation in State Executions

The AMA opposes any and all attempts either in state laws or in rules and regulations that seek to enable or require physician participation in legal executions and/or which protect from disclosure the identity of physicians participating or performing direct or ancillary functions in an execution. (Res. 6, I-91; Reaffirmed: Sunset Report, I-01; Reaffirmation A-04)

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H-140.898 Medical Profession Opposition to Physician Participation in Execution

Our AMA strongly reaffirms its opposition to physician participation in execution. (Res. 10, A-02; Reaffirmation A-04)

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CEJA Report A – I-92 Physician Participation in Capital Punishment

Resolution 5 (1-91), which was referred to the Board of Trustees, asked the Council on Ethical and Judicial Affairs to (a) develop a guideline which prohibits physician participation in state executions and (b) specify exactly which actions by physicians would constitute participation. The Council responds to the resolution with this report.

BACKGROUND

The question of physician participation in capital punishment has a long history. Physicians have been involved with finding execution methods that would be more humane than conventional methods. The most famous example is that of Dr. Guillotin, who developed a mechanism for execution which he believed to be far more humane and civilized than contemporary methods.² However, other physicians have disagreed with any physician participation in the death penalty.¹ The Oath of Hippocrates has historically been interpreted as prohibiting physician participation in executions. The Oath states in part:

I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anyone when asked to do so nor will I suggest such a course.¹ During the 1970s, states began to consider use of lethal injection when executing condemned prisoners. By 1980, four states had selected lethal injection as the method by which executions would take place,¹ and, in 1982, Texas became the first state to execute a person using this method.³

Although physicians had been concerned with the possibility that states might require their presence or assistance with legal executions in the past, execution by lethal injection presented special problems for the medical profession.^{1,4-6} Death by lethal injection requires that mechanisms which are ordinarily used to preserve life in a medical setting be used to cause death and that a person with at least some medical knowledge perform the procedure.¹

In 1980, the Council on Ethical and Judicial Affairs (then Judicial Council) issued a report which prohibited the participation of physicians in capital punishment.⁷ The Council considered all aspects of the problem and decided that physicians as professionals committed "to first of all do no harm," *primum non nocere*, could not ethically participate in executions. The Council's report was used as the basis for Current Opinion 2.06, which states:

CAPITAL PUNISHMENT. An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. A physician may make a determination or certification of death as currently provided by law in any situation.⁷

At about the same time or subsequent to the Council's original report, several other medical associations, including the World Medical Association,⁸ the American College of Physicians,⁹ the American Public Health Association,¹⁰ the medical societies of the Nordic countries (Norway, Finland, Denmark, Iceland and Sweden),¹¹ the American Psychiatric Association,¹² and the Committee on Bioethical Issues of the Medical Society of the State of New York,¹³ also adopted policies which prohibited physician participation in executions.

Today, in 37 states and the U.S. military, the death penalty can be administered for certain crimes. Thirteen states and the U.S. military specify lethal injection as the execution method, twelve require

electrocution, four use the gas chamber, and one uses hanging. In addition, seven states allow the condemned person to choose between lethal injection and one other previously specified method.³³

Since the Council's report in 1980, many commentators have asked organized medicine to provide a clarification as to what constitutes "participation" by the physician.¹⁴⁻¹⁶ This report specifies what is meant by participation. In updating its explanation of physician participation in execution, the Council does not abandon the principle that each individual physician has the right to his or her own personal view on the issue of capital punishment. This report addresses only the question of the extent to which a physician may ethically participate in, assist, or associate with the process of execution. This report does not take a position on the ethical propriety or morality of capital punishment.

RATIONALE AND OPPOSING VIEWS

Rationale

A physician's role is to use his or her medical knowledge and skills to alleviate pain and prolong life.^{11,16} The medical tools and technology used by physicians are meant to facilitate the realization of this role.¹ Physician participation in executions contradicts the dictates of the medical profession by causing harm rather than alleviating pain and suffering.

Participation by physicians in execution by lethal injection is especially troublesome.^{1,3-5} The process of execution by lethal injection employs the same devices and methods used by physicians to preserve life.¹ Using medical devices and methods for execution distorts the life-saving purposes of medical technology and medical tools. Physician participation in a process which has medical overtones but ultimately causes involuntary death further distorts the purpose and role of medicine and its professionals in the preservation of life. The use of physicians and medical technology in execution presents a conceptual contradiction for society and the public. The image of physician as executioner under circumstances mimicking medical care risks the general trust of the public.¹

It is not simply the participation in a death-causing process that makes physician participation in capital punishment unethical. In other contexts, physicians may ethically act in ways that contribute to the death of a patient. The Council has previously stated that a physician may, with the informed consent of the patient, withhold or withdraw treatment even if the treatment is life sustaining.¹⁷ Discontinuing life-sustaining treatment can be distinguished from participation in capital punishment in at least two ways. First, although death may ensue from the physician's actions, the individual patient is voluntarily choosing to risk death upon the withdrawal or withholding of care. With capital punishment, the physician is causing death against the will of the individual. Second, when life-sustaining treatment is discontinued, the patient's death is caused primarily by the underlying disease; with capital punishment, the lethal injection causes the prisoner's death. When physicians withdraw or withhold life sustaining treatment at the request of the patient, they do not violate the fundamental ethical principle of *primum non Nocere*. Physician participation in capital punishment, however, does violate that principle. Deliberately causing a death or participating in the process which intentionally causes death is a harm to the person executed.

Opposing Views

Opposing views hold that, when physicians decline to participate in executions, they are breaching their obligations as physicians and citizens.^{1,4,13,18-22} According to one argument, physicians have a moral duty to ensure that the execution is carried out in the most humane and painless way possible.^{4,22} Physician participation would not signal approval of the taking of a life, but compassion for the person to be executed. Further, the physician's duty as a citizen requires him or her to participate because the

executions take place with the authorization of the state.¹³

These arguments are not sufficiently compelling to justify physician participation in capital punishment. The procedures used for executions do not require the skills of a physician. Even when the method of execution is lethal injection, the specific procedures can be performed by non-physicians with no more pain or discomfort for the prisoner. While physician participation may potentially add some degree of humaneness to the execution of an individual, it does not outweigh the greater harm of causing death to the individual. Finally, the AMA's Principles of Medical Ethics do recognize that physicians have civic duties.²³

However, medical ethics do not require the physician to carry out civic duties which contradict fundamental medical and ethical principles, such as the duty to avoid doing harm. Further, state approval or authorization of an act does not constitute a requirement on the part of any citizen to take action. For instance, voting in an election is authorized by the state but is not mandatory

DEFINITION OF PARTICIPATION

Proposed definitions of "physician participation"

Although several other medical societies and associations have stated that physicians should not participate in executions, only a few have defined "participation" with a significant degree of specificity.^{13,14} Resolution 5 (I-91), which requested that the Council develop a definition of "participation," asked that the following be included as actions constituting "participation:"

selecting fatal injection sites; starting intravenous lines as a port for a lethal injection device; prescribing or administering pre-execution tranquilizers and other psychotropic agents and medications, injection drugs or their doses or types; inspecting, testing or maintaining lethal injection devices; consulting with or supervising lethal injection personnel; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending, observing or witnessing executions as a physician; providing psychiatric information to certify competence to be executed; providing psychiatric treatment to establish competence to be executed; and soliciting or harvesting organs for donation by condemned persons.¹⁴

Also, the Council of the Medical Society of the State of New York approved a statement on May 10, 1990 which defined "participation" as including, among other things:

1) the determination of mental and physical fitness for execution; 2) the rendering of technical advice regarding execution; 3) the prescription, preparation, administration, or supervision of doses of drugs in jurisdictions where lethal injection is used as a method of execution; and 4) the performance of medical examinations during the execution to determine whether or not the prisoner is dead.¹³

The Council of the MSSNY specifically excludes the following from its definition of "participation:"

1) to serve as a witness in a criminal trial prior to the rendering of a verdict to determine guilt or innocence of an accused person; 2) relieve acute suffering of a convicted prisoner while he is awaiting execution 3) certify death, *provided that* the prisoner has been declared dead by someone else; and 4) perform an autopsy following the execution. (emphasis in original)¹³

Clarifications to the AMA Prohibition on Participation

There is a consensus among most medical societies that physician participation in state executions is

unethical.⁷⁻¹⁴ There is also general consensus that the following functions constitute physician participation in executions: directly injecting a lethal agent into a person, starting an IV line which conducts a lethal agent, or rendering technical advice for the individuals performing the execution. However, a few actions by physicians that are considered to be included within the definition of "participation" need special explanation or clarification.

1. **Determination versus certification of death.** Determining death includes monitoring the condition of the condemned during the execution and determining the point at which the individual has actually died.¹³ Certifying death includes confirming that the individual is dead after another person has pronounced or determined that the individual is dead.¹³ Certifying death takes place after the execution procedure is complete, is a neutral medical act, does not implicate the moral beliefs of the physician concerning capital punishment, and cannot be construed to constitute physician participation in the death penalty.

Determining death has the potential to require physician involvement in the actual execution process.^{1,15} There have been several cases where a condemned person did not die immediately upon being injected, gassed, electrocuted, or hanged.²⁴ A physician charged with determining death where initial attempts at execution failed would have to signal that death was not achieved and indicate that the execution attempt must be repeated. In some cases, the physician might have to specifically indicate which drug, what amount of electricity, or what amount or type of gas must be added or repeated in order to complete the execution.¹⁵

Determining death might require the physician to use his or her medical knowledge or skills in a participatory fashion in the execution.²⁵ The physician would potentially be put in the position of directing the specific action which would cause death to the condemned person.¹⁵ For these reasons, determining death constitutes physician participation in execution and is unethical. Certifying death after another person has determined or pronounced death, however, would not involve the physician in the execution process and is permitted.

2. **Supervising or overseeing the preparation or administration of the execution process.** Supervising execution proceedings implicates concerns similar to those raised by determining the death of the condemned. If improper application of the chosen execution method occurred, the physician would be placed in the position of using his or her medical skills to assist the execution. The physician might be required to take specific corrective action that would contribute directly to the taking of life.¹⁵ Supervising the preparation or administration of the execution process is therefore unethical.

3. **Physician participation in the processes leading to condemnation and execution.** There are several ways in which physicians may be asked to participate in the legal processes which lead to the conviction, sentencing, and execution of an individual. A physician may be asked to evaluate and testify as to competence to stand trial, or, if the defendant is convicted, to testify as to the medical aspects of potentially aggravating or mitigating factors during the sentencing phase of the proceedings. Physicians may also be asked to evaluate competence to be executed or to provide treatment in order to restore competence so that the execution may take place.^{15,18,26-29}

Testifying as to competence to stand trial or competence to be executed presents particular ethical dilemmas for psychiatrists, as psychiatrists are ordinarily the only medical professionals called on to make such competency determinations. The American Psychiatric Association stated in 1980 that: "[t]he physician's serving the state as executioner, either directly or indirectly, is a perversion of medical ethics and of his or her role as a healer and comforter."¹²

A physician who testifies to the competence of an individual to stand trial in a capital proceeding may

ultimately contribute in some way to the individual's execution.¹⁸ Had the physician not provided testimony supportive of a finding of competence, then the individual might not have stood trial, been convicted, been sentenced, etc. However, the physician's responsibility for the execution is attenuated. Defendants who are found competent to stand trial may be acquitted, or, if found guilty, may be sentenced to a penalty less severe than death. In addition, the physician does not make the formal determinations that lead to the defendant's execution. The judge determines whether the defendant is competent to stand trial. Similarly, other parties, including the judge, the trial jury, and the sentencing jury, decide whether the defendant is guilty and whether the death penalty should be imposed. The psychiatrist is not using medical skills to cause the death of the accused, and the psychiatrist's actions do not directly result in a death.

Similar considerations apply when a physician provides testimony during the trial in a capital case or during the sentencing phase of a capital case. Although the physician's actions may ultimately influence the decision to execute an individual, the actual determination to execute is made by the jury, which has the option of accepting or rejecting the psychiatrist's testimony. In addition, the psychiatrist's testimony may help exculpate the defendant.

In all cases where a physician is called upon to testify before and during the trial and sentencing of the accused, the physician is ethically obligated to give an objective medical evaluation of the accused or of the medical evidence in the case. The physician may not allow personal beliefs regarding the morality of the capital punishment to influence the physician's medical evaluation.

Different concerns are raised when the psychiatrist is asked to testify to the competence of a condemned prisoner to be executed. There is a long-standing legal tradition, in both statutory and common law, which prohibits the execution of the incompetent.²⁶ In *Ford v. Wainwright* (1986), the Supreme Court held that executing an incompetent individual is unconstitutional.²⁷ When a psychiatrist evaluates an individual's competence to be executed, the psychiatrist is put in a position where his or her actions could set the process of execution in motion.²⁸ The death of the condemned may be directly dependent on the psychiatrist's use of medical skills. Additionally, most states' processes for determining competence do not include provisions for a psychiatrist's evaluation to be challenged under the usual protections of the adversarial system.²⁹ Similar to determining death during an execution, the physician might essentially be directing the process of execution to begin.¹⁵ On the other hand, the physician's testimony might result in a halt to the process of execution, and, as in other contexts, the competency determination is not a medical determination made by physicians, but a legal determination made by the governor³⁰ or other state official.

Given the complexity of the ethical issues and the importance of the role of psychiatrists, the Council will defer guidelines on physician involvement in evaluations of a prisoner's competence to be executed until the Council has consulted further with the ethics committee of the American Psychiatric Association. The Council will also defer guidelines on the question whether physicians may treat an incompetent prisoner to restore the prisoner's competence to be executed.

4. Actions Associated with Executions Which Do Not Constitute Physician Participation in Executions. A physician's obligation to do no harm does not require him or her to totally abandon a condemned individual or to refrain from providing comfort or medical care to a person on death row. A physician may provide medical care to a condemned person if the individual gives informed consent, the medical care is used to heal, comfort, or preserve the life of the condemned individual, and the medical care would not enable or facilitate the execution of the condemned person. One often cited example is that a physician may perform an appendectomy on a condemned person who has acute appendicitis. Ethically, this is permissible because performing the appendectomy prolongs the life of the condemned individual, if even only for a short period.¹⁸

The wait for execution on death row may be long, and a variety of illnesses or maladies may manifest themselves. Under the foregoing analysis, a physician may counsel or treat an individual for anxiety or depression with the patient's informed consent.³⁴ Any acute or chronic medical conditions which arise could be tended to, and the physician may use medical or personal skills to comfort the condemned person. For instance, the condemned individual might request medication that would relieve acute anxiety which occurred as a result of anticipating the impending execution.

Although the physician may not participate in an execution, he or she may witness the execution in a non-professional capacity. The physician may also witness the execution at the specific voluntary request of the condemned person as long as the physician takes no action which would cause the death of the condemned individual, assists in no way in the process which is used to execute the condemned individual, and does not otherwise violate the definition of physician participation in execution in this report.

A GENERAL DEFINITION OF PHYSICIAN PARTICIPATION

From the foregoing discussion, a general definition of physician "participation" can be constructed which would include the specific actions previously described while providing guidelines for determining whether other actions not mentioned or as yet unanticipated might also constitute "physician participation in executions." A general definition of physician participation in executions would be:

An action by a physician which would fulfill one or more of the following conditions: 1) an action which would directly cause the death of the condemned (e.g., administering a lethal injection); 2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned (e.g., prescribing the drugs necessary for a lethal injection); 3) an action which could automatically cause an execution to be carried out on a condemned prisoner (e.g., determining whether death has occurred during an execution).

This definition would exclude actions such as testifying as to competence to stand trial certifying death (after another party had declared death), and providing medical care to the condemned for medical problems before the execution.

RECOMMENDATIONS

For the reasons described in this report, the Council on Ethical and Judicial Affairs recommends that the following guidelines be adopted in lieu of Resolution 5 (1-91) and that the remainder of the report be filed:

1. An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a state execution. "Physician participation in execution" is defined generally as actions which would fall into one or more of the following categories: 1) an action which would directly cause the death of the condemned; 2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; 3) an action which could automatically cause an execution to be carried out on a condemned prisoner.
2. Physician participation in an execution includes but is not limited to the following actions: prescribing or administering tranquilizers and other psychotropic agents and medications which are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical

advice regarding execution.

3. In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing or maintaining lethal injection devices; consulting with or supervising lethal injection personnel.

4. The following actions do not constitute physician participation in execution: 1) testifying as to competence to stand trial, testifying as to relevant medical evidence during trial, or testifying as to medical aspects of aggravating or mitigating circumstances during the penalty phase of a capital case; 2) certifying death provided that the condemned has been declared dead by another person; 3) witnessing an execution in a totally non-professional capacity; 4) witnessing an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a non-physician capacity and takes no action which would constitute physician participation in an execution; and 5) relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution.

December 1992

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Article published Dec 14, 2006

Dec 13, 2006

Inmate takes 34 minutes to die

By NATHAN CRABBE

Sun staff writer

Angel Nieves Diaz shuddered and appeared to grimace in pain during his execution Wednesday, requiring two rounds of lethal drugs before dying.

Diaz, 55, was declared dead 34 minutes after the process started, about 20 minutes longer than recent executions have taken.

His appeals claimed lethal injection constituted cruel and unusual punishment, and his execution seems likely to fuel the debate over the process.

The Puerto Rican native was sentenced to death for the murder of a Miami topless club manager 27 years ago this month. He professed his innocence in his last statement, which was spoken in Spanish and translated by a prison official.

"The state of Florida is killing an innocent person. The state of Florida is committing a crime because I am innocent," he said.

Observers couldn't recall another execution that required two rounds of drugs since lethal injection was instituted in 2000. Inmates are typically given three drugs in the process: the first to render unconsciousness, the second to cause paralysis and the third to stop the heart.

Department of Corrections spokeswoman Gretl Plessinger said Diaz had liver disease, slowing the effectiveness of the drugs and requiring the second round. Plessinger said Diaz didn't feel pain during the procedure.

"Once the first set of drugs was introduced, he did not recover," she said.

But Diaz's family members and death-penalty advocates assembled outside Florida State Prison questioned her explanation. Mark Elliott of Floridians for Alternatives to the Death Penalty said Diaz would have felt intense pain if he was conscious when the third drug was administered.

"The sensation is supposed to be like being burned alive from the inside out," he said.

Cousin Maria Otero of Orlando said the family wasn't aware Diaz had liver disease and demanded more facts about what happened. One of 16 family members who spent 45 minutes with Diaz earlier in the day, she said he was calm and professed his innocence.

"He asked for us not to lose the faith, to try to be united," she said.

Family members aren't allowed to witness executions, so they assembled with protesters in the pasture across the street from the prison. Relatives cried out in grief during the protests, and two passed out from what a relative said was anxiety.

The U.S. Supreme Court rejected his last-ditch appeals in the hour before the execution. Diaz claimed he was not the triggerman in the killing of Joseph Nagy during a robbery at the Velvet Swing Lounge.

He was convicted largely on the testimony of a jailhouse informant who claimed the Spanish-speaking Diaz mimed a confession. The informant later said he lied.



Debbie Nieves, center, daughter of convicted murderer, Angel Nieves Diaz, 55, cries and prays with other family members outside the Florida State Prison in Starke, Fla., moments before her father was executed, Wednesday, Dec. 13, 2006. Diaz was convicted of murdering a Miami topless bar manager 27 years ago. Diaz died 34 minutes after receiving the first of two doses of chemicals. (TRACY WILCOX/The Gainesville Sun)

While a co-defendant cut a deal with prosecutors and was given life in prison, Diaz acted as his own attorney at trial and was sentenced to death.

Diaz turned down requests for a final meal and was served the day's standard prison meal of turkey tacos, which he turned down. He later met with prison chaplain Dale Recinella and received last rites from Father Jose Maniyangat.

He asked that his body be sent to Puerto Rico for funeral services. Puerto Rican Gov. Acevedo Vila and other officials had asked Gov. Jeb Bush to stop the execution. The U.S. territory abolished the death penalty in 1929.

The execution was the fourth this year, the most since 2000 even with delays caused by challenges to the lethal injection method. Convicted cop killer Clarence Hill stopped his execution in January with such a challenge, only to be executed in September when further appeals were not allowed.

All four inmates executed this year have challenged the lethal injection procedure as cruel and unusual punishment, claiming inmates can wake and feel pain during the process. The state has argued the process is designed to ensure inmates are unconscious after the first drug is administered.

But Diaz's execution would appear to contradict that claim.

After making his last statement at 6 p.m., Diaz appeared to wince and mouth words. Over the course of 10 minutes, he grimaced and shuddered at several junctures. He then moved his mouth in a way that made it appear he was gasping for air. Diaz stopped moving at 6:24, and was declared dead by prison officials 10 minutes later.

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Article published Dec 15, 2006

Dec 14, 2006

Diaz ordeal raises legal challenges

By NATHAN CRABBE

Sun staff writer

An execution that took two rounds of lethal drugs and 34 minutes to complete likely caused the inmate to suffer extreme pain, which could lead the courts to find Florida's death penalty is unconstitutional cruel and unusual punishment, medical and legal experts said Thursday.

Angel Nieves Diaz, 55, was executed Wednesday at Florida State Prison near Raiford for the 1979 murder of a Miami topless club manager. He appeared to shudder, grimace in pain and gasp for air during the execution, before he stopped moving 24 minutes into the process and was declared dead 10 minutes later.

Normally during an execution, inmates stop moving after five minutes and are declared dead after 15 minutes.

The Florida Supreme Court ordered Thursday that a lower court hear challenges to the state's execution method. Florida Department of Corrections Secretary James McDonough said an investigation would be conducted into the execution, but declined further comment.

A corrections department spokeswoman claimed earlier that Diaz had liver disease and had problems metabolizing the first round of drugs, so a second round was given. But doctors said the explanation defies logic and that Diaz's execution illustrates problems with the procedure.

"These drugs don't need metabolism to work. They work just fine if you don't have a liver," said Dr. Nikolaus Gravenstein, anesthesiology department chairman in the University of Florida College of Medicine.

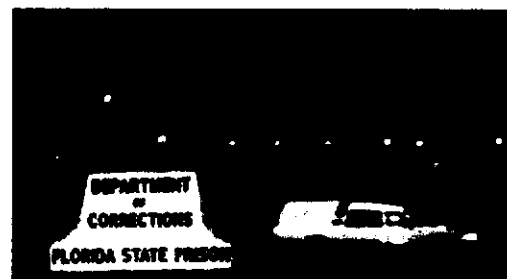
A possible explanation is that the IV wasn't properly inserted into the vein or became dislodged, Gravenstein said. The drugs would have then been flowing into Diaz's tissue and taken much longer to work, he said, which could explain why he appeared to be writhing in pain before finally succumbing.

Diaz's state-appointed attorney, Suzanne Keffer, said Diaz was an intravenous drug user, which doctors said might have led to problems with inserting the IV. Keffer filed a petition with the Florida Supreme Court asking that the state Medical Examiner's autopsy be stopped and that an independent examination be conducted instead. The petition also asked for access to public records on the process and a declaration that lethal injection is unconstitutional cruel and unusual punishment.

The court ruled an independent representative could be present during the autopsy and deferred the other questions to the 5th Circuit Court in Marion County. But an official with the Medical Examiner's Office in Gainesville, which conducts all autopsies on executed inmates, said the autopsy was already completed before the ruling came down.

The autopsy needed to be done as soon as possible to ensure accurate results, said Larry Bedore, director of investigations for the office. He said Diaz's blood needed to be taken quickly to show the amount of drugs administered before he died, which could provide clues to what happened during the execution.

"The more you delay, the more it gets diluted in the blood," he said.



A hearse carries the body of Angel Nieves Diaz outside the Florida State Prison Department of Corrections in Starke, Fla. Wednesday, Dec. 13, 2006 after he was executed. A man convicted of murdering the manager of a topless bar 27 years ago was executed by injection Wednesday despite his protests of innocence and requests for clemency made by the governor of his native Puerto Rico. (The Associated Press)

Florida's execution procedure is similar to the method used in the 36 other states that carry out executions via lethal injection. The inmate is first injected with sodium pentothal to render them unconscious, followed by pancuronium bromide to paralyze the muscles. Potassium chloride is then injected to stop the inmate's heart.

A study by University of Miami physicians, published in the British medical journal *The Lancet*, found that post-death blood concentrations of anesthetic were lower than required for surgery in 43 of 49 inmates executed in other states. Twenty-one of those inmates had levels consistent with awareness, suggesting they felt potassium chloride burn through their veins before dying but couldn't express pain because they were paralyzed.

But Diaz's execution sounds like the way the drugs were given, rather than the amount, likely caused the delayed death, said Dr. David Lubarsky, chairman of the University of Miami medical school's anesthesiology department and co-author of the study.

Lubarsky said the execution was botched and likely caused extreme pain. It illustrates the problems in allowing people without medical qualifications to perform executions, he said.

"Simply increasing the level of drugs isn't going to address these concerns," he said.

Attorneys have cited the Miami study in challenges to Florida's four executions this year, arguing that lethal injection constitutes unconstitutional cruel and unusual punishment. The U.S. Supreme Court stopped convicted cop killer Clarence Hill's execution in January and later ruled such an argument was legally permissible.

But the court allowed Hill's execution to proceed in September before he could pursue such a challenge. It has since allowed three more executions in Florida: those of Arthur Rutherford, Gainesville serial killer Danny Rolling in October and now Diaz.

Diaz's execution could provide proof that lethal injection is unconstitutional, said Deborah Denno, a Fordham University law professor who has written extensively about the procedure. Executioners in other states have encountered problems in locating veins and administering the correct level of drugs, she said, but descriptions of Diaz's suffering could mean violations of Eighth Amendment prohibitions against cruel and unusual punishment.

She compared Diaz's execution to Florida's experience with the electric chair, which caused flames to shoot from inmates' heads twice in the 1990s.

"No matter how hard they try, they can't seem to do it right," she said.

The state used the electric chair until the U.S. Supreme Court was poised to rule on the method's constitutionality. Rather than wait for that ruling, the state changed to the lethal injection method in 2000.

Gov. Jeb Bush on Wednesday dismissed comparisons to past problems with executions. He rejected calls asking for a suspension of executions as an attempt by opponents to end the death penalty.

"All the people that are against the death penalty whenever there's a chance will call for suspending the death penalty," Bush said. "That would be like ready, fire, aim."

Bush said the lethal injection procedure has been thoroughly vetted and the information is public. But Florida maintains a shroud of secrecy over certain parts of the procedure, including the credentials and identities of the people involved.

Two doctors appear at the end of the process shrouded in blue hoods to hide their identities, then make the determinations of death. While the state's execution protocols require other members of the execution team, including the person administering the drugs, to be qualified and properly licensed, they don't specify if any of them must be doctors.

Most doctors wouldn't participate in such a process because it violates the Hippocratic oath against harming patients, said Dr. Jonathan Groner, an associate professor of surgery at The Ohio State University medical school and author of several papers on the involvement of doctors in executions.

He called the issue the executioner's paradox: A doctor is needed to carry out the execution correctly, but doctors can't ethically be involved in the procedure.

"It's the familiar lethal injection trap," he said.

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Two books -- *Charlotte's Web* and *Eragon* -- hit movie screens. One is good.

St. Petersburg Times

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FLORIDA'S BEST NEWSPAPER

Thursday, December 14, 2006

Second dose needed to kill inmate

Angel Diaz's execution took longer than the norm, and lawyers call for an investigation into possible missteps.

BY CHRIS TRENCH AND CURTIS KNUSSER
Times Staff Writers

STARKE — A death row inmate who argued that Florida's execution procedures were cruel punishment needed 34 minutes and two drug doses to die by lethal injection Wednesday evening.

The scene of a grimacing Angel Diaz once again called into question the way the state kills condemned prisoners. Diaz winced, his body shuddered and he remained alive nearly three times as long as the state's two most recent executions.

Department of Corrections officials

said they had to take the rare step of giving Diaz a second dose of drugs to kill him. A second dose is part of their protocol and was anticipated because Diaz had liver disease, which they said can slow the time it takes the drugs to metabolize.

But defense lawyers said Diaz's execution was so unusual it could once again disrupt executions in Florida.

"Obviously there was something very wrong here," said Neal Dupree, super-

visor of the Capital Collateral Regional Counsel office for South Florida, which represented Diaz in his appeals.

Dupree, who sat in the front row while Diaz was executed, said the procedure appeared botched, particularly when Diaz squinted his eyes and tightened his jaw as if in pain. Twenty-six minutes into the procedure, Diaz's body suddenly jolted.

"It looked like Mr. Diaz was in a lot of pain," Dupree said.

See EXECUTIONS, 12A



Angel Diaz took about 34 minutes to die.

TIME LINE

EXECUTE from 1A

'Why a second dose?'

Diaz's death

What happened in the execution chamber as Angel Diaz was put to death Wednesday night is still unclear. The curtain opens: Angel Diaz gives a short last statement claiming he is innocent. Diaz begins mumbling and screaming. Death, though, if it comes, is off and none of the witnesses can hear him.

Diaz squints his eyes into the light and in part he continues to speak for several minutes.

Diaz says he is innocent and that he is sorry for what he did.

The execution team called for the second dose after noticing on heart monitors that Diaz was not dying, she said.

Diaz's cousin Maria Otero said the family had no knowledge of any liver disease.

of pain," Dupree said. "He was gasping for air for 11 minutes. This is a big deal. This is a problem."

Corrections officials acknowledged that 34 minutes was an unusually long time but said no records are kept that would tell if it's the longest in state history. They said they were not sure how many times a second dose has been needed.

Gretl Plessinger, a Department of Corrections spokeswoman, said it's unknown at what times the first and second doses were given because those records are not kept.

The execution team called for the second dose after noticing on heart monitors that Diaz was not dying, she said.

Diaz's cousin Maria Otero said the family had no knowledge of any liver disease.

"Who came down to Earth and gave you the right to kill somebody?" Otero said, referring to Gov. Jeb Bush. "Why a stupid second dose?"

Bush said in a written statement that the Department of Corrections followed all protocols.

"As announced earlier this evening by the department, a preexisting medical condition of the inmate was the reason tonight's procedure took longer than recent procedures carried out this year," the statement said.

Florida voluntarily began using lethal injection in 2000 after a number of gruesome executions in the electric chair put electrocutions at risk of being declared unconstitutional, cruel and unusual punishment.

But capital defense lawyers have contended that lethal injection, which in Florida and most states is given with a three-drug cocktail, has its own cruelty problems.

They cite a recent study that suggests a painkiller administered first wears off before the third and fatal drug kills the person. That third drug can cause excruciating pain, the study said, but no one would know because the second drug in the cocktail paralyzes the person.

Martin McClain, a lawyer who has represented more than 100 death row inmates, called for an investigation into Diaz's execution.

McClain said the state should have disclosed any liver problems in advance and explained its plans for dealing with them.

McClain said he questions if Diaz was given the pain-inducing drug potassium chloride before the anesthetic started working.

Lethal injection had been a subject of legal challenges, including one to the U.S. Supreme Court, which put executions in Florida on hold for much of this year. When those legal maneuvers failed, Gov. Bush began signing death warrants.

Diaz, 55, was the fourth person to be executed this year, the most the state has put to death since six were executed in 2000.

Diaz was condemned for the 1979 shooting death of Joseph Nagy, a topless bar manager in Miami. Nagy was killed during a robbery by three men. The case was unsolved for four years before a girlfriend of Diaz's called police to say he was involved.

Diaz had been sentenced to life in prison in Puerto Rico for another murder but escaped and came to the United States. He also escaped from a prison in Connecticut and tried to arrange an escape from jail in Miami.

Though no one witnessed Diaz pull the trigger, a jury convicted

FAST FACTS

Fast facts about Diaz's execution. The execution was the first since 2000. Diaz was sentenced to death in 1979 for the shooting death of Joseph Nagy. Diaz was the fourth person to be executed this year.

him of Nagy's murder and sentenced him to death.

Diaz continued to claim he was innocent in his final statement.

"The state of Florida is killing an innocent person," Diaz said in Spanish. "The state of Florida is committing a crime because I am innocent. The death penalty is a form of vengeance but also a cowardly act by humans. I am sorry for what is happening to me and my family who have been put through this."

TIME LINE

Diaz's death

What happened in the execution chamber as Angel Diaz was put to death Wednesday night:

6:00 p.m.: The curtain opens. Angel Diaz gives a short last statement claiming he is innocent.

6:02: Diaz begins grimacing and seems to speak, though a microphone is off and none of the witnesses can hear him.

6:06: Diaz squints his eyes and juts his chin as if in pain. He continues this for several minutes.

6:12: Diaz's head slips to the right. He coughs several times and appears to shudder.

6:15: His mouth has appeared to widen and his breathing is deep.

6:18: A member of the execution team hands a phone to another member of the team. What they say on the phone is not revealed. Diaz's mouth and chin move as he breathes deeply.

6:24: Diaz's mouth and chin slowly stop moving. His eyes appear fixed.

6:26: His body suddenly jolts. His eyes appear to be opening more widely. Again, a member of the execution team gets on the phone.

6:34: A doctor wearing a blue hood that covers his face enters the execution chamber and checks Diaz's vital signs. The doctor returns a minute later, checks the vital signs again and nods to a member of the execution team.

6:36: A member of the execution team announces that the sentence of Angel Diaz has been carried out. The curtain closes.



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December 14, 2006

Lawyers, death penalty opponents outraged by 34-minute execution

By RON WORD

Associated Press Writer

JACKSONVILLE, Fla. - Defense attorneys and death penalty opponents were outraged Thursday over an execution in which the condemned man took more than half an hour to die, needed a rare second dose of lethal chemicals, and appeared to grimace in his final moments.

"I am definitely appalled at what happened. I have no doubt he suffered unduly," Angel Nieves Diaz's attorney, Suzanne Myers Keffer, said after Diaz died by injection.

Executions in Florida normally take about 15 minutes, with the inmate rendered unconscious and motionless within the first three to five minutes. But Diaz took 34 minutes to die and appeared to be moving for most of that time.

Prison officials promised to investigate but insisted Diaz felt no pain and that it was not unexpected a second dose would be required, because liver disease had affected his ability to metabolize the drugs. They offered no explanation for the grimace or why officials did not adjust the dosage from the start.

Foes of capital punishment seized on the execution to argue that the death penalty is cruel and unusual punishment, just as they did after two inmates' heads caught fire in Florida's electric chair in 1990 and 1997 and a condemned man suffered a severe nosebleed in 2000 during his electrocution.

Those cases led Florida to get rid of the electric chair and switch to lethal injection, which was portrayed as more humane and more reliable.

"This is paralleling to an extraordinary degree what was happening to the electric chair in Florida," said Deborah Denno, a Fordham University law professor who has written extensively about the death penalty. "But this execution is worse. This inmate was conscious."

David Elliot, spokesman for the National Coalition to Abolish the Death Penalty, said Florida seemed to be "developing a national reputation for having problems with the way it conducts its executions."

Diaz's attorney filed a lawsuit Thursday on behalf of death row inmates, asking the Florida Supreme Court to rule that the state's lethal injection procedure is unconstitutional and to preserve evidence in the case.

The high court responded by ordering that Diaz's body be preserved and sent the case to the 5th Circuit Court in Marion County with orders to make an immediate decision on the inmates' request for an independent autopsy. The justices also ordered the lower court to act on all other issues they raised as soon as possible.

Diaz's relatives said he did not have liver disease, and accused Florida officials of lying about details of the execution. And one medical expert vehemently disputed the notion that liver disease interfered with the lethal drugs.

Diaz, 55, was executed Wednesday for the 1979 for fatally shooting of the manager of a Miami topless bar.

Seconds after the chemicals began flowing, Diaz looked up, blinked several times and appeared to be mouthing words. A minute later, he began grimacing.

He appeared to move for 24 minutes after the first injection, at one point looking toward witnesses and another time licking his lips and blowing. He was given a second dose of the chemicals at some point before he died.

Gov. Jeb Bush asked Corrections Secretary James McDonough to undertake a thorough review of the execution, including an autopsy and interviews with those in the death chamber. Bush noted "the unusual length of time it took for the process to complete."

Republican Gov.-elect Charlie Crist also had questions about the procedure.

"You wonder about the dosage and if there may have been some better medical diagnoses done prior to that," Crist said.

Norma Otero Diaz, a cousin in the Puerto Rican capital of San Juan, said Diaz was healthy and recently offered to donate a kidney to her ill son.

Paul Doering, a University of Florida pharmacy professor who is familiar with the lethal injection chemicals, said even if Diaz had a diseased liver, it would not have made any difference on how the drugs worked.

"This explanation doesn't make a bit of sense," Doering said. "It is the greatest fairy tale since Cinderella."

Dr. Mark Heath, an anesthesiologist at Columbia University Medical Center who has studied lethal injection cases across the country, said the effects of drugs used in an execution can be influenced by the medical condition of the prisoner.

"However, it's quite unlikely that the unusual features of this execution, if in fact it was unusual, are fully attributable to hepatic (liver) disease," Heath said.

Diaz proclaimed his innocence to the end.

"The death penalty is not only a form of vengeance, but also a cowardly act by humans," he said while strapped to a gurney. "I'm sorry for what is happening to me and my family who have been put through this."

Maria Magdalena Otero, another cousin of the executed man, said the family tried to stop a state autopsy to obtain independent evidence that Diaz had no liver condition. But the procedure was completed before relatives arrived.

"They have violated our rights and those of Angel's, who had 34 minutes of suffering," she said in a telephone interview.

Associated Press Writer Laura Candelas in San Juan, Puerto Rico, contributed to this story.

This story can be found on Jacksonville.com at <http://www.jacksonville.com/tu-apnews/stories/121406/D8M0SMD80.shtml>.

Asst. Warden Polk

FOLE AGENT

observation

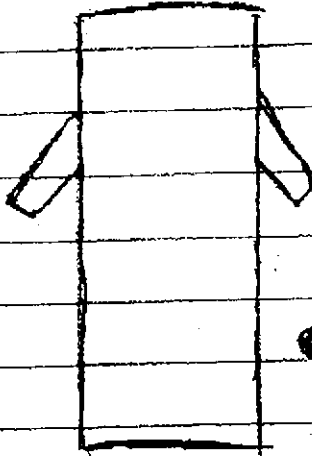
Secondary Executioner

Medical staff #2

Medical staff #1

Primary Executioner

Witness viewing window



OBSERVATION

Warden BRYANT

Asst. Warden

telephone

