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# **Lack of Transparency**

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*“Those persons who developed Kentucky’s lethal injection protocol were apparently given the task without the benefit of scientific aid or policy oversight. ... This action may be the first real public discussion of the lethal injection protocol in Kentucky.”*

*Baze v. Rees, Franklin Cty. Cir. Ct. Opinion, at 12 (July 8, 2005).*

# Execution Protocols Are Developed In Secret

- In response to a federal court decision holding California's lethal injection protocol unconstitutional, the state agreed to review its policies but sought an unprecedented judicial order barring all discovery into the review process, citing expert confidentiality. The judge denied this request. *Morales v. Tilton, No. C-06-219 JF (N.D. Cal. Mar. 6, 2007)*.
- Later, "correctional officials in secret started to build a new death chamber, but Gov. Arnold Schwarzenegger ordered building halted in April once legislators learned of the controversial project that had gone on without their knowledge...." *Scott Smith, Judge Will Visit Death Chamber Before Ruling, The Record (Stockton, Cal.), Jun. 2, 2007*.

# Secrecy Allows States To Develop Protocols Without Seeking Expert Input

- In California, “the Governor’s Office hosted a meeting lasting approximately an hour and a half at which potential changes to OP 770 were discussed. Although more significant modifications were proposed by some of the [medical] participants, the Governor’s Legal Affairs Secretary concluded that the only change that would be undertaken at that time was what was described as a “tweak” of the chemical aspects of the protocol. ... [G]iven past experience, it seems unlikely that a single, brief meeting primarily of lawyers, the result of which is to “tweak” OP 770, will be sufficient to address the problems identified in this case.” *Morales v. Tilton*, 465 F. Supp. 2d 972, 976, 983 (N.D. Cal. 2006).
- In Kentucky, the “Department of Corrections did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned.” *Baze v. Rees*, *Franklin Cty. Cir. Ct. Opinion*, at 6 (July 8, 2005).

# Execution Procedures, Like Other Important State Policies, Should Be Subjected To Public Scrutiny

- Recently, courts in two states have held that execution protocols developed in secret are invalid because they were not created in accordance with state Administrative Procedures Acts. Administrative procedure laws are designed to ensure that the adoption of important public policies takes place under public scrutiny.
  - *Evans v. State*, 914 A.2d 25, 79-81 (Md. 2006): “The whole issue of the death penalty, and particularly the method of its implementation, is of great interest to the Legislature.”
  - Order After Hearing, *Morales v. Calif. Dep’t of Corr. And Rehab.*, No. CV061436 (Cal. Super. Ct. Oct. 31, 2007).

# Execution Protocols Are Kept Secret

- In 2005, only six states had completely public protocols. *Deborah W. Denno, The Lethal Injection Quandary: How Medicine Has Dismantled The Death Penalty, 76 Fordham L. Rev. 49, 63 (2007).*
- In 2001, the Kentucky Department of Corrections denied a state Open Records Act request for information pertaining to lethal injection on the basis that the request improperly sought information rather than records and because, “**assuming that a protocol for execution by lethal injection even exists, such a policy would be exempt from disclosure...as a threat to security.**” *Attorney General Albert B. Chandler, Open Records Decision: In re: Robert M. Harding/Department of Corrections, 01-ORD-247, at 3 (Dec. 21, 2001).*
- In Alabama, officials refused to disclose how they would obtain IV access in David Nelson until days before his execution. The prison first stated that they “could not provide a copy” of the protocol, but represented that a doctor would insert the IV. Six days before the execution, the prison changed its mind: it would not use a doctor, and “prison personnel would now make a 2-inch incision in petitioner's arm or leg; the procedure would take place one hour before the scheduled execution; and only local anesthesia would be used.” *Nelson v. Campbell, 541 U.S. 637, 641 (2004).*

# Qualifications of Execution Personnel Are Hidden In The Name of Security

- In Missouri, after litigation revealed that the physician who supervised executions was incompetent, and the St. Louis Post-Dispatch disclosed the physician's identity and malpractice problems, the state responded by passing a bill providing damages for disclosing the identity of an executioner. *Adam Liptak, After Flawed Executions, State Resorts to Secrecy, N.Y. Times, at A9 (July 30, 2007).*
- Montana relied on a state statute protecting executioner confidentiality to refuse to provide qualification information to the legislature: "The department, therefore, *cannot give you details about the qualifications or training* of the person who will carry out the execution without violating the statute." *Letter from Mike Ferriter, Director, Montana Department of Corrections, to Representative Paul Clark (July 13, 2006) (emphasis added).*

# Qualifications of Execution Personnel Are Hidden In The Name of Security

- In Florida, an execution team member who was present for the Diaz execution refused to discuss his qualifications before the Florida Commission studying the humaneness of lethal injection. See Chris Tisch, *Testimony in Execution Case Disrupted*, Contra Costa Times (Walnut Creek, Cal.), Feb. 21, 2007 (“A machine disguised [the voice of a man testifying before a state commission studying lethal injection] as he spoke over a telephone. He refused to answer detailed questions about his qualifications....”).
- “Ironically, as executioner qualifications became more pertinent, the identities became increasingly confidential.” Ellyde Roko, *Note, Executioner Identities: Toward Recognizing a Right to Know Who is Hiding Beneath the Hood*, 75 *Fordham L. Rev.* 2791 (2007) at 2817.

# Prisons Hide Portions of the Execution Process From Witnesses

- What witnesses can and cannot see lies in the sole discretion of the warden and other corrections officials.
- The use of pancuronium hides evidence of suffering and makes it impossible for witnesses and the state to determine whether the execution was humane.
- In most states, a curtain is not opened until the inmate is already strapped to the gurney and the IV lines have been inserted. See *Phillip Rawls, Alabama Facing Execution Challenge, Press-Register (Mobile, Ala.), Sept. 30, 2007, at B1; Connecticut Department of Correction, Administration of Capital Punishment, Dir. No. 6.15 (9)-(11) (Oct. 19, 2004).*

# Prisons Use Curtains To Prevent Witnesses From Seeing Problematic Executions

- A report by the Human Rights Watch includes a list of known botched lethal injection executions, and in six of the fifteen described the curtain was drawn so that witnesses could not observe whatever problem was occurring in the chamber. *Human Rights Watch, So Long as They Die, at 46-50 (2006).*
- Florida's protocol explicitly states that the curtains should be closed if problems occur. Florida Department of Corrections, Execution by Lethal Injection Procedures 10-12 (July 31, 2007). The procedure states that the "window covering to the witness gallery" should be closed if the inmate is found to be conscious or if the IV is somehow compromised. *Id. at 11-12.*

# Prisons Use Curtains To Prevent Witnesses From Seeing Problematic Executions

- Ohio: During the botched execution of Joseph Clark, execution personnel closed the curtains after Clark sat up and said, “it’s not working.” “After 25 minutes of trying to find a vein, a curtain was pulled over the window separating witnesses from the area where the execution was to take place. Clark was heard moaning and groaning and when the curtain was reopened he had a shunt in one arm.” *Erica Ryan, Associated Press, Injection Problems Delay Ohio Execution (May 2, 2006).*
- Missouri: “Only minutes into Foster's execution, prison officials pulled the blinds in the death house to shield the condemned man from the handful of public witnesses. One, who had witnessed two previous executions, said he heard "a noise" in the lethal injection machine. Because the witnesses didn't actually see Foster's execution, a mandatory requirement ... two refused to sign the death documents.” *H. Swindle & D. Malone, Administration of Capital Punishment Marked By Inconsistencies, Dallas Morning News (Nov. 26, 1997).*

# Secrecy Continues After The Execution, Preventing Scientific and Public Inquiry

- “Only a tiny fraction of information on the specifics of the 907 executions carried out by lethal injection as of mid-May is publicly available.” *David Biello, Reasonable Doubt, Scientific American, July 2007, at 20, 21.*
- As one expert on lethal injection explained, “[t]here is an enormous amount of information from executions—autopsies, toxicology, ECG recordings, EEG recordings, execution logs and photographs—but most of it has been kept secret.” *Id. at 21.*