

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)
)
Plaintiff,)
)
v.)
)
GAYLE RAY, in her official)
capacity as Tennessee Commissioner)
of Correction, et al.,)
)
Defendants.)

No. 10-1675-I

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MEMORANDUM IN SUPPORT OF MOTION TO AMEND FINDINGS OF FACT AND
TO ALTER OR AMEND JUDGMENT

Preliminary Statement

Following a two-day hearing, this Court issued a bench ruling that was incorporated in an order filed November 22, 2010, granting declaratory judgment in favor of the plaintiffs. The trial court declared that "Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article I, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution." *West v. Ray*. No. 10-1675-I (Davidson Chanc. Ct. Nov. 22, 2010) (Order, p. 2).

The Court invalidated Tennessee's lethal injection protocol on the basis of its determination that the current amount of sodium thiopental mandated by the protocol (5 grams) is insufficient to ensure unconsciousness and that "there are feasible and readily available alternative procedures which could be supplied at execution to [e]nsure unconsciousness," which the protocol does not include. (Order, Bench Ruling, p. 37). On November 24, 2010, in response to, and heeding, this Court's ruling, the State added an explicit check for consciousness to

Tennessee's lethal injection protocol. In so doing, the State has taken the step the Court deemed necessary to ensure that the plaintiffs' sentences are carried out in a constitutional manner.

Argument

TENNESSEE'S LETHAL INJECTION PROTOCOL NOW INCLUDES AN EXPLICIT CHECK FOR CONSCIOUSNESS; THEREFORE, IT DOES NOT CREATE AN OBJECTIVELY INTOLERABLE RISK OF SEVERE SUFFERING OR PAIN DURING THE EXECUTION PROCESS.

The plaintiff alleged, and this Court ultimately found, that a proper dose of sodium thiopental is not sufficient to ensure unconsciousness. Consequently, the plaintiff also criticized the failure to include a check for consciousness in the Tennessee lethal injection protocol. (Amended Complaint, p. 57, ¶ 165a; p. 62, ¶ 183; p. 63, ¶¶ 185, 186, 188; p. 74, ¶ 219; p. 75, ¶ 222a; p. 102, ¶ 274; p. 105, ¶ 287). In doing so, the plaintiff noted that other states include such a safeguard. For instance, the plaintiff pointed to the Kentucky lethal injection protocol, which "specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds." (Amended Complaint, pp. 62-63, ¶ 184 (quoting *Baze v. Rees*, 553 U.S. 35, 56 (2008))). Yet the Kentucky protocol does not specify the manner in which unconsciousness is to be determined. (Trial Exhibit 2, Redacted Version of Kentucky Lethal Injection Protocol from *Baze v. Rees* Joint Appendix, Vol. IV).

The plaintiff also criticized the committee that drafted Tennessee's protocol for reviewing but failing to incorporate proposals from the Florida Commission Report on Administration of Lethal Injection including the proposal to "[d]evelop and implement procedures to ensure that the condemned inmate is unconscious after the administration of the first lethal chemical, sodium pentothal, before initiating administration of the second and third lethal chemicals." (Amended Complaint, p. 78, ¶ 224a; Trial Exhibit 23, Florida Commission Final Report, arch 2007, p. 11). The Florida Lethal Injection Procedures provide:

the team warden will assess whether the inmate is unconscious. The team warden must determine, after consultation, whether the inmate is indeed unconscious. If the inmate is unconscious and the team warden orders the executioners to continue, the executioners shall proceed to step (6).

Florida's Execution by Lethal Injection Procedures, Effective Aug. 1, 2007, p. 11, ¶ 4.¹ The procedures do not specify the manner in which unconsciousness is to be determined, but in *Lightbourne v. McCollum*, 969 So.2d 326, 347 (Fla. 2007), the Florida Supreme Court noted that the team warden in charge of future executions would assess consciousness by employing an "eyelash touch," calling the inmate's name, and shaking the inmate. Subsequent challenges to Florida's protocol have been rejected, noting that Florida has adopted measures to assess an inmate's consciousness. *See e.g., Evans v. Secretary*, 2010 WL 3834760 *43 (M D. Fla. Sept. 29, 2010) (citing *Baze v. Rees*, 553 U.S. at 120-21 (Ginsburg, J., dissenting)).

Again, in his pretrial brief, the plaintiff criticized the Tennessee protocol's failure to check for consciousness. The plaintiff quoted extensively from the United States District Court's decision in *Harbison v. Little*, 511 F.Supp.2d 872 (M.D. Tenn.), including the court's discussion of California's efforts to address consciousness checks:

In California's Lethal Injection Protocol and Review, which was issued on May 15, 2007, the California Department of Corrections' Review Team pointed out that earlier versions of its protocol "made no provisions for any objective assessment of consciousness of the condemned inmate following administration of the sodium thiopental, and prior to the administration of the other chemicals." State of California Lethal Injection Protocol Review, p. 20. The California committee noted that "[t]here are reliable, but relatively uncomplicated methods for effectively assessing consciousness that have been incorporated into the [California] Lethal Injection Protocol. Among them are *talking to and gently shaking the inmate, as well as lightly brushing the eyelash.*" *Id.*

¹ The Florida protocol effective May 9, 2007, was entered into evidence as Trial Exhibit 24. The defendants cite to Florida's Execution by Lethal Injection Procedures, Effective Aug. 1, 2007, which is publicly available at: http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2391/Filed_08-01-2007_NoticeFiling1.pdf.

Id., 511 F.Supp2d at 885 (quoted in Plaintiff's Pretrial Brief, p. 41) (internal footnote omitted) (emphasis added). The California lethal injection protocol incorporated the methods described above to assess consciousness. (Trial Exhibit 25, California Lethal Injection Protocol Review, Attachment C).²

During the evidentiary hearing in this case, the plaintiff entered into evidence testimony and exhibits from the evidentiary hearing in *Harbison v. Little*, No. 3:06-cv-1206 (M.D. Tenn.), held September 4-7, 2007, to highlight the absence of a check for consciousness in the Tennessee protocol. For instance, this evidence included the testimony elicited from then-commissioner of the TDOC, George Little, that the protocol did not require the warden or his designee to "do anything like approach the inmate and brush his eyelash and look for some type of reflex" or "administer any type of stimuli — for example, from a stylus or some other object — and see if the condemned inmate reacts." (Collective Trial Exhibit 1, Hearing Transcript Testimony of George Little in *Harbison v. Little*, No 3:06-cv-1206 (M.D. Tenn.), p. 23). The plaintiff also introduced into evidence the April 19, 2007, minutes of the Tennessee Protocol Committee that documented a suggestion by Physician A that "checking for an eyelash response by brushing a finger across them," lifting the person's arm, or "a pin prick or pinching the nipples." (Collective Trial Exhibit 3, TDOC Minutes – April 19, 2007, *Harbison v. Little*, No. 3:06-cv-1206 (M.D. Tenn.)(Harbison P-Ex. 29)).

The Tennessee lethal injection protocol has now been modified to include some of the methods of assessing consciousness utilized by other states as safeguards, the absence of which, the plaintiff has contended, rendered Tennessee's protocol violative of the Tennessee and United

² The San Quentin Operational Procedure Number 0-770, Execution by Lethal Injection, is publicly available at: www.cdcr.ca.gov/News/docs/RevisedProtocol.pdf. The assessment of consciousness is addressed on pages 47-48.

States constitutions. (Exhibit A, November 24, 2010, Revisions to Lethal Injection Procedures Manual).

In *Baze v. Rees*, 553 U.S. 35, the United States Supreme Court rejected the call for inclusion of such checks for consciousness. 553 U.S. at 60. But here, this Court ultimately ruled that an explicit check for consciousness *is* necessary, due to plaintiffs' contention, and the court's ultimate finding, that a proper dose of sodium thiopental is not sufficient to ensure unconsciousness. (Order, Bench Ruling, pp. 31-32) (distinguishing *Baze v. Rees*, 553 U.S. 35 (2008), and *Harbison*, 571 F.3d 531). But the Court characterized the various ways for checking unconsciousness as "feasible," "readily available," and "simple." (Order, Bench ruling, pp. 37-38). The Court found that the proof in *Harbison* and the protocols of other states with explicit checks for consciousness indicated that there were various ways the checks could be accomplished. (Order, Bench Ruling, p. 37). This Court, however, also expressly stated that it was not for the court to determine which particular method of checking for consciousness ought to be employed; *that* determination, the Court said, "should be left to the State." (Order, Bench Ruling, p. 37).

Tennessee has now incorporated into its protocol measures for assessing consciousness that are used in states the plaintiff has put forward as examples, and Tennessee's check for consciousness compares favorably to the methods utilized in other states.³ Having added this explicit check for consciousness, the State has supplied the procedure at execution deemed necessary by this Court "to [e]nsure unconsciousness and negate any objectively intolerable risk

³ See appendix for methods of assessing consciousness during lethal injection procedures in various states. Information regarding assessing consciousness could be located for only 19 of the thirty-six states that use a three-drug lethal injection process. Alabama, Arkansas, California, Delaware, Florida, Missouri, and Nebraska assess consciousness using methods similar to those used in the modified Tennessee protocol. Kentucky, Texas, and Washington rely on visual observation to assess consciousness. The lethal injection protocols of Colorado, Connecticut, Idaho, Maryland, Oklahoma, and Virginia, do not mention checks for consciousness.

of severe suffering or pain.” (Order, Bench Ruling, p. 37). *See Baze*, 553 U.S. at 121 (Ginsberg, J., dissenting) (consciousness checks provide a degree of assurance that the first drug has been properly administered, are simple and essentially costless to employ, yet work to lower the risk that the inmate will suffer pain during the administration of the pancuronium bromide and potassium chloride).

The plaintiff introduced into evidence the protocols of California and Florida and the proof from *Harbison v. Little*, claiming that Tennessee’s protocol was deficient for rejecting measures described therein for checking consciousness. (Amended Complaint, pp. 36, ¶ 75pp; 62, ¶ 183; 63, ¶¶ 186, 187; 78-79, ¶ 224a. Plaintiff’s Pretrial Brief, p. 41). Yet, now that these very measures have been adopted in the Tennessee protocol, the plaintiff claims that they are ineffective and inadequate, pointing to the testimony of his expert, Dr. Lubarsky. *See West v. Ray*, No. MI987-000130-SC-DPE-DD, (Tenn.) (Plaintiff’s Motion to Reconsider, pp. 8-16, filed Nov. 26, 2010). But plaintiff’s argument is not only self-contradictory, it also misses the point. The Eighth Amendment does not require the State to eliminate every risk; it need only eliminate an objectively intolerable risk. *Baze*, 553 U.S. at 50. The addition of the check for consciousness to Tennessee’s protocol, which plaintiff himself previously advocated, does just that.

Furthermore, plaintiff’s reliance on Dr. Lubarsky’s testimony is misplaced. Dr. Lubarsky, relying on the article, Thiopental Pharmacodynamics (Trial Exhibit 9), opined that at a serum thiopental level of 50.7 milligrams per liter, half of the people who are subjected to a stimulus such as a laryngoscopy, a stimulus much less painful than what goes on during the lethal injection, would respond. (Hearing Transcript, p. 104. Plaintiff’s Motion to Reconsider, p. 12). Thus, the plaintiff argues that, based on the thiopental levels of Coe (10.2 mg/L), Workman (18.9 mg/L) and Henley (8.3 mg/L), these inmates would have responded to the pain associated with

the administration of pancuronium bromide and potassium chloride. (Plaintiff's Motion to Reconsider. pp. 12-14).

But Dr. Lubarsky also testified that at a serum thiopental level of 10.2 mg/L, people would respond to verbal commands. (Hearing Transcript, pp. 142-144). If that is the case, then, under the modified Tennessee protocol, the condemned inmate, subjected to an intravenous injection of five grams of sodium thiopental, would respond to the new measures for checking consciousness prior to the administration of the second and third chemicals. In that contingency, the executioner would switch to the secondary IV line at the direction of the warden and begin administration of the second set of chemicals including another five-gram dose of thiopental.

Regarding the effectiveness and lethality of five grams of sodium thiopental, the Sixth Circuit found:

The whole point of the Tennessee lethal-injection protocol is to avoid the needless infliction of pain, not to cause it. The idea is to anesthetize the individual with one drug before the State administers the remaining two drugs, so that the serial combination of drugs causes a quick and pain-free death. *See Abdur'Rahman*, 181 S.W.3d at 307-08 (noting "that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death [...] ... that such a dose would cause an inmate to be unconscious in about five seconds and that the inmate would never regain consciousness and would feel no pain prior to dying").

486, F.3d at 907 (emphasis added). The Sixth Circuit further noted:

Under its lethal-injection protocol, Tennessee administers 5 grams of sodium thiopental to anesthetize the inmate. *See Execution Procedures for Lethal Injection* at 35. That lethal dosage represents the highest level that other States use, and it renders the inmate unconscious "nearly immediate[ly]," *Abdur'Rahman*, 181 S.W.3d at 308. *This 5-gram dose thus reduces, if not completely eliminates, any risk that Workman would "incur constitutionally excessive pain and suffering when he is executed."* *See id.* at 308 ("Dr. Heath [Workman's expert] ... testified that a lesser dosage of two grams of sodium Pentothal would cause unconsciousness in all

but 'very rare' cases and that a dosage of five grams would 'almost certainly cause death.'").

486 F.3d at 910 (emphasis added). This is consistent with the expert testimony in *Baze*.⁴ See *Baze*, 553 U.S. at 59 (“[A] proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated. All the experts who testified at trial agreed on this point.”).

Moreover, the testimony of Edwin Voorhies, South Regional Director for the Ohio Department of Rehabilitation, has greater significance now that Tennessee has modified its protocol to include a check for consciousness because there is now a pause in the process while the consciousness of the inmate is assessed. Thus, there is less opportunity for the sodium thiopental to interact with the pancuronium bromide as suggested by Dr. Lubarsky. (Hearing Transcript, p. 239). The effect of the administration of the sodium thiopental under the Tennessee protocol would be similar to the effect of its administration under a one-drug protocol.

Mr. Voorhies testified that Ohio adopted a one-drug protocol utilizing 5 grams of sodium thiopental, introduced by 5 IV syringes, in November 2009. (Hearing Transcript, pp. 210, 212-13). He testified that Ohio has executed nine condemned inmates since adopting that protocol and that he has been in attendance at each execution. (Hearing Transcript, p. 216). Mr. Voorhies is positioned within four feet of the condemned inmate’s feet when the sodium thiopental is administered, so that he can observe the condemned inmate as the sodium thiopental is introduced. (Hearing Transcript, pp. 216-17). He testified that the inmates appeared to lose consciousness after the conclusion of the first syringe and that by the end of the second syringe, one could see no visible signs of the chest rising and falling. (Hearing Transcript, p. 220). All nine executions resulted in death of the condemned inmate, without the necessity of utilizing the

⁴ The Kentucky lethal injection protocol upheld in *Baze* calls for the injection of 3 grams of sodium thiopental.

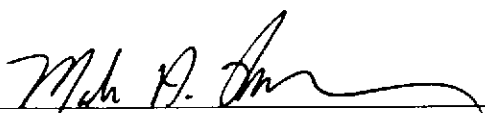
additional 5 grams of sodium thiopental as provided by the protocol. (Hearing Transcript, p. 218). This is consistent with, and supportive of, the testimony of the defendants' expert, Dr. Feng Li, to the effect that following the administration of 5 grams of sodium thiopental inmates Coe, Workman, and Henley were rendered unconscious at the time of their executions. (Hearing Transcript, p. 314). In fact, it is clear from Ohio's experience, that the administration of five grams of sodium thiopental is lethal. The effects of administering an additional five grams of sodium thiopental, if required pursuant to the contingency in the Tennessee protocol, would be just as lethal. Certainly, any "objectively intolerable" risk that the inmate would be conscious during the administration of the second and third chemicals has been eliminated by the addition of an explicit check for consciousness and the accompanying contingency plan.

CONCLUSION

Based on the foregoing, the defendants' motion to amend findings of fact and to alter or amend the judgment should be granted and judgment should be entered in favor of the defendants.

Respectfully submitted,

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APPENDIX

**AMOUNTS OF SODIUM THIOPENTAL USED AND MANNER OF ASSESSING
CONSCIOUSNESS IN LETHAL INJECTION BY STATE**

State	Amount of Sodium Thiopental/ Sodium Pentothal used	Supporting document	Consciousness checks	Supporting document
Alabama	2.5 grams of sodium thiopental	<i>Ex parte Rick Allen Belisle (In re: Rick Allen Belisle v. State of Alabama)</i> , 11 So. 3d 323, 2008 Ala. LEXIS 280	Calling his name, gently stroking his eyelashes, and pinching his arm	<i>Ex parte Rick Allen Belisle (In re: Rick Allen Belisle v. State of Alabama)</i> , 11 So. 3d 323, 2008 Ala. LEXIS 280
Arkansas	3.0 grams sodium pentothal in 2 syringes of 1.5 grams in 60 cc)	<i>Nooner v. Norris</i> , 594 F.3d 592 (Feb. 8, 2010)	Checking for movement, opened eyes, eyelash reflect, and response to verbal commands and physical stimuli to verify that the prisoner has been rendered completely unconscious	<i>Nooner v. Norris</i> , 594 F.3d 592 (Feb. 8, 2010)
Arizona	5 grams of sodium pentothal in four syringes	Arizona Dept. of Corrections, Execution Procedures www.azcorrections.gov/Policies/700/0710.pdf	Confirm the inmate is unconscious by sight and sound utilizing the audio equipment, camera, and monitor. Medical team leader will enter the room to physically confirm that the inmate is unconscious using all necessary medically appropriate methods.	Arizona Dept. of Corrections, Execution Procedures www.azcorrections.gov/Policies/700/0710.pdf
California	3 grams of sodium thiopental in 2 syringes with 1.5 grams of sodium thiopental in each syringe	State of California, San Quentin Operational Procedures No. 0-770 www.cdcr.ca.gov/News/docs/RevisedProtocol.pdf	IV Team Member will brush the back of his/her hand over the condemned inmate's eyelashes, and speak to and gently shake the condemned inmate. Observation will be documented. If the condemned inmate is unresponsive, it will demonstrate that he is unconscious.	State of California, San Quentin Operational Procedures No. 0-770 www.cdcr.ca.gov/News/docs/RevisedProtocol.pdf

State	Amount of Sodium Thiopental/ Sodium Pentothal used	Supporting document	Consciousness checks	Supporting document
Colorado	Use a lethal solution of sodium pentothal, pancuronium bromide and potassium chloride. No mention of specific amounts.	Colorado Department of Corrections, Execution Day www.doc.state.co.us/execution-day	No mention of consciousness checks	Colorado Department of Corrections, Execution Day. www.doc.state.co.us/execution-day
Connecticut	2,500 mg of thiopental sodium in 50 ml of clear sodium chloride 0.9% solution of an approximate concentration of 50 mg/ml or 5%	State of Connecticut, Dept. of Correction, Directive No. 6.15, Administration of Capital Punishment www.ct.gov/doc/lib/doc/pdf/ad/ad0615.pdf	No reference to consciousness checks in protocol	State of Connecticut, Dept. of Correction, Directive No. 6.15, Administration of Capital Punishment www.ct.gov/doc/lib/doc/pdf/ad/ad0615.pdf
Delaware	3 grams of sodium thiopental	State of Delaware, Dept. of Correction, Execution Policies www.doc.delaware.gov/pdfs/policies/procedure2-7redact_3.pdf	Consciousness check performed as follows: curtain between execution chamber and witness room closed; warden will call ISDP's name in a loud voice and observe the ISDP for a reaction; a member of the IV team will assess the consciousness of the ISDP by tactile stimulation which shall include touching the ISDP, shaking the ISDP's shoulder, and brushing the eyelashes of the ISDP.	State of Delaware, Dept. of Correction, Execution Policies www.doc.delaware.gov/pdfs/policies/procedure2-7redact_3.pdf

State	Amount of Sodium Thiopental/ Sodium Pentothal used	Supporting document	Consciousness checks	Supporting document
Florida	5 grams of sodium pentothal	<i>Schwab v. State of Florida</i> , 995 So. 2 nd 922, 2008 Fla. LEXIS 1113	Under current protocol, team warden will consult with medical members of execution team in making assessment of unconsciousness. <i>Schwab</i> mentions <i>Lighthourne v. McCollum</i> —eyelash touch, shaking the inmate, calling his name	<i>Schwab v. State of Florida</i> , 995 So. 2d 922, 2008 Fla. LEXIS 1113 (copy of Florida protocol filed in <i>Schwab</i>); <i>Lighthourne v. McCollum</i> , 969 So.2d 326 (2007)
Idaho	2 syringes each containing 5.0 g sodium pentothal	Idaho Department of Correction, Execution Procedures www.idoc.idaho.gov/policy/int1350201001.pdf	No mention of consciousness checks	Idaho Department of Correction, Execution Procedures www.idoc.idaho.gov/policy/int1350201001.pdf
Indiana	5 grams of sodium pentothal	<i>Lambert v. Buss</i> , 498 F3d 446, 2007 U.S. App. LEXIS 14512	The effectiveness of the sodium pentothal is confirmed before the second chemical is injected. This is done through confirmation that the offender has lost consciousness, shows no reflex or muscle response and has no response to noxious stimuli (ammonia tablets).	<i>Timberlake v. Buss</i> , 2007WL 2316451 (S.D. Ind); <i>Lambert v. Buss</i> , 498 F3d 446, 2007 U.S. App. LEXIS 14512
Kentucky	3 grams of sodium thiopental	501 Ky. Admin. Regs 16:330 www.lrc.state.ky.us/kar/501/016/330.htm	It appears to the warden based on his visual inspection that the condemned person is unconscious	501 Ky. Admin. Regs 16:330 www.lrc.state.ky.us/kar/501/016/330.htm
Maryland	3 grams of sodium thiopental	<i>Evans v. Saar</i> , 412 F.Supp 2d. 519, 2006 U.S. Dist LEXIS 4418	No mention of consciousness checks.	Maryland Department of Public Safety and Correctional Services, Death Penalty Procedures. http://dpscs.maryland.gov/tmp/NewProvisionalDeathPenaltyProcedures.pdf

State	Amount of Sodium Thiopental/ Sodium Pentothal used	Supporting document	Consciousness checks	Supporting document
Mississippi	2.0 grams of Sodium Pentothal	Mississippi Department of Corrections, Media Kit on Death Row Inmate Joseph Burns www.mdoc.state.ms.us/Media%20Kit/Media%20Kit%20BURNS.pdf		
Missouri	5 grams of sodium pentothal (but Dr. believed he had unwritten authority to alter chemical doses at will based on his medical judgment and chose to give a dose of only 2.5 grams without notifying director.)	<i>Clemons v. Crawford</i> , 585 F.3d 1119 (2009), <i>Taylor v. Crawford</i> , 2006 U.S. Dist. LEXIS 42949	Medical personnel physically examine the prisoner to confirm that he is unconscious using the "standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflect, pupillary responses or diameters, and response to verbal commands and physical stimuli.	<i>Clemons v. Crawford</i> , 585 F.3d 1119 (2009)
Montana	3 grams of sodium thiopentathol	<i>Smith v. State of Montana</i> , 2010 Mont. Dist. LEXIS 12		
Nebraska	Initial 3 gram dose of sodium thiopental	Nebraska Administrative Code—Execution Protocol http://www.sos.ne.gov/rules-and-regs/regsearch/Rules/Correctional_Services_Dept_of/Title-69_Execution_Protocol/Chapter-11.pdf	There will be a waiting period of at least one minute between the administration of the sodium thiopental and conducting the consciousness checks. Brushing the eye lashes of one eye of the condemned inmate with the fingers of a hand, observing any involuntary muscular response; and opening one eye of the condemned inmate and passing over it a light source observing the pupil's reaction to the light.	Nebraska Administrative Code—Execution Protocol http://www.sos.ne.gov/rules-and-regs/regsearch/Rules/Correctional_Services_Dept_of/Title-69_Execution_Protocol/Chapter-11.pdf

State	Amount of Sodium Thiopental/ Sodium Pentothal used	Supporting document	Consciousness checks	Supporting document
North Carolina	First syringes contain no less than 3,000 mg. of sodium pentothal	North Carolina Dept. of Correction, Execution Method www.doc.state.nc.us/DOP/death_penalty/method.htm	Mention of a BIS (bispectral index) monitor in <i>Brown v. Beck</i> . Unable to find protocol to verify.	<i>Brown v. Beck</i> , 445 F.3d 752 (N.C.) 2006
Ohio	5 grams of thiopental sodium	<i>Cooley v. Strickland</i> , 2009 U.S. Dist. LEXIS 122025 Ohio Department of Rehabilitation and Correction Policy, re: Execution www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf	Using 1 drug protocol: five minutes after injection of this medication, a medical team member shall reenter the chamber to listen for breathing sounds.	Ohio Department of Rehabilitation and Correction, Policy re: Execution www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf
Oklahoma	5 grams of sodium thiopental	<i>Wackerly v. Jones</i> , 2010 U.S. App. LEXIS 21061	No mention of consciousness checks.	Oklahoma Department of Correction Procedures for the Execution of Offenders Sentenced to Death www.doc.state.ok.us/offtech/op040301.pdf
Texas	3 grams of sodium thiopental	<i>Ex Parte Heliberto Chi</i> , 256 S.W. 3d 702, 2008 Tex. Crim. App. LEXIS 690	The CI Division Director or designee and the Huntsville Unit Warden or designee shall observe the appearance of the condemned individual during application of the sodium pentothal. If the condemned individual exhibits no visible sign of being awake to the designated observers, the CI Division Director or designee shall instruct the drug team to proceed with the next step.	Texas Department of Criminal Justice, Correctional Institutions Division, Execution Procedure, May 2008 www.executionwatch.org/docs/ExecutionProcedureTDCJ2008.pdf
Virginia	2 grams of sodium thiopental	<i>Emmett v. Johnson</i> , 532 F.3d 291, 2008 U.S. App. LEXIS 14701	No mention of a consciousness check in <i>Emmett v. Johnson</i>	<i>Emmett v. Johnson</i> , 532 F.3d 291, 2008 U.S. App. LEXIS 14701

State	Amount of Sodium Thiopental/ Sodium Pentothal used	Supporting document	Consciousness checks	Supporting document
Washington	1 drug protocol: 5 grams of thiopental sodium 3 drug protocol: 3 grams thiopental sodium	State of Washington, Department of Correction, Policy No. 490.200 www.doc.wa.gov/policies/default.aspx?show=400	In the event the 3 drug protocol is used, the Superintendent shall observe the ISDP for signs of consciousness before the lethal Injection Team administers the pancuronium bromide.	State of Washington, Department of Correction, Policy No. 490.200 www.doc.wa.gov/policies/default.aspx?show=400