

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff

vs

IAN DECO LIGHTBOURNE,
Defendant

CASE NO. 1981-170 CF; SC06-2391

ORDER DENYING DEFENDANT'S ALL WRITS
PETITION TO DECLARE FLORIDA'S LETHAL INJECTION
PROCEDURE UNCONSTITUTIONAL

On 13 December 2006 the State of Florida executed Angel Diaz by lethal injection. Defendant Lightbourne filed an All Writs Petition with the Florida Supreme Court on 14 December 2006 to declare the Florida lethal injection procedures unconstitutional based on the facts of the Angel Diaz execution.

Defendant Lightbourne claims that the Angel Diaz execution was botched.

Defendant Lightbourne claims that Angel Diaz suffered unnecessary and wanton infliction of pain, contrary to contemporary standards of decency and a humane execution, all of which show that Florida's execution procedures did and will in the future expose inmates to be executed to an unreasonable risk of suffering unnecessary and wanton infliction of pain and to a lingering death, contrary to the prohibition against cruel and unusual punishment by the Eighth Amendment to the U.S. Constitution and to the Florida Constitution.

The Florida Supreme Court relinquished jurisdiction to this Court to consider "the impact of those events [the Angel Diaz execution] on the issue of the constitutionality of Florida's lethal injection procedures...."

FACTUAL FINDINGS

The first issue for this Court's determination is to establish the essential, material facts of the Diaz execution and any factual conclusions that can be drawn from the evidence. The evidence was presented to the Court by 40 witnesses and numerous exhibits presented at hearings over 13 days on May 18 and 21, June 18 and 19, July 17 through 22, and August 28 to 30, 2007.

The protocols under which Diaz was executed were published by the Department of Corrections (DOC) on 16 August 2006. The protocols provide for intravenous injection of two (2) 60 cc syringes each with 2.5 grams of sodium pentothal in solution, followed by one (1) 20 cc syringe of saline solution, followed by two (2) 60 cc syringes each with 50 milligrams pancuronium bromide, followed by one (1) 20 cc syringe of saline solution, followed by two (2) 60 cc syringes each with 120 milliequivalents of

potassium chloride.

Medical experts testified that injecting these syringes can take from a few seconds up to one minute each, thus taking as long as approximately up to eight (8) minutes to inject all syringes.

Even though when properly injected these chemicals are absorbed rapidly into the blood stream and rapidly produce a sequence of unconsciousness, cessation of all skeletal muscular function, and cessation of all heart function, resulting in death, there is no exact time within which these events happen. It can take several minutes for the body to react to each of these drugs. Experience in past executions has shown death to occur within approximately 10 to 18 minutes. Diaz was pronounced dead 34 to 36 minutes after his execution began.

After several minutes, especially after 15 minutes, it was obvious to all lay witnesses who had witnessed other executions that things were not progressing as anticipated.

After the autopsy, it is undisputed that the problem with the Diaz execution was that proper venous injection of the chemicals was not obtained, or maintained during the injection process.

The observations of the lay witnesses is confirmed and explained by the medical evidence.

The executioners also realized there was a problem with injecting the chemicals.

It is not clear exactly how they responded to this problem. It is clear that they began switching the injection process from one stand of chemicals to the other stand of chemicals and from the IV site in the left arm to the IV site in the right arm.

Although there is some doubt about it, it seems clear, and the Court so finds that regardless of which stand of chemicals was used, or which IV site was used, the executioners at all times injected all of the chemicals from both stands into the body of the inmate in the proper sequence, i.e. first sodium pentothal, followed by pancuronium bromide, followed by potassium chloride.

Except for one witness, who felt afterwards that he just witnessed a man be tortured to death, the observations of other lay witnesses are consistent in seeing various limited body movements. This is consistent with medical evidence that the paralytic effect of the pancuronium bromide was slower than anticipated because the chemical was injected into soft body tissue, not into the blood stream, and there could have been some muscular movement due to the delayed reaction of the chemical.

It is unclear and disputed whether inmate Diaz suffered any pain. It is unclear exactly how conscious or unconscious inmate Diaz was after injection of the sodium pentothal into the soft body tissue. It is unknown what the absorption rate is for that chemical or the other chemicals injected into soft body tissue. It is medically clear that anyone would experience pain if pancuronium bromide or potassium chloride were injected into a body that was not properly anesthetized. It is not uncommon for this to happen in the best of hospital settings. Medical experts testified to patients screaming or yelling from severe pain from injection of drugs before being properly anesthetized. No witness testified that inmate Diaz screamed or yelled after the injection of pancuronium bromide or potassium chloride. Therefore, the

Court concludes and so finds that inmate Diaz did not suffer any pain from the process of injecting these chemicals. The Governor's Commission which investigated this execution could not find whether or not inmate Diaz suffered any pain.

The Court has been provided no standard by which to assess a level of pain, if any is experienced in the execution process. The Court concludes that the level of pain which concerns the appellate courts must be something such as substantial, significant, excruciating, or the like, and must be of significant duration. If inmate Diaz did experience any pain in this execution, the Court finds that it was not significant, substantial, or excruciating, and further that it would not have been of significant, but limited, duration.

As to the witness who felt he had observed a man tortured to death, the Court finds that his observation is not corroborated by other witnesses or medical evidence, and therefore rejects his conclusion.

After the execution, the Governor's Commission appointed to investigate what went wrong in the execution found that the execution "took 34 minutes, which was substantially longer than in any previous lethal injection in Florida." However, there is no indication that the fact that this execution took longer than prior executions, due to the improper location of the IV lines and the delayed reaction of the chemicals, caused or contributed to any abuse, or to any unnecessary pain, or a lingering, suffering death. It appears that this execution took from 10 to 20 minutes longer than anticipated. It is unclear what if any significance should be attached to the conclusion that this execution was "substantially longer" than prior executions. Therefore, the Court attaches no significance to this conclusion.

The Defendant Lightbourne argues that Diaz was a "botched" execution. It is true that the Governor's Commission found several instances in which prior protocols were not followed and recommended several areas for improvement in the execution process.

However, the Court finds that none of the irregularities in the Diaz execution caused the execution to result in any abuse, or any cruel or unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution or the Florida Constitution. It is true that both IV sites in inmate Diaz penetrated the venous walls resulting in most, if not all, of the chemicals being injected subcutaneously, rather than intravenously, as intended. However, this did not cause any abuse, or any grotesque or painful consequences to the inmate. Because of slower absorption rates, this delayed the death process by 10 to 20 minutes. Because of the very high levels of sodium pentothal injected into his body, inmate Diaz would have been totally unconscious and insensate throughout the entire death process. The distorted bullae which the autopsy found in the inmates arms were most probably caused by the body's reaction to the chemicals post mortem.

The Court further finds that the medical evidence and observations of lay witnesses do not support the allegation that the execution was "botched." There were irregularities which the Department of Corrections has addressed and taken appropriate action to reduce the risk of happening in the future. The Court rejects the argument that the Diaz execution was "botched." Inmate Diaz died within a reasonably short time after chemicals were injected in a manner that the Court finds was painless and humane. It was never intended that the inmate should wake up and go home.

LEGAL CONCLUSIONS

Defendant Lightbourne does not argue that lethal injections are per se unconstitutional. The Florida Supreme Court has consistently held that it finds no constitutional bar to death by lethal injection. *Sims v. State*, 754 So.2d 657 (Fla. 2000); *Rolling v. State*, 944 So.2d 176 (Fla. 2006); *Rutherford v. State*, 926 So.2d 1100 (Fla. 2006); *Hill v. State*, 921 So.2d 579 (Fla. 2006); *Diaz v. State*, 945 So.2d 1136 (Fla. 2006).

The Defendant contends that, while the general process may be constitutional, the specific protocols adopted by DOC and the execution team members employed to carry out the process, including their qualifications, experience, and training, do not protect the Defendant against infliction of unnecessary and wanton pain and expose the Defendant to a foreseeable risk of infliction of unnecessary and wanton pain. The Defendant argues that the State must adopt protocols that are not likely to result in unnecessary or wanton infliction of pain.

The protocols under which Angel Diaz was executed were adopted on 16 August 2006. The protocols have since been amended on 9 May 2007 and later on 1 August 2007.

The Court considers the Defendant's argument in light of the following legal standards.

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Jones v. State*, 701 So.2d 76 (Fla. 1997).

The Defendant claims that there is a foreseeable risk of unnecessary and wanton pain if the Department is allowed to proceed even under the most recent protocols adopted 1 August 2007 and even with an entirely new execution team selected and trained since the Diaz execution.

However, no Florida court has adopted the standard suggested by the Defendant that there be no foreseeable risk of pain in executions. The Eighth Amendment does not require a State to ensure that no suffering is involved in the lethal injection process. It does not require a State to guarantee that executions proceed without human error. *Jones v. State*, 701 So.2d 76 (Fla. 1997).

The Florida Supreme Court recognizes the separation of powers between the judiciary and the executive branch. It is the function of the executive branch to carry out the sentences of the courts of this State, including executions. In executing a death sentence, that Court has held that "determining the methodology and chemicals to be used are matters best left to the Department of Corrections." *Sims v. State*, 745 So.2d 657 (Fla. 2000).

The Supreme Court has also held that "It must be presumed that members of the executive branch will properly perform their duties." *Buenoano v. State*, 565 So.2d 309 (Fla. 1990); *Provenzano v. State*, 739 So.2d 1150 (Fla. 1999). The Court finds that the events of the Diaz execution do not overcome that presumption.

Considering the facts of the Diaz execution, the findings of the DOC investigative teams, the findings of the Governor's Commission, the most recently adopted protocols, and all the witnesses and evidence presented at these hearings, the Court cannot distinguish this case from the Supreme Court's holding in *Sims* that "testimony concerning the list of horrors that could happen if a mishap occurs during execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner." *Sims v. State*, 745 So.2d 657 (Fla. 2000).

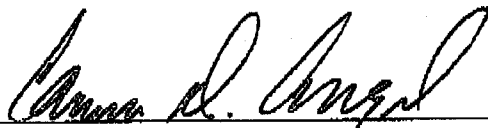
The recent finding of Circuit Court Judge Charles M. Holcomb is equally applicable to this case: "Although the procedures in effect at the time of the *Sims* ruling have been updated and revised ... , the principle remains that the Department is entrusted with developing adequate protocol, revising as necessary to meet evolving societal concerns and that the mere possibility of human error in the process of execution does not render the current protocol inadequate." Order dated 17 August 2007 in *State v. Schwab*, in the Circuit Court for the Eighteenth Judicial Circuit in and for Brevard County, Florida, Case No. 05-1991-7249-AXXX.

The United States Court of Appeals for the Eighth Circuit recently reviewed lethal injection protocols for the State of Missouri identical to the Florida protocols. The defendant in Missouri made this same constitutional challenge that defendant Lightbourne makes in this case. In rejecting the defense argument and denying any relief, the federal Circuit Court held: "The focus of our inquiry is whether the written protocol inherently imposes a constitutionally significant risk of pain. 'The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method to extinguish life humanely.' *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality). A 'risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.' *Campbell v. Wood*, 18 F.3d 662, 687, (9th Cir.), *cert denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994). If Missouri's protocol as written involves no inherent substantial risk of the wanton infliction of pain, any risk that the procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in our constitutional analysis. *Resweber*, 329 U.S. at 464, 67 S.Ct. 374 (noting that a risk of an 'unforeseeable accident' interfering with the designated procedure is not constitutionally significant.)" *Taylor v Crawford*, 487 F.3d 1072 (8th Cir. 2007).

Therefore, based on the foregoing factual findings and conclusions of law, it is hereby **ORDERED** that all relief requested by the Defendant's All Writs Petition be and is **denied**.

It is further **ORDERED** that the temporary stay of execution ordered by this Court on 22 July 2007 be and is hereby vacated and terminated.

DONE AND ORDERED in Chambers at Ocala, Marion County, Florida, this 10th day of September, 2007



CARVEN D. ANGEL
CIRCUIT JUDGE