

(1958)). As to executions, it prohibits “the unnecessary and wanton infliction of pain” as well as methods involving torture or a lingering death. See Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976).

While the State’s revised protocol is an improvement over the previous procedures used by John Doe No. 1, it falls short of providing the critical Constitutional protections required. It was never the intention of this Court to prevent the State of Missouri from executing its death row inmates. Rather, the Court sought only to ensure that the State was meeting Constitutional standards. Those standards can be achieved in various ways. However, certain protocols suggested by the State fall short of those standards. If the State wants to continue using the three drug method of lethal injection, its proposal shall be modified as follows:

1. First, John Doe No. 1 shall not participate in any manner, at any level, in the State of Missouri’s lethal injection process.
2. Second, while a board certified anesthesiologist is preferred, the Court hereby modifies its previous order (Doc. # 195, p. 14) to permit a physician with training in the application and administration of anesthesia to either mix the chemicals or to oversee the mixing of the chemicals for lethal injections.
3. Anesthetic Depth - The States’ proposal is rejected in favor of that proposed by the Court. As noted in the Court’s previous order, the State may have to purchase additional equipment in order to adequately monitor anesthetic depth. The method of monitoring anesthetic depth shall be determined after the State consults with the physician who is chosen to assist in the lethal injection process. The State has agreed to reposition the gurney on which the inmate is positioned, so that the inmate’s face will be directly visible to the medical personnel.
4. Contingency Plan - The State’s proposed contingency plan is acceptable.
5. Auditing Process - The “Sequence of Chemicals” form that verifies that the

drugs were given in the order specified in the protocol shall be signed by each staff member taking part in the protocol as soon as the inmate has been declared dead. The physician in charge of the lethal injection procedure will also complete and sign the chemical log.

6. Any deviations from this written protocol shall be a matter of written record submitted to the appropriate state officials and subject to Court review. Said review may result in further modifications of the approved protocol.

7. Obtaining Use of a Board Certified Anesthesiologist - this provision has been modified to allow a physician trained in the administration and application of anesthetic drugs to be involved. The State's proposed use of "medical personnel" is rejected to the extent they propose the use of paramedics and/or emergency medical technicians. However, the supervising physician previously referred to may employ medical personnel whom he or she believes are necessary to assist the physician.

8. The State shall submit a revised protocol to the Court for review and approval on or before **October 27, 2006**. The State shall select a physician who is in good standing with their State's licensing board. The physician selected shall not have any disciplinary action taken against them by their State's licensing authority.

II. Motion to Withdraw

Also pending before the Court is a Motion to Withdraw and Motion for Appointment of Successor Counsel. This motion was filed in the Eighth Circuit, but was remanded to this Court on August 9, 2006. Mr. Simon moves to withdraw as counsel for plaintiff because he has accepted a position with the Missouri State Public Defender System. Co-counsel in plaintiff's habeas corpus and executive clemency representation, Mark Thornhill, will continue representing plaintiff in his clemency proceedings and Jenner & Block, LLP will continue to represent plaintiff in his lethal injection litigation. Plaintiff has filed an affidavit requesting that the Court appoint C.

John Pleban, to succeed Mr. Simon in the habeas corpus and executive clemency litigation. As plaintiff has adequate counsel which are continuing to represent him, the Court finds it unnecessary to appoint replacement counsel. Accordingly, Mr. Simon's Motion to Withdraw is hereby **GRANTED** and the Motion to Appoint Replacement Counsel is hereby **DENIED**.

Date: September 12, 2006
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge