

## Controversy Swirls Around Lethal Injection Amidst Concerns Over Adequacy of Anesthesia<sup>1</sup>

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On June 30, 2006, Dr. Orin Guidry, President of the American Society for Anesthesiologists (“ASA”), released a statement on the ASA website, urging anesthesiologists to avoid participating in executions.<sup>2</sup> The statement canvasses several court decisions regarding the constitutionality of execution by lethal injection. Legal challenges to execution by legal injection in California, North Carolina, and Missouri resulted in more stringent requirements for the state to show that the inmate is adequately anesthetized before the lethal injection is administered.<sup>3</sup> According to Dr. Guidry’s statement, these rulings were partly prompted by a study published in the April 16, 2005 *Lancet*, which claimed that post-mortem studies raised questions about whether the inmates were conscious and experienced pain once the lethal injection was administered.<sup>4</sup>

The possibility that inmates are not adequately anesthetized prior to receiving the lethal injection prompted each court that considered the issue to require stronger evidence of sufficient anesthetization. The California court suggested confirmation of anesthetization by “a person with formal training and experience in the general field of anesthesia.”<sup>5</sup> Similarly, the Missouri court endorsed specific procedures for relying on the supervision of anesthesiologists in the anesthetization process prior to lethal injection, and required that an anesthesiologist certify that sufficient anesthesia had been administered.<sup>6</sup>

Dr. Guidry was careful to note that his opposition to anesthesiologists participating in the ways envisioned by these courts is not grounded in ethical opposition to the death penalty, but in the American Medical Association’s Code of Ethics, which provides, in pertinent part, that “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.”<sup>7</sup> Though the situations are not precisely the same, a similar rationale is proffered by those who oppose physician-assisted suicide, namely, that physicians, whose primary role is to preserve life, ought not take action intended to end a life.<sup>8</sup>

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<sup>1</sup> This article is based on an article written for the Health Law & Policy Institute’s July 2006 Update on Health.

<sup>2</sup> Dr. Orin Guidry, *Observations Regarding Lethal Injection*, AM. SOC. ANESTHESIOLOGISTS, June 30, 2006, <http://www.asahq.org/news/asanews063006.htm>.

<sup>3</sup> See *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006); *Brown v. Beck*, 445 F.3d 752, 753 (4th Cir. 2006) (per curiam); *Taylor v. Crawford*, \_\_\_ F. Supp. 2d \_\_\_, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006).

<sup>4</sup> Guidry, *supra* note 1.

<sup>5</sup> See *Morales*, 415 F. Supp. 2d at 1048.

<sup>6</sup> See *Taylor*, 2006 WL at \*8-9.

<sup>7</sup> AMA CODE OF ETHICS E-206 (2005).

<sup>8</sup> See, e.g., Thomas J. Marzen, “*Out, Out Brief Candle:*” *Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST. L.Q. 799, 825 (1994).

Dr. Guidry's other concern was that if anesthesiologists are perceived to be involved in the execution process, patients may begin to "equate the O.R. with a death chamber, to equate anesthetic drugs with death drugs, or to have in their subconscious the specter of the anesthesiologist as an executioner." Dr. Guidry was unsympathetic to the technical problems posed by lethal injection:

Lethal injection was not anesthesiology's idea. American society decided to have capital punishment as part of our legal system and to carry it out with lethal injection. The fact that problems are surfacing is not our dilemma. The legal system has painted itself into this corner and it is not our obligation to get it out.<sup>9</sup>

Perhaps aware of the problems that might attend the imposition of a requirement that anesthesiologists certify the sufficiency of anesthesia, the *Taylor* Court on September 12 revised its June 26 order "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."<sup>10</sup> The L.A. Times reports that "Missouri officials . . . said they had contacted 298 anesthesiologists in Missouri and southern Illinois and none was willing to participate in executions."<sup>11</sup>

While one can only speculate on the extent of the link between Dr. Guidry's statement and the mass refusal of Missouri anesthesiologists to participate in executions,<sup>12</sup> it would seem to stretch credulity to deny any link at all. In turn, it is at least conceivable to view the Court's revision of its earlier requirement that an anesthesiologist certify the adequacy of the anesthesia as a response to the difficulty of finding anesthesiologists who would be willing to participate.

Although board certified anesthesiologists may not be required for Missouri's scheme of lethal injections to pass constitutional muster, the Court's Sept. 12 Order rejected the state's revised scheme for the third time, citing problems in the state's revised plan that would permit a constitutionally unacceptable degree of uncertainty into the question of whether the inmate would suffer from excruciating pain prior to dying.<sup>13</sup>

Finally, on Wednesday, September 20, the U.S. Supreme Court voted 5-4 to deny an additional stay in the case of *Hill v. McDonough*.<sup>14</sup> Hill had advanced the same argument for staying the execution as made in *Taylor*, viz., the possibility that the chemicals used could cause excruciating pain.<sup>15</sup> Justices Breyer, Ginsburg, Souter, and Stevens voted to

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<sup>9</sup> Guidry, *supra* note 1.

<sup>10</sup> Order, *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, (W.D. Mo. Sept. 12, 2006), available at <http://howappealing.law.com/TaylorVsCrawford.pdf> (last visited Oct. 03, 2006).

<sup>11</sup> Henry Weinstein, *Missouri Plan for Executions Rejected Again*, Sept. 13, 2006, at 14.

<sup>12</sup> Research does not reveal any relevant public statement made by any organization purporting to represent the views of Missouri anesthesiologists.

<sup>13</sup> *Id.*

<sup>14</sup> Ron Word, *Killer Who Argued Lethal Injection Cruelty is Executed*, HOUST. CHRONICLE, Sept. 21, 2006, at A4.

<sup>15</sup> *Id.*

issue the stay.<sup>16</sup> The inmate, Clarence Hill, was executed in the evening of September 20.<sup>17</sup>

Given the recent developments, it seems safe to suggest that the controversy over the constitutionality of lethal injection execution schemes will continue. For an excellent treatment of larger issues surrounding the permissibility of pain and capital punishment, see Austin Sarat's *PAIN, DEATH, AND THE LAW* (2001).

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*