

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK E. ALDERMAN,

Plaintiff,

v.

JAMES E. DONALD, in his capacity
as Commissioner of the Georgia
Department of Corrections; et al.,

Defendants.

CIVIL ACTION FILE

NO. 1:07-CV-1474-BBM

ORDER AND OPINION

This matter challenging the constitutionality of Georgia's lethal injection protocol is before the court on the Motion for Summary Judgment [Doc. No. 99], filed by Plaintiff Jack E. Alderman ("Mr. Alderman"), as well as the Motion for Summary Judgment [Doc. No. 130], and the Motion for Reconsideration or in the Alternative to Set Aside Order [Doc. No. 119] (the "Motion for Reconsideration"), both filed by Defendants. Mr. Alderman has filed Requests for Oral Argument on his Motion for Summary Judgment and on the Defendants' Motion for Reconsideration [Doc. Nos. 101, 121].¹ Also before the court are a Motion for Leave to File Supplemental Motion in Opposition to Motion for Reconsideration [Doc. No.

¹The Motions for Oral Argument are GRANTED.

124],² a Motion for Leave to File Supplemental Exhibit in Support of Motion for Summary Judgment [Doc. No. 142],³ and a Motion for Leave to File Supplemental Brief in Support of Plaintiff's Motion for Summary Judgment [Doc. No. 143],⁴ all filed by Mr. Alderman. Finally, before the court are a Motion for Reconsideration Out of Time [Doc. No. 118] and a Motion for Miscellaneous Relief [Doc. No. 132], filed by Defendants.⁵

I. Background

Mr. Alderman is a death row inmate imprisoned at the Georgia Diagnostic and Classification Prison ("GDCP") in Jackson Georgia. Defendant James Donald ("Mr. Donald") is the Commissioner of the Department of Corrections ("the Department"), and Defendant Hilton Hall ("Mr. Hall") is the Warden at GDCP (the

²The court GRANTS this Motion, though it easily rejects the arguments contained within the supplemental filing, in short that the statute of limitations should be tolled as a result of Defendants' fraud in representing that Georgia's lethal injection protocol is constitutional.

³The court GRANTS this Motion, based on the Supreme Court's recent decision in Baze v. Rees, 128 S. Ct. 1520 (2008) (plurality opinion).

⁴The court GRANTS this Motion, based on the Supreme Court's recent decision in Baze v. Rees, 128 S. Ct. 1520 (2008) (plurality opinion).

⁵The court has reviewed the parties' briefs on the Motion for Miscellaneous Relief, in which Defendants seek to clarify whether they should file record excerpts. The court sees no need for Defendants to file additional material in conjunction with their Motion for Summary Judgment. The Motion for Miscellaneous Relief should be marked as GRANTED.

“Warden”). On a summary judgment motion, justifiable factual inferences are construed in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Plaintiff and Defendants have cross-moved for summary judgment. Unless otherwise noted, the following material facts are not in dispute.⁶

A. Mr. Alderman’s Conviction and Post-Conviction Review

Mr. Alderman was originally sentenced to death for the murder of his wife in 1975. Alderman v. State, 254 Ga. 206, 206, 327 S.E.2d 168, 170 (1985). He obtained federal habeas relief on the ground that three prospective jurors had been excused erroneously. Id. Another sentencing trial was conducted in 1984, resulting in another death sentence on March 31, 1984. Id. at 206 n.1, 327 S.E.2d at 170 n.1. Mr. Alderman appealed that sentence. The Georgia Supreme Court denied his appeal on February 28, 1985, and denied rehearing on March 28, 1985. Alderman v. State, 254 Ga. 206, 327 S.E.2d 168. Mr. Alderman then filed writs of habeas corpus which were denied in both the state and federal courts. The United States Supreme Court denied his petition for certiorari review. Following the Supreme Court’s

⁶After thoroughly reviewing the parties’ Statements of Material Fact, the court concludes that very few *facts* regarding the implementation of Georgia’s death penalty protocol are actually in dispute. However, both parties make numerous objections that their opponent’s “characterization of the facts” is inaccurate. The court has considered both parties’ phrasing of the underlying facts and does its best to “characterize” the facts in what it considers to be a neutral manner. The court recognizes the parties’ preference for their own characterization, however finds there to be no real dispute about any *material* fact in this case.

denial of certiorari, Mr. Alderman's execution was set for October 19, 2007. However, on October 18, 2007, the Georgia Supreme Court granted a stay of Mr. Alderman's execution because the Supreme Court had granted certiorari in Baze v. Rees, a case involving Kentucky's similar lethal injection protocol. As of the date of this Order, that stay is still in effect.

B. Georgia's Lethal Injection Protocol

Execution by lethal injection replaced electrocution as the method of court-ordered execution in Georgia and became effective as of October 5, 2001. See O.C.G.A. § 17-10-38. Georgia adopted a written protocol for implementing lethal injection in 2000. (Ga. Dep't of Corr., Lethal Injection Procedure, June 7, 2007, Ex. C to Pl.'s Compl. (the "Protocol").) In brief, a Georgia inmate sentenced to death is executed by injection of three chemicals in order: first, sodium pentothal, also referred to as sodium thiopental,⁷ an anesthetic; next, pancuronium bromide, a paralytic agent; and last, potassium chloride, which stops the inmate's heart. The Protocol has undergone two minor revisions in 2002 and 2007, neither of which provided for substantive changes to the procedure.

⁷The briefs in this case use the term "sodium pentothal." The Supreme Court in Baze uses "sodium thiopental" as well. Both terms refer to the same chemical, and the court will use them interchangeably.

1. Staff Present

The Protocol provides that certain staff members shall be present at each execution. (Protocol § 11.1.) The Intravenous Team, or IV Team, must consist of two or more trained personnel, including at least one nurse, "to provide intravenous access." (Id. § 11.1.5.) In practice, the IV Team consists of two nurses. (See Defs.' Statement of Material Facts ("Defs.' SMF") ¶ 103.) The Injection Team must consist of three trained staff members "to inject solutions into the intravenous port(s) during the execution process." (Protocol § 11.1.7.) One physician must be present to provide medical assistance during the execution process, and two physicians must be present to determine when death occurs. (Id. §§ 11.1.3-4.) Various other personnel must also be present, including the Warden or Deputy Warden, correctional officers, security personnel, and a Chaplain. (Id. §§ 11.1.1, .6, .8, .9.)

2. Facilities

The facilities for an execution in Georgia include the Execution Room and the adjacent Injection Room. Between the two rooms is a tinted one-way window such that the Execution Room can be seen from the Injection Room, but not vice versa. The Execution Room measures 19 feet 2 inches by 11 feet 4 inches. In the center of the Execution Room is the gurney where the inmate will ultimately be executed, about 7 feet long and 2 feet 10 inches wide. The gurney is secured with bolts to the

floor. A heart monitor is located in a part of the Execution Room separated from the gurney by a curtain. In the wall between the Execution Room and the Injection Room, there are two holes, each approximately 1.5 inches in diameter. The IV tubes run from the Injection Room to the Execution Room through these holes.

3. Preparation for Execution

Prior to commencement of the execution, the Protocol calls for multiple checks of communication equipment, sound equipment, medical equipment, and the conditions of the Execution Room. The condemned inmate is examined and offered a sedative. Two nurses check for potential problems obtaining access to the inmate's vein, and apply an anesthetic ointment to the inmate's skin.

The drugs are purchased pursuant to a DEA license and maintained in the pharmacy until the Deputy Warden retrieves them two hours before an execution. The drugs come in pre-measured containers and are stored in the pharmacy as provided on the packaging. A nurse observes⁸ other individuals mixing the pre-measured sodium pentothal into pre-measured saline solution, drawing all the drugs into syringes, and placing the drugs into a labeled syringe holder. Each syringe used during the execution has a capacity of 60 ccs, and is fitted with a printed label to specify the number, but not the contents, of the syringe. In addition

⁸As Mr. Alderman points out, "observes" is not to be confused with "supervises."

to the primary set of drugs, a second set is prepared, and a third is on hand if needed.

The nurses comprising the IV Team assemble new IV tubing, inspect the cart containing medical supplies, and test the heart monitor. They check for leaks or kinks in the line. Once the inmate is secured onto the gurney, the nurses establish two IV sites on the inmate so that if the primary site fails for any reason, the secondary site may be utilized.⁹ If they are unable to provide access, a physician will determine the best method for intravenous access, possibly utilizing a central venous cannulation, also known as a "central line." The IV tubes run from the inmate in the Execution Room through the two holes in the wall to the Injection Room.¹⁰ The nurses connect the heart monitor to the inmate. The doctors check and

⁹Although the Protocol does not expressly require that this procedure be performed within one hour, it does indicate that this task is accomplished "Within One (1) Hour of Execution." (Protocol § 17.3.) Georgia's protocol leaves discretion to the nurses to use their medical discretion to insert the IV catheter at optimal IV sites, which the court views as superior to Kentucky's stated preference for particular IV locations on all inmates.

¹⁰The parties dispute the length of the IV tubing. Mr. Alderman claims the tubing is 15 feet long. Defendants dispute this contention as "speculation" but provide no estimate of their own. Even assuming a 15 foot long IV tube, the court finds that this difference between the Georgia and Kentucky procedures does not create a "substantial" difference between the two.

The parties also dispute the resistance of the IV at the vein versus in the tubing set. Mr. Alderman contends that the resistance at the vein is sixteen times higher than it is at the tubing set, and Defendants contend that it is only eight times higher. Defendants do not dispute Mr. Alderman's statement in the abstract that "[i]ncreased resistance at the vein increases the probability that the drug will flow back in the tubing and away from the
(continued...)

observe the heart monitor.

4. Execution Process

Once the Warden orders that the execution begin, the Injection Team, also in the Injection Room, begins the injection process. One team member injects the first two syringes each containing one gram of sodium pentothal. After the sodium pentothal is administered, the first team member injects saline solution to clear the IV tubing.¹¹ The second team member then injects the next syringe containing 50 milligrams of pancuronium bromide, followed by another syringe containing saline solution. The third team member then injects the next syringe containing 120 milliequivalents of potassium chloride followed by another syringe containing saline solution. The Protocol states that the Injection Team must "ensur[e] a steady, even flow of the chemical[s]" (Protocol § 17.3.20.2), but provides for no pause

¹⁰(...continued)

vein." (Defs.' Resp. to Pl.'s Statement of Material Facts ¶ 171.) The parties agree that in clinical settings, this problem is mitigated by running the IVs at a rate of 50-100 milliliters per hour. Plaintiff contends that for the executions, the Department utilizes a rate of approximately 1 milliliter per hour. Defendants dispute this as an "inaccurate characterization" and note that the rate of 1 milliliter per hour is applicable only to the saline drip used to keep the IV lines open prior to the actual execution process. The court does not find any of this dispute to be material so as to preclude summary judgment.

¹¹At oral argument, Defendants indicated that the amount of saline solution is 60 ccs (an amount larger than that used in Kentucky). However, Mr. Alderman appeared to dispute that in his response to Defendants' Statement of Material Facts (¶ 114), where Mr. Alderman states that the amount is unspecified. Again, however, the court does not find this dispute to be material.

between any of the injections. One nurse observes the injections and measures the time by tapping her foot to ensure that the Injection Team administers the drugs evenly. The drugs are pushed at a rate of approximately 50 to 60 seconds per syringe. The Injection Team cannot see into the Execution Room from where they stand in the Injection Room.

The other nurse remains in the Execution Room next to the inmate.¹² She monitors the inmate for signs of consciousness or problems with intravenous flow. Additionally, two doctors stand in the Execution Room to observe the heart monitor during the injections. The doctors cannot see the inmate, as the inmate is on the other side of a curtain. As the sodium pentothal is injected, the doctors can see the heart rate decrease on the heart monitor. During the injections, the Warden watches the Injection Team, and observes the inmate through the window. When properly administered, the sodium pentothal anesthetizes the inmate, the pancuronium bromide paralyzes the inmate, and the potassium chloride stops the inmate's heart. Two grams of sodium pentothal, four to seven times the amount used in a clinical setting, renders the inmate unconscious and unable to feel pain. Fifty milligrams of pancuronium bromide, approximately five times the clinical amount, gradually

¹²The Protocol requires that the individual in the Execution Room with the inmate be a nurse. (Protocol § 17.3.20.5.)

causes paralysis a few minutes after it is administered. Once the 120 milliequivalents of potassium chloride reaches the heart, it causes the heart to stop.

After the heart rate monitor flat lines, the doctors examine the inmate for signs of life. If the inmate exhibits residual signs of life within a reasonable period after all injections are complete, the Protocol provides that all seven syringes are to be repeated. Once the doctors determine that the inmate is deceased, the Warden pronounces that the order of the court has been carried out. An autopsy is conducted the next day.

5. Selection and Training of Staff

In practice, the physicians and nurses present during the execution are selected based on their experience with the tasks they will perform, or may be required to perform, during the execution. For example, the physicians currently involved with the execution process have experience with central venous cannulation and either emergency medicine or critical care. The nurses currently involved, one registered nurse and one licensed practical nurse, likewise have extensive experience with IV lines. The physicians and nurses are currently licensed

and employed in their respective professions.¹³ However, the current medical professionals do not have training in anesthesiology.

The Warden selects the Injection Team. That team consists of Peace Officer Standards and Training certified correctional officers employed at the prison, who undergo screening and random drug testing. The team of officers taking part in lethal injections has largely remained the same since the institution of the Protocol, though there have been retirements. The officers are not required to have outside medical training.

6. Initial Training Exercises

When the Department adopted lethal injection, it set up initial training exercises, conducted sometime in 2000 or 2001, in which officials from another state utilizing lethal injection assisted. The initial training exercises taught officers how to mix the sodium pentothal and how to use the syringes to inject the drugs. A nurse demonstrated mixing the sodium pentothal. The officers present at the training were required to repeatedly mix the drug under the nurse's observation. A nurse demonstrated how to depress the syringe in a smooth even manner, timing the injection to discharge the syringe within 45 to 60 seconds. For demonstration

¹³Mr. Alderman does not dispute this statement, but notes that Defendants' citations in its Statement of Material Facts do not establish that Dr. Musso is currently licensed or employed as a physician.

purposes, the nurse used an artificial arm with simulated veins. The officers present were required to depress the syringe repeatedly under the nurse's observation.

7. Maintenance Training Exercises

While the Protocol requires that the IV Team and the Injection Team be trained, it does not specify what kind of training is required. The Department engages in practices prior to a scheduled execution, including those executions that are scheduled, but ultimately stayed, postponed, or commuted.¹⁴ Three or four practice days are scheduled before an execution, each lasting a few hours and containing multiple sessions. No set number of practice sessions are required. During each session, the officers and nurses usually go through the entire procedure more than once. The participants mix simulated drugs (real drugs are not used), draw them into syringes, and inject them through IV tubing with a catheter on the end, which drains into a bucket. The participants do not utilize a human, either alive or dead, for training on administering the injection, and the artificial arm used in the initial training is no longer used. The participants also prepare to some

¹⁴Defendants claim that if no executions are scheduled, the Warden or Deputy Warden is to schedule about two practices per year. Deputy Warden Duffey testified to this effect. However, Mr. Alderman apparently disputes that a practice would be scheduled in absence of an execution, and claims that "other witness[es] recall no training sessions other than the practice run-throughs that take place before executions." (Pl.'s Statement of Material Facts ¶ 83.) Even accepting Mr. Alderman's characterization, it is not disputed that every scheduled execution prompts multiple walk-throughs of the execution procedure in each of at least two days just prior to the planned execution.