



ALAN WILSON  
ATTORNEY GENERAL

April 21, 2011

Mr. William R. Byars, Jr.  
Director  
South Carolina Department of Corrections  
P. O. Box 21787  
Columbia, S.C. 29221

Re: Execution Protocol

Dear Judge Byars:

I am in receipt of your request to this office concerning the authority of the Director of the Department of Corrections to establish and revise the procedures and protocols concerning the management of lethal injection executions pursuant to S.C. Code Ann. § 24-3-530. Particularly, your question concerns whether you have the authority to revise the particular drugs and /or amounts of the particular drugs to be used in the procedures of lethal injection.

A review of the South Carolina Code reveals that the General Assembly has not established any particular statutory formula or method of lethal injection. The legislature did determine that lethal injection is a form of execution for death sentences in South Carolina. S.C. Code Ann. § 24-3-530. Rather, it appears that the management of lethal injection executions rests upon the direction of the Department and its Director. The pertinent part reads:

- (A) A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the person, **lethal injection under the direction of the Director of the Department of Corrections. . . .**

§ 24-3-530 (emphasis added). Further, “[T]he Department of Corrections shall provide a death chamber and all necessary appliances for inflicting this penalty and pay the costs thereof out of any funds in its hands.” S.C. Code Ann. § 24-3-540.

The Director of the South Carolina Department of Corrections has broad authority in this area of the governance of the prison system. “The director shall have authority to make and

Mr. William R. Byars, Jr.  
April 21, 2011  
Page 2

promulgate rules and regulations necessary for the proper performance of the department's functions." S.C. Code Ann. § 24-1-90. More particularly:

The director shall be vested with the exclusive management and control of the prison system, and all properties belonging thereto, subject to the limitations of Sections 24-1-20 to 24-1-230 and 24-1-260 and shall be responsible for the management of the affairs of the prison system and for the proper care, treatment, feeding, clothing, and management of the prisoners confined therein. The director shall manage and control the prison system.

S.C. Code Ann. § 24-1-130. See also, S.C. Code Ann. § 24-1-40 ("The director shall have power to prescribe reasonable rules and regulations governing the humane treatment, training, and discipline of prisoners").

It is our opinion that the Director has the authority to establish reasonable rules and regulations, including the authority to revise existing drug protocols, for the management of lethal injection procedures and protocols.

In addition to inquiring about the authority of lethal injection procedure revisions, you also ask whether notice of the revisions of the lethal injection protocol must be provided to the inmate and/or his counsel. The only required notice to an inmate prior to execution is the statutory notice that is served upon the inmate after the conclusion of his appeal pursuant to S.C. Code §§ 17-25-370-390. This notice does not require or include any specificity about the particular procedures involved in either lethal injection or electrocution that will be used by the Department. As noted above, the S.C.D.C. Director has the authority to make rules and regulations. See S.C. Code Ann. 24-1-90. But, in our opinion, although not legally required, we find it prudent for S.C.D.C. to provide information about the particular change in the prior procedures involving the drug protocol, if revised, to the inmate and/or his counsel.

Finally, you have inquired regarding a change in the drug protocol as to whether you can solely rely upon a decision from the 10<sup>th</sup> Circuit, in Pavatt v. Jones, 627 F.3d 1336 (10<sup>th</sup> Cir. 2010) which denied a stay of preliminary injection and stay of execution to challenge a revision in Oklahoma's execution procedures when it planned to substitute pentobarbital for sodium thiopental. The revision or establishment of any lethal injection protocol is a policy decision that rests with the Director. In making the decision, the Director is empowered to make "reasonable rules and regulations governing the humane treatment. . . of prisoners." § 24-1-90. Also §§ 24-1-130, 24-3-530. In making such decisions concerning lethal injection procedures under his direction, it would be appropriate to take reasonable steps which may include consultation with

Mr. William R. Byars, Jr.  
April 21, 2011  
Page 3

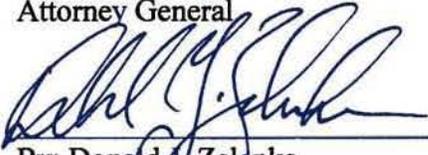
experts and other present or past correctional officials in South Carolina and other states, reviewing prior expert testimony and prior litigation as the Director deems necessary in his discretion.

### CONCLUSION

It is our opinion that the Director has the authority to establish reasonable rules and regulations, including the authority to revise existing drug protocols, for the management of lethal injection procedures and protocols.

Very Truly Yours,

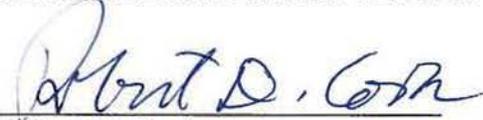
Alan Wilson  
Attorney General



---

By: Donald J. Zelenka  
Assistant Deputy Attorney General

REVIEWED AND APPROVED BY:



---

Robert D. Cook  
Deputy Attorney General