

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

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April 4, 2011

The Hon. Rick Perry
c/o Office of the General Counsel
1100 San Jacinto Street, Suite 412
Austin, Texas 78701

Via email transmission to: Christopher.Burnett@governor.state.tx.us

RE: Request for 30-day reprieve for Cleve Foster; Mr. Foster is scheduled to be executed tomorrow, April 5, 2011.

Dear Governor Perry:

We are writing to request a reprieve for Mr. Cleve Foster, who is scheduled for execution tomorrow, Tuesday April 5th.

As you are undoubtedly aware, Mr. Foster's would be the first execution that includes the use of pentobarbital instead of sodium thiopental. The failure of the Texas Department of Criminal Justice (TDCJ) to disclose this information until just three weeks prior to Mr. Foster's execution, and illegalities revealed by the disclosure, compel this request.

Despite the fact that it was widely known that sodium thiopental was no longer available, and that TDCJ began the process of procuring pentobarbital in early February, and repeated requests for information by Mr. Foster's counsel, TDCJ did not announce the change in drugs – or disclose it to undersigned counsel for Mr. Foster – until the middle of March.¹ The decision was made behind closed doors, without public input, and with cursory and one sided consideration of the benefits and risks and the possible need for revisions to the execution protocol. The timing of the decision and disclosure raises serious concerns about the haste with which TDCJ seeks to implement this new process, and a lack of transparency by state officials. To permit less than three weeks for these matters to be vetted undermines any faith we can have in TDCJ's concern for deliberate process, accountability, or the constitutionality of the new procedures.

¹ See 2011 Execution Procedure, attached as Appendix A.

The information finally disclosed to Mr. Foster's counsel also revealed that TDCJ appears to have violated the federal and state laws governing controlled substances in the manner in which they purchased the pentobarbital (and have been purchasing lethal injection drugs for the past twenty-five years), using an authorization number registered to the Huntsville Unit Hospital, which was closed down in 1983.

As a result, in the past three weeks, Mr. Foster's counsel have been engaged in efforts to compel TDCJ to comply with the law: first, in a lawsuit filed in Travis County Administrative Procedure Act, and second through letters to Attorney General Eric Holder and Director Steven McCraw of the Texas Department of Public Safety, asking for an investigation into the manner in which TDCJ has been violating the laws governing the purchase, possession, and distribution of controlled substances.²

One day shy of Mr. Foster's execution date, these matters are still being litigated.³ These are not matters that should or can be fully determined, litigated, or resolved in three weeks time. The use of pentobarbital as a sedative in the lethal injection process is brand new, and is, for all intents and purposes, experimental. The manner in which the execution protocol might need to be changed in light of this drug's particular qualities has not been considered or taken into account, generally or with respect to Mr. Foster individually.⁴ Upon information and belief, TDCJ's execution team has not been trained in the specific use of pentobarbital in the lethal injection protocol, as training is attained – per the terms of TDCJ's protocol - through hands on experience.

We are not asking for a commutation or pardon, but for a reprieve of limited duration to permit these matters to be sorted in a careful and judicious fashion befitting of the task at hand. The breakneck speed of the litigation, and the hour of this request, is a result of the timing of TDCJ's disclosure – not of any delays by Mr. Foster. The rush to execute should not trump the need to ensure that appropriate safeguards have been taken, or the far reaching implications of circumventing an open, deliberate process, especially when it is TDCJ that has waited until the last minute to decide on or announce the change in how it plans to carry out executions. The requested reprieve is in the interest of all

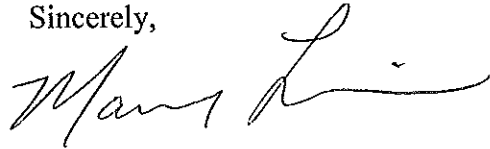
² See *Foster and Leal v. TDCJ* Original Complaint, attached as Appendix B; Letter to Attorney General Eric Holder, attached as Appendix C; Letter to Director Steven McCraw, attached as Appendix D.

³ Given the time frame, in conjunction with the APA action, counsel was forced to request a Temporary Restraining Order (TRO), which by definition only permits a limited presentation of argument and evidence. On April 1, 2011, the Travis County District Court denied Mr. Foster's request for a TRO and Preliminary Injunction. An appeal of that denial is being filed with 3rd Court of Appeals today. On April 1, 2011, counsel Levin received a message from the DEA's Houston Field Office noting that they were "looking into the matter regarding the Huntsville Prison System" and that it has been "referred to our DEA headquarters for an official opinion."

⁴ This morning counsel sent a letter to Warden Jones of the Huntsville Unit, detailing concerns about Mr. Foster's veins, and problems that might be encountered when the execution team seeks to gain I.V. access. The quality of the IV access needed must be understood, in part, in relationship to the kind of drug or drugs that are being injected. The existing execution protocol fails to take any of this into account, fails to articulate a back up plan if IV access through the veins cannot be attained, fails to account for the particular dangers inherent to access, if needed, through a jugular or femoral vein (a "central line"), and fails to provide for any method for monitoring of the IV insertion process, and the possible need for legal intervention.

who believe in the importance of open government, and the need for Texas to carry out the ultimate task – the execution of one of our citizens – in a dignified and lawful manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Maurie Levin". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Maurie Levin
Capital Punishment Center

F. Clinton Broden
Broden & Mickelsen
Dallas, Texas