



SCHOOL OF LAW  
THE UNIVERSITY OF TEXAS AT AUSTIN

---

Capital Punishment Center • 727 E. Dean Keeton Street • Austin, Texas 78705-3299  
(512) 232-7795 • FAX (512) 232-9171

March 30, 2011

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 10530

*Via facsimile transmission to: 202-307-6777*

Dear Mr. Attorney General:

We are writing on behalf of Texas death row inmates Cleve Foster, scheduled for execution on April 5, 2011, and Humberto Leal Garcia, scheduled for execution on July 7, 2011.

Information very recently provided in response to a Public Information Act request leads us to believe that the Texas Department of Criminal Justice (TDCJ) has violated the federal Controlled Substances Act (CSA) by purchasing controlled substances used in lethal injections through the use of a Drug Enforcement Administration (DEA) registration number maintained only by providing false information to the DEA, in violation of 21 U.S.C. 843(a)(3) and 21 U.S.C. 843(a)(4). In addition, and as a result, we believe that TDCJ is unlawfully in possession of and unlawfully dispensing controlled substances, in violation of 21 U.S.C. 844(a)(1) and 21 U.S.C. 842(a)(1).

Given these potential violations of federal law and the resulting impact on the legality of the executions imminently contemplated, we respectfully urge you to direct appropriate agencies within your Department to conduct a prompt and thorough investigation of these issues. The Texas Department of Criminal Justice is charged with the secure custody of those who have broken the laws and the carrying out of executions by lethal injection. Any indication that they are violating the law is cause for alarm and immediate action.

## Texas' Execution Protocol

Like many states, Texas executes death sentenced inmates by lethal injection.<sup>1</sup> Specifically, the current protocol calls for the sequential administration by injection of three drugs: pentobarbital (a barbiturate); pancuronium bromide (a paralytic) and potassium chloride (to stop the heart).<sup>2</sup> The proper administration and integrity of each of these drugs, as well as the experience and professionalism of the members of the execution team, are all essential to avoiding a cruel and inhumane execution.

## The Violations

As you are well aware, federal law closely regulates the manufacture, possession, and distribution of controlled substances.<sup>3</sup>

The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes, and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country.<sup>4</sup>

A critical piece of this system is the use of DEA “registration numbers,” which allow the DEA to monitor the purchase and use of controlled substances. TDCJ used such a DEA registration number to purchase pentobarbital (a Schedule II non narcotic).<sup>5</sup> When that number is run through the DEA system, it reflects that it is registered to:

Texas Department of Criminal Justice  
Huntsville Unit Hospital  
815 12<sup>th</sup> Street  
Huntsville, TX 77340<sup>6</sup>

The business activity code is listed as “B”, which is for a hospital.”<sup>7</sup> The expiration date is November 30, 2011. The information provided on the DEA form 222 (Appendix B)

---

<sup>1</sup> Tex. Code Crim. Proc. art. 43.14.

<sup>2</sup> See March 2011 Execution Procedure, attached as Appendix A. The substitution of pentobarbital for sodium thiopental – and the consequent issuance of the new protocol – was only announced by TDCJ on March 15, 2011.

<sup>3</sup> See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, s.101, 84 Stat. 1236, 1242 (1970) (codified at 21 U.S.C. 801 *et seq.*).

<sup>4</sup> 21 U.S.C. 801(1) (Congressional findings and declarations: psychotropic substances).

<sup>5</sup> See TDCJ DEA Form 222 used to purchase pentobarbital, attached as Appendix B. Despite diligent efforts, these documents were only obtained after filing a mandamus action. Even then, TDCJ waited until the last day to deliver Appendix B (and a limited number of other documents) by U.S. mail, and were not received until March 17, 2011.

<sup>6</sup> See Appendix C.

<sup>7</sup> The first letter of a DEA registration number indicates the “registrant type.” “A” is the first letter

used to purchase the pentobarbital is the same, with James Jones, the Warden of the Huntsville Unit, signing as the “Purchaser or Attorney or Agent.” TDCJ’s purchase orders likewise list James Jones and the Huntsville Unit Hospital as the delivery destination, as does the Invoice by at least one of the distributors.<sup>8</sup>

The Huntsville Unit Hospital has been closed since 1983.<sup>9</sup> Indeed, TDCJ is forbidden from providing medical care to inmates. Instead, the University of Texas Medical Branch (UTMB) is charged with providing health services to inmates in TDCJ. While there is an infirmary at the Huntsville Unit, it is run by UTMB, not TDCJ. While UTMB has numerous DEA registration numbers, none of them are registered to the Huntsville Unit or the Unit’s 12<sup>th</sup> Street address.<sup>10</sup>

DEA Registration numbers must be renewed every three years.<sup>11</sup> Assuming the DEA registration number used by TDCJ last month to purchase controlled substances was one originally issued to the Huntsville Unit Hospital, TDCJ has failed, on information and belief, to advise the DEA *for the past twenty-eight years* of the fact that the Huntsville Unit Hospital no longer exists, and that it is a prison unit and warden of same that is purchasing and dispensing controlled substances with a DEA registration number registered to a nonexistent entity. We submit that in so doing TDCJ has violated and continues to violate 21 U.S.C. 843(a)(3) and 843(a)(4)(A). As the DEA registration number used by TDCJ was thus obtained and/or retained through false pretenses, TDCJ’s possession of the controlled substances required for lethal injections is in violation of 21 U.S.C. 844(a)(1).

Furthermore, upon information and belief, the controlled substances used by TDCJ to carry out executions are neither kept by a pharmacy, hospital, or clinic, nor dispensed by an authorized practitioner through a prescription or otherwise. Upon information and belief, they are instead held somewhere at TDCJ’s Huntsville Unit (where executions take place) in the possession of TDCJ staff and not persons authorized by law to possess controlled substances. The drugs are then given to an unidentified

---

of TDCJ’s registration number, which means that it is registrant type “Deprecated (may be used by some older entities)”, and indeed was only given to registration numbers issued before Oct. 1, 1985. See [http://www.deadiversion.usdoj.gov/pubs/manuals/pharm2/pharm\\_content.htm#p10b](http://www.deadiversion.usdoj.gov/pubs/manuals/pharm2/pharm_content.htm#p10b). The second letter reflects the name of the registrant. Here, it is “T” – presumably for “TDCJ.”

<sup>8</sup> See Appendix D.

<sup>9</sup> It is difficult to determine the exact date the Huntsville Unit Hospital was shut down. This date relies upon an article in JAMA which briefly recounts the notorious history of health care in Texas’ prisons. See Raimer, Ben and Stobo, John, *Health Care Delivery in the Texas Prison System*, JAMA, July 28, 2004 – Vol. 292, No. 4 at 486-487. This came about as the result of a prison condition lawsuit which put TDCJ in receivership for approximately twenty years. The abominable health care provided to inmates in TDCJ – and the Huntsville Unit Hospital in particular - was a significant piece of the litigation. One outcome of the litigation was to take inmate health care entirely out of TDCJ’s hands. See *Ruiz v. Johnson*, 37 F.Supp. 2d 855, 892-93 (N.D. Tex. 1999). This transfer was made official in 1994, when the Texas Legislature created the six-member Correctional Managed Health Care Advisory Committee (which contracts with UTMB and Texas Tech) to take over management of TDCJ’s health care delivery system. See Tex. Gov’t Code 501.059. See also *Ruiz v. Johnson*, 37 F.Supp. 2d 855, 892-93 (N.D. Tex. 1999).

<sup>10</sup> See Appendix E.

<sup>11</sup> See <http://www.deadiversion.usdoj.gov/drugreg/faq.htm#3>

executioner (who is also not authorized by law to possess controlled substances) (*see* Appendix A) on the day of the scheduled execution. At no point is an appropriately licensed or authorized practitioner<sup>12</sup> involved in the dispensing process, and at no point is a prescription written to transfer the controlled substances to a member of the execution team. They are, upon information and belief, simply handed from one employee of TDCJ to another. This process – or lack thereof – is in violation of 21 U.S.C. 829(a) and 21 U.S.C. 842(a)(1).

**The Department of Justice Should Investigate TDCJ's Actions Forthwith and Take Appropriate Steps if TDCJ has Violated Federal Law**

Based on the information set forth above, we respectfully request that you direct the DEA (and/or other appropriate agencies) to conduct a prompt and thorough investigation of these issues. The potential for abuse is rampant, and contrary to the ideals behind the federal closed system the CSA was enacted to create and enforce. The consequent heightened potential for error in the lethal injection process should not be minimized.

If such an investigation confirms that TDCJ has violated federal law, immediate action is warranted. 21 C.F.R. 1301.36(e). In such circumstances, the DEA may revoke or suspend the violator's registration to possess controlled substances and require that all controlled substances in the violator's possession are delivered to the DEA. *See* 21 C.F.R. 1336(e)-(f). Both such actions would be appropriate if TDCJ is in violation of federal law as alleged above.

We appreciate your attention to this matter.

Sincerely,



Maurie Levin  
Adjunct Professor  
University of Texas School of Law

Sandra Babcock  
Clinical Professor  
Northwestern University School of Law

Cc: Texas DEA Field Office, Houston, Texas  
Via facsimile transmission to: 713-693-3361

Rick Thaler, Director, Correctional Institutions Division, TDCJ,  
via facsimile transmission to Melinda Bozarth, General Counsel, at 512-936-2159

Attorney F. Clinton Broden, Broden & Mickelsen

---

<sup>12</sup> *See* 21 USC 802(21).