Alan E. Peterson

Attorney at Law

Suite 103 the Mayfair
625 South 14th Street
Lincoln, Nebraska 68508

Phone: 402-435-0008
Fax: 402-474-5837
alanepeterson@gmail.com

March 25, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Regarding: State of Nebraska: Apparent violations of the Federal Controlled Substances Act in Importation of Lethal Injection Drug Thiopental from India in January, 2011

Dear Mr. Attorney General:

I write you in behalf of a Nebraska Death Row inmate, Carey Dean Moore. I am one of his attorneys, having been appointed at various stages to assist him in his state and federal court challenges to his sentence of death. At this moment, his case remains pending in the Nebraska Supreme Court on a motion by the state to set a date and issue a warrant for his execution, and on responsive motions he filed generally seeking evidence and a hearing on several lethal injection issues. The Nebraska Commission on Public Advocacy is representing him on those matters, and particularly Jerry Soucie, Esq. of Lincoln.

There is strong evidence indicating that Nebraska illegally imported sodium pentathol from India, with no attention to the requirements of the Controlled Substances Act ("CSA). It now is planning to use this Schedule III controlled substance in the lethal injection execution of Moore and other death row inmates in this state. We request that your office, and the Drug Enforcement Administration investigate right away, and if appropriate, intervene against any such illegal use by confiscating or suspending use of the substance at least during any such investigation. The situation appears to be similar, possibly even worse than that in Georgia, where we understand that an investigation by the DEA is underway, and all of the pentathol, or "thiopental" was picked up from the Department of Corrections during the investigation. We have seen the detailed analysis in the letter to you dated February 24, 2011 from Mr. John Bentivoglio and his firm. To avoid some unnecessary length of this letter, we would refer to that excellent summary of the CSA, the DEA regulations, and the legislative history cited. You will still need to be apprised of the factual situation here of course, and I will summarize.

Here's our background. Our Supreme Court recently held Nebraska's sole method of execution, electrocution, is unconstitutional. It is cruel and unusual under Nebraska's own Constitution (State v. Mata, 275 Neb. 1, 745 N.W.2d 229 (2008). In 2009, our state Legislature reacted by passing Legislative Bill 36, authorizing lethal injection as the new sole method of execution

(Neb. Rev. Stat. § 83-964). The law also proposes to apply lethal injection to pre-existing cases (Neb. Rev. Stat. § 83-968), such as Carey Dean Moore's. The Department of Corrections then, through the Nebraska Administrative Procedure Act, held hearings, promulgated and then adopted the fairly common three drug protocol, starting with the injection of sodium pentathol, also referred to as thiopental. Mr. Moore would be the first subject for execution using the new protocol.

Nebraska had trouble and delays obtaining this drug, the sole domestic supplier, Hospira, having in 2010 determined no longer to sell it. The Department then resorted to a very small manufacturer based in Mumbai, India, named Neon Laboratories, Ltd., and an intermediary company, Kayem Pharmaceutical Pvt. Ltd, with its offices in Mumbai but with a United States office in Las Vegas, Nevada. The Department imported 500 grams on February 7, 2011, and in a press release advised that it was ready to carry out executions.

Three interested citizens of this state made an information/document request on February 3, 2011, to the State Department of Correctional Services (Appendix 1-2). In it, they asked, among other requests, for the following category:

> "5. Please provide documentation related to the chain of custody in importing and procuring these pharmaceuticals including order, delivery, payment, storage, timeline, and *documentation related to compliance with federal laws, rules, or regulations applicable to foreign imports."* (Emphasis added.)

In response, Director Robert P. Houston, treating the request as a public records request, provided a cover letter dated February 16, 2011, with summaries of what was being provided, along with explanation of any redacted items (Appendix 3-6). The documents were thus considered public records, and the undersigned has examined them. There are some 432 pages. Relevant excerpts, including the invoices, packing lists identifying the contents as "Harmless Medicines" and the press release are provided in the appendix, and of course I would be glad to forward all of them if you wish to have them. I have paginated them at the left top for convenience.

Other than the "Controlled Substance Registration Certificate for the Department of Correctional Services "HOSPITAL/CLINIC" Dated 09-25-2009, accompanying the State Pharmacy License (Appendix 16), which does not in any way authorize importation of controlled substances, there was found no hint of any compliance with the CSA, nor with the Attorney General's promulgated regulations regarding importing Schedule III controlled substances.

I am sure it will be undisputed that thiopental is a Schedule III Controlled Substance, of the non-narcotic category, pursuant to 21 U.S.C. § 812 (b)(3) and (c). Here are the other most relevant laws that appear to have been ignored or otherwise breached:

Specifically, 21 U.S.C. § 952(b) provides:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof . . . *any nonnarcotic controlled substance in schedule III . . . unless such nonnarcotic controlled substance—*
>
> (1) is imported for medical, scientific, or other legitimate uses, *and*
>
> (2) is imported pursuant to such notification, or declaration, *or in the case of any nonnarcotic controlled substance in schedule III, such*

> *import permit, notification, or declaration, as the Attorney General may by regulation prescribe. . . .*

(Emphasis added.) Also, 21 U.S.C. § 954(2) requires that "A controlled substance in schedule II, III, or IV may be so imported, transferred or transshipped if and only if advance notice is given to the Attorney General in accordance with regulations of the Attorney General."

The relevant regulation which your office has duly promulgated under the Controlled Substance Act is 21 C.F.R. § 1312.11(b), to be enforced by the DEA, requires that

> [n]o person shall import or cause to be imported any non-narcotic controlled substance listed in Schedule III . . . unless and until such person is properly registered under the Act (or exempt from registration) and has filed an import declaration to do so with the Administrator, pursuant to § 1312.18 of this part.

The CSA also makes it unlawful to "possess, manufacture, distribute, or dispense" controlled substances absent a properly issued registration by the DEA. 21 U.S.C. § 822(a-b); see also 21 C.F.R. § 1312.11(b).

Based on what we have gleaned to date, it does appear, subject to investigation of any other facts, defenses, or explanations which the Department may be able to offer:

(1) the Nebraska Department of Correctional Services has imported thiopental in a quantity of 500 grams, enough for many dozens of executions, from an Indian manufacturer using an Indian importing company with an office in Nevada;

(2) the Department was not registered with the DEA as an importer of non-narcotic controlled substances when that importation took place;

(3) we doubt but at this point would need further investigation to prove whether either the manufacturer, "Neon" or the intermediary "Kayem" complied with applicable CSA laws and regulations, but there is no indication in the documents so far supplied as public records that either of them did; we also do not have enough facts at this point to determine whether the exportation of the thiopental was lawful under India's laws;

(4) there is no indication that the Department or anyone else provided to DEA the required declaration of importation in advance as required by law, or later either; and

(5) the Department does not appear to have been at the time of the importation, registered with the DEA in a form or manner allowing it to possess an imported non-narcotic controlled substance listed under the Controlled Substances Act.

In view of the foregoing, with respect I request that you direct the DEA and other appropriate agencies to conduct prompt and thorough investigation(s) of these issues. As noted by the attorney in the Georgia matter, illegally imported thiopental may be adulterated, counterfeit, or otherwise ineffective in providing adequate sedation to minimize risks of unnecessary and severe pain in the course of a lethal injection execution. That is a risk with both humane and legal implications, that is to say constitutional issues of cruel and unusual punishment due to unjustifiable risks of excessive suffering, physical and mental.

If the investigation we request is done, and confirms that there have been violations of federal law, the situation presents what the regulations call "an imminent danger to the public health

and safety," 21 C.F.R. § 1301.36(e), which could allow the DEA to revoke or suspend the violator's registrations to possess any controlled substances, and require delivery of all such substances to the DEA, or at least of the particular substances involved in any violation. We would hope and request that during any investigation, the possibly contraband drug be sequestered.

Thank you for your attention to this concern. I would be pleased to answer any questions from you or your staff, or furnish any further information to you or any investigator that may be helpful.

Sincerely,

Alan E. Peterson

cc: Carey Dean Moore

Jon Bruning, Nebraska Attorney General

George Green, Counsel
Nebraska Department of Correctional Services