

**Summary of SC89571, John C. Middleton, et al. v. Missouri Department of Corrections, et al.**  
Appeal from the Cole County circuit court, Judge Jon E. Beetem

**Attorneys:** The inmates were represented by; Joseph W. Luby and Jennifer A. Merrigan of the Public Interest Litigation Clinic in Kansas City, (816) 363-2795; John W. Simon of Constitutional Advocacy LLC in St. Louis, (314) 604-6982; Cheryl A. Pilate and Rebecca L. Kurz of Morgan Pilate LLC in Olathe, Kansas, (913) 829-6336; Michael J. Gorla and Eric W. Butts of Weller Gorla & Butts in St. Louis, (314) 621-1617; Jennifer Herndon of Florissant, (314) 831-5531; Elizabeth Unger Carlyle of Columbus, Mississippi, (816) 525-6540; John K. Power of Husch Blackwell Sanders LLP of Kansas City, (816) 283-4651; Jeremy S. Weis of Berkowitz Oliver Williams Shaw & Eisenbrandt LLP in Prairie Village, Kansas, (816) 627-0311; Christopher E. McGraugh of Leritz, Plunkert & Bruning PC in St. Louis, (314) 231-9600; S. Paige Canfield of St. Louis, (314) 664-7635; and Richard Sindel of Sindel Sindel & Noble PC in St. Louis, (314) 721-6040.

The state was represented by Michael J. Spillane of the attorney general's office in Jefferson City, (573) 751-3321.

The Missouri Press Association – which filed a brief as a friend of the Court – was represented by Jean Maneke of The Maneke Law Group LC in Kansas City, (816) 753-9000.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A circuit court dismissed a challenge by 17 death-row inmates and others to the state's execution protocol, alleging it was not promulgated according to public notice-and-comment rulemaking procedures. In a 4-3 decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the trial court's judgment, holding the statutes show the legislature intended to exempt the execution protocol from the rulemaking procedures because it is a protocol "concerning only inmates." In a dissenting opinion, Judge Richard B. Teitelman disagrees, noting the plain and ordinary language of the exemption does not apply to the protocol, which directs medical personnel and, therefore, does not refer only to inmates. In a dissenting opinion, Judge Michael A. Wolff agrees with Judge Teitelman, noting it is likely the legislature did not intend to exempt the execution protocol from public rulemaking or else it could have said so specifically.

**Facts:** In July 2006, the Missouri Department of Corrections issued an execution protocol setting out the steps necessary for preparing, injecting and monitoring lethal injections pursuant to section 546.720, RSMo Supp. 2007. It describes the duties of the execution team, consisting of department employees and medical personnel. Seventeen inmates who have been sentenced to death and other interested parties subsequently challenged the protocol, alleging the department violated section 536.021, RSMo Supp. 2007, when it adopted the protocol without undertaking notice and public comment rulemaking. The circuit court dismissed the action, finding the protocol is not a rule and, therefore, is not subject to the procedures of chapter 536, RSMo. The inmates and interested parties appeal.

## **AFFIRMED.**

**Court en banc holds:** The department's execution protocol is not a rule and, therefore, does not violate the state's administrative procedures act because it is not subject to notice and comment rulemaking procedures. The protocol is exempt from the definition of "rule" in section 536.010(6)(k), RSMo Supp. 2007, which specifically exempts "[a] statement concerning only inmates of an institution under the control of the department of corrections ... when issued by such an agency." Giving each word meaning, and reading the exemption in context, it is apparent that the legislature intended "concerning only inmates" simply to limit who may be the direct subject of a protocol or statement. This avoids imputing an arbitrary legislative intent that otherwise would result if the statute turned on who generally was involved in implementing a protocol or on who was present when it was implemented. The protocol is not concerned with directing the behavior of medical professionals, whose role is incidental as their skills are needed to carry out the protocol's technical provisions effectively, nor does it affect the rights of persons allowed to witness executions under section 576.740, RSMo 2000. Further, section 546.720.2, RSMo Supp. 2007 – which declares part of the protocol to be an open record – shows the legislature intended to exempt the protocol from the rulemaking statutes; there would be no need for such a declaration if the protocol were a rule, as rulemaking is inherently a public process. To the extent section 546.720.2 provides that part of the protocol is a closed record, that portion would be rendered meaningless if the closed portion must be promulgated publicly as a rule. All this statutory language demonstrates the legislature did not intend to make the department's execution protocol subject to notice and comment rulemaking.

**Dissenting opinion by Judge Teitelman:** The author would hold that the execution protocol is not subject to the statutory exemption and, therefore, is void because it was not promulgated as required. The exemption of section 536.010(6)(k) for statements "concerning only inmates" does not apply here, as its plain language shows it applies only to statements or protocols relating exclusively to inmates. The execution protocol, however, does not relate exclusively to inmates but rather directs the actions of medical professionals who carry out executions. The role of medical professionals is not incidental, because medical professionals are strictly necessary to carry out the execution protocol. Further, it is plausible to conclude that the open records provision of section 546.720.2 indicates the legislature wished to emphasize that the lethal injection procedures in the execution protocol are subject to rulemaking.

**Dissenting opinion by Judge Wolff:** The author would hold that, in the absence of specific legislative direction to the contrary, and giving the words in section 536.010(6) their plain and ordinary meaning, the execution protocol is subject to the public rulemaking process. Citing Justice Scalia, he notes that the court must look at the words of the statute itself and not render its expectation about what the legislature must have meant. Here, it is likely the legislature did not consider the execution protocol when drafting the exemption in the statute, especially given that other statutes make specific mention of an "execution protocol." It is not the Court's job to rewrite or pre-write a statute to say what it imagines the legislature would say.