NO. SC89571

IN THE SUPREME COURT OF MISSOURI

JOHN MIDDLETON et al.,

Appellants,

v.

MISSOURI DEPARTMENT OF CORRECTIONS and LARRY CRAWFORD,

Respondents

RESPONDENTS' BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
Mo. Bar No. 45631

MICHAEL SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-1307
Facsimile: (573) 751-3825

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STATEMENT OF THE CASE

This case is about whether the portion of the Missouri Execution Protocol dealing with the administration of lethal chemicals to inmates under sentence of death is a rule within the meaning of §536.010(6),[1] and therefore subject to the notice and comment procedures of the Missouri Administrative Procedure Act, Chapter 536, RSMo.

The challenged portion of the protocol does not fit within the definition of rule for three reasons:

1) This Court has held that it is implicit in the definition of "rule" that an agency statement or announcement in order to be a rule have the potential to affect the substantive or procedural rights of members of the public, and the challenged protocol does not have that potential. *See Baugus v. Director of Revenue*, 879 S.W.2d 39, 42 (Mo. banc 1994).

2) The challenged portion of the protocol concerns only the internal management of an agency and does not substantially affect the legal rights or procedures available to the public and is therefore excluded the definition of rule by §536.010(6)(a).

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[1] Unless otherwise indicated, all citations are to RSMo. 2000.

3) The challenged portion of the protocol concerns only inmates of an institution under the control of the Department of Corrections and therefore is excluded from the definition of rule by the exclusion contained in 536.010(6)(k).

STATEMENT OF FACTS

The instructions at issue – comprising a document titled "Preparation and Injection of Chemicals" (Appendix 43-46 – "Injection Protocol" herein)[2] – are part of the execution protocol and were prepared in July 2006 by the Missouri Department of Corrections, partially in response to federal court litigation over Missouri's execution method. *Taylor v. Crawford*, No. 05-417-CV-C-FTG 2006 W.L. 1779035 (W.D. Mo. June 26, 2006). *See also Clemons et al., v. Crawford et al.,* No. 07-4129-CV-C-FJG (W.D. Mo. July 15, 2008) (dismissing challenge to Missouri execution protocol.)

The Injection Protocol contains six sections dealing with (A) the composition of the execution team; (B) the preparation of chemicals; (C) use of intravenous lines; (D) monitoring the prisoner; (E) administration of chemicals; and (F) documentation of chemicals. *Id.* The Injection Protocol was submitted to the United States District Court for the

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[2] Section 546.720.2 RSMo Cum. Supp. 2007 states that "[t]he section of an execution protocol that directly relates to the administration of lethal chemicals or gas is an open record, the remainder of any execution protocol of the Department of Corrections is a closed record." Appellants do not assert the portion of the Execution Protocol that is "a closed record" – *i.e.*, the portion beyond the Injection Protocol, which largely deals with security-related issues – is a rule subject to notice and comment procedures.

Western District of Missouri. Though that court initially rejected one portion of the Injection Protocol, the United States Court of Appeals for the Eighth Circuit disagreed and upheld constitutionality of the protocol as written. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), *cert. denied* 128 S.Ct 2047 (2008).

Last July, two years after the Injection Protocol was prepared and publicly filed with the federal court, this action was filed in the Circuit Court for Cole County by seventeen Missouri inmates sentenced to death, five relatives of inmates sentenced to death, three members of the clergy, a member of the Missouri House of Representatives, and a member of the Missouri Senate (when referred to collectively, "Plaintiffs" herein). (Appendix 4-50). They named as defendants the Missouri Department of Corrections and its Director (collectively "Department" herein). The suit asked for a declaration that the Injection Protocol was a rule that had not been properly promulgated under §§536.021 and 536.024, an injunction preventing enforcement of the Injection Protocol, an award of costs, and other unspecified relief (Appendix 36-38).

The Department moved to dismiss, arguing that: (1) the challenged portion of the protocol did not fit within the definition of "rule" in §536.010(6); (2) the challenged portion of the protocol fit within the internal management exception to the definition of rule set out in §536.010(6)(a); and (3) the challenged portion of the protocol fit within the "concerning only inmates" exclusion from the definition of rule contained in §536.010(6)(k). (Appendix 71-77). The Department further argued, relying on this Court's decision in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10, 26 (Mo. banc 2003), that because the challenged protocol was not a rule, the trial court did not have subject matter jurisdiction to issue a declaration on whether it had been promulgated in compliance with statutory requirements for the promulgation of rules (Appendix 72)[3]. Plaintiffs filed suggestions in opposition to the motion to dismiss (Appendix 82-122), and the circuit court held a hearing on the motion to dismiss and the plaintiffs' motion for injunction (*see* Appendix 3).

[3] The Department also raised a statute of limitations defense under §516.145 RSMo to the inmate plaintiffs and challenged the standing of the non-inmate plaintiffs (Appendix 77-79).

On August 13, 2008, the circuit court granted the motion to dismiss, holding that the Injection Protocol is not a rule (Appendix 131-133).

STANDARD OF REVIEW

The case below was a declaratory judgment action in which there were not genuinely disputed facts material to the outcome of the case, and the case was decided based on the interpretation and application of statutory law. The standard of review is *de novo. Gash v. Lafayette County,* 245 S.W.3d 229, 231-232 (Mo. banc 2008).

ARGUMENT

Because the Injection Protocol is not a rule that must be promulgated under the Missouri Administrative Procedures Act, the circuit court had no jurisdiction to determine if the notice and comment requirements for promulgating a rule under the Act were followed. (Responds to Appellants' Arguments I and II)

I. Whether the challenged policy was a "rule" under §536.010(6) is a jurisdictional question.

Plaintiffs asked the Circuit Court of Cole County to declare that the portion of the Missouri execution protocol that deals with the preparation and administration of lethal chemicals – "Preparation and Injection of Chemicals" (Appendix 43-46; the "Injection Protocol") – is "null," "void," "unenforceable," "invalid," and "without legal effect." In their view, the Injection Protocol was a "rule" as defined in §536.010(6), and thus had to be adopted using the procedures set forth in §§536.021 and 536.024 (*see* Appendix 36-38). This Court has previously addressed such claims, and has held that the question whether a policy is a "rule" goes to the jurisdiction of the circuit court.

In *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 210 (Mo. banc 2003), as here, the plaintiff

challenged an agency statement that had not been promulgated as a "rule." They sought a declaration that the inclusion of the Missouri and Mississippi Rivers on a list of impaired waterways violated statutorily required notice and comment and fiscal note procedures for rules. *Id.* at 22-23. This Court held that because the list was not a rule, the circuit court lacked subject matter jurisdiction to issue the sought-after declaratory judgment. *Id.* at 25. This Court also held that the challenge was premature. *Id.* at 29.

Here, the circuit court considered whether the Injection Protocol was a rule and concluded that it was not. (Appendix 131-133). Then the court followed the model in *Missouri Soybean*: it dismissed the case due to lack of subject matter jurisdiction.

Plaintiffs question whether the dismissal should have been for lack of subject matter jurisdiction as opposed to failure to state a claim on which relief can be granted. Appellant's Brief ("App. Br.") at 9. But they acknowledge that this makes little practical difference because if the Injection Protocol is not a rule, it was proper to dismiss the petition. App. Br. 9. Therefore, plaintiffs agree that the dispositive question in

this case is whether the Injection Protocol is a rule as the term is defined in §536.010(6).

II. The circuit court lacked jurisdiction because the Injection Protocol was not a "rule" under §536.010(6).

The definition of "rule" in §536.010(6) consists of a general statement, followed by a series of exclusions. In order to demonstrate that the Injection Protocol was a "rule," then, Plaintiffs had to show that it fits within the general statement, and then that it does not fit within any of the exclusions. Here, they fail at each point: the Injection Protocol does not fit within the general statement, as it has been explained by this Court; and it fits within two of the exclusions. Therefore, it is not a rule, it did not have to be promulgated as a rule under §§536.021 and 536.024, and the circuit court properly dismissed the action.

A. The Injection Protocol does not fit within the general statement regarding what constitutes a rule because it does not have an impact on the substantive or procedural rights of the public.

The definition of "rule" begins with a general statement: "'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency."

§536.010(6). So we begin with the question of whether the Injection Protocol fits within that definition.

We do so, however, with precedent and not just the language of the statute before us. In *Baugus v. Missouri Department of Revenue*, 878 S.W.2d 39 (Mo banc 1994), this Court addressed the meaning of the opening sentence of §536.010(6). There, the Court reviewed a challenge to an announcement by the Director of Revenue of her intent to affix the label "prior salvage" to all titles issued on a vehicle after a salvage certificate had been issued on that vehicle. Used car dealers challenged this pronouncement on various grounds, including that it was allegedly a rule promulgated without the steps required by the Missouri Administrative Procedure Act. *Id.* at 42. This Court held that "implicit in the concept of the word 'rule' is that the agency declaration has a potential however slight of impacting the substantive or procedural rights of some member of the public." *Id.* This Court held that if statutory law were strictly employed, titles of this type would say, "Certificate of title issued subsequent to titles described in 301.227 RSMo known as salvage certificate of title," that abbreviating this as "prior salvage" does not substantially affect the rights of any party, and

that therefore the announcement was not a rule. *Id.* Thus the Court clarified that implicit in the concept of a rule is the potential for some impact on the rights of someone outside of government.

Nearly a decade later, the Court returned to the opening language of §536.010(6) and again demanded an impact on the public. In *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo. banc 2003), this Court reviewed a challenge by trade and business associations to the Missouri Clean Water Commission's inclusion of the Missouri and Mississippi Rivers on a list of impaired waterways submitted to the Environmental Protection Agency. The use of such impaired waterways is subject to enhanced regulation if the list is accepted and approved by the Environmental Protection Agency. This Court rejected the claim that the list was a rule, finding that the list did not command the appellants to do or refrain from doing anything and did not create any legal rights or obligations. *Id.* at 22. The Court relied on *Baugus. Id.* at 23-24.

Following *Baugus* and *Missouri Soybean*, the Missouri Court of Appeals, Western District (the court most often called upon to construe the Missouri Administrative Procedures Act) similarly questioned the

scope of the opening sentence of the "rule" definition. In *McIntosh v. LaBundy*, 161 S.W.3d 413 (Mo. App. W.D. 2005), that court heard a challenge by a clinical social worker to a list of approved sex offender therapists issued by the Department of Corrections – a list that was, like the documents at issue in *Baugus*, and *Missouri Soybean*, not promulgated under the rulemaking procedures. The Western District, relying on *Baugus,* found that the therapist had no right to be included on the list of approved therapists and that an impact on a nonexistent right did not make the list a rule. *Id.* at 416-417.[4]

Baugus, *Missouri Soybean*, and *LaBundy* recognize what a court in another state has correctly observed: that if the words of the statute (there, "a statement of general applicability [that]… implements, interprets, or prescribes existing law") are not given some substance, the "definition of a rule is too broad to be workable. Under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures." *Asarco Inc. v. State*, 69 P.3d 139,

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[4] The majority opinion in *United Pharmacal Co. v. Missouri Bd. Of Pharmacy*, 159 S.W.3d 361 (Mo. banc 2005), reflects, but does not expressly adopt, the *Baugus-Missouri Soybean* approach. Even the narrower concurrence expressly recognized the *Baugus* requirement that a rule would impact the substantive or procedural rights of the public. *Id.* at 368 (White, J., concurring).

143 (Idaho 2003). Thus other courts have adopted criteria to be used in determining whether a statement really meets the statutory definition.[5] The general rule among the states with statutes similar to Missouri's Administrative Procedures Act is consistent with *Baugus*: a rule is "[a]n agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." *Dep't of Revenue of State of Fla. v. Vanjaria Enterprises, Inc.,* 675 So.2d 252, 255 (Fla. App. 5th Dist. 1996).

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[5] For example, in *Asarco*, 69 P.3d at 143, the Idaho court said it would look at six factors:

> (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy.

Those are a shortened version of factors used in New Jersey. *See Metromedia, Inc. v. Director, Div. of Taxation,* 478 A.2d 742, 751 (N.J. 1984).

This Court found no need for a list of criteria in *Baugus*, nor in *Missouri Soybean*. But again, in both cases this Court read the general definition in the first sentence of §536.010(6) to have sufficient substance to exclude many statements made by agencies. This Court should decline Plaintiffs' implicit insistence that this Court abandon that approach.

We return, then, to the *Baugus* rule and ask whether the Injection Protocol "has a potential however slight of impacting the substantive or procedural rights of some member of the public." 878 S.W.2d at 42. It does not.

The Injection Protocol implements only the Director's responsibility under §546.720 RSMo. Cum. Supp. 2007, which requires him to carry out execution warrants by the administration of lethal gas or by means of lethal injection. Inmates and potential witnesses to an execution, while they are arguably members of the public, do not have a substantive or procedural right to control the specific details of the administration of lethal injections except through legislation, and through the courts if illegalities occur. The protocol itself, which gives specific direction to Department permanent and contract employees on

an internal management issue, is neutral as to inmates' rights to have executions carried out in a constitutional manner. Of course inmates have such a right, but the Injection Protocol does not violate it. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), *cert. denied* 128 S.Ct 2047 (2008). As in *Baugus*, the executive branch here is carrying out a statutory mandate that the people have placed on it through the legislature, and the general public does not have a further substantive or procedural right that is impacted by the details of the way the mandate is carried out.

Further, no public right is affected simply because the Department may use contract medical personnel, rather than its own full-time employees, to carry out part of the execution procedure. Such a choice by the Department does not create any substantive or procedural right for the public to control the details of execution procedures beyond the legislative process that has already occurred. The direct impact of that choice is solely on those who make a contract with the state, who by virtue of that choice are no longer part of "the public" as that term is used in *Baugus* and on whom no right to change the protocol is vested by their decision to accept employment in implementing it.

In any event, contractors (none of whom are among the plaintiffs here) could come no closer to being able to assert that their rights are affected than the plaintiff in *LaBundy*. There, neither the public in general, nor the licensed care giver who challenged the selection of individuals eligible to provide sex offender treatment had a substantive or procedural right affected by the selection of particular individuals and the exclusion of others from the list of approved providers. Similarly, there is no substantive or procedural right of the public impacted by the procedure for preparing and injecting lethal chemicals during an execution. The contract employees are carrying out an internal management function concerning inmates. That does not impact a substantive or procedural right of inmates or the public.

B. The Injection Protocol is excluded from the definition of a "rule" by §536.010(a) because it concerns only the internal management of the Department.

Even those statements that fit within the general, opening sentence of the definition of "rule" in §536.010(6) may not be "rules" for purposes of the notice and comment requirements. The definition contains 13 exclusions; two of them apply to the Injection Protocol.

The first applicable exclusion is for statements that are made to regulate internal department affairs, without substantial impact on those outside the agency: "A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof …." §536.010(6)(a). To avoid having the Injection Protocol fall within that exclusion, Plaintiffs must show that it does not concern "only the internal management" of the Department, or that although it does concern only internal management, it does so in a way that "substantially affect[s]" the rights or procedures available the public. Plaintiffs have not accomplished either.

The Injection Protocol was set out by the Director in accordance with §546.720, RSMo Cum. Supp. 2007, which commands him to provide a suitable place for executions, the necessary appliances for carrying out executions, and to select the persons responsible for carrying out executions and the persons responsible for supporting the personnel who actually carry out executions. There is no room for argument that the Injection Protocol concerns more than "internal management." Its instructions are directed solely to Department

personnel (whether employees or contractors) and concern only inmates. In fact, the Injection Protocol is a textbook example of internal agency management, setting out in more specific detail how the statutory mandate of §546.720 RSMo Cum. Supp. 2007 is to be carried out. It provides no instructions to and imposes no requirements on anyone other than employees or contractors. Therefore the statement is excluded from the definition of "rule" unless it has a substantial impact on the substantive or procedural rights of the public. The Circuit Court of Cole County correctly recognized this application of law (Appendix 131-132)[6].

The circuit court held that neither the public in general nor any segment of the public has a legal right or procedure available that is substantially impacted by this statement and that therefore the challenged statement is excluded from the definition of rule by §536.010(6)(a) RSMo.(Appendix 131-133) That analysis is straight forward and correct.

To paraphrase language from one of Plaintiffs' authorities, *Gray Panthers v. Public Welfare Div.*, 561 P.2d 674, 676 (Or. Ct. App. 1977):

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[6] The Circuit Court of Cole County found it "obvious" that this is an internal management issue (Appendix 132).

because the Injection Protocol "affect[s] individual solely in their capacities as employees of the agency involved," and it does not affect "the general public who may have occasion to deal with the agency … more directly … than the employees of the agency in carrying out their duties, the action [need not] be reflected in a properly enacted rule."

To our knowledge, only two appellate decisions from other states address the issue of whether an execution protocol is a rule subject to the notice and comment procedures of an administrative procedure act. The Tennessee Supreme Court held that the Tennessee execution protocol fits "squarely within" the exception to the definition of rule for "statements concerning only the internal management of state government and not affecting private rights privileges or procedures available to the public" and the exception for "statements concerning inmates of a correctional detention facility." *Abdur'rahman v. Breseden*, 181 S.W.3d 292, 311-312 (Tenn. 2005). Here, the circuit court found this case instructive, as the Tennessee statute analyzed is very similar to the Missouri statute (Appendix 133). In fact, the internal management exclusion in the Tennessee statute would not exclude as many statements from the definition of rule, as does the exclusion in Missouri,

because the Tennessee statute mentions only an effect on rights privileges or procedures as taking a statement outside the exclusion. Under §536.010(6)(a) a *substantial* effect on the legal rights of or procedures available to the public is required to take a statement outside the exclusion.

In *Evans v. State*, 914 A.2d 25 (Md. 2006), the Maryland Court of Appeals concluded that its execution protocol did not fit within its internal management exception and therefore was subject to notice and comment procedures. But the Maryland Court of Appeals did not identify any substantive or procedural right of the public affected by the protocol. Rather, its conclusion was that the test of whether a statement fits within the exception is whether the legislature would want notice and comment to occur under the circumstances. Because the issue of the death penalty and its implementation is important to the legislature, the Court was unwilling to assume the legislature meant to leave the matter of developing a protocol to the Department of Corrections. *Id.* This type of analysis is not consistent with that conducted by Missouri courts and was properly rejected by the circuit court because the Maryland court did not define a public right affected by the protocol

(Appendix 133). Therefore, the one case squarely on point strongly favors the conclusion that the challenged portion of the execution protocol is not a rule because it involves only the internal management of the Department of Corrections.

Plaintiffs cite a treatise and numerous cases for the general proposition that the internal management exception is narrow (App. Br.22-27). Plaintiffs then argue that the challenged portion of the protocol does not concern only internal management because "non-DOC medical personnel mix the chemicals, prepare the syringes, insert the I.V. line, monitor the prisoners condition and pronounce death among other critical responsibilities" (Appellant's Brief 29). This argument essentially is a claim that the Injection Protocol is a rule because "[t]he execution team consists of contracted medical personnel and department employees." (Appendix 43). How the Department of Corrections implements the statutory requirement that it execute prisoners condemned to death either is a matter of internal management, which it clearly is, or it is not. This is not changed because some of the personnel on the execution team may be employed

under contracts as opposed to being at will or merit system employees. All are performing an internal management function.

Next, relying largely on *Evans v. State*, 914 A.2d 25 (Md. 2006), Plaintiffs argue that the challenged portion of the protocol is not an internal management issue because it is important to the public in general, and to witnesses and inmates, who are also members of the public (Appellant's Brief 30-35). This argument is without merit. A statement is either about how an agency is to manage itself, or it is not. A matter does not cease to be an internal management matter because it is interesting or politically charged.

C. The Injection Protocol is excluded from the definition of "rule" by §536.010(6)(k) because it is directed only to inmates.

If Plaintiffs had shown that the Injection Protocol fit within the general definition in the first sentence of §536.010(6) and that it substantially affected the rights of the public despite being a internal agency instruction, they would still have to show that the Injection Protocol did not fit within the scope of the exclusion in §536.010(6)(k) for statements "concerning only inmates." Under the plain language of that portion of the statute, a statement concerning only inmates is not a rule even if it has a substantial impact on the substantive or procedural

rights of the public. This exclusion eliminates the relevance of whether inmates in general are members of the public for purposes of more general analysis. The legislature has clearly expressed its conclusion by this exception that inmates are not to be treated as members of the public for analysis of whether their substantive or procedural rights are impacted by an agency statement.

The Circuit Court of Cole County correctly held that a protocol setting out the manner of execution of a death sentence applies only to inmates and specifically only to inmates under a warrant of execution, and that the fact that the protocol instructs employees and agents of the Department of Corrections in how to deal with inmates does not change that it concerns only inmates (Appendix A133). The Circuit Court of Cole County also distinguished the Maryland case, *Evans*, by noting that Maryland, unlike Missouri, does not have exclusion for statements concerning only inmates (Appendix 133). This is accurate. See Maryland Code §10-101.

The law is well established that running a correctional system is an inordinately difficult task and that great deference should be give to correctional official in the matters within their province and expertise.

See Turner v. Safley, 482 U.S. 78, 84-92 (1987). The Missouri Administrative Procedure Act recognizes this, as shown by the progressive treatment evident in the three portions of the "rule" definition discussed here. The opening sentence sets out the general principle that a statement is a "rule" if it has even a slight potential to impact on public rights. The first exclusion removes internal management documents unless they have a "substantial" impact on public rights. And the "inmate" exclusion imposes a hard and fast rule that statements concerning only inmates are not rules, without analysis of impact on public rights. *See Martin v. Department of Corrections,* 384 N.W. 2d 392, 395 (Mich. 1986)(noting the exception in the Model Administrative Procedure Act for statements concerning only inmates exists so that inmates are not treated as members of the public).

Plaintiffs attempt to make their case based on use of the word "only" to modify "inmates." They do so to distinguish their case from the Tennessee precedent, *Abdur'Rahman v. Breseden*, 181 S.W.3d 292, 311-312 (Tenn. 2005). The Tennessee statute's exception for statements concerning inmates, unlike the Missouri exception, uses the phrase "concerning inmates" as opposed to "concerning only inmates" as in the

Missouri statute. *See Abdur'rahman*, 181 S.W.3d at 311. But the word "only" read in the context of the Missouri statute does not exclude and cannot reasonably be read to exclude, statements that have a potential collateral effect on any non-inmate, because that would make the exclusion meaningless. Plaintiffs place far more weight on the difference than the word "only" can possible bear in the context of the Missouri law.

Exclusion (k) is not the only place where the legislature used that word. It also used it in exclusion (a), the internal management exclusion discussed above, which addresses statements "concerning only the internal management of an agency." §536.010 (6)(a). If "only" had the meaning in (a) that Plaintiffs wish to give it in (k), the language regarding a "substantial" effect on the public would be entirely superfluous. But that language is not superfluous. A statement that directly concerns "only internal management" may have collateral impact elsewhere. And the same is true of a statement that itself concerns "only inmates." There are many examples of decisions, policies, or instructions that concern only inmates that have collateral impacts

on others. Indeed, it is hard to come up with examples that would *not* have an impact on someone other than the inmates themselves.

Plaintiffs also attempt to distinguish *Abdur'rahman* by arguing that in Tennessee the Department of Corrections has a blanket exception from the requirement for rule making (Appellant Brief at 33-34). That is not an accurate distinction. The Tennessee Supreme Court based its decision on the fact that the protocol fit squarely within the "internal management" and "concerning inmates" exceptions. *Abdur'rahman,* 181 S.W. 2d at 311. The Tennessee Supreme Court noted that Tennessee statutes that authorize state agencies to make "rules" under the Tennessee Administrative Procedure Act make explicit reference to that Act. *Id.* at 312. The Tennessee Supreme Court did this in rejecting the argument that the statute authorizing the Department of Corrections to make rules necessarily made all its statements into rules. That rejection did not change the basis of the decision, which was explicitly based on exclusions from the definition of "rule" similar to those in Missouri law.

Plaintiffs also argue that the challenged protocol does not fit within the "concerning only inmates" exclusion of §536.010(6)(k)

because witnesses and participants in executions are concerned by the protocol as is the public in general (Appellant's Brief 36-39). This is a weak argument based on an out-of-context reading of the phrase and giving double meaning to the word "concerning." It is essentially a restatement of the argument that if something is interesting or important it is necessarily a rule subject to notice and comment procedures. That is not the law in Missouri, nor should it be. The case Plaintiffs cite as support for their argument, *Airhart v. Iowa Department of Social Services*, 248 N.W. 2d 83, 85 (Iowa 1976), App. Br. 37, is not on point, as it held only that parolees do not fit within the "concerning only inmates" exception, and as support for this cited a law review article which argued that changes in visiting hours would not fit within the concerning only inmates exception. The article was only marginally relevant to the issue before the Iowa court. The fact that Plaintiffs' principle authority to support their strained reading of the Missouri statute is one reference to a law review article in a twenty-two year-old case highlights the lack of authority for Appellants' argument.

In the end, the structure of §536.010(6) leads to a simple result: that instructions such as the Injection Protocol, which are solely

directed to the Department deals with inmates are not rules. Assertions that such instructions are rules simply cannot be reconciled with the legislature's desire, unequivocally expressed in exclusion (k), to give the Department the authority to manage prisons and prisoners without the notice and comment procedures required for rule making.

CONCLUSION

The decision of the Circuit Court of Cole County should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor

MICHAEL SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-7406
Facsimile: (573) 751-2096

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by Microsoft Office Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free and

3. That two true and correct copies of the attached brief, and a floppy disk containing one copy of this brief, were mailed, postage prepaid, on October 1, 2008, to:

Joseph W. Luby
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113

John William Simon
Constitutional Advocacy, LLC
2683 South Big Bend Blvd., Ste 12
St. Louis, MO 63143

Elizabeth Unger Carlyle
P.O. Box 962
Columbus, MS

Jennifer A. Merrigan
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113

Richard Sindel
Sindel Sindel & Noble, P.C.
8008 Carondelet, Suite 301
St. Louis, MO 63105

Cheryl Ann Pilate
Rebecca L. Kurz
Morgan Pilate LLC
142 North Cherry
Olathe, KS 66061

Michael J. Gorla
729 Olive Street, Ste 1630
St. Louis, MO 63101

Christopher E. McGraugh
Leritz, Plunkett & Bruning, P.C.
One City Centre, Ste 2001
St. Louis, MO 63101

S. Paige Canfield
3889 Juniata Street
St. Louis, MO 63116

Jeremy S. Weis
Berkowitz, Oliver Williams Shaw & Eisenbrandt
4200 Somerset, Ste. 150
Prairie Village, KS 66208

John K. Power
Husch Blackewell Sanders LLP
1200 Main Street, Ste 2300
Kansas City, MO 64105

Jennifer Herndon
224 Highway 67 North, #122
Florissant, MO 63031

Eric W. Butts
720 Olive Street, Ste. 1630
St. Louis, MO 63101-2314

Jean Manege
The Manege Law Group, L.C.
910 One Main Plaza
4435 Main St.
Kansas City, MO 64111

MICHAEL J. SPILLANE
Assistant Attorney General

RESPONDENTS' APPENDIX

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