

NO SC89571

IN THE SUPREME COURT OF MISSOURI

JOHN MIDDLETON, et al.,
Appellants,

v.

MISSOURI DEPARTMENT OF CORRECTIONS
and LARRY CRAWFORD,
Respondents.

RESPONDENTS' SUPPLEMENTAL 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
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.....	3
ARGUMENT.....	5
<p>Sections 214.040.2 and 217.040.3, RSMo 2000 explicitly exclude Department of Corrections policies and procedures concerning only the Department’s internal management from the notice and comment requirements of Chapter 536 RSMo. These specific statutory provisions exclude the procedure titled “Preparation and Injection of Chemicals” from the general statutory provision defining rules in §536.010 RSMo 2000. Additionally §536.010 (6)(c), the exclusion for intra-agency or inter-agency memoranda and communications, removes the document from the notice and comment requirements of Chapter 536 RSMo.</p>	
CONCLUSION	13
CERTIFICATE OF SERVICE AND COMPLIANCE	14

TABLE OF AUTHORITIES

Cases

<i>Evans v. State</i> , A.2d 25 (Md. 2006)	12
<i>Jackson v. Danberg</i> , 2008 W.L. 1850858 (Del. Super. 2008)	11
<i>Morales v. California Department of Corrections</i> 85 Cal. Rpter. 3d. 724 (Cal. App. 1 st Dist. 2008).....	11
<i>See Aziz v. McCondichie</i> , 132 S.W.3d 238 (Mo. banc 2004).....	8
<i>See Lane v. Lenmeyer</i> , 158 S.W.3d (Mo. banc 2005)	6
<i>See Porter v. Commonwealth</i> , 661 S.E.2d 415 (Va. 2008)	7, 11
<i>See Turner v. Safley</i> , 482 U.S. 78 (1987)	8
<i>State v. Jackson</i> , 2008 W.L. 5048424 (Del. Super. 2008)	11

Statutes

Chapter 536 RSMo	5, 6, 7, 8, 9, 10
Maryland Statutes Annotated 10-101(g)	12
Section 217.015.1 RSMo Cum. Supp. 2007.....	8
Section 217.040 RSMo.....	5, 6
Section 217.040.2 RSMo.....	5, 6, 7, 8, 9, 12
Section 217.040.3 RSMo.....	5, 6, 7, 8, 9, 12
Section 217.690.3 RSMo 2000.....	9
Section 536.010 RSMo.....	6
Section 536.010(6) RSMo	5, 8, 9
Section 536.010(6)(a) RSMo.....	5, 6, 7

Section 536.010(6)(c) RSMo.....	5, 10, 11, 12
Section 536.010(6)(k) RSMo	5, 12
Section 546.720 RSMo.....	10
Section 558.041.4 RSMo 2000.....	9
<u>Other Authorities</u>	
14 C.S.R. 20-1.010	8

ARGUMENT

Section 217.040.2, 217.040.3 RSMo and §536.010(6)(c) independently provide an adequate statutory basis for the conclusion that the procedure set out in “Preparation and Injection of Chemicals” is not subject to the notice and comment procedures of Chapter 536 RSMo.

Respondents argued the exclusions in §217.040 RSMo and §536.010(6)(c) RSMo at the previous oral argument but concentrated in the original brief on the general provisions of §536.010(6) and the exclusions in §536.010(6)(a) RSMo and §536.010(6)(k) RSMo. Therefore Respondents feel it would be useful to the Court to briefly discuss §217.040 and §536.010(6)(c) in this supplemental brief, along with additional relevant case law, some more recent than the original briefs.

I.

Section 217.040 RSMo

The general internal agency management exclusion of §536.010(6)(a) RSMo requires that a procedure not substantially affect the legal rights of the public or a segment of the public in order to fit within the exclusion. Though sections 217.040.2 RSMo and 217.040.3 RSMo largely parallel that exclusion, they are broader than §536.010(6)(a):

2.The department shall adopt policies and operating regulations concerning only its internal management which need not be published in the Missouri Register or the code of state regulations under chapter 536, RSMo, but these regulations shall be available for public inspection and review.

3.Divisions of the department shall jointly or separately adopt regulations, policies and procedures concerning internal management which shall be consistent with the department's policies and regulations, and need not be published in the Missouri Register or the code of state regulations under chapter 536, RSMo.

§217.040.2,.3 RSMo 2000.

Section 217.040.2 RSMo thus excludes Department of Corrections procedures concerning only internal management from the notice and comment provisions of Chapter 536 RSMo, even if the procedure has a substantial impact on the rights of the public. Section 217.040.3 RSMo provides an even broader exclusion from the rule making requirements of Chapter 536 RSMo for policy and procedures of a division of the Department of Corrections. This exclusion, unlike the exclusion in §536.010(6)(a), applies to procedures “concerning internal management” as opposed to procedures “concerning only internal management”; this exclusion is not limited to procedures that do not substantially affect the public or a segment of the public.

In light of the specific statutory exclusions of §217.040 RSMo, and the principle of law that specific statutes control over more general statutes, the issue of whether the notice and comment requirements of Chapter 536 RSMo apply to the procedure titled “Preparation and Injection of Chemicals” may be resolved without the necessity of conducting analysis under §536.010 RSMo. *See Lane v. Lenmeyer*, 158 S.W.3d 218, 225 (Mo. banc 2005)

(“when the same subject matter is addressed in general terms in one statute and in specific terms in another the more specific controls over the more general”).

Assuming for the sake of argument that “Preparation and Injection of Chemicals” is treated as a general Department of Corrections Procedure, as opposed to a more specific Division of Adult Institutions procedure, the procedure is excluded from the rulemaking requirements of Chapter 536 RSMo by §217.040.2 RSMo in that it concerns only internal management. The object of this procedure is entirely the method for carrying out the sentence of particular inmates, which is an internal function of the Department of Corrections, and more specifically of its Division of Adult Institutions. *See Porter v. Commonwealth*, 661 S.E.2d 415, 432-433 (Va. 2008) (noting that the sole purpose of the Virginia Department of Corrections is related to the inmates of prisons and therefore the Virginia lethal injection protocol is not subject to the Virginia APA as it fits within a statutory “relating to inmates” exclusion from the requirements of the Virginia APA). Although this procedure does not have a substantial impact on the rights of the public, it is not necessary under §217.040.2 RSMo for specific Department of Corrections internal management procedures to meet the test of not having a substantial impact on a right of the public in order to fit within the exclusion. Therefore the exclusion for Department of Corrections statements concerning internal management is broader than the exclusion for other agencies contained in §536.010(6)(a) RSMo.

Further, “Preparation and Injection of Chemicals” more properly fits within the specific exclusion of §217.040.3 RSMo because it deals with subject matter that falls within the responsibility of the Division of Adult Institutions as opposed to the Department of

Corrections in general. *See* §217.015.1 RSMo Cum. Supp. 2007 (dividing the Department into the Division of Human Services, the Division of Adult Institutions, The Board of Probation and Parole, and the Division of Offender Rehabilitative Services); 14 C.S.R. 20-1.010 (defining the duties of the Division of Adult Institutions). For a procedure's exclusion under §217.040.3 from the rulemaking requirements of Chapter 536, it is only necessary that the procedure concern internal management, not that it concern "only" internal management and not that it not have a substantial impact on the public. There can be no question that the lethal injection protocol concerns the internal management of the Division of Adult Institutions. Therefore, it is not a proper subject for rulemaking under Chapter 536, and it is unnecessary to analyze the definition of "rule" and the exclusions to that definition contained in §536.010(6) RSMo..

The exemptions in §217.040.2 RSMo and §217.040.3 RSMo are consistent with sound public policy goals. *See Turner v. Safley*, 482 U.S. 78 (1987) ("the problems of prisons in America are complex and intractable). In general, the administration of penal institutions requires flexibility and specialized expertise. Subjecting procedures for the administration of prisons to notice and comment requirements would eliminate flexibility, and dilute the influence of the experience of prison administrators. In practice, the most likely result is that prisons would become harsher and more rigid places, as policies that are not easily subject to repeal or modification would presumably be heavily weighted towards security in any balancing of competing interests. *See Aziz v. McCondichie*, 132 S.W.3d 238, 240 (Mo. banc 2004) (stating "[t]o impose unnecessary constraints upon parole conditions may provide an incentive to keep offenders in prison longer than the board might otherwise

deem suitable”). Therefore the legislature achieved sound public policy goals by providing broader exceptions from the provisions of the APA for the Department and its divisions than exist for other agencies.

These general principles also apply to the specific case of an execution protocol. Flexibility to take advantage of improving technology, or scientific knowledge, or flexibility to adjust procedures to particular inmates, (e.g., those with allergies or poor veins from drug abuse, or extreme obesity), would obviously be inhibited by an inflexible procedure that cannot be changed for months, and might not be changed in the way needed at all.

Similarly, the requirement of compliance with notice and comment procedures would as a practical matter eliminate the flexibility to timely comply with judicial decisions concerning the procedure. (Indeed, the current protocol was developed in the course of a judicial proceeding.) Additionally, there is no guarantee that whatever procedure emerged from the notice and comment process would be viewed by reviewing courts as complying with previous judicial mandates.

Finally, it is noteworthy that the legislature in specific instances has required particular procedures by the Department or its divisions to be promulgated as rules under Chapter 536 RSMo. *See* §217.690.3 RSMo 2000 (parole) and §558.041.4 RSMo 2000 (good time credit). By requiring in specific statutes that some things be promulgated as rules the legislature recognized that the exclusions in §217.040.2 and 217.040.3 as well as the exclusions in §536.010(6) apply to the Department. If the procedures concerning parole and good time credit issues were otherwise subject to the requirements of Chapter 536, then specific salutatory provisions requiring rulemaking in compliance with the APA would be

unnecessary. The legislature knows how to require that a Department of Corrections procedure be published as a rule.

Moreover, the Legislature has demonstrated awareness and understanding of the execution protocol. Section 546.720 RSMo mentions that only the specific part of an execution protocol that directly relates to the administration of lethal gas or chemicals is an open record. That statute contains no direction that this portion of the protocol need be promulgated as a rule under Chapter 536. In context, this is entirely consistent with the conclusion that the challenged document is not meant by the legislature to be subject to the notice and comment procedures of Chapter 536. (It would not be reasonable for Appellants to argue that the majority of the protocol, which is an explicitly closed record, is subject to notice and comment procedures, and they do not do so.)

II.

§536.010(6)(c)

The statement “Preparation and Injection of Chemicals” also falls within the exception in §536.010(6)(c) for “[a]n intergovernmental, interagency or intraagency memorandum directive, manual or other communication which does not substantially affect the legal rights or procedures available to the public or any segment thereof.” It is an intra-agency or inter-agency communication, i.e., it provides instructions only to Department employees or contractors, not to any member of the public. This exclusion from the definition of rule excludes statements that do not have a substantial effect on public rights, as opposed to merely the potential to affect the rights of the public which qualifies a statement in general as a rule. The challenged statement in this case does not have even a potential

effect on public rights. It certainly does not have the substantial effect on the rights of the public that would be required for it to be a rule in light of the exclusion in §536.010(6)(c).

III.

Recent Published decisions do not support the conclusion the Missouri protocol is subject to notice and comment requirements.

The Supreme Court of Virginia in a published decision rejected the idea that the Virginia execution protocol is subject to notice and comment procedures in *Porter v. Commonwealth*, 661 S.E.2d 415, 432-433(Va. 2008). The Superior Court of Delaware appears to have rejected an APA challenge to its lethal injection protocol on November 25, 2008 in an unpublished opinion in *State v. Jackson*, 2008 W.L. 5048424 (Del. Super. 2008). That decision relies on an earlier unpublished decision, which was affirmed by the Delaware Supreme Court. *Jackson v. Danberg*, 2008 W.L. 1850858 (Del. Super. 2008) aff'd 2008 W.L. 4717426 (Del. 2008.). In *Jackson v. Danberg*, 2008 W.L. 1850585 (Del. Super. 2008) the Superior Court of Delaware found that North Carolina and New Jersey have “apparently conceded” that their administrative procedure acts apply to the promulgation of a lethal injection protocol but that courts in Tennessee, Kentucky, Georgia, and Florida have rejected such claims. The Delaware Superior Court decision does not contain reporter citations for any of these decisions, and presumably, except for the Tennessee decision, these decisions, like the Delaware decision, itself are unpublished. On November 21, 2008, a California intermediate appellate court affirmed a trial court decision that the California lethal injection protocol fit within the rule making requirements of the California APA, in *Morales v. California Department of Corrections* 85 Cal. Rpter. 3d. 724 (Cal. App. 1st Dist. 2008). In

that case the California Department of Corrections lost in the trial court, arguing that the protocol did not have general applicability because not all inmates are sentenced to death, and that the APA did not apply because executions are only carried out in one prison. On appeal the California Department made these arguments and argued that the internal management exception to the APA was applicable. The California appellate court found the first two arguments to be without merit and declined to consider the third, because the Department had lost at trial and never presented the argument to the trial court. This is a very narrow decision that does not consider the issue in a sense applicable to this case.

Similarly, the earlier Maryland decision, *Evans v. State*, A.2d 25, 78-81 (Md. 2006) dealt with a narrow aspect of the question before this Court. Maryland argued that its protocol was not a statement of general applicability, and that the protocol fit within Maryland's internal management exclusion because it concerned only internal management of the Department of Corrections and did not directly affect the rights of the public. The Supreme Court of Maryland disagreed finding that the statement had general applicability and did not concern only internal management. But Maryland does not have exclusions similar to §536.010.(6)(c)RSMo for intra-agency communications or §536.010.(6)(k)RSMo for statements concerning only inmates, nor does it apparently have any exclusions like those in §217.040.2 and §217.040.3 RSMo 2000. *See* Maryland Statutes Annotated 10-101(g). These later Missouri exclusions for the Department of Corrections and its divisions are broader than the general internal management exclusion affecting all agencies discussed by the Supreme Court of Maryland. In short, the California case and the Maryland case are too narrow and too state law specific to provide useful guidance in this case.

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 January ____, 2009, 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

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

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

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

Christopher E. McGraugh
Leritz, Plunkett & Bruning, P.C.
555 Washington Ave., Ste. 600
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

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