

STATE OF SOUTH DAKOTA



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October 5, 2011

Deborah A. Johnston  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Associate Deputy Johnston,

I would like to take this opportunity to address your recent concerns about the South Dakota Department of Corrections' importation of sodium thiopental, and to accept your invitation to assist South Dakota in importing substances for purposes of state enforcement of our criminal laws.

The concern regarding South Dakota's importation of sodium thiopental is misplaced. I am enclosing the Form 236, U.S. Customs Certification and Importation Declaration dated March 25, 2011, that DEA received when federal authorities cleared the shipment through customs. To further relieve your concerns, the imported sodium thiopental has independently tested positive for meeting the United States Pharmacopeia's sodium thiopental standards for safety and efficacy. If the DEA would similarly wish to independently test a sample of the sodium thiopental, the State is certainly willing to accommodate; however, the State must retain legal custody of sufficient amounts of the substance to preserve chain of custody and to assure its safety and efficacy for future use.

As you are aware, the Controlled Substance Act was enacted "to deal in a comprehensive fashion with the growing menace of drug abuse." H.R.Rep.No.91-1444, 91<sup>st</sup> Cong., 2<sup>nd</sup> Sess. at 3 (1971)

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reprinted in 1970 U.S.C.A.N 4566, 4567. The lawful use of controlled substances for penal executions does not implicate the DEA's drug abuse prevention mission for penal executions. See *Delaware v. Deputy*, 644 A.2d 411, 419 (Del. 1994) (recognizing the lack of judicial authority construing either the CSA's or FDCA's purpose to include the prevention of lawful executions of inmates); U.S. Const., 10<sup>th</sup> Amendment.

Recent DEA actions with respect to other States' lethal injection substances provides justification to reiterate that the United States Supreme Court has made it abundantly clear that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." See *Gregg v. Georgia*, 428 U.S. 153, 184 (U.S. 1976). In this vein, the next likely execution to be scheduled in South Dakota is Donald Moeller, who raped, sodomized, and stabbed to death a 9 year-old little girl 21 years ago. Two separate juries of South Dakota citizens sentenced Moeller to death for his crimes. Twenty-one years for a victim's family to await justice is disturbing, particularly in light of Congress' clear direction to the Department of Justice in the 2006 AEDP amendments to establish the rules for state death penalty certification procedures, a responsibility that appears to have gone unfulfilled.

I am encouraged by your referenced desire to assist the South Dakota Department of Corrections to rectify any perceived deficiencies with respect to sodium thiopental or in the alternative, to assist South Dakota to obtain an import registration by working to "expeditiously" process such a request. To further assist, I am again including South Dakota's submissions to DEA for an import registration filed on August 18, 2011.

Finally, there is presently no urgent need to confiscate South Dakota's sodium thiopental justifying an *ex parte* proceeding of any nature because no executions are scheduled. South Dakota is not willing to forfeit state property without proper notice and opportunity to be heard before a court and interim appeal if necessary, unless and until we have satisfactory replacement inventory.

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In conclusion, I welcome your offer to work with us "to promptly come to an appropriate resolution." Please feel free to contact either myself or Assistant Attorney General Paul Swedlund in my office to discuss how we may address any further concerns that you may have.

Sincerely,



Marty J. Jackley  
ATTORNEY GENERAL

MJJ/lde  
Enc.

cc: South Dakota Governor Dennis Daugaard  
United States Attorney Brendan Johnson