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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RICHARD E. GLOSSIP, et al,
Plaintiff,

vs. Case No. CIV-14-665-F

KEVIN, J.GROSS, et al.,
Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

MAY 5, 2020

1:30 P.M.

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

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APPEARANCES

FOR THE PLAINTIFFS: Mr. Michael W. Lieberman, Ms. Patti Ghezzi, Federal Public Defender's Office - OKC, 215 Dean A. McGee Ave., Suite 109, Oklahoma City, OK 73102

Mr. Harry P. Cohen, Mr. Michael K. Robles, Mr. James K. Stronski, Crowell & Moring, LLP - New York, 590 Madison Ave., New York, NY 10022

Mr. Dale A. Baich, Ms. Jennifer Moreno, Federal Public Defender's Office - Phoenix, 850 W. Adams St., Suite 201, Phoenix, AZ 85007

FOR PLAINTIFF PHILLIP HANCOCK: Mr. Alexander L. Kursman, Federal Community Defender - Philadelphia, 601 Walnut St., Suite 545, West, Philadelphia, PA 19106

FOR THE DEFENDANTS: Mr. Bryan G. Cleveland, Mr. Andy N. Ferguson, Mr. Mithun Mansinghani, Mr. Zachary P. West, Attorney General's Office, 313 N.E. 21st Street, Oklahoma City, OK 73105

1 (PROCEEDINGS HAD MAY 5, 2020.)

2 THE COURT: Good afternoon. We're here in Civil
3 14-665, which is Glossip vs. Kevin Gross and others, for a
4 motion hearing.

5 As everyone is well aware, some counsel are appearing in
6 person and some counsel are appearing by telephone. I will
7 first ask for appearances by counsel who are here in person and
8 then I will ask for appearances by counsel who are present by
9 telephone.

10 MR. LIEBERMAN: Good afternoon, Your Honor. Michael
11 Lieberman from the Capital Habeas Unit on behalf of plaintiffs.

12 MR. CLEVELAND: Good afternoon, Your Honor. This is
13 Bryan Cleveland on behalf of defendants.

14 THE COURT: Okay.

15 MR. FERGUSON: Good afternoon. Andy Ferguson on
16 behalf of defendants.

17 THE COURT: Okay. Thank you.

18 And by telephone?

19 MR. COHEN: Your Honor, this is Harry Cohen from
20 Crowell & Moring on behalf of plaintiffs.

21 MR. ROBLES: Michael Robles, Crowell & Moring, on
22 behalf of plaintiffs.

23 MR. STRONSKI: Jim Stronski, Crowell & Moring, on
24 behalf of plaintiffs, Your Honor.

25 MR. BAICH: Dale Baich, Federal Public Defender,

1 District of Arizona, on behalf of plaintiffs.

2 MR. KURSMAN: Al Kursman, Federal Public Defender,
3 Eastern District of Pennsylvania, on behalf of Plaintiff
4 Phillip Hancock.

5 MS. GHEZZI: Your Honor, Patti Ghezzi from the
6 Western District Federal Public Defender's Office, on behalf of
7 Plaintiffs.

8 THE COURT: Okay.

9 MS. MORENO: Jennifer Moreno, Public Defender's
10 Office, District of Arizona, Plaintiff Richard Glossip.

11 THE COURT: Okay. Is that all counsel in the case?

12 MR. MANSINGHANI: No, Your Honor. This is Mithun
13 Mansinghani with the Attorney Generals's Office on behalf of
14 Defendant.

15 MR. WEST: And this is Zach West from the Attorney
16 General's Office on behalf of Defendants, as well.

17 THE COURT: Okay. Thank you.

18 We have, as you all are well aware, two motions set for
19 hearing.

20 The first is the motion -- plaintiffs' motion for
21 extension of time to file a second amended complaint. That is
22 the motion at Docket Entry Number 284.

23 The parties have in their filings made it clear, and I
24 concur, that as far as they are concerned the motion is moot,
25 and, consequently, the motion at Docket Entry Number 284 is

1 stricken as moot.

2 We will obviously get to the matter of the filing of a
3 second amended complaint this afternoon. And I assure all
4 concerned that I will be hearing what the parties have to say
5 about the appropriate timing for that.

6 That brings us to the plaintiffs' motion to enforce the
7 terms of the October 2015 order; that's at Docket Entry Number
8 303. That's where the motion is.

9 The defendants have responded by a response at Docket
10 Entry Number 315 and the plaintiffs have replied by reply at
11 Docket Entry Number 316.

12 And certainly those filings have been very helpful to me
13 in sorting through the matter and in determining what remains
14 at issue and -- to review it just a bit, and then I'm going to
15 invite counsel to address one aspect of it -- to review it just
16 a bit, obviously, as everyone is aware, we're focusing on
17 Paragraph 2 of that October 16 of 2015 order, which put the
18 case on ice for a time -- turned out to be a substantial
19 time -- but put the case on ice for a time.

20 Paragraph 2 recites, in substance, that it would be in the
21 interest of judicial economy for the State not to seek an
22 execution date until plaintiffs have been provided certain
23 specified items.

24 Paragraph 2-A related to notice that investigations of
25 matters relating to execution procedures have been conducted.

1 And Paragraph B relates to notification as to the results
2 of investigations.

3 Paragraph C, which we'll focus on more than anything else,
4 I suspect, relates to providing notice and copies of amendments
5 to the June 30, 2015 execution protocol.

6 And Paragraph D relates to notice -- providing notice that
7 the DOC will be able to comply with the express terms of the
8 protocol.

9 As to Subparagraphs A and B, I do note from the response
10 at Docket Entry Number 316, pages 10 and 11 and note 4, that
11 plaintiffs have accepted the defendants' representation that
12 the investigation of execution procedures is complete.

13 And I also note, and I'll certainly mention in the same
14 breath, that plaintiffs, quite understandably, reserve the
15 right to seek relief if it should appear that the defendants'
16 representation on that score is inaccurate.

17 And it's also plain that the defendants have produced to
18 the plaintiffs a copy of the relevant grand jury report.

19 Obviously -- and this is not news to anyone -- once all
20 the briefing on both sides was done, it's clear that anything
21 that was in the grand jury report that was provided that
22 suggested that there was more to do or that this was only an
23 interim report really related -- resulted from the fact that
24 the statewide grand jury proceedings were ongoing relating to a
25 whole gamut of matters having nothing to do with this case, so

1 the report -- apparently until the final report is rendered at
2 the end of the existence of the statewide grand jury,
3 everything is styled as being "interim."

4 So, anyway, I had no trouble working through that and I
5 do, as I say, note the plaintiffs' acceptance of the
6 defendants' representation that the investigation of the
7 execution procedures is complete, and certainly in terms of
8 anything that I have been made aware of, that appears to be the
9 case.

10 Now, that brings me to Subparagraph C and I do want to
11 hear from counsel on this. But as to Paragraph C, in
12 substance -- and forgive any too brief a summary -- but, in
13 substance, plaintiffs complain that the amended protocol does
14 not disclose the training program for the DOC's execution team
15 and that there is no text other than reserved in Chart C of
16 Attachment D of the amended protocol.

17 And I'm going to invite plaintiffs to address this first.
18 I'm a little concerned about addressing anything relating to
19 the merits of the protocol in the context of deciding whether
20 Paragraph C has been complied with.

21 And that, of course, implicates the plaintiffs' contention
22 that the amended protocol is materially incomplete, which --
23 and, again, I'm going to give plaintiffs an opportunity to
24 address this -- but the question of whether the amended
25 protocol is, in plaintiffs' words, "materially incomplete"

1 seems to me to be a different issue than the question of
2 whether the defendants have provided a copy of the relevant
3 document to the plaintiffs.

4 So I'll invite plaintiffs to address that issue. Again,
5 in case you want to push me a little different direction, my
6 concern is as to the advisability of litigating anything
7 relating to the merits of the protocol in the context of
8 deciding whether Paragraph C has been complied with, especially
9 when Paragraph C on its face would appear to require simply the
10 production of a document, regardless of whether plaintiffs are
11 satisfied with the content of that document.

12 So I'll be happy to hear from plaintiffs on that score and
13 then we'll take it one step at a time from there.

14 MR. COHEN: Your Honor, thank you. This is Harry
15 Cohen from Crowell & Moring. I'll speak on behalf of the
16 plaintiffs on those issues.

17 And I also want to thank you very much for accommodating
18 those of us who were unable to travel to Oklahoma. We would
19 obviously have preferred to be there in person, but do
20 appreciate being able to participate telephonically.

21 I think, Your Honor, your comments hit the nail on the
22 head from our perspective, and that is we are unable to address
23 the merits of the adequacy of the training protocol because
24 they haven't been provided.

25 This is a chicken-and-egg situation where we believe the

1 protocol is, indeed, materially incomplete, only because the
2 State admittedly has not completed the training protocols that
3 by the terms of the protocol itself should be part of the
4 protocol.

5 And, you know, as Your Honor astutely noted back in 2014
6 at a September 18th conference, the object here is to make sure
7 that the protocol minimizes the likelihood of either a serious
8 or constitutionally significant mishap.

9 And we believe -- the plaintiffs believe that, with the
10 exception of ensuring the use of appropriate drugs for
11 executions, there's nothing more central to achieving that
12 important goal than ensuring that the individuals who are given
13 the responsibility for this serious, somber and irreversible
14 process of executing a human being are properly trained.

15 As the Supreme Court made clear in *Baze*, thorough training
16 is, in fact, one of the important safeguards that ensures that
17 executions are carried out properly and without threatening an
18 inmate's protected constitutional rights.

19 And as I just mentioned, the requirement of a full and
20 complete proper training protocol is expressly stated in the --
21 in the document itself in OP-040301. And not just the
22 requirement of having the training protocols, but the reason
23 for them to be part of the protocol, and that is to enable
24 staff to function in a safe, effective and professional manner
25 before, during and after an execution.

1 And to put this into context, it's no secret of anybody in
2 this hearing that inadequate training was a significant
3 contributing factor to the problems that plagued the Lockett
4 and the Warner executions, as well as the Glossip aborted
5 execution. That's effectively been admitted by the State and
6 it was the conclusion reached by the grand jury that you just
7 mentioned, the Oklahoma Death Penalty Review Commission and the
8 Department of Public Safety. And I won't go through the
9 details; that's all in the briefs that we submitted. And you
10 don't have to take our word for it.

11 And I don't know if you happened to note this, but during
12 the State's press conference on February 13th, when they
13 announced the release of the protocol, the Interim Director of
14 Corrections, Scott Crow, emphasized the importance of training,
15 stating -- and this is the exact quote -- "The one thing that
16 we are really focused on is making sure that the individuals
17 that are involved in carrying it out have actually been
18 trained."

19 And he explained the training and checks and balances are
20 necessary to accountability. And, again, another quote:
21 "...to make sure there are no mistakes."

22 And Attorney General Hunter made the same comments about
23 the importance of training in order to ensure that what has
24 happened in the past won't happen again.

25 And that, of course, makes perfect sense. To make sure

1 what happened in the past doesn't happen again, you have to
2 make sure that the protocol contains adequate training process
3 (unintelligible). That's critical to the ability of the State
4 to implement any execution.

5 And it is that precise sentiment that goes to the heart
6 not only of the present motion but the entire action. And
7 that, frankly, is what makes the current situation and the
8 defendants' position in this litigation so troubling to the
9 plaintiffs.

10 On the one hand, they concede the critical importance of
11 training. That's -- that's undisputed. They concede that the
12 reason that the prior executions were botched was significantly
13 caused by inadequate training, yet at the same time they
14 pretend the execution protocol can somehow be complete in the
15 absence of the training details and they haven't treated it as
16 a priority.

17 And I don't need to remind you or anybody else in this
18 hearing that it's been nearly six years since the execution of
19 Mr. Lockett and it's been four years since the grand jury
20 issued its report, yet here we are in 2020 and not only have
21 the defendants still not developed the required training
22 protocol, but they can't even give us an estimate for when they
23 will be completed.

24 Now, we find that remarkable and we find it troubling, in
25 particular, given the fact that inadequate training was a

1 significant cause of the prior mistakes.

2 Establishing the training protocols should have been the
3 very first thing the defendants turned their attention to in
4 going back to the language of the protocol. It's why it's
5 written the way it is.

6 The training protocol is a required component of the
7 protocol and the reason that it's a required component of the
8 protocol, to ensure that executions are done in a safe and
9 humane manner.

10 But whatever the reasons for the State's failure to
11 complete the training protocol, they're, in effect, asking the
12 plaintiffs to suffer the consequences of their dilatory
13 conduct. And this, I think, goes to the heart of your
14 question.

15 You know, basically their position is, well, we've given
16 you this document that says, in essence, the training protocols
17 will be done when we get to it and we'll deal with it then. In
18 our opinion, that's not what the protocol requires and we think
19 that position is illogical, we think it's unfair, and it's also
20 profoundly inefficient.

21 And, again, it highlights the fact that the State cannot
22 possibly satisfy the other requirements that you alluded to of
23 your prior order, and that's Paragraph 2-D, which requires that
24 they provide notice that the Oklahoma Department of Corrections
25 will be able to comply with the express terms of the protocol.

1 And we think it's clear, as a matter of simple logic, that
2 the Department of Corrections have --

3 THE COURT: Excuse me. Excuse me. Let me interrupt
4 just for a moment.

5 I'm not going to entertain any argument relating to
6 Subparagraph D because the only developed argument plaintiffs
7 provided as to failure to comply with Subparagraph D is the
8 argument they advanced for the first time beginning at page 3
9 of their reply brief. It is simply too late to argue about
10 compliance with Subparagraph D.

11 Mr. Cohen, you may continue.

12 MR. COHEN: Okay. Thank you, Your Honor. I will
13 certainly go back and check that. And I apologize if that's
14 the case.

15 But I think the point I was getting to is that, again,
16 putting this into the context of the disastrous circumstances
17 of both prior executions, in essence, "take our word for it" is
18 something the State has not earned the right to ask for and the
19 stakes are just too high anyway to proceed based on an
20 incomplete record that can change at any time.

21 And that's also why the State's position is self-evidently
22 unworkable from a practical perspective. Without the yet-to-
23 be-established protocols and training, it's simply not possible
24 for the plaintiffs to understand and vet and challenge and
25 fully and fairly litigate the constitutionality of the entire

1 protocol.

2 What the defendants are essentially advocating is
3 piecemeal litigation: Litigate certain aspects of the protocol
4 now and then wait until later to litigate issues related to
5 training once the State finally gets around to completing the
6 required protocols and regimen. And we have no idea when
7 that's going to be. It could be a month from now, it could be
8 after the close of fact discovery, it could be in the midst of
9 expert discovery, it could be the week before the trial. We
10 don't know. We're flying blind here.

11 And as Your Honor may recall, this exact same thing
12 happened in connection with the preliminary injunction hearing:
13 Training materials were not produced by the State until very
14 shortly before the hearing and then more materials were
15 produced after the hearing. And that obviously was not timing
16 and that resulted in prejudice to the plaintiffs.

17 We just want to make sure the same thing doesn't happen
18 again. And we think that context is why it's clear that the
19 protocol, as delivered to us, expressly stating that the
20 training protocols are missing, yet required, is why Paragraph
21 2-C has not been satisfied, it's why the Protocol OP-040301 is,
22 in fact, materially incomplete.

23 And we think what the order calls for is confirmation that
24 the protocol is actually complete and that indisputably hasn't
25 happened. There's just no reason to litigate -- to proceed

1 before the protocol is complete. And that flies in the face of
2 judicial economy, it invites inefficiency and prejudice. And
3 that can't be what was contemplated by the process.

4 Executions were put on hold until such time as the State
5 was able to move forward with execution. Without knowing how
6 the people who are doing the executions have been adequately
7 trained, that can't possibly happen and that's why the order
8 hasn't been satisfied.

9 And in our view, what's -- remains missing goes to the
10 very heart of ensuring -- and, again, hearkening back to your
11 prophetic words back in 2014, six years ago -- the protocol
12 must minimize the likelihood of either a serious or
13 constitutionally significant mishap.

14 We already know that serious and constitutionally
15 significant mishaps have happened because of inadequate
16 training. And to suggest that training is something that it's
17 okay to get around to later and isn't required for the protocol
18 to be complete just doesn't fly.

19 We think the protocol is materially incomplete; that's why
20 we made our motion. And we ask that Your Honor grant our
21 motion to enforce the terms of the Court's October 16, 2015
22 order.

23 And then our deadline, as you telegraphed earlier in terms
24 of our deadline to file our amended complaint, would then be,
25 either by agreement or your order, triggered by a number of

1 days after the State completes the protocol by providing all of
2 the training regimen and protocols.

3 Thank you.

4 THE COURT: Thank you, Mr. Cohen.

5 I'll hear from the defendants.

6 And even though you're here in open court, for the benefit
7 of those who are present by telephone, please identify
8 yourself.

9 MR. CLEVELAND: Will do, Your Honor. This is Bryan
10 Cleveland on behalf of defendants.

11 This argument in the motion styled a "Motion to Enforce"
12 is really just seeking one of two things: Either front-loading
13 discovery into before the case is proceeding in actual
14 discovery or second-guessing a state on the merits of whether
15 this protocol actually includes everything it should, namely
16 whether it's materially complete.

17 Now, when this case was still going on in 2015, the
18 protocol at issue had the exact language in it that plaintiffs
19 are complaining about now, namely about training protocols will
20 be developed.

21 Now, they had the right to ask about it then, and we're
22 not saying that no further discovery should happen. They still
23 have the right to ask about it in discovery in this case.

24 The pause order was simply about putting the situation on
25 pause to restore it back to where it had been so that it could

1 continue in discovery, which is why it specified that we were
2 to provide notice and copy of the amendments to a particular
3 document.

4 Now, with the request from plaintiff here, what they're
5 talking about is something that's not changed, not amended at
6 all in this document, and, in fact, is not this document
7 itself.

8 Now, they get around this and they talk about other
9 training materials by mostly focusing on what the relevance
10 might be to the merits of the case.

11 Now, couple different angles on this. First, they want to
12 articulate some new failure-to-train claim that's not really a
13 request here for some sort of precomplaint discovery, and if
14 they articulate that based on what they have, they can continue
15 asking for these materials.

16 Now, beyond that, though, it's also that we're not really
17 today talking about whether these training materials are
18 relevant or whether the protocol ought to have them in here
19 because this isn't a discovery dispute or a merits dispute, the
20 question is just simply whether we provided everything we
21 promised and what we handed over was a complete copy of the
22 protocol that we specified, including everything that we had
23 amended or changed in it, and in our view, that completely
24 satisfies everything that we agreed to and the case should
25 proceed to discovery where we could get into them asking for

1 copies of these and getting into the merits of whether the
2 protocol should have included these things, as is their
3 position.

4 THE COURT: One thing that is quite likely that we'll
5 be addressing one way or another is whether the defendants,
6 recognizing the duty to supplement under 26(e)(1), intend to
7 supplement their previous document production relating to
8 training.

9 MR. CLEVELAND: And, I mean, I'll double-check on
10 them, Your Honor. I think all the training requests specified
11 certain dates which wouldn't include the newer ones, but if
12 there were ones that had asked for all of it, we'll go back and
13 review it and intend to meet our requirement under the rules.

14 THE COURT: Well, 26(e)(1), the duty to supplement,
15 doesn't really -- is not really tied to either -- any
16 particular dates or events. As a matter of fact, it leaves the
17 temporal aspect wide open. It says in a timely manner.

18 MR. CLEVELAND: Oh, yeah. I didn't -- I'm not trying
19 to dodge it, Your Honor, I was just trying to remember what the
20 request was and I think it had asked for the training documents
21 that were used in the Warner and Lockett executions, so I just
22 want to go back and review what it actually says.

23 THE COURT: Okay. Anything further?

24 MR. CLEVELAND: No.

25 THE COURT: Okay. Very well.

1 Anything further from the plaintiff?

2 MR. COHEN: Yeah, I don't want to -- I'm sorry, I
3 don't want to repeat myself. I think that this is not a
4 discovery issue, it has more to do with what the purpose and
5 intent of the order was.

6 And the purpose and intent of the order was to make sure
7 that when this litigation began again and when the State
8 purported to be in a position to commence executions, it
9 absolutely necessarily included the ability to properly train.
10 That's what Scott Crow said, that's what the Attorney General
11 said, that's what Your Honor said back in 2014.

12 And it just simply invites profound inefficiency and a
13 waste of judicial economy to suggest that we have to wait for
14 one of the most critical aspects of the protocol before this --
15 at some point later in the litigation. It just doesn't make
16 any sense and it can't possibly be what was intended by this
17 order.

18 THE COURT: Thank you.

19 As I have mentioned, but I think it is appropriate so that
20 we're -- we all understand the status of the matter.

21 As I have mentioned, the essential complaint lodged as to
22 Subparagraph C, as I understand it from the papers, is that the
23 plaintiffs object to the fact that the amended protocol does
24 not disclose the training program for the DOC's execution team
25 and that there is no text other than reserved in Chart C of

1 Attachment D to the amended protocol.

2 As we heard briefly this afternoon and as the defendants
3 made clear in their response, the reference in the amended
4 protocol to a training protocol to be developed is unchanged
5 from the 2015 protocol.

6 The defendants also point out that the reserved
7 designation for Chart C is the same as it was in the 2015
8 protocol as it existed for several months before October --
9 before the October 2015 order was entered.

10 Consequently, the defendants argue that Subparagraph C
11 requires only that they provide a copy of a document,
12 specifically any amendment to the June 2015 protocol, and that
13 they have satisfied that requirement by providing that
14 document.

15 I agree that the defendants have complied with
16 Subparagraph C. The only document required by that
17 subparagraph has been provided.

18 I conclude that it would be highly inadvisable to litigate
19 the substantive merits of the amended protocol, including the
20 existence of any constitutional requirement that the protocol
21 say more than it does say by way of determining whether
22 Subparagraph C has been complied with.

23 The question of whether the amended protocol is
24 "materially incomplete," as argued by plaintiffs is, in my
25 view, a different issue from the question of whether the

1 defendants have provided a copy of the relevant document to the
2 plaintiffs. They have done so.

3 As I previously mentioned, it is too late for the
4 plaintiffs to argue any failure to comply with Subparagraph D
5 because the only developed argument plaintiffs have provided as
6 to Subparagraph D is the argument they advanced for the first
7 time beginning at page 3 of their reply brief. So nothing will
8 be entertained as to Subparagraph D.

9 I do conclude that the defendants have not been shown to
10 have violated the terms of the October '15 order and the motion
11 to enforce that order is denied.

12 Now, that brings me to scheduling. And let me frame it
13 just a bit.

14 As you all know from reading Baze, from reading the
15 Glossip opinion from the Supreme Court, which took a whole lot
16 of pages, and for that matter, from reading Bucklew, from
17 reading the Hill decision that came along a few years before
18 all of that, on one hand, there is certainly deep division on
19 the Supreme Court about the death penalty, but the Court is
20 also discernibly not as deeply divided in lamenting the
21 inordinate amount of time that death penalty litigation takes.

22 So I'm going to take my cue from the Supreme Court and I'm
23 going to be mindful that it is necessary to bring this case to
24 a conclusion without unnecessary delay.

25 The plaintiffs have had the amended protocol for about two

1 and a half months. I'm going to hear from -- give both sides
2 an opportunity to address this, but let me give you the benefit
3 of some preliminary thinking. Because my next question is
4 going to be how much time the plaintiffs reasonably need in
5 order to file their second amended complaint. But first of
6 all, let me walk you through some of my reasoning as to where
7 we stand right now.

8 First of all, I'm aware of no law requiring the
9 particulars of the execution team's training program to be set
10 forth in the execution protocol. And plaintiffs have cited me
11 no such law, specifically that the Constitution requires the
12 training program to be embodied in the protocol.

13 Can plaintiffs cite me anything that says -- any case that
14 says the Constitution requires the training program to be set
15 forth in the protocol?

16 MR. COHEN: Your Honor, this is Harry Cohen again.

17 I don't know the answer to that question off the top of my
18 head, but I would note that in the Baze decision, the Court did
19 refer to the training protocol as among the important
20 safeguards to ensure that executions were conducted in
21 accordance with the prisoner's rights under the Eighth
22 Amendment, so I think on that basis alone, there's certainly a
23 requirement that adequate training must be conducted, whether
24 it has to actually have been in that specific document or
25 elsewhere. I just don't know the answer off the top of my

1 head.

2 I apologize not being able to answer your question.

3 THE COURT: Well, and, again, I'm just -- Counsel, I
4 want to assure you I'm giving you my first take on it, and if
5 there's more to be said, I will certainly be happy to entertain
6 that, but it would seem to me to be advisable to give the
7 Department of Corrections the flexibility, for that matter, if
8 necessary, to continuously upgrade and refine its training
9 program with no litigation-related time limit, again, if that's
10 what it takes for the Department to be well-satisfied with its
11 training program, without having to formally adopt and publish
12 yet another amended protocol.

13 So that's one leg of the matter in terms of where I begin,
14 start from in terms of scheduling.

15 Secondly, the defendants have represented and we've
16 briefly discussed this afternoon the fact that the defendants
17 have produced training documents to the plaintiffs.

18 Now, the defendants make reference to the duty to
19 supplement under 26(e)(1). The defendants are required under
20 that rule to supplement their previous document production "in
21 a timely manner if the party learns that in some material
22 respect the disclosure or response is incomplete or incorrect
23 and if the additional or corrective information has not
24 otherwise been made known to the other parties during the
25 discovery process or in writing."

1 I would also point out -- and I think from plaintiffs'
2 perspective, this, I think, perhaps is noteworthy and makes
3 plaintiffs' counsel's job in some ways perhaps a bit easier --
4 the second amended complaint does not have to be confined to
5 the four corners of the amended protocol.

6 The second amended complaint can certainly rely on any
7 facts which plaintiffs believe that they are in a position to
8 plead consistently with their professional responsibilities.

9 So where I am now from a scheduling standpoint is I am
10 inclined to set a date for supplementation of the defendants'
11 previous document production with respect to training or
12 perhaps a representation that no such documents exist, although
13 that seems unlikely, but I do not want to be understood to be
14 foreclosing ongoing development of the department's training
15 program.

16 So my next inquiry is of the defendants: Is there any
17 reason that I should not set a date for supplementation of the
18 defendants' previous document production, specifically relating
19 to training?

20 Please work from the lectern.

21 MR. CLEVELAND: Your Honor, my only hesitation is
22 that I don't have a date yet from the Department of Corrections
23 on when their training document will be complete. I understand
24 it's in progress right now, but I don't have the final document
25 in hand yet.

1 THE COURT: Well, okay.

2 MR. CLEVELAND: That's my only hesitation.

3 THE COURT: Bear with me just a minute.

4 The last time we were together, that was -- Lori, when was
5 our scheduling conference?

6 MR. COHEN: March 12th, Your Honor.

7 THE COURT: March 12th, okay.

8 On March 12th, the -- it had been 1,625 days since the
9 Attorney General of the State of Oklahoma said let's put this
10 on hold so that we can get our act together.

11 MR. CLEVELAND: Uh-huh.

12 THE COURT: I am mindful of every one of those 1,625
13 days. And so you're here telling me, well, we don't know when
14 we can supplement because we haven't developed this yet. I
15 need to hear a little bit more. And, again, I don't foreclose
16 ongoing refinement and upgrade of the DOC's training program,
17 but 1,625 days is a long time.

18 MR. CLEVELAND: Understood, Your Honor.

19 THE COURT: So I'm inclined -- and you can steer me
20 in a different direction if you want to, but I'm inclined to
21 give you a date for supplementation. That is not the --
22 perhaps by some standards -- not exactly the same thing as a
23 deadline for your development of your training materials
24 because I don't want to foreclose ongoing development of your
25 training program, nor am I aware of any constitutional

1 requirement that I do so.

2 But if there is something more to produce or in the works
3 to be produced, then I want it to be produced by way of
4 supplementation, as required by Rule 26(e).

5 So what more do you have for me on that score?

6 MR. CLEVELAND: I mean, if there is a date for
7 supplementation, we'll go contact the Department of Corrections
8 and let them know the date and do our best to get everything
9 supplemented then.

10 THE COURT: Okay. Very well.

11 I'm going to give the plaintiffs an opportunity to
12 respond, but I am inclined to set a date for supplementation of
13 the defendants' production of documents with respect to their
14 training program and then have a deadline for the filing of a
15 second amended complaint follow that.

16 Do the plaintiffs have desire to be heard as to that
17 tentative plan on my part?

18 MR. COHEN: No, Your Honor. This is Harry Cohen
19 again.

20 In fact, you read our mind. I was going to suggest that
21 exact approach and we think that makes a lot of sense.

22 THE COURT: Okay. Here we are on May 5th. I'm going
23 to -- the minutes of this proceeding will state that the
24 defendants have until June 5th to produce -- to complete
25 supplemental production of documents with respect to their

1 training program.

2 As of June 5th, the plaintiffs will have had the amended
3 protocol since sometime in February, I believe. It's been two
4 and a half months now. As of June 5th, presumably you'll get
5 whatever supplemental production there may be.

6 I'm inclined to set a date, for instance, two weeks down
7 the road from that, June 19th, for the filing of a second
8 amended complaint.

9 What say the plaintiffs about that?

10 MR. COHEN: Your Honor, I would ask that, rather than
11 two weeks, that we get 30 days from that date. I think that
12 there will be -- there's also a lot going on in terms of our
13 process of trying to work out a protocol with the AG and the
14 Department of Corrections to be able to communicate in a
15 meaningful way with our clients. For obvious reasons, it's not
16 possible now to actually go to the prison to meet with them in
17 person.

18 We have had some discussions with the AG about
19 alternatives which they're willing to consider, but negotiating
20 that process and then implementing the process by conducting
21 those communications, you know, some perhaps by phone,
22 hopefully in person, will take some time.

23 So our -- we would respectfully request 30 days from the
24 June 5th date for our amended complaint.

25 THE COURT: Well, one brief inquiry on that score,

1 Mr. Cohen: Am I to understand that you want to consult with
2 your clients about the training program?

3 MR. COHEN: No, not -- well, no, not specifically
4 necessarily about the training program, we want to communicate
5 with them generally about the case and specifically with
6 respect to issues that are plaintiff-specific, like the
7 obligation for us to plead alternatives and the basis for
8 as-applied challenges and that requires communications with the
9 client.

10 THE COURT: Okay. Well, to give me a little better
11 idea, then, of what's reasonable time-wise, aside from any
12 issues there may be about training, what's going to be the
13 general thrust of the second amended complaint, if anything,
14 other than training?

15 MR. COHEN: Yeah, well, it will certainly be much
16 broader than training. We have issues with the protocol that
17 has been announced by the State; we have issues with access to
18 counsel; we have issues with First Amendment rights; we have
19 issues with training; we have issues with qualifications of the
20 people who are participating in certain aspects of the
21 execution.

22 I mean, a lot of the issues are set forth in our prior
23 amended complaint and they will be updated as we've now
24 proceeded since back in 2015.

25 So there will be issues well beyond training, Your Honor.

1 THE COURT: Let me -- and this may be unfair, but
2 very often that has not stopped me -- let me inquire of the
3 defendants.

4 Do the defendants anticipate responding to a second
5 amended complaint by answer under Rule 12(a) or by a motion
6 under Rule 12(b)?

7 MR. CLEVELAND: Our intent is to answer it, Your
8 Honor.

9 THE COURT: Okay. Well, Mr. Cohen strikes a
10 responsive chord with me in terms of what's undoubtedly
11 difficulty in communicating with inmates under present
12 circumstances. I'm sure they are isolated. And for that
13 reason, Mr. Cleveland, I'm inclined to put the deadline for the
14 filing of a second amended complaint a month out from June 5th,
15 for the reason Mr. Cohen states.

16 Do the defendants have any issue with that?

17 MR. CLEVELAND: I mean, one comment, Your Honor, is
18 my understanding with the Department of Corrections has been
19 accommodating in-person meetings between counsel and these
20 plaintiffs since March, so I was a little surprised to hear
21 opposing counsel saying that they haven't been able to do that
22 because that wasn't the consistent with my understanding. I
23 thought they had had --

24 THE COURT: Well, facilitating communication in
25 March --

1 MR. CLEVELAND: Yeah.

2 THE COURT: -- may not be the same thing as
3 facilitating communication here we are in May. Things -- the
4 world has turned a few times since then.

5 MR. CLEVELAND: I meant, since all the coronavirus
6 stuff has been implemented, my understanding was Department of
7 Corrections has facilitated contact with clients during that
8 setting --

9 THE COURT: Okay. Thank you.

10 The second amended complaint will be due on July 6th.

11 And do the defendants -- and, of course, you're not bound
12 by this, but -- and the defendants have said they plan to
13 respond by answer, rather than by motion. Do the defendants --
14 whichever it may be, do the defendants anticipate needing more
15 than the 21 days normally allotted by Rule 12 to respond?

16 MR. CLEVELAND: No, Your Honor.

17 THE COURT: Okay. Very well. You're going to have
18 those 21 days allotted by Rule 12 after the second amended
19 complaint is filed.

20 Counsel, that resolves the only matters before the Court
21 this afternoon.

22 The two pending motions have been denied and we have set
23 what I believe to be a workable schedule to get the case
24 moving.

25 I'm just going to leave you with one thought, and that is,

1 now that we have gotten the case moving, it is my intent to
2 keep the case moving and we'll -- in chambers, we'll certainly
3 do our job in a timely way. I -- and I'm sure that most of the
4 lawyers on one side or the other of this case are new to each
5 other, but I urge you to cooperate in every way in what I
6 already sense is a civil and professional way to make my job
7 easier to keep the case moving and avoid any unnecessary
8 procedural glitches or arguments so that we can get the matter
9 down to the merits without unnecessary delay.

10 Anything further in this matter this afternoon from
11 plaintiff?

12 MR. COHEN: Yes, Your Honor. If I might, I just
13 wanted to -- and I appreciate the fact that the formal motion
14 to enforce the prior order has been denied.

15 I would like to address and perhaps by agreement get some
16 confirmation that the State will not seek execution dates until
17 after this case has been completed. I think that makes sense.
18 I think it's fair. I think it's reasonable. And I just wanted
19 to throw it out there as --

20 THE COURT: Well, I'm not even going to invite the
21 defendants to respond to that because I had the representation
22 last March from none other than the Attorney General of
23 Oklahoma that that would not happen. And if we should have any
24 indication that that will happen, I will be, to put it mildly,
25 immediately available, so it's not necessary to address that.

1 MR. COHEN: Thank you, Your Honor.

2 THE COURT: Anything further this afternoon from the
3 defendants?

4 MR. CLEVELAND: No, Your Honor.

5 THE COURT: Very well.

6 Court will be in recess.

7 (COURT ADJOURNED.)

8 CERTIFICATE OF OFFICIAL REPORTER

9 I, Tracy Thompson, Federal Official Realtime Court
10 Reporter, in and for the United States District Court for the
11 Western District of Oklahoma, do hereby certify that pursuant
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14 reported proceedings held in the above-entitled matter and that
15 the transcript page format is in conformance with the
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17 Dated this 21st day of May 2020.

18

19 ***/S/ Tracy Thompson***

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21 Tracy Thompson, RDR, CRR
22 Federal Official Court Reporter

23

24

25

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