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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

MITCHELL CARLTON SIMS,

Defendant.

Case Number A591707

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

TIEQUON AUNDRAY COX,

Defendant.

Case Number A758447

**NOTICE OF MOTION AND MOTION TO
PRECLUDE TAKING OF EVIDENCE AT
JULY 13, 2012 HEARING**

Date: July 13, 2012
Judge: Hon. Larry Fidler
Dep't: 106
Time: 10:00 a.m.

1 **To Stephen L. Cooley, District Attorney of Los Angeles, and Kamala Harris, Attorney**
2 **General of the State of California:**

3 Notice is hereby given that, in the above-captioned Department of the Los Angeles Superior
4 Court, Defendant Mitchell Sims and Defendant Tiequon Cox, by and through counsel, will and
5 hereby do move for an order precluding the taking of evidence at the July 13, 2012 hearing on the
6 Commitment and Judgment of Death, Notice of Motion and Motion for Order of Execution Using
7 Single Drug Method and Order to Show Cause ("Motion"), and, if necessary, setting a future date
8 for taking such evidence after the Court resolves the jurisdictional issues raised in the Defendants'
9 oppositions to the Motion and the parties have had adequate time to prepare. Good cause exists for
10 the relief requested by this motion for the reasons set forth in the Memorandum of Points and
11 Authorities and Declaration of Michael Laurence, filed herewith. This motion is based on
12 Defendants' due process rights and the right to be free from cruel and unusual punishment as
13 guaranteed by Amendments V, VI, VIII, and XIV of the United States Constitution, and by Article
14 1, section 7 of the California Constitution, the below Memorandum of Points and Authorities, and
15 the accompanying Declaration of Michael Laurence.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **INTRODUCTION**

18 On May 25, 2012, the Court conducted a scheduling hearing on the District Attorney's
19 Commitment and Judgment of Death, Notice of Motion and Motion for Order of Execution Using
20 Single Drug Method and Order to Show Cause ("Motion"), filed May 1, 2012. At that hearing, this
21 Court noted that the Defendants had not been afforded an opportunity to respond to the Motion and
22 that the Motion raised important jurisdictional questions, and then set a hearing on July 13, 2012,
23 "for argument." Reporter's Transcript of Proceedings, May 25, 2012, at 2 ("May 25 RT").
24 Following the scheduling of oral argument on the Motion, the District Attorney requested that this
25 Court issue an Order to Show Cause to the CDCR. In response to Defendants' objections that the
26 Motion suffered from several jurisdictional defects, the District Attorney conceded that "we will
27 need to deal with certain jurisdictional issues prior to" addressing the merits of the Motion. May 25
28 RT at 5. Subsequently, on July 10, 2012, the District Attorney filed an ex parte and unnoticed

1 Petition for Attendance of Witness Residing in Excess of 150 Miles from the Court (“Petition”), in
2 which the District Attorney again conceded that this Court must resolve the jurisdictional issues
3 prior to the taking of any evidence concerning the appropriateness of ordering the CDCR to conduct
4 an execution using a single drug. Petition 2 (“In the event this court finds it has jurisdiction in these
5 matters”). Despite this Court’s express statement concerning the scope of the July 13, 2012
6 hearing and the District Attorney’s own concessions, the District Attorney now seeks to sandbag
7 Defendants by transforming—without any reasonable notice—that hearing, scheduled for
8 “argument” on the jurisdictional issues, into an evidentiary hearing on the merits of a single-drug
9 protocol. This should not be permitted.

10 **I. THIS COURT MUST RESOLVE THE JURISDICTIONAL CHALLENGES TO THE**
11 **MOTION PRIOR TO COMMENCEMENT OF DISCOVERY AND THE**
PRESENTATION OF EVIDENCE ON THE MERITS OF THE MOTION.

12 As noted above, the parties and this Court recognize that the important jurisdictional
13 questions raised by the Motion remain undecided. Resolving these jurisdictional issues in the
14 District Attorney’s favor is a necessary prerequisite to consideration of the merits of the Motion.
15 *See Abelleira v. District Court of Appeal, Third District*, 17 Cal. 2d 280, 288 (1941) (“Lack of
16 jurisdiction in its most fundamental or strict sense means an *entire absence of power to hear or*
17 *determine the case*, an absence of authority over the subject matter or the parties”) (emphasis
18 added); *Harrington v. Superior Court*, 194 Cal. 185, 188 (1924) (“jurisdiction may be concisely
19 stated to be the right to adjudicate concerning the subject matter in a given case”) (citation and
20 internal quotation marks omitted). Because it is axiomatic that a court may not act in the absence
21 of—or in excess of—its jurisdiction, the question of jurisdiction “is a threshold matter that [the
22 Court] must address whenever it is raised.” *Holiday Matinee, Inc. v. Rambus, Inc.*, 118 Cal. App.
23 4th 1413, 1422 (2004). The Court cannot hear evidence on the merits of the case until it has
24 addressed the jurisdictional issues pending before it. 2 B Witkin, *California Procedure*, Jurisdiction
25 §341 (5th ed. 2008) (“A court cannot lift itself by its own bootstraps, i.e, it cannot acquire
26 jurisdiction by a declaration that it has jurisdiction”). As the parties and this Court understood, the
27 hearing on July 13, 2012, was designed for argument on the multitude of issues raised in
28 Defendants’ oppositions, beginning with the essential jurisdictional questions.

1 **II. THE DISTRICT ATTORNEY'S FAILURE TO PROVIDE ADEQUATE NOTICE OF**
2 **HIS INTENTION TO PRESENT EVIDENCE REQUIRES A CONTINUANCE.**

3 The District Attorney apparently has planned since at least early April 2012 to call Mr.
4 McAuliffe to offer testimony in this matter. But the District Attorney did not inform counsel for
5 Mr. Cox or Mr. Sims of this fact until July 11. *See* Declaration of Michele Hanisee in Support of
6 Petition ("Hanisee Decl.") ¶8 & Ex. 3. Adequate notice of the potential issues to be addressed at
7 proceedings is critical to protect the Defendants' rights to due process and an opportunity to be
8 heard, compulsory process, confrontation, and ultimately to the heightened reliability mandated by
9 the Eighth and Fourteenth Amendments. *See People v. Sarazzawski*, 27 Cal. 2d 7, 17 (1945)
10 (holding that "counsel for a defendant has a right to reasonable opportunity to prepare for a trial"
11 and ruling that the trial court's insistence, upon only three days' notice, that counsel proceed to
12 argue the merits of a motion ten days earlier than the date the hearing on the motion had been
13 previously been set deprived defendant's counsel of the opportunity to prepare), *overruled on other*
14 *grounds, People v. Braxton*, 34 Cal. 4th 798 (2004).¹ Because adequate notice has not been
15 provided, the District Attorney should not be permitted to offer the oral testimony of Mr. McAuliffe
16 at the July 13, 2012 hearing.

17 On July 3, 2012, the District Attorney issued a subpoena for Mr. McAuliffe's attendance at
18 the hearing. Hanisee Decl. ¶9 & Ex. 4. The District Attorney did not serve a copy on counsel for
19 Mr. Cox or Mr. Sims. Declaration of Michael Laurence in Support of Defendants' Motion
20 Defendants' Motion to Preclude Taking of Evidence at July 13, 2012 Hearing ("Laurence Decl.")

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¹ *See also Gardner v. Florida*, 430 U.S. 349, 361 (1979) ("Our belief that debate between
23 adversaries is often essential to the truth seeking function of trials requires us also to recognize the
24 importance of giving counsel an opportunity to comment on facts which may influence the
25 sentencing decision in capital cases."); *Boettcher v. Secretary of Health & Human Servs.*, 759 F.2d
26 719, 723 (9th Cir. 1985) (plaintiff was afforded due process because he was given sufficient notice
27 of the issues to be addressed at a disability hearing pursuant to the Social Security Act and was
28 permitted an opportunity for full hearing to present evidence and argument and cross-examine
 witnesses); *In re D.L.*, 206 Cal. App. 4th 1240, 142 Cal. Rptr. 3d 325, 329 (2012) (reversal required
 where minor was notified that he was eligible for deferred entry of judgment ("DEJ") but he was
 not provided notice that his suitability for DEJ would be considered at a particular hearing; he was
 denied due process at that hearing because the lack of notice provided him no meaningful
 opportunity to be heard).

1 ¶8. Shortly thereafter, the Attorney General's office informed the District Attorney's office that the
2 subpoena was objectionable on several grounds, including that "there is no jurisdiction in this
3 proceeding to seek Mr. McAuliffe's testimony," and explained that "based on these objections, Mr.
4 McAuliffe will not appear at the hearing on July 13, 2012, absent a court order compelling his
5 presence." Hanisee Decl. Ex. 7. The next day, the District Attorney filed a Petition with this Court.
6 The District Attorney did not serve a copy of this Petition on counsel for Mr. Cox or Mr. Sims.
7 Laurence Decl. ¶8. Without adequately alerting the Court to the jurisdictional objections raised by
8 the Attorney General, the District Attorney sought—an obtained—an order compelling Mr.
9 McAuliffe's attendance at the July 13, 2012 hearing. Yet again, the District Attorney did not serve
10 a copy of this order on counsel for Mr. Cox or Mr. Sims. *Id.* ¶8.² Indeed, the District Attorney
11 failed to provide counsel for Mr. Cox or Mr. Sims *any notice whatsoever* of his intent to present Mr.
12 McAuliffe's testimony at the July 13 hearing until the morning of July 11—barely 48 hours before
13 the hearing. In an e-mail received at 9:26 a.m., Deputy District Attorney Michele Hanisee notified
14 counsel for Mr. Cox and Mr. Sims that she intended to introduce testimony of John McAuliffe at the
15 hearing. Laurence Decl. ¶7 & Ex. A.

16 As a result of the District Attorney's failure to provide notice to Mr. Cox and Mr. Sims of
17 his intention to call Mr. McAuliffe to testify until the eve of the hearing, the parties lack sufficient
18 time to prepare for his cross-examination. To prepare for the cross-examination, Defendants'
19 counsel will be required to conduct significant discovery. The documents required to prepare for
20 and conduct the cross-examination of this witness include, for example: the witness's curriculum
21 vitae; the witness's personnel file; the witness's sworn testimony in other matters regarding the
22 topics upon which the District Attorney plans to examine him; and other documents relating to the
23 CDCR's decision to implement a three-drug rather than a single-drug protocol, including
24 departmental memoranda and records of communications between CDCR employees and/or
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27 ² Notably, between the filing of the Motion and the present time, the District Attorney has engaged
28 in a pattern of improper service, with some violations more serious than others, ranging from
misrepresentations on the proofs of service to a complete failure to serve documents and provide
timely notice of proceedings. *See* Laurence Decl. ¶¶3-6.

1 between CDCR employees and other individuals or agencies. Nor do Mr. Cox and Mr. Sims have
2 adequate time before the July 13 hearing to subpoena and secure the attendance of their own
3 witnesses if impeachment of the witness's testimony by other witnesses is required, let alone
4 present additional competing evidence.

5 As described in the Opposition to Motion for Order of Execution Using Single Drug Method
6 and Order to Show Cause, filed in *People v. Sims*, on June 28, 2012, an inquiry into the legality and
7 feasibility of the single-drug execution protocol the District Attorney seeks to devise will be
8 complex and time-consuming.³ It would violate due process and fundamental fairness to force
9 Defendants to conduct critical phases of this inquiry without adequate notice.

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26 ³ The Federal District Court in *Morales v. Cate*, Nos. 3-6-cv-219, 3-6-cv-926 (N.D. Cal), examining
27 only Eighth Amendment questions, has generated extensive testimony from CDCR personnel and
28 medical experts and conducted a review of "a mountain of documents, including hundreds of pages
of legal briefs, expert declarations, and deposition testimony." *Morales v. Tilton*, 465 F. Supp. 2d
972, 974 (N.D. Cal. 2006).

1 **CONCLUSION**

2 For the foregoing reasons, this Court should preclude the taking of evidence on the Motion,
3 until after the Court resolves the jurisdictional issues raised in the Defendants' oppositions thereto.
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5 Dated: July 12, 2012

6 Respectfully,

7 ARNOLD & PORTER LLP

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