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TIEQUON A. COX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, vs. MATTHEW CATE, Secretary of the California Department of Corrections and Rehabilitation, et al., Defendants.	) CASE NO. C 06 0219 RS) C 06-0926 RS)) NOTICE OF MOTION AND MOTION TO) INTERVENE BY TIEQUON A. COX;) NOTICE OF MOTION AND MOTION TO) STAY EXECUTION; MEMORANDUM OF) POINTS AND AUTHORITIES)))))

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PLEASE TAKE NOTICE that intervenor Tiequon A. Cox ("Cox") hereby moves the Court under Federal Rule of Civil Procedure 24, for an order granting him leave to intervene in the present matter. Intervenor Cox's claims share with the main action common questions of law or fact.

Mr. Cox further moves the Court for an order staying his execution and all preparations relating thereto. There is a strong likelihood the present matter will succeed on the merits, the relative harm to the parties weighs in favor of Mr. Cox, and Mr. Cox has not delayed unnecessarily in bringing this motion for a stay.

The motions are based on the Plaintiff Morales' Fourth Amended Complaint for Equitable and Injunctive Relief Pursuant to 42 U.S.C. §1983, this Notice, this Memorandum of Points and Authorities, along with all exhibits and papers filed in this action, and on any evidence received at the hearing.

DATED: May 16, 2012

By: _____/s/_____
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McBREEN &SENIOR

Richard P. Steinken
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TIEQUON COX

MEMORANDUM OF POINTS AND AUTHORITIES

Tiequon A. Cox ("Cox") seeks to intervene in the present action, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, because he "has a claim or defense that shares with the main action a common question of law or fact." *Id.* Mr. Cox further seeks a stay of preparations for an execution date.

I. Issues to be decided

1. Whether Tiequon A. Cox may intervene as a Plaintiff in this litigation pursuant to Rule 24(b) of the Federal Rules of Civil Procedure permissibly or as a matter of right.

2. Whether Mr. Cox should be granted a stay of execution on the same basis and to the same extent as in the case of Plaintiffs Morales, Brown, Fields, and Sims, including but not limited to preparations for an execution and the setting of an execution date for Mr. Cox.

II. Summary of Relevant Facts

Mr. Cox is a condemned inmate in the custody of the California Department of Corrections and Rehabilitation ("CDCR").

On December 15, 2006, this Court issued an order finding that the "implementation of California's lethal-injection protocol lacks both reliability and transparency." *Morales v. Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006). The Court further determined that California's actions and failures to act with respect to the implementation of its lethal-injection protocol have resulted in an intolerable risk of a Constitutional violation. *Id.* To remedy this situation, California would have to

undertake a "meaningful" review of its processes, which "*must be undertaken* with an openness to the idea of making significant improvements in the 'infrastructure' of executions." *Id.* at 983 (emphasis added).

In response to this clear, unambiguous, and respectful guidance, Governor Schwarzenegger announced via a press release on December 18, 2006, that he was "committed to doing whatever it takes . . . to ensure that the lethal injection process is constitutional . . . ." (Response by the Governor's Office to the Court's Memorandum of Intended Decision Dated December 15, 2006, Dkt. 291, Ex. A.) The Governor added that his "administration will take immediate action to resolve [the] court['s] concerns . . ." (*Id*).

The Governor and CDCR issued a revised Operational Procedure 770 ("Lethal Injection Protocol") on May 15, 2007. On November 29, 2007, in *Morales v. California Department of Corrections and Rehabilitation*, the Marin County Superior Court declared invalid and enjoined the enforcement of California's Lethal Injection Protocol. *Morales v. Cal. Dep't of Corr. & Rehab.*, No. CV 061436 (Super. Ct. Marin County, Cal. Nov. 29, 2007), *aff'd*, *Morales v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 724, 733 (Cal. Ct. App. 2008).

On July 30, 2010, California promulgated regulations of the Lethal Injection Protocol, effective August 29, 2010. Cal. Code Regs. tit. 15, § 3349. With the exception of a few additional deficiencies, the regulations are substantially identical to the version of OP 770 that was published by the Governor and CDCR on May 15, 2007.

The day after the regulations took effect, on August 30, 2010, the Riverside County Superior Court issued an execution warrant for Albert Brown. *People v. Brown*, No. CR18104 (Super. Ct. Riverside County, Cal. Aug. 30, 2010).

After litigation involving five different courts over a six-week period, the Ninth Circuit Court of Appeals directed this Court to reconsider its previous denial of Mr. Brown's motion to stay his execution (Dkt. 420), and the Court then issued a stay (Dkt. 424). "[O]f particular importance" to the Ninth Circuit was the fact that Mr. Brown's claims were "identical" to those then before this Court by Mr. Morales. (Dkt. 420, at 7-8).

On September 28, 2010, this Court found that the lethal injection procedure "as implemented in practice through and including the date of the evidentiary hearing in the 2006 Morales litigation created a 'demonstrated risk of severe pain.'" (Dkt. 424, at 4). This Court also found, based on its limited opportunity to compare OP 770 and the lethal injection regulations approved by the California OAL on July 30, 2010, that "there is significant dispute" that there is a meaningful difference between the two protocols other than the physical facility in which executions are to take place. (*Id*. at 5.) This Court further indicated that it "intends to undertake . . . review . . . as quickly as is reasonably possible" of the examination of the claims raised by Mr. Morales and Mr. Brown. (*Id*. at 8.)

Shortly thereafter, on November 16, 2010, in response to an inquiry by the Court, Defendants' counsel, the chief law enforcement officer of the State of California, assured the Court that no execution dates would be set in California until the litigation of this matter was concluded due to expressed concerns that future execution dates would be set

and that such would result in disorderly litigation such as occurred with Plaintiff Brown. (RT, Nov. 16, 2010, at 3-9, filed herewith as Exhibit A.)

Defendants chose to move to dismiss the complaint rather than respond to discovery requests. The Court stayed discovery propounded by Plaintiffs pending resolution of Defendants' motion. (Dkt. 453). Defendants' motion was denied on December 10, 2010. (Dkt. 461). Shortly thereafter, on December 22, 2010, the parties were ordered to respond to each other's discovery requests. (Dkt. 465).

On December 29, 2011, Plaintiffs Fields and Sims moved to intervene and for stays of executions. (Dkt. 467). Their motions were granted. (Dkt. 473).

Defendants did not respond to Plaintiffs' discovery requests, but rather moved for a protective order (Dkt. 478) and to strike portions of the Fourth Amended Complaint (Dkt. 484).

On March 4, 2011, and in response to a stipulated intervention sought by inmate David Raley (Dkt. 511), the Court expressed its concern that issuing stays for all condemned inmates who were otherwise eligible for execution was unnecessary, given the assurances by the Attorney General of the State of California (counsel for Defendants) that no further execution dates would be set while the Court's review was pending. (RT, March 4, 2011, at 60-62, filed as Exhibit B). The stipulation remains before the Court.

Defendants were ordered to respond to Plaintiffs' discovery requests forthwith. (Dkt. 513). By stipulation and order, that deadline was extended to June 14, 2011, with further disclosures to occur fourteen (14) days after selection of a lethal injection team, which was expected to occur by August 2011. (Dkt. 524). Discovery was to be

completed by January 15, 2012 and briefing submitted a month later. (*Id*. at 5.)

Defendants secured an execution team on or about October 17, 2011. (Dkt. 531). On November 2, 2011, the dates for discovery cut-off and for the parties to identify issues in dispute were extended to August 15, 2012 and September 15, 2012. (Dkt. 531).

On December 19, 2011, the Marin County Superior Court ordered that the execution protocol, Cal. Code Regs. tit. 15, §§ 3349 *et seq*., was improperly enacted under California's Administrative Procedures Act (APA) in response to plaintiff's motion for summary judgment. A judgment with an injunction was entered on February 21, 2012. A copy of that judgment and order is filed herewith as Exhibit C. Defendant CDCR filed a Notice of Appeal on April 26, 2012. (Exhibit D). In that Notice, defendant CDCR states that a review of a possible single drug execution protocol is to take place during the appeal.

On March 27, 2012, the United States District Court for the District of Columbia ordered that the Food and Drug Administration (FDA) had acted improperly in permitting the importation of Thiopental for the purposes of executions, and ordered the FDA to retrieve all imported Thiopental. Respondent CDCR imported its present stock of Thiopental (Exhibits E, F & G), and was ordered to return it to the FDA (Exhibit H).

On April 5, 2012, this Court ordered that due to uncertainties in how the Marin County Superior Court litigation will impact the present action, discovery is stayed to allow the parties to avoid engaging in discovery that may become moot or wasteful. The Court further ordered the parties to report to the Court regarding the status of the actions in the Marin County Superior Court and the District Court of the District of Columbia on July 16, 2012. (Dkt. 534).

On May 1, 2012, the District Attorney for the County of Los Angeles moved in the Superior Court of that county for a hearing to order defendant CDCR to develop a single-drug execution protocol without APA approval, and to set executions dates for Mr. Cox, and Plaintiff Sims. A hearing date has been set for May 25, 2012. A copy of those papers is filed herewith as Exhibit I.[1]

The District Attorney, who personally signed the motions, failed to inform the Los Angeles County Superior Court of this Court's stay of execution for Plaintiff Sims, the March 4, 2011 proceedings in this Court, the Marin County Superior Court's permanent injunction, or defendant CDCR's appeal of that case.

Although the District Attorney's papers are vague in this regard, particularly as to when that setting would occur (and it can occur on short notice), it appears from the language of the proposed order that the setting of an execution date is a purpose of the motion. Consequently, it is possible that the Los Angeles County Superior Court could set an execution date in the near future, setting off a chain of events similar to what occurred with Plaintiff Brown in September of 2010. Mr. Cox, therefore, is in an even more precarious position than that expressed by Plaintiffs Sims and Fields in their motion to intervene and for a stay of execution. (Dkt. 467, at 4).

Plaintiffs' counsel sought a stipulation to intervene and for a stay for Mr. Cox that was identical to that which defendants stipulated to and submitted to this Court for David

[1] The moving papers and proposed order are submitted as Exhibit I. The exhibits to that motion are too voluminous to file electronically, and therefore are being submitted directly to the Court. Plaintiffs' counsel has been led to believe that defendants' counsel (Mr. Quinn and Mr. Goldman of the Attorney General's office) were not served with the District Attorney's motion or exhibits, and plaintiffs' counsel will, therefore, serve the exhibits on defendants' counsel as well.

Raley (Dkt. 511). Without explanation, defendants' counsel now will not agree to the same terms for Mr. Cox. Plaintiffs' counsel requested defendants' position on this Motion, and have been advised only that defendants are continuing to review their options.

Upon receipt of the Los Angeles County District Attorney's motion, Mr. Cox submitted his inmate appeal for administrative remedy on May 7, 2012, but he has received no response from defendant CDCR to date.

III. Mr. Cox's Motion to Intervene Should Be Granted

A. Introduction

Plaintiffs Morales's and Brown's Fourth Amended Complaint for Equitable and Injunctive Relief ("Morales Complaint", Dkt. 428) is incorporated herein by reference. Mr. Cox joins in the Morales Complaint in all its particulars as it currently is set forth.

A federal court must permit intervention as of right by anyone who files a timely motion and who "claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Alternatively, "a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996); Fed. R. Civ. P. 24(b).

Mr. Cox satisfies the standards for intervention as of right as well as for permissive intervention.

B. Mr. Cox's Motion to Intervene Is Timely

Mr. Cox's motion to intervene is timely under standards for intervention as of right and permissive intervention. In determining whether a motion to intervene is timely, courts consider three factors: "the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997); Fed. R. Civ. Proc. 24(b)(3) ("In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."). All three factors weigh in favor of granting Mr. Cox's motion to intervene.

This matter is still in its initial stages of review, mandated by numerous court orders. A status report on pending matters is due on July 16, 2012. The litigation is not "beginning to wind itself down," such that any additional delay caused by Mr. Cox's intervention is "relevant to the timeliness calculus." *League of United Latin Am. Citizens*, 131 F.3d at 1304. Regardless, there will be no delay as a result of Mr. Cox's intervention.

Federal Rule of Civil Procedure 24(b)(3) sets forth the standard by which a court determines whether a motion for permissive intervention is timely: "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." "The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene. In

fact, this may well be the only significant consideration when the proposed intervenor seeks intervention of right." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (citations omitted). Mr. Cox is not aware of any prejudice to existing parties, and counsel for plaintiffs have no objection to the intervention.[2] Mr. Cox does not seek to "relitigate matters which have previously been litigated," raise any claims other than those raised by existing plaintiffs, or assert any claims against them. *United States v. Oregon*, 745 F.2d 550, 553 (9th Cir. 1984) (holding that the state of Idaho could intervene in litigation concerning fishing on the Columbia River when "Idaho has disclaimed any intent to relitigate matters which have previously been litigated, to raise any claims unrelated to the Tribes' treaty fishing rights, or to assert any claims against the other states."). *See, e.g., Martinez v. City of Oxnard*, 229 F.R.D. at 163 (holding that while discovery is still being conducted, defendants would not be prejudiced by intervention). Defendants are aware that Mr. Cox has a significant interest in the outcome of this litigation. *See, e.g., Winbush v. Iowa by Glenwood State Hosp.*, 66 F.3d 1471 (8th Cir. 1995) (intervention of 21 individuals in Title VII action was timely even though it occurred 10 years after the filing of the complaint and following the bench trial because defendants were aware of the intervenors who were members of the class action).

Mr. Cox has not delayed in bringing his claims. California's execution protocol went into effect on August 29, 2010, but was declared invalid on February 21, 2012. In the interim, Mr. Cox was exhausting his habeas corpus appeals. Moreover, on March 4, 2011, this Court questioned whether stay applications are even necessary as a result of

[2] Counsel for Mr. Cox in his state and federal habeas proceedings are John R Grele, counsel for Morales and Brown here, and Jeannie Sternberg of the Habeas Corpus Resource Center, which also represents Sims and Fields in this proceeding.

the State's assurances that execution dates would not be sought while this Court's review of this case is pending. Mr. Cox brings this motion to intervene promptly after being informed that a District Attorney instituted a proceeding that seeks his execution date. He seeks intervention prior to the setting of any execution date in order to avoid putting this Court in the position in which it was placed in September 2010. (*See* Dkt. 424, at 7 ("it is clear that the urgency of the present situation was created not by Brown but by Defendants' decision to seek an execution date only thirty days after the new regulations became final").

Intervention is critical to protect Mr. Cox from being subjected to an execution pursuant to a protocol that carries a demonstrated risk of severe pain. If Mr. Cox is not permitted to intervene in this action, an execution date will be set for him, and it will be carried out pursuant to the current, flawed lethal injection protocol, using the sodium thiopental that the CDCR has obtained from a foreign source that was improperly imported and must be returned. Worse, it will be carried out by some unknown procedure cobbled together at the last minute by the Los Angeles County Superior Court. Federal Rule of Civil Procedure 24(b) permits this Court to grant a motion for intervention to avoid such an unconstitutional state action. *Hill v. Western Elec. Co.*, 672 F.2d 381 (4th Cir. 1982) (holding that the critical issue with respect to the timeliness of intervention is whether the proposed intervenor moved to intervene as soon as it became clear that the interests of the unnamed class members would no longer be protected by the named class representatives).

Furthermore, intervention by Mr. Cox will cause no delay to the proceedings. As explained in further detail below, the interests of Mr. Cox are identical to those of Mr.

Morales, Mr. Brown, Mr. Sims and Mr. Fields in this action. Mr. Cox joins the Fourth Amended Complaint in all its particulars and counsel for Mr. Cox are identical to present counsel for the current Plaintiffs.

C. This Court Must Grant Intervention To Mr. Cox as of Right

As set forth above, a federal court must permit intervention as of right by anyone who files a timely motion and "claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a).

1. Mr. Cox's Interests In This Matter Are Identical To Those of Mr. Morales, Mr. Brown, Mr. Sims and Mr. Fields

Mr. Cox joins in the Fourth Amended Complaint filed on behalf of Mr. Morales and Mr. Brown on October 8, 2010. All questions of law and fact related to Mr. Cox's claims are identical to those in the Fourth Amended Complaint.

2. Without Intervention, Mr. Cox is Practically Impaired and Impeded From Protecting His Fifth, Eighth, And Fourteenth Amendment Interests in Avoiding Execution by an Unconstitutional and Arbitrary Procedure

Intervention as of right must be granted when the disposition of the action would put the movant at a practical disadvantage in protecting its interest. *United States v. Oregon*, 839 F.2d 635 (9th Cir. 1988) (intervention as of right proper when factual determinations in lawsuit challenging conditions of state mental health facility would have persuasive stare decisis effect in subsequent litigation by residents of facility). Intervention must also be granted when the existing parties do not adequately represent the movants' interests. *Associated Gen. Contractors of Cal. v. Secretary of Commerce*,

459 F. Supp. 766, 771 (C.D. Cal. 1978), *vacated on other grounds*, 448 U.S. 908 (1980); Fed. R. Civ. P. 24(a)(2). Though Mr. Cox shares identical interests in the legal claims propounded by Plaintiffs Morales, Brown, Fields and Sims, his specific interest in avoiding execution by an unconstitutional protocol is not adequately represented by the existing plaintiffs because, without him being a party to this lawsuit, the State of California is seeking an execution date for him while this lawsuit is pending. The likelihood of such action by the State of California is demonstrated by similar actions undertaken by the State in the past. Despite the fact that this lawsuit was pending in August and September 2010, the State of California sought to set an execution date for Mr. Fields, and did set an execution date and nearly accomplished the execution of Mr. Brown, condemned prisoners who at the time were not parties to this lawsuit. Only by intervening in this lawsuit does Mr. Cox obtain some measure of security against execution by an unconstitutional protocol pending the resolution of this matter. *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (intervention properly granted to private parties in state's action seeking judicial clearance of a legislative redistricting plan under the Voting Rights Act when private parties identified interests not adequately represented by existing parties).

D. <u>The Standards for Permissive Intervention Are Met</u>

"[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Resource Council v. Glickman*, 82 F.3d at 839; *see also* Fed. R. Civ. P. 24(b).

1. This Court Has Independent Grounds for Jurisdiction

Mr. Cox's claims arise under the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has independent grounds for jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights).

2. The Claims of Mr. Cox Have Common Questions of Law or Fact with Those of the Main Action

Mr. Cox joins the plaintiffs in the Morales Complaint. The claims of plaintiffs and Mr. Cox share the following common questions of law and fact:

• Whether the lethal injection regulations violate the Eighth and Fourteenth Amendments to the United States Constitution by creating a substantial risk that condemned inmates will experience severe pain and suffering during executions. (Fourth Amended Complaint, ¶¶ 22-23.)

• Whether the procedure for the remote administration of chemical substances, the absence of standardized procedures for administration of the chemicals, the lack of adequate training, screening and qualifications of the personnel on the execution team, and the combination and amounts of the chemicals used in executions create a grave, substantial and demonstrated risk that condemned prisoners will be conscious during the execution process and, as a result, experience an excruciatingly painful and protracted death. (*Id.* at ¶¶ 24-25, 27-31, 33-40.)

• Whether the lethal injection regulations fail to require the minimum expertise of the execution team personnel necessary to ensure their proper performance. (*Id*. at ¶¶ 26, 32.)

• Whether defendants have deliberately chosen to conduct executions in a manner that is not constitutionally compliant by selecting chemicals that cause excruciating pain and therefore carry a substantial risk of serious harm to a condemned inmate and by failing to take precautions to ensure that the personnel involved in the execution process possess the training, experience, and expertise necessary to administer the chemicals properly. (*Id*. at ¶ 120.)

• Whether defendants have deliberately chosen to conduct executions by a combination of chemicals and a procedure that carries a substantial risk of serious harm when a feasible, readily implemented alternative method of execution is available. (*Id*. at ¶¶ 5, 105(f), 106-109.)

• Whether the Lethal Injection Protocol provides "specific guidelines for the administration of the three separate chemicals." (*Id*. at ¶ 113.)

• Whether the Protocol contains adequate guidelines to assure that the inmate is "deeply anesthetized prior to injecting the second two drugs, or establish procedures for determining when an additional dose of sodium pentothal should be administered." (*Id*. at ¶ 116.)

• Whether Mr. Cox, like Messrs. Morales, Brown, Fields and Sims, is entitled to injunctive relief.

IV. Motion to Stay Execution

This Court should stay Mr. Cox's execution and all preparations relating thereto by extending to him the exact stay already in place for plaintiffs Morales, Brown, Sims, and Fields, which secures the orderly review in this Court that was ordered by the Ninth Circuit Court of Appeals. The Court has not ruled on Mr. Raley's stipulated request to intervene and for a stay after it received assurances from defendants' counsel here that executions would not resume until this litigation is completed. Those assurances now appear to be insufficient *as to Mr. Cox* to bind other state actors who refuse to respect the agreements made by, and representations made to this Court by, the California Attorney General's office.

A plaintiff seeking a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, __ U.S. __, 129 S. Ct. 365, 375 (2008). Under *Barefoot v. Estelle*, 463 U. S. 880, 885 (1983), Mr. Cox is entitled to a stay of execution if he demonstrates "substantial grounds upon which relief might be granted." This standard is satisfied when the movant demonstrates that his "argument warrants further review," which cannot be fully and fairly accomplished in the time remaining before the execution. *See Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997). Mr. Cox meets these standards no less than Mr. Brown did.

The course of the litigation here demonstrates that review has been delayed by Defendant's difficulties in securing an execution team, litigation brought by Defendants to prohibit discovery, state court actions and two state court injunctions. Without valid

lethal injection regulations in place, and in the absence of the completion of discovery, the substantive review mandated by the Ninth Circuit remand and this Court's order in response cannot yet take place. (Dkt. 534.)

On February 22, 2006, a stay of execution in favor of plaintiff Morales went into effect to allow the Court to "hold an evidentiary hearing on the merits of Plaintiff's claims . . ." *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1048 (N.D. Cal. 2006); *see also Morales v. Tilton*, 465 F. Supp. 2d 972, 977 (N.D. Cal. 2006). After the Court issued its Memorandum of Intended Decision on December 15, 2006, further hearings were stayed in November 2007 pending the outcome of the state regulatory litigation by agreement of the parties. (Dkt. 370.) That state administrative regulatory litigation was completed in August of 2010, and, pursuant to the remand order of the Ninth Circuit issued on September 28, 2010, this Court ordered its review shortly thereafter.

The administrative review was delayed, however, by litigation instituted by Defendants to dismiss the complaint and for a protective order, and a year-long wait for the appointment of an execution team. On October 15, 2010, Plaintiffs served on Defendants interrogatories and requests for documents relating to Defendants' efforts to adopt and implement the new lethal injection regulations which became effective on August 28, 2010. Defendants supposedly employed the new regulations even earlier than the published effective date, and were employing them through September 29, 2010 during Defendants' unsuccessful attempt to execute plaintiff Albert Brown on September 30, 2010. Defendants responded to the discovery requests with a motion for a protective order (Dkt. 436), which induced Plaintiffs to file a motion to compel answers, documents, and information (Dkt. 452). On March 4, 2011, the Court held a hearing on these

motions, as well as on subsequent letter-briefing (Docs. 497, 498, 500) requested by the Court regarding the impact of the then-recent decision of the Court of Appeals for the Ninth Circuit in *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

On March 11, 2011, the Court ordered "Defendants to produce the requested documents and information and to answer the interrogatories." (Dkt. 513). The Court added that it "expects the parties to comply with their discovery obligations as set forth herein forthwith . . ." (*Id*. at 6.) Defendants have yet to comply with this order. While defendants have served supplemental responses to the interrogatories and document requests, two privilege logs with a supporting declaration, and certain documents, they have withheld hundreds of pages of responsive documents and improperly asserted objections with many of their responses. Many of the documents that were produced were heavily redacted, and numerous emails were produced without the referenced attachments. As to the objections asserted – e.g., deliberative process privilege and "*Dickens*" – the Court already specifically has ruled that these objections are without merit, evidenced by its March 11 directive to answer the interrogatories and produce the requested documents. Defendants' subsequent document productions, on July 22, 2011, and August 5, 2011, suffered from the same deficiencies. In those submissions, Defendants also withheld in their entirety numerous documents that this Court ordered to be produced. Defendants' position was that the Court did not order compliance on March 11, 2011, only that they respond and that their response could contain further objections and privilege assertions.

On September 13, 2011, Plaintiffs requested that Defendants "comply with [their] discovery obligations as set forth [in the Court's March 11, 2011 Order] forthwith" (Dkt.

513, at 6) by withdrawing their objections, providing complete answers to interrogatories, and producing the requested documents and information, including all documents identified in Defendants' privilege logs served on July 15 and August 5, 2011. In the parties' November 2, 2011 Joint Proposed Schedule and included in the Court's November 3, 2011 Order (Dkt. 531), Plaintiffs agreed to wait for Defendants' requested meeting in order to try to get an explanation of Defendants' position and/or resolve this matter. Defendants thereafter asked to postpone the meeting to the week of November 7 and Plaintiffs again agreed to the request.

With this issue unresolved, the Marin County Superior Court granted plaintiff's motion for summary judgment on December 19, 2011, declaring the lethal injection regulations invalid. Judgment became final, with an injunction, on February 21, 2012. CDCR has now appealed from this judgment. The Notice of Appeal notes that CDCR will commence a review of the viability of changing its procedure to a single drug protocol. The prospect of a different procedure in response to the state court's order may render some discovery litigation in this case moot. (*See* Order, April 5, 2012, at 2, Dkt. 534).

A. Mr. Cox is Likely to Succeed on the Merits

Mr. Cox's request for an injunction is likely to succeed on the merits. In its Memorandum of Intended Decision, this Court already has found that the demonstrable unreliability of the State's execution protocol, and defendants' failure to correct it, violate the Eighth Amendment. It made that order explicit in response to the Brown execution effort, after remand from the Ninth Circuit. (Dkt. 424).

Mr. Cox sits now in a similar position as Mr. Brown did upon remand from the Ninth Circuit. Mr. Brown was facing execution under a procedure that was out of compliance with state law. That procedure has now been declared invalid and enjoined, and the CDCR has been ordered to issue one that does comply with the Administrative Procedure Act. Nonetheless, the Los Angeles County District Attorney has requested that a criminal court order the CDCR to bypass this process and execute Mr. Cox.

There is proof that defendant CDCR substantially deviated from their procedure in order to accelerate execution of Mr. Brown. (Dkt. 423).[3] If an execution date is set for Mr. Cox in the near future, it is likely that defendants will deviate from their ad hoc procedure again in order to execute Mr. Cox.[4] The regulations suffer the deficiencies noted above and in the Complaint.

B. Mr. Cox Will Suffer Irreparable Harm

Mr. Cox faces execution pursuant to the same – or worse – Lethal Injection Protocol which already has required constitutional review by this Court sufficient to grant stays of execution for Plaintiffs Morales, Brown, Sims, and Fields. Nothing has changed in this regard, and without a stay, Mr. Cox faces the real possibility of cruel and unusual capital punishment. In fact, Mr. Cox faces a possibly more inhumane execution as the District Attorney has asked the state criminal court to cobble together a procedure of

[3] As noted during the Brown litigation, the few documents produced indicated numerous deficiencies, including the complete lack of training in the mixing of the chemicals. Defendants have never produced numerous training documents required to be maintained by the regulations such as chain of custody and sign in sheets, and have not produced any additional training materials since January of 2011.

[4] Defendants have no thiopental that they may use, and apparently have run out of pancuronium bromide, according to the Los Angeles County District Attorney's motion.

unknown viability that will not have benefited from the thorough and necessary review this Court ordered in 2006, that the state courts have required be undertaken in accordance with the state APA, and that the Governor has now requested be done anew in the Notice of Appeal.

C. The Equities are in Mr. Cox's Favor

As discussed *supra*, Mr. Cox brings this request for a stay promptly after being informed of efforts to execute him and the instigation of that process. There has been no delay. The California Attorney General has expressed twice in this Court that executions will not be set until this Court's orderly review is completed. Furthermore, state courts have ruled twice that this review requires compliance with the state APA. There is no equity that favors the type of "fire drill" approach to litigation that we saw in February 2006 and again in September 2010.

D. The Public's Interest in Orderly Review and Litigation

In 2006, this Court stated that a thorough review of the process of executions was necessary, and strongly suggested that the Governor take the lead in conducting this review. In 2010, the Ninth Circuit and this Court ruled that the review process also requires independent and orderly judicial review. Simply because a single District Attorney wishes to prevent that review does not make it in the public's interest that this Court permit him to circumvent the process that other state actors and two courts have accepted as what must be conducted to comport with state law and the Constitution.

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V. Conclusion

For the foregoing reasons, Tiequon Cox respectfully requests that this Court grant his motion to intervene and motion to stay his execution and all preparations relating thereto.

DATED: May 16, 2012

By: /s/

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