UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES,	)	C-06-0219-JF
	)	
Plaintiff,	)	
	)	San Jose, CA
vs.	)	September 28, 2006
	)	
JAMES TILTON, et al.,	)	Volume 4 of 5
	)	PP. 773-1067
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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excused unless there is some objection.

MR. GRELE: No, Your Honor.

THE COURT: Okay. Thank you.

You are released from your subpoena.

And, Mr. Gillette, you may call your next witness.

MR. GILLETTE: Thank you, Your Honor. Defendants call [redacted].

THE CLERK: Raise your right hand, please.

[redacted] M.D.,

being called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK. Thank you. Be seated.

Please state your name and spell it.

THE WITNESS: [redacted].

DIRECT EXAMINATION

BY MR. GILLETTE:

Q Good afternoon, Doctor. What is your profession, please?

A I'm a physician and anesthesiologist by specialty.

Q And where are you currently employed?

place in the Governor's Office in February perhaps.

Q Thank you. Now, with respect to the issue of your -- you say you've had occasion to work with thiopental; is that correct?

A That is correct.

Q And it is a drug whose uses and properties you are familiar with?

A I am. I used it on a daily basis for almost 20 years.

Q And do you have experience as an anesthesiologist working with pancuronium bromide?

A I do.

Q Are you also familiar with its uses and properties?

A I last used it the day before yesterday.

Q And as a clinical anesthesiologist do you have experience working with potassium chloride?

A That as well, yes.

Q And you're familiar with its uses and properties?

A I last used it the day before yesterday.

Q Now, Doctor, did you agree to attend the execution that was scheduled for Michael Morales

on February the 24th, 2006 in your capacity as an anesthesiologist?

A I did.

Q And what was your understanding of the role that you would play in the Morales execution, if it went forward?

A Well, pursuant to an order that I believe came from this Court I agreed to monitor Mr. Morales's state of unconsciousness from the time he was placed in the chamber and began receiving anesthetic drugs until the time that pancuronium bromide was started.

Q Was it your understanding you would actually be in the chamber at the time that the execution was taking place?

A There were two of us, two anesthesiologists, and by mutual agreement I agreed to be the anesthesiologist in the chamber unless I were otherwise incapacitated, in which case my alternate was to step in.

Q So based on the understanding that you had of the role you would play, you did agree that -- you were prepared to participate in the execution under those -- or to be present at the execution under those circumstances?

A Be present is more the way I look at it, yes.
Q Did you have any ethical considerations or concerns with respect to that level of involvement in the execution?
A I did and still do. I initially declined the invitation to participate. It was -- it was -- the request came in some haste with the indication that there was a short number of days before the scheduled execution. And I suggested that it was not something I would probably do, but stated that I would talk with my wife and we'd talk it over.

On further discussion with my family I did agree to go forward on the basis of the documents that I received from this Court.
Q And you're referring to the order you'd seen that described the role as you understood it for purposes of your presence at the execution?
A Yes.
Q After you agreed to attend the execution, did you attend any practice sessions prior to that with members of the execution team at San Quentin Prison?
A I did. Both anesthesiologists spent the

entire day with -- or at least many hours with the warden and then subsequently with the team actually going through a simulated protocol from beginning to end followed by discussion and then doing it again from start to finish.

So we went through two complete run-throughs the afternoon -- or by the end of the afternoon that day that I attended at San Quentin.

Q And was this on the Saturday before the execution which was scheduled to start at 12:01 a.m. on a Tuesday morning?

A I'm afraid I don't recall the date offhand, but could retrieve that if I -- that seems like it.

Q Certainly it was at least two or three days prior to the scheduled execution?

A Yes.

Q And you've indicated that you had an opportunity to observe the execution team practice the procedure; is that correct?

A That was the first thing that both of us watched, yes.

Q And that gave you -- and you had an opportunity to observe the execution chamber and

the facilities that surround it; is that correct?
A Yes.
Q Did you have any discussion with any of the team members about the techniques that they were using in the execution procedure?
A Yes. In one specific area in particular. As I was informed about the court order, we had an affirmative duty to practice much as we did in the hospital, to try to replicate the hospital setting in an attempt to ensure that the planned execution was a humane process.

I had a verbal description of the protocol, although I had not read the protocol, prior to that practice session or indeed prior to the planned night of execution. I had not seen the protocol in print in either of its forms.

But I was reasonably comfortable on the basis of the description that I had that if things proceeded as they do in hospital with me observing this directly that there would be virtually no chance for -- for pain and suffering given the drugs that were described.

But as I watched the first practice run and the description of that by the team I felt compelled even given my ethical discomfiture to

comment on how the IV flow issues were being handled. As it was described to me, the team would use slow, gentle pressure to exhaust the syringe in question and place the drug in circulation.

That's very difficult to do with a 50 cc syringe. Typically if I need palpable feedback when I'm injecting, I'll use a 10 cc syringe or less. And you get virtually no tactile feedback from a large barrel syringe. So you need another mechanism to reassure yourself that you're not blowing the IV just through hydraulic action, and that was a concern of mine as I -- as I heard the protocol described.

Certainly the antecubital IVs that are used are hardy vessels. I mean, we pump great amounts of fluid into patients in shock through that site with regularity and yet, if we're talking about theoretical possibilities and being placed in the situation in the chamber with the inmate, I wanted to rule out any possibility that there would be misadventure.

So I asked the team to consider using the passive flow rate of the IV as a -- as a rate limiting step. You open the IV up, let it run

wide, and then you manipulate the stopcock so that, much as I do in hospital when I'm using a patient with an extremely small, say, pediatric IV so that I'm certain that I'm not exceeding the passive flow rate of that intravenous.

And that's done by merely rotating the stopcock into a position that allows flow from two ports instead of just one.

That was a change. I felt troubled by that because I did not see myself in the role of redoing their protocol or adjusting or suggesting refinements, but given that the court order asked me to practice much as I would in hospital, I felt compelled to point that out because I didn't want to be placed in a situation where the technician was blowing the veins before my eyes and we would be in a situation where I could not guarantee what I had been asked to guarantee.

Q Now, you mentioned the passive flow rate. Could you describe a little more what that means in terms of the injection -- injecting a syringe into the -- into the tubing in a stopcock.

A Well, for most patients an antecubital IV is a big vein and, if you place an 18, 16, even many of the modern 20 gauge IVs into that vessel and

open the roller clamp up wide, you won't be able to count the drips.

They will -- they will drop through the drip chamber faster than you can count. That's what we typically call "wide open."

What that IV has just displayed for you is its -- is that -- is the patient's passive acceptance of that rate of fluid under a hydraulic pressure of the height difference between the bag and the patient as to how fast that patient's vascular system will accept that fluid. There's a couple bottlenecks, the biggest one of which is the IV catheter and not the vein.

So if one of the theoretical risks, however small, is that you will hydraulically blow this vein apart by pushing too hard on the syringe, then I think you can reassure yourself that you're not going to get into trouble if you don't exceed what that IV will accept passively.

Q Other than that suggestion, did you give any other advice or information or instruction to any members of the execution team?

A Only with regard to my positioning inside the chamber, how I wanted the instruments or the monitoring equipment which I planned to bring

with me positioned on the inmate or adjacent to the inmate. We moved a small aluminum stool in a position where I could see my monitoring equipment at the same time as I was seeing the inmate.

Q So those discussions were with respect to the equipment that you anticipated using to do the job that you understood was required by the court's order as opposed to telling the team how to actually conduct the execution?

A That's correct.

Q Now, at some point did you come to the conclusion that, in fact, you could not participate, could not even be present at the Morales execution?

A That decision was the subject of several hours of agonizing discussion between my partner and myself.

Q And what was it that led you to conclude that you could no longer be present for the execution?

A You handed me shortly after my arrival at San Quentin an excerpt from an opinion rendered by the Ninth Circuit, and this one-page excerpt was at variance with my understanding and my

associate's understanding of what our obligations were to be under the order that came from Judge Fogel.

Q And in what way did you perceive a variance between what you thought it was that you were going to be asked to do versus how you understood the Ninth Circuit to be suggesting what you should do?

A It's difficult to be diplomatic about it. We do not see ourselves as having anything remotely approaching an executioner's role. We saw our role as -- as not too different from -- from opposing counsels' concept, I think. We both are interested in the same outcome no matter what our personal opinions about capital punishment might be, and that would be a painless execution process.

That was a role which -- which matched my interpretation of the Hippocratic Oath, but the excerpt from the Ninth Circuit opinion, if I can quote from it because I believe it's one of our exhibits here --

Q Would you please do that.

A -- said that we construe the order, by which I think he meant the order from this Court, as

clearly contemplating that they, the anesthesiologists, have the authority to take all medically appropriate steps.

And then it goes on to say: "We also construe 'take all medically appropriate steps' language to require that the anesthesiologist have supplies and a responsibility to ensure Morales is and remains unconscious."

That was an affirmative duty to act, which was a very large step beyond observation. My associate and I were willing to place ourselves in the unenviable opinion of being slightly at variance with the AMA's stance on capital punishment or involvement in a process of lethal injection.

I was willing to stand in the chamber as this inmate died because, in my professional opinion, he would not suffer. I would be there to see that indeed the drugs went into his system and based on my clinical experience I know that he would have felt no pain from the potassium chloride nor suffered from his inability to breathe.

And so I was really not placing myself in an awkward position in that sense except to

the extent that I was standing next to someone who was dying and I could not intervene. But even though I thought the process would run, especially because I was there watching according to protocol, the way the outside world would view it, at least in reading this excerpt from the Ninth Circuit, would be that I had a responsibility now to rescue a botched execution even though I knew full well in my heart that physiologically that just could not happen based on my experience.

And so I just didn't feel like getting painted as an executioner rescuing a botched execution. It was just -- it was beyond my limit.

Q So did you come to the conclusion then that as you understood the way the order had now been interpreted and applied by the Ninth Circuit that if you were to proceed under those circumstances, even if you didn't think you'd ever have to do anything, the very fact that that is what was anticipated would be unethical?

A That is correct.

Q And can you tell us about when it was that you came to that conclusion? I believe you said

this was the night leading up to the actual execution; is that correct?

A In retrospect my associate and I came to that conclusion probably within 30 seconds of your handing me this excerpt and we then spent the next many hours debating it, seeking additional information from this Court, trying to figure out a way out of our quandary, and that was unsuccessful.

Q Were there discussions with respect to whether the change in the language from the Ninth Circuit did anticipate a greater role than the one that you thought you were being asked to participate in?

A Yes.

Q And ultimately you came to the conclusion that you could not participate ethically in the execution; is that correct?

A That is correct.

Q You could not even ethically attend the execution?

A That is correct.

Q Now, did you leave the prison at some point that night, the night that the execution was supposed to take place?

A Yes.
Q Did you ever go back to the prison the next day?
A I did not. I recall in deposition that this -- this same topic came up and I had a vague recollection of -- not to make light of it, but being given a tour of the warden's garden because of its historical significance. And I recall that happening in daylight and somehow assumed that I must have gone back the next day, but on discussion with my family I realized that that was erroneous testimony on my part at the deposition and that I went once for the practice session and once the night of the planned execution and did not go back.
Q Now, following the ultimate stay of the Morales execution was there a point in time when you attended a meeting at the Governor's Office pertaining to California's execution procedures?
A Yes.
Q And can you recall approximately when that took place?
A I think it's on the order of a week later.
Q And what was your understanding of the role that you would play at that -- in that meeting at

the Governor's Office?
A Well, I was invited to participate by the same person who had asked if I would be willing to attend on the execution. Both events were in no small part agreed to on the basis of my personal association with the individual who called me.
And so in the case of the meeting at the Governor's Office it was described as a -- as a chance to discuss what had happened, to ask my medical opinion about -- about the protocol as I had seen it practiced with an eye towards what the state was going to do next.
Q Was the person who contacted you both with respect to participating -- excuse me, attending the Morales execution and to attend the meeting of the Governor's Office Darc Keller?
A It was.
Q And do you know where he works?
A He worked for the Department of Corrections. Beyond that, I've been to his office once, but I don't know where, no.
Q Is there another connection between you and Mr. Keller?
A Yes. As we have discussed, he is also a

member of the Air Force Reserve and a member of the same unit in which I worked for quite a few years.

Q Now, when you agreed to attend the meeting in Sacramento, did you make it known that there were -- that you had some limitations on how involved you were prepared to be in your participation in that meeting?

A On more than one occasion.

Q And what were the limitations that you placed on your participation?

A That I was not there to -- I was not there to play 20 questions. I was not there to have the state come up with a revised protocol by gleaning an answer from me based on my practice.

I was not there to tweak the protocol, but to answer medical questions based on my experience and also based on what was also public knowledge, drugs that had been discussed in the public.

Q Was it your intent in participating and attending this meeting to assist the state in designing a lethal injection protocol?

A Not at all.

Q Was it your understanding that you were

there as a resource, as you just suggested, to ask questions and provide information upon request or questioning?

A I'll be honest with you. The way it was actually portrayed to me is an interesting way to see what goes on at the Governor's level. I'm not involved in politics. It was a meeting that I attended gratis. There was no fee like there was associated with my participation in the practice session.

It was one that I just -- I went to more out of interest's sake than anything else as long as I was able to make clear to Mr. Keller that there were limits to what I was willing to talk about.

Q Did you at this meeting in the Governor's office offer any advice on how the state should conduct lethal injection executions?

A I don't know. Is answering medical questions advice? Yes? No? I certainly didn't see myself as having helped them come up with the revision of the protocol, which I have subsequently read, although there are clear components that were a reflection of our day in the -- in the antechamber and the chamber during

the practice session that revolved around how you use the IV.

There were questions about the drugs that were used and alternatives, and that was where it got a little difficult for me because I just was not prepared to suggest a better way of doing things, if you want to put it that way.

Q Did you respond to questions that were asked of you about the drugs that were used in the protocol?

A Yes.

Q Did you respond to questions that were asked of you about the procedure that was being used?

A Yes.

Q Do you recall any discussions at that meeting about the amount of thiopental that was currently being used by the state in its lethal execution protocol?

A Yes. That was an area of concern to me on the basis of comments that were made about past executions.

Q And with respect to that earlier protocol, was it your understanding that it was a 5 gram bolus dose of thiopental?

A Yes.

Q And what were the concerns you had that you had expressed in response to questions at that meeting?

A The -- the only specific one that I recall related to this use of multiple doses of potassium prior to obtaining a flat line and how that could possibly occur. And I had to devote some thought to that because the -- the expectation is that a super lethal dose of potassium would give you a cardiac rhythm which is not consistent with life within a very few seconds and yet it was described to me and subsequently confirmed in logs that were sent to me that there were some minutes that had passed.

And as we pondered this over the meeting I think the conclusion that I came to and expressed to the group was that this was closest to the clinical situation where I would find myself with a frail patient who might receive a very small dose of pentothal and immediately have near unobtainable blood pressure.

There's indeed a spectrum of response to thiopental. It's, in my opinion, not as broad as I have heard it described today in testimony, but nonetheless there is a range of response which is

fairly wide. And I have seen on countless occasions -- indeed, it's why we are specialists. We are specialists in titrations of drug to effect, and I have seen on countless occasions what you would normally think of as relatively small doses of thiopental producing large drops in blood pressure.

I extrapolated from that to now even a healthy patient or inmate receiving this extraordinary dose of thiopental over a relatively short interval and tried to imagine what the physiology would be, and I could only conclude that if I'd seen low blood pressure before, it must be near unobtainable in no small number of inmates receiving 5 grams.

Now, what would that cause? Well, it would cause a very slow circulation, and then we bantered back and forth about what the possible physiological responses to that would be. I expressed my discomfiture with 5 grams as a dose.

Q And this discussion that you just described, was this in response to questions that were asked of you about based on your medical background and knowledge --

A Yes.

Q -- what might have been going on?
A Yes.
Q Now, I'd like to ask you to take a look at Exhibit 71, please. Do you have that in front of you?
A I do.
Q You stated at the beginning of your testimony that the one additional document that you've reviewed since your deposition were the notes that were made of a meet -- of this meeting that we've just discussed at the Governor's Office; is that correct?
A Yes.
Q And does this Exhibit 71 appear to be the notes that you reviewed last night?
A It is.
Q And having reviewed those notes, do they appear to accurately reflect statements that were made by you at the meeting?
A Well, yes and no. The meeting was not short and, to the extent that two pages summarizes a couple of hours of very active discussion, it can't possibly match what I think I said.

I'm -- I am anxious over seeing Mr. Slavin's note of [redacted] saying "that's

perfect" because it implies, taking it out of context, that somehow I was describing the perfect regimen, but, in fact, was a reflection, and I do recall that phrase, of being asked a question, the state or someone in that group suggested a change and how would that work with regard to the physiology we've been discussing. And I said, "Well, that's perfect. If you're trying to do this, then that's the sort of thing that you would have happen."

So, yes, these notes are pretty accurate, but they don't reflect the entirety of that discussion and I'm anxious about it being taken out of context.

Q I understand. Now, subsequent to that meeting did you agree to appear and testify as an expert for the Defendants, the California Department of Corrections and Rehabilitation in this action?

A I did.

Q And in agreeing to that did you place some ethical limitations with respect to what your participation would entail?

A None different from those you had heard before, that I would not prescribe revisions to

the protocol that would produce a better physiological response, a faster execution, a more humane execution.

I would work with what was on the record. I would give my opinion of the expected physiological response to what was on the record, but I just would find myself unable to prescribe a different regimen even though in my medical training and experience I might have knowledge of drugs that would do the job a little differently.

MR. GILLETTE: Your Honor, I'm going to move on now to some substantive areas. I don't know if you want --

THE COURT: It seems like as good a time as any.

All right. We'll take a 15-minute recess and start up again at five after 3:00.

(Recess taken.)

THE COURT: We'll be back on the record in the matter of Morales versus Tilton. The record will reflect counsel are present.

Mr. Gillette, you may continue with your direct examination of Dr. [redacted]

MR. GILLETTE: Thank you, Your Honor.

we're trying to make it belt and suspenders in terms of reliability and safety.

In clinical practice I push hard on antecubital IVs all the time. That's how we resuscitate patients in shock. We give large volumes through those IVs that are inserted in the field by paramedics. That's all we've got, to rush in in shock and you're just pumping fluids and blood and you're certainly not using passive flow rate as a limitation.

MR. GILLETTE: Thank you very much, Doctor.

Your Honor, I have no further questions at this time.

THE COURT: Okay. We have about 15 minutes. Do you want to get started?

MR. GRELE: If Your Honor wants us to start, I can start.

CROSS-EXAMINATION

BY MR. GRELE:

Q Good afternoon, Doctor.

A Good afternoon.

Q I know it's been a long day for you here. So I just wanted to ask you about a couple of things and that is -- can you look at Exhibit 136

up there, please.

Do you see that, Doctor?

A I do.

Q Okay. Is that your handwriting there?

A It is.

Q Okay. And when did you put that handwriting on that -- on that document?

A Somewhere around the time I was asked to be an expert for the state. The -- I started putting my thoughts together about, you know, what led us to the decisions we made, the two anesthesiologists, and how I felt about the various materials that I had been supplied for evaluation.

Q You had been supplied this on the night of Mr. Morales's scheduled execution; is that correct?

A Yes.

Q This is a page from the Ninth Circuit order; isn't that right?

A I don't know. It appears to be.

Q Okay. It says: "We construe the order as clearly contemplating that they," meaning you and the other anesthesiologists, "have the authority to take, quote, 'all medically appropriate

steps.'"

Do you see that?

A I do.

Q And then it says: "Either alone or in conjunction with the team to immediately place or return Morales into an unconscious state or to otherwise alleviate the painful effects of pancuronium bromide or potassium chloride."

Do you see that?

A I do.

Q Okay. Was it your understanding that this court's order that you were to take all medically appropriate steps did not include somehow signaling to the team that Mr. Morales was in distress?

A Before we proceed, it was my understanding that this was not an order. This was an opinion by the Ninth Circuit regarding the order that emanated from this Court, and that was part of what caused our confusion as to how -- how we should regard this difference of opinion.

Q Now, who told you that this was not an order, that it was an opinion?

A I don't remember. It was titled an opinion is what I was told.

Q And what -- who told you that it was an opinion?
A I do not know.
Q Okay. Was it somebody from the Attorney General's Office; do you know?
A It was one of people in the warden's office that evening, but I had never met any of them besides Mr. Slavin or Mr. Gillette before. So I'm afraid I can't answer your question.
Q Okay. When Mr. -- so it wasn't Mr. Slavin or Mr. Gillette, the only two people you remember being there; is that your testimony?
A It could indeed have been more. I just don't remember.
Q Did Mr. Slavin or Mr. Gillette jump up and say, "Well, wait a second. An opinion from the Ninth Circuit is indeed a court order"?
A You're talking to a layperson. That may be the case. I don't know.
Q You don't remember any such thing?
A All I remember is that there was some discussion regarding how we were to regard this language. We informed the people in the warden's office it was really problematic for us.
Q I understand that. And I notice on the top

here it says in your handwriting "excerpt from the Ninth Circuit opinion dated 2/19."

Do you see that?

A Yes.

Q "Delivered to us at 9:00 p.m. 2/20/06 in the warden's office."

Do you see that?

A Yes.

Q It's significant to you the date of the order and when you got it; isn't that correct?

A Yes.

Q And the bottom I see with two stars next to it. So I imagine that's also significant as well. It says: "Attorney General's Office had this for two days," with two or three exclamation points next to it. Do you see that with the two stars?

A I do.

Q So, again, it was pretty significant to you that this thing had been -- this order or decision or opinion had been out there for two days and had not been given to you; isn't that correct?

A Yes.

Q Okay. And then I see at the bottom where it

says in quotes: "Didn't see a problem."

Do you see that?

A Yes.

Q Now, that's information that was given to you from the Attorney General's representative; isn't that right?

A I'm afraid I don't recall who handed it to me. I believe it was Mr. Gillette.

Q Okay.

A But in any case, it demonstrated for me a bit of the gulf in understanding between the physicians and their issues with regard to medical ethics and the legal approach to this process. It's -- it's no one's fault. It was just an unfortunate series of events that --

Q Well, that's a matter for history, Doctor, whether it's somebody's fault. But what I'm interested in is your subject of your sentence here is "Attorney General's office had this for two days."

A Uh-huh.

Q And then the next sentence: "Didn't see a problem."

A Yes.

Q That wasn't your language that you didn't

see a problem, was it?
A No. That was Mr. Gillette's statement.
Q Okay. All right. And did he -- well -- now, you went to -- are you familiar with the concept bait and switch?
A I have heard that term used before, yes.
Q Okay. Now, your understanding was that you were only to monitor Mr. Morales's condition; isn't that correct?
A That's how I interpreted it as a layperson, the order that came from this court.
Q And you had spoken with representatives from the CDCR and Mr. Gillette's office about that; isn't that right?
A Minimally before the night of the planned execution.
Q You had spoken to them in the context of your run-through, isn't that right, your practice session?
A No. We didn't talk a lot about the court order. It was sort of an assumption that we would be proceeding, that I and my associate had agreed to proceed on the basis of our understanding and, no, we concentrated on the clinical issues that day. It was not a topic of

discussion.
Q Okay. Did you have a conversation -- did Mr. Keller inform you as to what the appropriate parameters of your involvement were?
A He did not.
Q Okay. Did you inquire of him?
A No.
Q Did the warden instruct you as to what the parameters of your task were?
A Instruct me? No. We -- we discussed our roles that night in the warden's office in some detail. At least if, you know, based on the amount of time it took, no, I didn't get instructions from the warden.
Q I'm sorry, Doctor. I'm referring to when you first became involved in this process.
A I did not meet the warden until that -- that day of the practice run.
Q Okay. And did you have a discussion with the warden then about what you felt your understanding of the process was?
A Yes, I did.
Q And you made it clear to him that your understanding was that you were going to monitor Mr. Morales; isn't that correct?

A Yes.
Q Okay. And he didn't inform you that there was any other obligations on your part or expectations of you?
A That's correct.
Q Okay. All right. And when you were there for the training sessions was Mr. Gillette there as well?
A I believe so.
Q Okay. And he didn't instruct you that it was any different, did he?
A I have no recollection of that, no.
MR. GRELE: Okay.
THE COURT: Mr. Grele, let me know when you're done with this area and we'll stop for the day.
MR. GRELE: That's the Ninth Circuit order. I'm done with that, Your Honor.
THE COURT: Okay. You're going to go on to medical matters now?
MR. GRELE: I was going to -- yes.
THE COURT: Okay. All right. Let's stop because it seems like a reasonable point.
We'll be in recess until 9:00 o'clock tomorrow. I just want to go over some

hear the medical stuff, but in light of this I mean it's --

THE COURT: That's fine.

MR. GRELE: Okay. Thank you.

[redacted] M.D.,

being called as a witness on behalf of the Defendant, having been previously duly sworn, resumed the stand and testified as follows:

RESUMED CROSS-EXAMINATION

BY MR. GRELE:

Q Now, you attended a meeting at the Governor's office, Doctor?

A I did.

Q And certain individuals with CDC were present?

A I believe so.

Q Okay. And some lawyers from the Governor's office and Mr. Gillette as well?

A Yes.

Q Okay. All right. And you've had an opportunity to review what's Exhibit 71, the notes of that meeting by Mr. Slavin?

A I have.

Q Okay. And you were asked a little bit about that by Mr. Gillette early in your examination;

do you recall that?
A I do.
Q Okay. And you had some difficulties with some of the information that's chronicled in those notes; is that correct?
A No.
Q Okay. All right. Just the appearance of what those notes may imply is what you said, I think?
A Yes.
Q Okay. All right. All right. And I think I take it from your testimony and I know from earlier in deposition that you were concerned about whether or not they could imply that you had skirted an ethical boundary that you had established for yourself in these proceedings; isn't that right?
A That is correct.
Q Okay. That's not an ethical boundary that's prescribed by law; is that right?
A Not to my knowledge.
Q Physicians can participate in executions in California by law; isn't that correct?
A I don't know.
Q Okay. Now, in these notes it describes

quite a bit of conversation by you. Are the notes an accurate recitation of the conversation?

A To the extent that two pages can represent a discussion lasting some hours, yes.

Q Okay. Now you say "some hours." Are you disagreeing with the stipulated fact by the parties that the meeting took place over an hour to an hour and a half?

A I don't have a precise recollection. If that's what was stated, I won't disagree with that. It seemed longer to me.

Q Maybe travel time was included?

A Perhaps.

Q Okay. And in here it seems that you are describing some -- some processes concerning lethal injection; isn't that correct?

A Yes.

Q Okay. In the first note it says "agrees with," and I can't read that and I assume you can't either?

A I cannot.

Q Okay. All right. "We need to address both the drugs and the mechanical administration issues." Isn't that right?

A Yes.

Q So there were two issues in your mind when you attended this meeting. One is some of the pharmacokinetic dynamics that you've described in your direct and another was issues of mechanical administration, is it being done mechanically properly by the proper people; isn't that right?
A Yes.
Q Okay. All right. And the rest of the conversation here appears to be devoted to the first topic and not the second; is that correct?
A The first topic being mechanics?
Q Being the pharmacokinetics, how the drugs work, what -- what the doses would be, those kinds of things.
A All right. That seems reasonable.
Q Okay. But do you recall any discussion about what you -- what you referred to as mechanical administration issues at the Governor's meeting?
A Not precisely. If we can use these notes to prompt me, but, no, nothing springs to mind.
Q Okay. Well, there's nothing in the notes. So I don't know how it could prompt you, but if it does, let us know. Okay?
A All right.

Q And by -- and your opinion you expressed at the meeting was effectively based on the protocol you have a one-drug protocol; isn't that right?
A That was a conclusion I reached -- probably yes. That's the short answer.
Q All right. And the basis for that is, and I think you testified to this on direct, was you have such a high dose of thiopental, that 5 gram dose, that the other drugs aren't getting -- moving around in the system in the way you would expect them to move normally; isn't that correct?
A The response to those drugs, which we are indeed, seeing is not occurring in the time sequence which we expect.
Q Which you would expect. Okay. And when you mean the time sequence meaning it's taking longer for inmates to expire; is that correct?
A It's taking longer for the -- for the bodily response that you expect to see to take place, cessation of respiratory effort or the onset of a fatal arrhythmia or a flat line that's taking longer in both cases for a number of inmates.
Q Okay. All right. And so you said that 5 grams of thiopental is lethal by itself, but slow would take up to 45 minutes. Is that your

opinion?
A Yes.
Q Okay. Now, this is -- obviously you're extrapolating from your clinical experience. You've never given anyone 5 grams of thiopental?
A That's also correct.
Q Okay. All right. And is that a linear measurement? Can you linearly go there? Can you say I know what it does at 750 milligrams and so, therefore, I can predict what it's going to do at 5,000 milligrams?
A Okay.
Q I think we've heard this term "leap of faith." Is that one of those leaps of faith?
A Well, I prefer to consider it a combination of so many thousands of uses, personal uses of thiopental on my patients, observing the effects, couple that with my medical training and extrapolating. So it's a bit more than a leap of faith for me.
Q Okay. All right. Then the next comment is one that I'm -- I'd like to ask you about. You represented to the meeting that if you don't want to risk the death rattle then want to use the paralyzing agent, the Pavulon.

Do you see that comment?
A I do.
Q Was that your representation to the group?
A That was a response to a discussion which had ranged around the table regarding the cosmetics, if you will, of the death process and I --
Q I'm sorry. That's fine, Doctor. I just want to ask you another question about that then.
And the cosmetics were whether or not the visible manifestations of death would be disturbing or misinterpreted; isn't that correct?
A No, that's not correct.
Q Okay.
A The way the discussion ranged was -- "cosmetics" is an inappropriate term. The occurrence of visibly disturbing phenomena during the death process rose as a topic of discussion and my response was that if you wish to eliminate them then Pavulon would do that.
Q Okay.
A That was not represented to me that that was what the state was after. It was merely a topic of discussion.

Q I understand that. I understand that. The state never represented to you that they were considering removing that drug from the protocol, did they?
A That was not a topic of discussion.
Q Okay. And I think later on you said, if you're stuck with these drugs, then you give thiopental as a continuous infusion; isn't that correct?
A We discussed whether or not you could move to pentobarbital because that drug was in the record, whether or not -- since pain was an issue whether or not the state wanted to add a narcotic, which was the obvious drug for pain, and it was represented to me that the state wanted to stay with the three drugs that it had. Hence my comment.
Q Thank you. Your comment was if they were stuck with these three drugs, then you go to the continuous infusion method; isn't that correct?
A I don't recall whether those were my precise words. Those are the notes that were made.
Q Okay. Do you have any reason to disagree with that representation of your wording?
A I don't know if it's the terminology that I

would have used, but it's a small point.
Q Okay. All right. Approximates the concept that you were interested in conveying?
A Yes, yes.
Q Okay. All right. Now, you're saying that the problem is the physiology -- the heart almost collapses from thiopental. So the other drugs don't flow effectively and the potassium diffuses out slowly.

Is that correct? That's your statement?
A That's my statement.
Q Okay. And that was what you testified to today.

Now, one comment I noticed here, and we've had some discussion about that in our proceedings throughout, you said it would be preferable to use phenobarbital; isn't that correct?
A No, I did not say phenobarbital. I believe that's a transcription error. I believe my choice of drug was pentobarbital. I tried to restrict myself to drugs that were already in the record as far as I --
Q In the record, you mean, in terms of what people had considered for similar processes --

A Yes.
Q -- in other states and things of that nature?
A Yes.
Q All right. What other states were considering using pentobarbital?
A I don't know.
Q Okay. And where did you get the note -- was it drawing upon your clinical experience or perhaps pentobarbital was a better drug?
A If you are using a single-drug protocol and if you are concerned about possibilities, small possibilities although they might be some minutes to half an hour to an hour out, and if the rare inmate has a favorable airway that allows this involuntary respiration to resume, then you prefer to have a non-ultrashort-acting barbiturate still in the system to assure unconsciousness. Pentobarbital would provide that in a single-drug protocol.
Q Okay. And if you had somebody there monitoring the situation and the inmate -- and this is, again, we're talking about the extremely rare case; isn't that correct?
A In my opinion, yes.

Q I mean, if you load somebody up with 9 grams of pentobarbital, they are going to expire; isn't that correct?
A I believe so.
Q Okay. With near 100 percent certainty; isn't that right?
A Yes.
Q And so we're talking about an extreme outlier. Do you know percentages, one in 10,000, one in 100,000?
A I do not.
Q Okay. All right. But, anyway, in this extreme inmate situation that you're describing or hypothesizing, if you had somebody there at -- at the side of the inmate or in proximity to the inmate and able to monitor the inmate, they could induce an additional dose of sedative at that point if there was a problem; isn't that correct?
A If it were that person's duties, yes.
Q And that may alleviate the concerns of one in 10,000 or one in 100,000 inmates that might live past 9 grams of pentobarbital; isn't that correct?
A No. It wouldn't change that. What you are positing is an inmate with this rare favorable

airway who's receiving a non-paralyzing drug so with this additional dose that you were prescribing would merely perpetuate the sleep, and that could go on ad infinitum until the brain damage that presumably is also occurring is the fatal event, but now we're talking many hours out.

Q I understand. Brain damage occurs within six to eight minutes; isn't that right?

A If you have complete apnea, but that's not what you're positing here. You're positing a favorable airway.

Q All right. But somebody would be able to tell, somebody such as yourself with the experience that you've bought to this endeavor could be able to tell whether or not somebody has a positive airway or not; isn't that correct?

A Yes. There are devices that would provide the same information.

Q And you were going to use them at the Morales execution; isn't that right?

A I was.

Q Okay. And then you came up -- then it says here the answer is 1 gram of thiopental and then the pentobarbital. Do you see that comment?

A I do.
Q Okay. Does that reflect your -- the message you conveyed at the meeting?
A That reflects the -- my final comment on a discussion which was revolving around the issue of fast onset, long duration. So we had two drugs in the record, if you will, one of which was known for extremely fast onset. We have another drug which is known for longer duration of action. If you were after both issues, you might consider combining the two.
Q Okay. And here you're still sort of trying to maybe push the discussion in a direction that you understand at this point the state is somewhat reluctant to go; isn't that right?
A I'm offering medical alternatives to what -- to the protocol that I was -- that was described to me prior to the meeting.
Q Okay. All right. And they were not -- obviously they were not adopted by the state; isn't that correct? I mean, they are not --
A Apparently not.
Q Okay. And then Mr. Gillette said, "Okay. Do it 1, 2, 3, 1, 2, 3 in lower doses." Do you see that?

A I do.
Q Does that reflect his comment?
A I believe he's ascribing that -- oh, yes. Mr. Gillette, yes.
Q Okay. And --
A And you will see that I followed then with or 1, 2, 3, 1. The discussion, what those numbers mean --
Q If you could, Doctor, actually, you missed an important feature here, your comment "that's perfect."
A Well, that was just what I described yesterday as my concern about this being taken out of context.
Q I understand.
A I was offered a very simple -- I was offered an attorney's description of a medical procedure when we were talking about 1, 2, 3, sleep drug, paralytic drug, potassium. And he repeated that back to me and I said, "yes, that's -- you have a perfect understanding of that concept" as we were talking about it at that time.

It does not mean to be an endorsement of the protocol. It's merely a description of the three-drug steps and that attorney's

representation back to me of what we were talking about.

Q Okay. "That's perfect." It's at that point, of course, that they adopt -- that they decide that they are going to go with the 1, 2, 3 method; isn't that correct?

A The 1, 2, 3 method is what they had anyway.

Q I understand. But you had offered them some alternatives to consider perhaps in your expert opinion as a clinician?

A I merely said that the five grams was an excessive dose in my mind. It was far more than was necessary to be lethal, that in combination with the second and third drugs it might be an explanation for why those subsequent two drugs did not act in the fashion that was expected.

Q But that is an earlier discussion. The discussion that immediately precedes the 1, 2, 3 comment is a discussion of alternatives that you're suggesting perhaps the state should consider; isn't that correct?

A You're connecting a discussion in a fashion that does not follow the way the discussion went.

Q So Mr. Slavin is recording the conversation piecemeal and injecting parts that came before as

after. He's not chronologically --
A No. The chronology is correct. You're trying to connect the discussion of thiopental and pentobarbital herein described as "phenobarbital" with the subsequent discussion of 1, 2, 3. We have maybe 10, 12 bullets here of an hour's discussion, that the two are not connected. They were different issues.
Q Okay. All right. So but then you offer another alternative, 1 to 2 to 3 to 1. Do you see that?
A Yes.
Q And then you offer another alternative, continuous infusion after 3; is that correct?
A Yes.
Q And then you offer another alternative, continuous in one arm of 1 and then 2 and 3 in the other arm. Do you see that?
A Yes.
Q Okay. Now, by the way, Mr. Gillette had offered the audience or the meeting participants a sort of brief run-through or a listing of what other states are doing; isn't that correct?
A Yes.
Q Okay. And are you aware of the difficulties

that have occurred in other states when they use that method of the one drug in one arm and the two drugs in the other arm? Are you aware?
A I am not.
Q Okay. And then did Mr. Gillette describe them to you, the problems that they've had in Oklahoma, for instance, the very great difficulties they've had as a result?
A He did not.
Q Okay. And, by the way, what would the purpose be of putting a dose of thiopental at the end of a dose of potassium chloride?
A The reason we seem to be here is this disbelief that the huge overdose of barbiturate persists. And so it seems fairly simple from a medical perspective that, if you are concerned about continued sleep no matter what else is happening, then add more sleep drug.
Q Okay. Are you familiar with the North Carolina procedure that had a similar kind of -- well, I shouldn't say "similar," but had a dose before and after the proceeding?
A I'm not.
Q Okay. And you're not aware of Dr. Dershwitz's recommendation that they remove

that?
A I'm not.
Q Okay. Now, there was a -- the next -- if you turn the page, the next page, there is some discussion by some other participants here Warden Ornoski. Do you see that?
A I do.
Q Okay. By the way, and then Ms. Hoch and she -- would you disagree with Warden Ornoski's representation that Ms. Hoch did most of the -- most of the running of this meeting?
A I really don't recall.
Q Okay.
A Almost all of these people were new to me and so that's not something that I track.
Q All right. But she asked the most questions and talked the most?
A I don't know.
Q Okay. All right. Would you have any reason to disagree with that representation?
A No.
Q It's a stipulated fact by the parties.
A Not at all.
Q Now, her comment there was: "Fewer changes will be better." Do you see that?

A I do.
Q Was that a general comment that you perceived at the meeting or was it a particular comment by Ms. Hoch?
A I don't recall the comment at all.
Q Okay. All right. Now, you said in the rare case you may need -- there may be a problem because the barbiturate would only cause permanent sleep. And I take by that that you mean not death; is that right?
A Yes. We were once again returning to this favorable airway hypothesis.
Q Okay. All right. And then you said: "If you can't get to Pavulon and potassium within two minutes" and then it says "done."
A Yes.
Q Okay. So that -- they would be dead at that point; right?
A I don't -- I don't -- I am trying to recall when I read this yesterday what this note means, and I don't recall the conversation that -- I don't know what "done" means here.
Q Okay. And you recommended then -- and then Mr. Gillette talked about the continuous infusion and keeping the other two drugs; isn't that

right?

It said: "Let's have a continuous infusion, 40 grams of Pavulon, and then we have potassium until death."

Do you see that comment?

A I see that comment.

Q Do you remember that comment by Mr. Gillette?

A Not specifically, but I have no reason to doubt these notes.

Q Okay. All right. And then -- and then you said: "1 gram push with 4 grams in the bag for the drip." Do you see that?

A I do.

Q Okay. Now, there you're correcting Mr. Gillette; isn't that correct?

A Well, to the extent that this one line says that Mr. Gillette was suggesting you could only have a continuous infusion, I am disagreeing with that. I don't think that is what he was representing. That's not how the discussion ever went.

There was never any discussion that I recall about abandoning bolus dosage in favor of only a continuous infusion of barbiturate.

Q Okay. And you raised -- again you raised another drug that perhaps they should consider as part of the process, and that's a narcotic that would eliminate pain; isn't that right?
A Yes.
Q There's nothing really, no analgesic involved in this process as it now stands; isn't that correct?
A An overdose of barbiturate of this degree is analgesic.
Q Okay. That's a process as opposed to a particular drug; isn't that right?
A No. It's the barbiturate effect in overdose --
Q In overdose?
A -- is analgesic.
Q And Mr. Gillette's response was when you said "why not use it" his response was "because all three drugs are currently upheld by the courts." Isn't that right?
A Yes.
Q And Ms. Hoch then said stay with -- quote: "Stay with three bags and tweak with Heath testimony as [redacted] suggestions." Do you see that?

A I do.
Q And you recall that comment?
A I recall something along those lines, yes.
Q All right. And then you followed up with some discussion about the line collapsing; isn't that correct?
A It appears now we've switched finally to our mechanical topic, yes.
Q Okay. All right. All right. Now, these notes then represent basically your understanding of the discussion about the development of this protocol; isn't that right?
A I think it's better than I could have done from my recollection.
Q Okay. Because you remember in deposition we had a back and forth about that and there was some gaps?
A It's very hard for me to recall that meeting, yes. It was early in this process.
Q Okay. Now, did you have an opportunity prior to that meeting to consult with a pharmacokineticist about -- about the action of these drugs?
A No.
Q Okay. Would it be perhaps -- and how about

a pharmacist such as Dr. Ekins that testified here?

A I consulted with no one prior to this meeting. I didn't know this meeting was going to occur until a couple days before, a few days before.

Q And so the only expertise that was brought to bear at this meeting was your clinical expertise; isn't that correct?

A Yes.

Q All right. Now, bringing expertise to the -- speaking of bringing expertise to the process, you did bring some expertise to the process when you visited San Quentin on Saturday before Mr. Morales's scheduled execution; isn't that right?

A Yes.

Q Okay. And you recommended some changes. I think you've talked about your additions to this endeavor that were part of the process that day; isn't that correct?

A Consistent with my obligations under the court order then in effect.

Q Okay. You thought -- you offered them some discussions about twisting the catheter I think