

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

MORALES ,) CV-06-00219 -JF
)
PLAINTIFF ,) SAN JOSE , CALIFORNIA
)
VS .)
) MARCH 4 , 2011
CATE , ET AL ,)
)
DEFENDANT .) PAGES 1-63
)
_____)

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

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

FOR THE PLAINTIFF : LAW OFFICE OF JOHN R. GRELE
MORALES , BROWN BY : JOHN GRELE
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SAN FRANCISCO , CA 94105

FOR THE DEFENDANT : CALIFORNIA STATE ATTORNEY
GENERAL 'S OFFICE
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(APPEARANCES CONTINUED ON THE NEXT PAGE)

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SAN JOSE , CALIFORNIA

MARCH 4 , 2011

P R O C E E D I N G S

(WHEREUPON , COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD :)

THE COURT : THIS IS THE MATTER OF MORALES
VERSUS CATE AND PACIFIC NEWS SERVICE VERSUS CATE .

AND CAN I GET THE APPEARANCES FROM
COUNSEL , COUNSEL FROM THE COURTROOM , AND I THINK WE
HAVE A COUPLE TELEPHONIC APPEARANCES ALSO .

MR. GRELE : GOOD AFTERNOON , YOUR HONOR .

JOHN GRELE AND DAVID SENIOR ON BEHALF OF
PLAINTIFFS MORALES AND BROWN .

MS. COHBRA : GOOD AFTERNOON , YOUR HONOR .

SARA COHBRA ON BEHALF OF MITCHELL SIMS
SIMMS AND STEVIE FIELDS .

MR. KRISHNAN : GOOD AFTERNOON ,
YOUR HONOR .

AJAY KRISHNAN ON BEHALF OF PLAINTIFF
PACIFIC NEWS SERVICE .

MR. QUINN : GOOD AFTERNOON .

MICHAEL QUINN FOR DEFENDANTS .

MR. GOLDMAN : GOOD AFTERNOON .

JAY GOLDMAN FOR DEFENDANTS .

MR. SENIOR : DAVID SENIOR .

THE COURT : AND I SHOW MR. STEINKEN , AND

1 I KNOW MR. SMITH -- ACTUALLY , MR. SMITH IS A
2 REPORTER FOR *THE STOCKTON RECORD* . YOU 'RE BOTH
3 THERE ?

4 MR. STEINKEN : THIS IS MR. STEINKEN ,
5 YOUR HONOR . I CAN HARDLY HEAR YOU .

6 THE COURT : I WILL SPEAK INTO THE
7 MICROPHONE .

8 I THINK MR. SMITH IS LISTEN ONLY , SO I
9 HOPE THAT HE 'S THERE .

10 ALL RIGHT . WHAT WE HAVE THIS AFTERNOON
11 IS ESSENTIALLY MATTERS RELATED TO DISCOVERY .

12 THERE 'S A RELATED MOTION FOR PROTECTIVE ORDER , A
13 MOTION TO STRIKE THAT WAS FILED BY THE STATE .

14 AND LET ME SEE IF I CAN APPROACH THIS
15 FROM A GLOBAL PERSPECTIVE AND TELL YOU HOW I THINK
16 ALL OF THE MATTERS CAN BE ADDRESSED .

17 THE LEGAL LANDSCAPE HAS SHIFTED SOMEWHAT
18 SINCE THIS LITIGATION RESUMED IN THE FALL AFTER THE
19 NEW REGULATIONS WERE PROMULGATED . AND THE MOST
20 RECENT SIGNIFICANT DEVELOPMENT WAS THE
21 NINTH CIRCUIT 'S DECISION IN THE DICKENS CASE WHICH
22 CONCERNED THE ARIZONA PROTOCOL .

23 IT 'S CLEAR FROM THAT CASE THAT THE
24 AVAILABILITY OF AN ALTERNATIVE METHOD OF EXECUTION ,
25 IN THIS CASE THE ONE-DRUG PROTOCOL , DOES NOT COME

1 INTO PLAY UNLESS AND UNTIL THERE 'S A SHOWING THAT
2 THE STATE 'S METHOD IN THIS CASE WHICH IS THE THREE
3 DRUG PROTOCOL S SHOWS A SUBSTANTIAL RISK OF AN 8TH
4 AMENDMENT VIOLATION .

5 SO WE 'RE NOT AT THAT POINT IN TERMS OF
6 THE RECORD WHERE THE AVAILABILITY OF AN ALTERNATIVE
7 IS IN PLAY . AS THE STATE HAS ARGUED FOR SOME TIME ,
8 THE PLAINTIFF FIRST HAS TO SHOW THAT THERE IS A
9 SUBSTANTIAL RISK AND THEN THE AVAILABILITY OF AN
10 ALTERNATIVE WHICH ELIMINATES OR REDUCES THE RISK
11 BECOMES RELEVANT . THAT HAS SOME BEARING ON THE
12 DISCOVERY AND THE MOTION FOR PROTECTIVE ORDER .

13 IT SEEMS TO ME THAT TO THE EXTENT
14 PLAINTIFFS WANTED TO DEPOSE FORMER GOVERNOR
15 SCHWARZENEGGER OR A FORMER LEGAL AFFAIRS SECRETARY
16 HOGUE , AS TO WHY THEY CHOSE TO PROCEED WITH A THREE
17 DRUG RATHER THAN A ONE DRUG PROTOCOL , THAT
18 INFORMATION IS IRRELEVANT AT THIS POINT IN THE
19 CASE .

20 IT 'S CONCEIVABLE , I SUPPOSE , THAT IT
21 COULD BECOME RELEVANT BUT IT WOULDN 'T BE UNTIL
22 THERE 'S A SHOWING THAT THERE 'S A SUBSTANTIAL RISK
23 OF AN 8TH AMENDMENT VIOLATION .

24 SO THEN THE QUESTION IS WHAT ABOUT THE
25 WRITTEN DISCOVERY IS OUT STANDING . AND I THINK ON

1 THAT POINT I WOULD SAY THIS : WHAT DICKENS SAYS IS
2 THAT EVIDENCE OF PAST PROBLEMS WITH AN EXECUTION
3 PROTOCOL IS NOT SUFFICIENT TO SHOW THAT THERE ARE
4 LIKELY TO BE PROBLEMS WITH A NEW LETHAL INJECTION
5 PROTOCOL .

6 AND IT'S A DIFFICULT SHOWING FOR THE
7 PLAINTIFF TO MAKE THAT THERE IS A LINK BETWEEN THE
8 PAST PROBLEMS AND CURRENT PROBLEMS . BUT THE COURT
9 EXPLICITLY DOES NOT SAY THAT PAST PERFORMANCE IS
10 IRRELEVANT , IT SIMPLY SAYS IT'S OF LIMITED
11 RELEVANCE . AND HOW RELEVANT IT IS DEPENDS ON HOW
12 MUCH THE NEW PROTOCOL AND THE OLD PROTOCOL ARE
13 ALIKE .

14 AND A POINT WAS MADE IN THE DICKENS CASE
15 THAT ARIZONA HAD MADE SIGNIFICANT CHANGES TO ITS
16 EXECUTION PROCEDURES BETWEEN THE TIME OF THE OLD
17 PROTOCOL THAT HAD THE PROBLEMS AND THE NEW ONE
18 WHICH WAS BEING REVIEWED IN THAT CASE .

19 ONE OF THE THINGS THAT THE COURT IS GOING
20 TO BE LOOKING AT IN THIS CASE , AND IT'S A PRETTY
21 SIGNIFICANT PIECE , IS THE EXTENT TO WHICH THE NEW
22 PROTOCOL THAT WAS ADOPTED UNDER THE REGULATIONS IS
23 THE SAME AS OR DIFFERENT FROM THE OLD PROTOCOL
24 WHICH WAS THE SUBJECT OF THE ORIGINAL MORALES
25 LITIGATION .

1 SO I THINK THE FOCUS HAS TO BE ON WHAT 'S
2 HAPPENING IN THE PRESENT . BUT TO THE EXTENT THAT
3 THE -- WHAT 'S HAPPENING IN THE PRESENT IS THE SAME
4 AS WHAT 'S HAPPENING IN THE PAST THEN THERE IS EVEN
5 UNDER DICKENS SOME RELEVANCE .

6 AND I THINK MOST OF THE REQUESTS THAT THE
7 PLAINTIFFS HAVE MADE THUS ARE RELEVANT TO THE
8 QUESTION OF HOW MUCH OF A DIFFERENCE THERE IS
9 BETWEEN OLD AND NEW .

10 THERE ARE CERTAINLY SOME THINGS IN THE
11 DOCUMENT REQUESTS THAT GO BEYOND THAT . BUT I THINK
12 IF THE FOCUS STAYS ON THE NEW PROTOCOL AND WHAT THE
13 COURT NEEDS TO LOOK AT UNDER THE NEW PROTOCOL ,
14 DICKENS SAYS THERE IS SOME LIMITED RELEVANCE IN
15 LOOKING AT PAST PROBLEMS PARTICULARLY IF THE
16 PROCEDURES ARE THE SAME BETWEEN THE OLD AND THE
17 NEW .

18 SO I THINK THAT 'S THE -- THAT 'S WHAT I
19 HAVE TO SAY IN THE GLOBAL SENSE ABOUT DISCOVERY .

20 THE MOTION TO STRIKE IS RELATED TO THAT
21 BECAUSE IT TALKS ABOUT THE MATERIAL IN THE FOURTH
22 AMENDED COMPLAINT THAT RELATES TO PAST PROBLEMS .

23 AND I THINK IN THIS INSTANCE THIS IS NOT
24 GOING TO BE A JURY TRIAL THERE ISN'T THE QUESTION
25 OF PREJUDICE . THE EXISTENCE OF PAST PROBLEMS -- I

1 MEAN FIRST OF ALL THIS COURT HAS HAD THIS CASE
2 SINCE ITS INCEPTION SO IT'S NOT AS IF THE PAST
3 PROBLEMS ARE UNKNOWN TO THIS COURT .

4 AND SECONDLY , THE EXISTENCE OF THE PAST
5 PROBLEMS IS NOT COMPLETELY IRRELEVANT . IT'S , THE
6 POINT IS IT'S OF LIMITED RELEVANCE . IF THE STATE
7 CAN SHOW THAT IT HAS MODIFIED THE PROCEDURES IN A
8 WAY THAT THERE IS NO LONGER A SUBSTANTIAL RISK OF
9 AN 8TH AMENDMENT VIOLATION , THEN WHAT HAPPENED IN
10 THE PAST TRULY IS IRRELEVANT . BUT THERE IS THAT
11 PREDICATE THAT HAS TO BE SATISFIED , AND THAT IS
12 WHAT 'S THE SITUATION NOW?

13 SO FOR INSTANCE , IF THE PLAINTIFFS ARE
14 CONTENDING TODAY THAT THE MAKE UP OF THE EXECUTION
15 TEAM IS FLAWED , TODAY UNDER THIS PROTOCOL , THAT 'S A
16 CONTENTION THAT THEY ARE ENTITLED TO MAKE . AND IF
17 THEY WANT TO SHOW THAT BY SAYING IT'S EXACTLY THE
18 SAME AS THE EXECUTION THAT THE TEAM FOUND FLAWED
19 UNDER THE OLD PROTOCOL , THAT 'S A FAIR ARGUMENT FOR
20 THEM TO MAKE .

21 AND IF THE STATE COMES BACK AND SAYS ,
22 WELL , NO IT'S DIFFERENT HERE 'S HOW IT'S DIFFERENT
23 HERE 'S THE THINGS WE CHANGE D AND HERE ARE THE
24 THINGS WE 'VE DONE IN THE LAST SEVERAL YEARS IN
25 RESPONSE TO THE EXCLUSIONS IN THE EARLIER MORALES

1 LITIGATION AND THE REGULATION ADMINISTRATIVE
2 PROCESS , THESE ARE THE CHANGES WE 'VE MADE , THAT 'S
3 WHAT THE STATE 'S RESPONSE WOULD BE AND THEN WE CAN
4 TAKE FROM THERE THEN THAT 'S WHAT WOULD BE LITIGATED
5 GOING FORWARD .

6 SO I THINK IT'S , I DON'T THINK ANY
7 PURPOSE IS SERVED BY STRIKING MATERIAL FROM THE
8 COMPLAINT . I THINK THE POINT THE STATE IS MAKING
9 THAT IS VALID IS THAT THE PAST IS OF LIMITED
10 RELEVANCE TO THE SITUATION IN THE FUTURE AND IN THE
11 PRESENT .

12 IT'S NOT IRRELEVANT BUT IT'S OF LIMITED
13 RELEVANCE . AND THAT 'S REALLY WHAT DICKENS SAYS .
14 THE NINTH CIRCUIT SAYS IT LOUD AND CLEAR THAT WE
15 NEED TO FOCUS ON THE CURRENT PROTOCOL THE CURRENT
16 LIKE HOOD THAT THERE 'S GOING TO BE A PROBLEM .

17 IF THERE 'S NOT A SUBSTANTIAL RISK OF AN
18 8TH AMENDMENT VIOLATION UNDER THE CURRENT PROTOCOL
19 THEN THERE IS NO PROBLEM WITH THE PROTOCOL FROM A
20 CONSTITUTIONAL STANDPOINT AND EXECUTIONS CAN
21 PROCEED .

22 SO I DON'T THINK ANY PURPOSE IS SERVED BY
23 PRETENDING THAT THE PAST DIDN'T EXIST OR SAYING
24 THAT IT HAS ABSOLUTELY NO BEARING BUT I TAKE THE
25 STATE 'S POINT AND I THINK THEY ARE RIGHT THAT IN

1 LIGHT OF BAZE AND DICKENS IT'S OF LIMITED
2 RELEVANCE .

3 AND SO TO SUM UP , I THINK THE PROTECTIVE
4 ORDER AS TO THE DEPOSITIONS OF THE FORMER GOVERNOR
5 AND LEGAL AFFAIRS SECRETARY IS WELL TAKEN . THAT
6 MOTION IS WELL TAKEN .

7 I THINK THAT THE NOTION STRIKE IS
8 UNNECESSARY AND THERE 'S A GENERAL PRESUMPTION IN
9 PLEADING PRACTICE THAT SUCH MOTIONS ARE DISFAVORED .
10 AND I DON 'T THINK THERE 'S ANY REAL PREJUDICE TO THE
11 STATE IN THAT RESPECT .

12 AND THEN FINALLY WITH REGARD TO THE ON
13 GOING DISCOVERY DISPUTES THAT THE PARTIES HAVE , I
14 DO THINK THAT WHAT HAPPENED IN THE PAST , FROM A
15 DISCOVERY STANDPOINT , IF NOT FROM A PROOF
16 STANDPOINT AT TRIAL , IS ARGUABLY RELEVANT TO WHAT 'S
17 HAPPENING NOW AS LONG AS THOSE DOTS CAN BE
18 CONNECTED AS LONG AS THERE 'S AN ARGUMENT THAT CAN
19 BE MADE IN GOOD FAITH THAT AUTHORIZE THERE HASN 'T
20 BEEN ANY CHANGE MADE IN POINT A TO POINT B , IF YOU
21 FOLLOW WHAT I 'M SAYING .

22 THOSE ARE SOME TENTATIVE THOUGHTS . LET
23 ME GET A RESPONSE FIRST FROM THE STATE AND THEN
24 FROM PLAINTIFFS .

25 MR . GOLDMAN : WELL , YOUR HONOR , ASSUMING

1 I UNDERSTAND WHAT YOU ARE SAYING AND PERHAPS I
2 DON'T, BUT IN TERMS OF THE PAST BEING RELEVANT ,
3 MOST -- FIRST OF ALL , MOST OF THE DISCOVERY
4 REQUESTS ARE SUBJECT TO PROTECTIVE ORDER , ARE NOT
5 ABOUT PAST PERFORMANCE OF AN EXECUTION TEAM . THEY
6 ARE -- THE VAST MAJORITY ARE ABOUT HOW WHAT IF THE
7 PROTOCOLS COMPOSED AND HOW THIS WAS COMPOSED .

8 THEY SAY SO IN THEIR PAPERS THEY WANT
9 INFORMATION ABOUT THE DRAFTING PROCESS TO IDENTIFY
10 YOU KNOW WHICH IDEAS WERE REVIEWED AND REJECTED AND
11 WHY BEST PRACTICES WERE NOT ADOPTED .

12 LOOK AT PAGE 17 IN THEIR OPPOSITION FOR
13 THAT . UNDER DICKENS AND BAZE THAT SEEMS TO BE
14 WHOLLY OUTSIDE THE SCOPE OF THE DISCOVERY AND THAT
15 IS , I THINK , THE MAJORITY OF THE WRITTEN DISCOVERY
16 REQUESTS THAT WE ARE TALKING ABOUT .

17 IT IS -- IT IS , AND WHAT I AM JUST SAYING
18 COMPLETELY COMPORTS WITH WHAT THE COURT JUST SAID
19 WHICH IS ONE HOW THE CURRENT REGULATIONS ARE BEING
20 IMPLEMENTED THERE 'S WHAT 'S ON PAPER AND THEN YOU
21 GOT TO SEE IF THAT 'S WHAT 'S HAPPENING .

22 THAT OF COURSE IS WHOLLY WITHIN THE SCOPE
23 AND THAT 'S NOT THE SUBJECT OF THE MOTION FOR THE
24 PROTECTIVE ORDER .

25 AND UNDER DICKENS , CERTAIN CATEGORY WAS

1 PAST MISSTEPS COULD POSSIBLY CREATE MATERIAL KNOW
2 EFFECTS .

3 SOME UNDER DICKENS WILL NOT , SOME WILL .

4 THE WRITTEN DISCOVERY REQUESTS , NEITHER
5 ONE OF THEM ASKS ANY QUESTIONS ABOUT EXECUTIONS
6 THAT OCCURRED IN THE PAST , AND WHAT HAPPENED THERE
7 AND HOW THEY WERE PERFORMED .

8 THE SCOPE IN TERMS OF WHEN WE GET TO
9 THAT , IN TERM WAS THINGS LIKE TRAINING AND TEAM
10 SELECTION , NONE OF THOSE GO BACK BENEFIT
11 NOVEMBER '07 , THE LAST EXECUTION WAS I BELIEVE
12 JANUARY '06 .

13 AND SO TO THE DEGREE WE ARE TALKING ABOUT
14 WRITTEN REQUESTS THAT ARE THINGS LIKE THE GOVERNORS
15 E-MAILS OR SOMETHING EVERYBODY MIGHT HAVE READ OR
16 CONSIDERED WHEN THEY WERE THINKING ABOUT DRAFTING
17 REGULATIONS , UNDER BAZE AND DICKENS I JUST DON'T
18 SEE ANY ROOM FOR THAT .

19 THE COURT : SO THEIR THOUGHT PROCESS AS
20 YOU SEE IT IS IRRELEVANT .

21 THE QUESTION IS : ARE THE CURRENT
22 PRACTICES AND PROTOCOLS AND PLANS , TO WHAT EXTENT
23 ARE THEY THE SAME AND TO WHAT EXTENT ARE THEY
24 DIFFERENT FROM WHAT EXISTED BEFORE ?

25 MR . GOLDMAN : WELL , THAT BASICALLY IS

1 WHAT I AM SAYING IN TERMS OF OBVIOUSLY WHAT IS
2 GOING ON NOW , THERE 'S DISCOVERY THAT WE ARE NOT
3 SUBJECT --

4 THE COURT : THAT 'S CLEARLY RELEVANT .

5 MR. GOLDMAN : AND WHAT HAPPENED DURING
6 THE EXECUTION OF , YOU KNOW , THIS PERSON OR THAT
7 PERSON , IS NOT THE SUBJECT OF THIS MOTION EITHER .

8 THE COURT : OKAY .

9 MR. QUINN : IN TERMS OF THE THOUGHT
10 PROCESSES , THAT 'S MY THOUGHT , THEN IS THE THOUGHT
11 OF I BELIEVE , BAZE AND THAT 'S CONFIRMED IN JACKSON
12 V. DANBERG , EMMETT V. JOHNSON AND THE RABY CASE WE
13 CITE .

14 THE COURT : IT'S WHAT THE PRODUCT WAS AND
15 NOT WHAT THE PROCESS WAS THAT LEAD TO THAT PRODUCT .

16 MR. GOLDMAN : WELL , IN TERMS OF -- I
17 BELIEVE THE WAY THE PLAINTIFFS MENTION IT IN THEIR
18 REPLY . BUT AS THESE THREE CIRCUIT COURTS POINT OUT
19 RABY IN ITS SUMMATION OF ITS REASONING EXPLICITLY
20 BY EMMETT AND JACKSON THAT , YOU KNOW , THE BAZE
21 COURT DID NOT REQUIRE A SHOWING OF DELIBERATE
22 INDIFFERENCE , IS WHAT I THINK THEY ARE GETTING AT
23 WHAT THEY SAID SUBJECTIVE BLAMELESSNESS .

24 JACKSON SAID BAZE CAPTURED SOME OF THE
25 LANGUAGE OF HELLING AND FARMER , IMPORTANTLY THE

1 DELIBERATE INDIFFERENCE LANGUAGE USED IN THOSE
2 CASES .

3 AND THESE COURTS EXPLAIN THERE 'S A
4 SEPARATE DISTINCTION BETWEEN THE 8TH AMENDMENT
5 EXECUTION CASES AND CONS OF CONFINEMENT 8TH
6 AMENDMENT CASES .

7 THE COURT : RIGHT .

8 AND I MEAN , I HESITATE TO DO THIS , IT'S
9 SOMETHING I DO A LOT IN ORAL ARGUMENT . I WOULD
10 COME UP WITH A HYPOTHETICAL THAT WOULDN 'T EXIST IN
11 REAL WORLD TO MAKE A POINT .

12 SO IF THE STATE DECIDED THAT WE ARE GOING
13 TO DEAL WITH THIS PROBLEM THE PERSON MIGHT NOT BE
14 UNCONSCIOUS BY HAVING A CONSCIOUSNESS CHECK WHICH
15 IN FACT THE STATE HAS DONE .

16 AND LET 'S SAY THE STATE 'S REASON FOR THAT
17 WASN 'T BECAUSE THEY THOUGHT THAT THIS WAS THE BEST
18 METHOD TO USE BUT BECAUSE THE PERSON WHO DOES THE
19 CONSCIOUSNESS NEED A JOB AND WANTED TO EMPLOY THAT
20 PERSON , IN OTHER WORDS , IT HAD NOTHING TO DO WITH
21 THE DESIRE TO COMPLY WITH THE 8TH AMENDMENT .

22 YOUR POSITION WOULD BE YOU DON 'T LOOK AT
23 WHY THEY DID IT , YOU LOOK AT WHETHER WHAT THEY DO
24 WAS SUFFICIENT TO ADDRESS THE PROBLEM ?

25 MR . GOLDMAN : THAT 'S THE POSITION OF THE

1 SUPREME COURT .

2 AND AS A MATTER OF FACT , THAT 'S WHY AS
3 DICKENS RECOGNIZED THERE ARE NOT ONLY THERE ARE
4 ACTUALLY SAFE HARBORS .

5 I MEAN , YOU KNOW , IF THE DAY AFTER BAZE
6 CAME OUT IF THE STATE RAN OUT , GRABBED KENTUCKY 'S
7 PROTOCOL , SCRATCHED OUT THE WORD KENTUCKY AND WROTE
8 THEIR STATE , AND IF THEY HAD THE MOST BASE MOTIVE S
9 IN DOING IT IN THEIR MIND , IT WOULD STILL BE
10 COMPLIANT AS WRITTEN .

11 THE COURT : IT WOULD SURVIVE A FACIAL
12 CHALLENGE .

13 MR . GOLDMAN : NOW OF COURSE IF THEY DON 'T
14 FOLLOW IT , THAT 'S A DIFFERENT STORY .

15 BUT WHAT WE ARE GETTING AT AND THIS
16 MOTION HAS BEEN USEFUL BECAUSE I THINK THEY HAVE
17 HAD TO EXPLICITLY SAY THIS IS BASICALLY THEY WANT
18 TO HAVE AN ANALYSIS UNDER THE UNNECESSARY RISK
19 STANDARD AND GIVE IT A DIFFERENT NAME IF THEY HAVE
20 TO .

21 BUT THE PURPOSE THAT THEY SAY IT 'S
22 NECESSARY FOR IS EXACTLY WHAT AN UNNECESSARY RISK
23 ANALYSIS WOULD HAVE .

24 AND I THINK THERE 'S A REASON THE ROBERT 'S
25 PLURALITY , RESPONDING TO SOME OF THE OTHER

1 JUSTICES , SAID NO , OUR HOLDINGS TODAY ARE NOT GOING
2 TO CREATE ENDLESS AMOUNTS OF LITIGATION BECAUSE
3 THERE ARE SOME BRIGHT LINE DIFFERENCES WHICH
4 DICKENS AND THE NINTH CIRCUIT RECOGNIZE TOO .

5 AND THAT 'S WHY YOU CAN HAVE A SAFE
6 HARBOR , FOR EXAMPLE . ACKNOWLEDGING A SAFE HARBOR
7 WOULD MAKE NO SENSE IF YOU HAVE TO GO INTO THE MIND
8 OF THE AUTHORS OF THE PROTOCOL .

9 THE COURT : LET ME SUM UP , MR . GOLDMAN ,
10 AND LET ME GIVE PLAINTIFFS A CHANCE TO RESPOND .

11 WHAT I'M HEARING IS YOU DON'T LOOK INTO
12 WHY THEY DID IT . THE ISSUE IS WHAT'S HAPPENING NOW
13 OBVIOUSLY IS RELEVANT , THE STATE DOESN'T OPPOSE
14 DISCOVERY AS TO WHAT'S GOING NOW . AND WHAT
15 HAPPENED IN THE PAST IS RELEVANT TO THE EXTENT THAT
16 IT IS COMPARATIVE WITH WHAT'S GOING NOW .

17 IN OTHER WORDS , YOU CAN SAY THIS IS WHAT
18 WE DID THEN THIS IS WHAT WE DID NOW .

19 AND TO THE EXTENT THAT IT'S THE SAME OR
20 THE EXTENT IT'S DIFFERENT THAT IS RELEVANT TO THE
21 COURT'S INQUIRY EVEN UNDER DICKENS . THAT'S WHAT
22 I'M HEARING YOU SAY .

23 BUT WHAT YOU DON'T GET INTO THE MIND SET
24 OF THE DECISION MAKERS AND SAY WELL , WHY DID YOU
25 DECIDE TO DO THIS AND NOT DECIDE TO DO THAT

1 MR. GOLDMAN : WELL , EXACTLY .

2 AND THE SUPREME COURT WHEN IT SAID WE'RE
3 NOT GOING LET COURTS BE BEST PRACTICES COURTS
4 THAT'S EXACTLY WHAT THEY MEANT .

5 THEY WEREN'T TALKING ABOUT WHETHER
6 SOMEBODY AS THEY DRAFTED A PROTOCOL AS A CARING
7 ATTITUDE , A BAD ATTITUDE , THE BEST ATTITUDE . THEY
8 ARE GOING TO THE FACT THAT THERE USED TO BE THIS
9 BEST PRACTICES SORT OF LITIGATION , AND THEY ARE --
10 THEY EXPLICITLY DIDN'T ALLOW IT ANYMORE .

11 THE COURT : OKAY .

12 MR. GOLDMAN : AND THAT'S EXACTLY WHAT
13 THIS DISCOVERY THAT WE ARE TALKING ABOUT RIGHT NOW
14 WOULD GET INTO . AND IT'S EXACTLY I THINK
15 EXPLICITLY WHAT HAS BEEN CONFIRMED IN THEIR OWN
16 OPPOSITION .

17 THE COURT : ALL RIGHT .

18 LET ME GET THE OTHER SIDE OF THE STORY .

19 MR. GRELE ?

20 MR. GRELE : THANK YOU , YOUR HONOR .

21 I OFTEN TIMES SIT HERE AND WONDER IF I'M
22 READING THE SAME CASES AS DEFENDANT'S COUNSEL .

23 I DON'T SEE THE WORD SAFE HARBOR IN BAZE
24 AT ALL . I SEE IT IN SOME OTHER OPINIONS BUT I
25 DON'T SEE IT AT ALL

1 THE COURT : IT'S IN DICKENS WHICH IS
2 SOMETHING YOU NEED TO DEAL WITH .

3 MR. GRELE : I KNOW I UNDERSTAND THAT .

4 IF WE GO BACK TO FOUNDATIONAL MATTERS ,
5 AND ONE THING I WANTED TO TALK ABOUT WHEN WE ARE
6 TALKING ABOUT PROTOCOLS , WHEN THE SUPREME COURT IS
7 TALKING ABOUT KENTUCKY 'S PROTOCOL AND THEY GO
8 THROUGH THE PROTOCOL , THE PROTOCOL ISN'T A WRITTEN
9 PROTOCOL FOR THE SUPREME COURT , IT'S BASED ON AN
10 EXTENSIVE RECORD OF HEARINGS AND DEPOSITIONS AND
11 THINGS OF THAT NATURE AS TO HOW THE PROCESS IS
12 ACTUALLY REALLY EFFECTUATED .

13 AND TO TRY TO TRANSITION THAT TO SAY
14 PROTOCOL AS WRITTEN , AS WE SEE IN DEFENDANT 'S
15 PAPERS ALL THE TIME , IS I THINK IS NOT A FAIR
16 READING OF WHAT THE SUPREME COURT HAS NOTED

17 THE COURT : BUT DOES THAT MATTER HERE
18 MR. GRELE AND I WILL TELL YOU WHY I'M ASKING THAT
19 QUESTION .

20 I THINK I HEARD MR. GOLDMAN SAY THAT THE
21 STATE AGGRESS THAT THE PLAINTIFFS ARE ENTITLED TO
22 DISCOVERY ABOUT WHAT IS GOING ON TODAY , OKAY .

23 HOW ARE THE EXECUTION TEAMS BEING
24 CONSTITUTED ? HOW ARE THEY BEING TRAINED ? WHAT 'S
25 BEING DONE WITH THE DRUGS ? WHAT 'S BEING DONE WITH

1 THE EXECUTION CHAMBER ?

2 ALL OF THOSE QUESTIONS IN 2011 ARE
3 CLEARLY RELEVANT .

4 MR . GRELE : I HEAR THEM SAY THAT HERE
5 TODAY , BUT IF YOUR HONOR LOOKS AS EXHIBIT 3 THEY
6 HAVE OBJECTED TO EVERY ONE OF THOSE .

7 THE COURT : I WILL GET THERE . I 'M JUST
8 TRYING TO UNDERSTAND THE PARTIE S' POSITIONS . I
9 THINK THERE ARE SPECIFIC WAYS IN WHICH THE
10 QUESTIONS AND THE OBJECTIONS NEED TO BE WORKED
11 THROUGH . BUT I 'M TRYING TO UNDERSTAND THE PARTIES '
12 POSITIONS .

13 SO WHAT I 'M HEARING HERE IS THAT AS FAR
14 AS THE FACTS ON THE GROUND TODAY ARE CONCERNED ,
15 ABSOLUTELY THAT NEEDS TO BE A FACT INTENSIVE
16 INQUIRY , WE NEED TO FIND OUT WHAT 'S GOING TODAY .

17 AND AS FAR AS THE FACTS ON THE GROUND IN
18 THE PAST ARE CONCERNED , FIRST OF ALL , THE COURT
19 SPENT A WEEK HEARING EVIDENCE ABOUT THAT , SO IT 'S
20 NOT AS IF THAT 'S NOT PART OF THE RECORD .

21 AND SECONDLY , TO THE EXTENT THAT THERE
22 ARE OTHER FACTS ON THE GROUND THAT POST DATED THE
23 PROCEEDING S IN 2006 , THOSE FACTS ARE RELEVANT TO
24 SHOW THE CONNECTION OR LACK THERE OF BETWEEN THE
25 OLD PROTOCOL AND THE THREW NEW ONE .

1 SO I THINK WE ALL AGREE ON THAT . I THINK
2 WHERE THE REAL DIFFERENCE IS , IS IN HOW MUCH THE
3 PLAINTIFFS GET TO INQUIRE INTO THE THOUGHT
4 PROCESSES OF THE FOLKS IN THE CDCR AND THE
5 GOVERNOR 'S OFFICE THAT MADE THE DECISIONS THAT THEY
6 DID . AND I THINK THAT WOULD BE THE MOST USEFUL
7 THING FOR YOU HERE .

8 MR . GRELE : AND I WANTED TO ADDRESS THAT ,
9 YOUR HONOR .

10 BUT -- AND I THINK I SAID TO THE COURT ,
11 MONTHS AGO , MONTHS AGO IN RELATION TO THIS INQUIRY
12 I SAID , YOU KNOW , IF WE GOT THE ACTUAL DOCUMENTS
13 THAT WE HAVE BEEN ASKING FOR , WE MAY NOT EVEN HAVE
14 TO DEPOSE THOSE PEOPLE . AND DIDN 'T PUT THEM IN AS
15 THE WITNESSES IN THE CASE , THE DEFENDANTS DID .
16 WHEN WE ASKED THEM WHO MADE THE DECISIONS IN THIS
17 CASE , THEY SAID MS . HOGUE AND GOVERNOR
18 SCHWARZENEGGER .

19 SO IT 'S NOT LIKE WE BROUGHT THEM INTO THE
20 CASE THE DEFENDANTS BROUGHT THEM INTO THE CASE .
21 AND WE SAID GIVE US THE DOCUMENTS THAT RELATE TO
22 THE DECISION MAKING PROCESS AND MAYBE WE DID OR WE
23 DON 'T HAVE TO DEPOSE THEM .

24 OKAY . THEY DON 'T WANT TO DO THAT . AND
25 NOW THEY SAY IT 'S BECAUSE THE THOUGHT PROCESSES ARE

1 IRRELEVANT . WELL THAT 'S NOT -- I DON 'T SHARE THAT
2 OPINION AND THE REASON FOR THAT IS NOT ONLY DO THE
3 THOUGHT PROCESSES REFLECT HOW WELL THEY ARE GOING
4 ACTUALLY EFFECTUATE THE PROCEDURE BECAUSE AS THE
5 COURT 'S HYPOTHETICAL MENTIONED IF YOU WANT TO GET
6 SOMEBODY A JOB AND THAT 'S THE REASON YOU CAN BE
7 ALMOST GUARANTE ED THE PERSON ISN 'T GOING TO BE UP
8 TO SNUFF WHEN THE ACTUAL PROCESS GETS PUT IN PLACE .

9 BUT ALSO IN THOSE DISCUSSIONS AS WE 'VE
10 LEARNED BACK IN 2007 WHEN WE PREPARED FOR THE
11 SECOND HEARING , THAT DIDN 'T TAKE PLACE BEFORE THIS
12 COURT . IN THOSE DISCUSSION S THERE 'S A LOT OF
13 FACTUAL MATTER , ABOUT WHAT THIS PROCEDURE SHOULD OR
14 COULD OR WILL LOOK LIKE AND WHY .

15 AND HERE 'S OUR FACTUAL SCIENTIFIC REVIEW
16 OF MATERIAL . AND HERE 'S OUR REVIEW OF WHAT
17 PLAINTIFF S ARE SAYING AND WHY THIS OR THAT MAKES
18 SENSE . I DO THE HYPOTHETICAL TOO YOUR HONOR , AND I
19 CAN THROW OUT A COUPLE FOR THE COURT .

20 SUPPOSE WE ARE LOOKING AT THE
21 CONSCIOUSNESS CHECK AND I KNOW THAT 'S A VERY
22 IMPORTANT FEATURE OF THE NEW PROTOCOL THAT THE
23 COURT HAS EXPRESSED SOME INTEREST IN MAKING AN
24 INQUIRY OF .

25 IF THERE 'S SOMETHING IN THERE THAT SAYS

1 WE DON'T THINK THIS THING IS GOING TO WORK AT ALL
2 WE DON'T THINK WE HAVE ANYBODY THAT CAN DO IT, WE
3 DON'T THINK IT'S A PROPER PROCEDURE FOR US TO BE
4 DOING AND WE ARE ONLY GOING TO MAKE SOMEBODY FROM
5 THE IV TEAM OR THE WARDEN BE THERE BECAUSE WE DO
6 NOT WANT TO EXPOSE ANYONE ELSE TO ANY PUBLIC --

7 THE COURT: THAT'S DIFFERENT, THAT'S NOT
8 THOUGHT PROCESSES, THAT'S AN ADMISSION. THAT'S
9 SOMEBODY SAYING WE DON'T THINK THIS IS GOING TO
10 WORK BUT WE ARE DOING IT ANY WAY. AND THAT GOES TO
11 THE QUESTION OF WHETHER IT'S GOING TO WORK WHICH IS
12 ABSOLUTELY A QUESTION THE COURT HAS TO DECIDE.

13 THE COURT HAS TO DECIDE WHETHER THERE'S
14 EVIDENCE THAT IT'S NOT GOING TO WORK TO THE LEVEL
15 THAT THERE'S A SUBSTANTIAL RISK OF AN 8TH AMENDMENT
16 VIOLATION.

17 BUT THAT'S DIFFERENT FROM JUST A GENERAL
18 INQUIRY INTO THE THOUGHT PROCESSES.

19 MR. GRELE: I AGREE.

20 BUT YOU KNOW, WE DON'T MAKE THESE
21 REQUESTS JUST BECAUSE WE THINK IT MIGHT BE
22 INTERESTING TO FIND OUT THIS INFORMATION. WE MAKE
23 THESE REQUESTS BECAUSE WITHIN THE ANSWERS, WITHIN
24 THESE MATERIALS, ARE THE NUGGETS OF OUR CASE. JUST
25 AS THE COURT POINTED OUT.

1 AND SO IT'S NOT BECAUSE WE WANT TO KNOW
2 EXACTLY WHAT THE GOVERNOR WAS THINKING FOR ALL I
3 KNOW HE WAS THINKING I DON'T WANT TO BREAK RANK
4 WITH THE OTHER STATES THEREFORE I WILL STAY WITH
5 THE THREE DRUG PROTOCOL .

6 WHATEVER REASON IS WHAT WAS EXPRESSED , IS
7 THERE ANYTHING TALKING ABOUT HOW WE GOT TO KEEP
8 PANCURONIUM BROMIDE IN THERE BECAUSE THOSE GUYS AT
9 CDC CAN'T GET IT RIGHT AND IT'S THE ONLY THING THAT
10 KEEPS THE PUBLIC FROM FREAKING OUT ABOUT EXECUTION .

11 OBVIOUSLY , A VERY RELEVANT DISCUSSION FOR
12 WHAT'S GOING WITH THE COURT . OR WE WANT TO BE ABLE
13 TO KEEP THE THREE DRUG PROCEDURE BECAUSE WE KNOW
14 ALL THE PROBLEMS THE PLAINTIFFS POINTED OUT AND THE
15 JUDGE FOUND TO BE RELEVANT AREN'T REALLY RELEVANT ,
16 WE DON'T CARE , AS LONG AS WE GET A NEW PIECE OF
17 PAPER OUT THERE WE WILL BE OKAY BECAUSE THE NEW
18 COURT CASES SAY THAT .

19 THOSE THINGS ARE RELEVANT TO ALL THE
20 THINGS WE HAVE TO DO IN THIS CASE .

21 PREVIOUSLY WHEN THE DEFENDANTS WERE
22 ASKING TO GO FORWARD WITH THE HEARING EVEN THOUGH
23 CERT HAS BEEN GRANTED IN BAZE , THEY GAVE US A LONG
24 LIST OF WHAT WE NEEDED TO DISCUSS .

25 REGARDLESS OF WHAT THE BAZE DECISION

1 SAYS . AND EACH ONE OF OUR POINTS GOES TO THAT . SO
2 WE CAN TALK ABOUT PARTICULAR DOCUMENTS AND WHETHER
3 THEY 'RE IRRELEVANT OR NOT IN TERMS OF THE PROCESS ,
4 BUT WE CAN 'T DO THAT WITHOUT SEEING WHAT THOSE
5 DOCUMENTS ARE .

6 THE COURT : OKAY . JUST A MINUTE .

7 I WANT TO JUST LET MR . GRELE FINISH ,
8 MR . KRISHNAN WANTS TO SAY SOMETHING THEN I WILL
9 COME BACK TO YOU , MR . GOLDMAN .

10 MR . GRELE , DO YOU HAVE ANY OTHER POINT
11 YOU WANTED TO MAKE ?

12 MR . GRELE : FOR INSTANCE , IN THE 2007
13 DISCOVERY WE HAD YOUR HONOR , WE HAD THE PROPOSAL
14 WAS TO PUT THE WARDEN IN THE CHAMBER WHICH THEY 'VE
15 DONE . AND THAT 'S WHY 2007 IS SO RELEVANT TO TODAY
16 BECAUSE IT 'S THE EXACT SAME PROTOCOL .

17 AND THE WARDEN OBJECTED . THE WARDEN SAID
18 I DON 'T THINK AS WARDEN OF SAN QUENTIN THIS IS A
19 GOOD IDEA . I THINK THAT 'S BAD FOR THE PROTOCOL AND
20 BAD FOR THE PROCESS AND HERE 'S WHY .

21 WELL , THAT 'S A VERY RELEVANT PIECE OF
22 MATERIAL AND I THINK WE HAVE SUBMITTED IT AS AN
23 EXHIBIT TO THE COURT IN THE CONTEXT OF THE BROWN
24 LITIGATION . AND OBVIOUSLY IT 'S WITHIN THE CATEGORY
25 THAT THEY CONSIDER TO BE DUPLICATIVE IN THE SENSE

1 OF DRAFTING PROCESS .

2 BUT I THINK IT'S A VERY IMPORTANT OPINION
3 AND VERY IMPORTANT MATERIAL THAT THE WARDEN
4 PRESENTS FOR THE COURT TO CONSIDER WHETHER OR NOT
5 THEY CAN RECTIFY THE PROBLEMS .

6 THE COURT : BUT IF THERE 'S NO INDICATION ,
7 JUST TO FOLLOW UP ON THAT ONE POINT , IF THERE 'S NO
8 INDICATION THAT THE WARDEN 'S REASONING WAS THAT HE
9 DIDN 'T THINK THE CONSCIOUSNESS CHECK WOULD BE
10 EFFECTIVE HE JUST DIDN 'T THINK IT WOULD BE
11 APPROPRIATE FOR HIM AND HIS OFFICE AS THE WARDEN TO
12 DO IT .

13 IF THERE WAS SOME PROFFER THAT THE REASON
14 HE SAID WHAT HE DID WAS BECAUSE HE DIDN 'T THINK IT
15 WOULD WORK I SUPPOSE THAT WOULD BE RELEVANT . BUT
16 THAT 'S NOT -- THERE 'S NO INDICATION OF THAT .

17 MR . GRELE : I THINK THE WARDEN -- WE
18 HAVEN 'T HAD A CHANCE OF COURSE TO DEPOSE THE
19 WARDEN , BUT THE WARDEN -- THE POSITION OF THE
20 WARDEN WAS BECAUSE ALL THE ACTION IS OCCURRING IN
21 THE INFUSION ROOM AND I 'VE GOT TO MAKE DECISIONS
22 BASED ON THAT INCLUDING THE PHONES FROM THE
23 GOVERNOR AND THE SUPREME COURT , AND I 'VE GOT TO
24 MAKE DECISIONS BASED ON THAT I SHOULDN 'T BE IN HERE
25 AND MY VALUE IN HERE IS SUPERFLUOUS .

1 THE COURT : OKAY .

2 MR . GRELE : AND THAT 'S AN IMPORTANT
3 DECISION , AN IMPORTANT PIECE OF INFORMATION IN FACT
4 THAT THE DEFENDANTS , THAT KIND OF MATERIAL THE
5 DEFENDANTS WANT TO SAY IS IRRELEVANT .

6 I CAN SEE WHY THEY WANT TO SAY IT'S NOT
7 IRRELEVANT , IT'S IMPORTANT TO THIS LITIGATION .

8 THE COURT : THANK YOU .

9 MR . KRISHNAN ?

10 MR . KRISHNAN : THANK YOU , YOUR HONOR .

11 WHEN WE ARE DISCUSSING THE REASONS WHY
12 CDCR DECIDED TO IMPLEMENT OR NOT IMPLEMENT A
13 PARTICULAR PROTOCOL , THE FACT IS FROM THE FIRST
14 AMENDMENT PERSPECTIVE , AND THE PNS CASE IT IS
15 RELEVANT WHY CDCR DECIDED TO KEEP IN PANCURONIUM OR
16 WHY THEY DECIDED NOT TO KEEP IN PANCURONIUM .

17 THE THOUGHT PROCESS THERE IS COMPLETELY
18 RELEVANT BECAUSE UNDER THE RELEVANT FIRST AMENDMENT
19 STANDARD , THE COURT WILL HAVE TO WEIGH THE FIRST
20 AMENDMENT INTEREST AGAINST THE DEFENDANT 'S REASONS
21 FOR KEEPING PANCURONIUM .

22 THE COURT : IT'S NOT AN 8TH AMENDMENT
23 PROBLEM , DICKENS IS NOT EVEN ON -- GERMANE TO THE
24 QUESTION YOU ARE TALKING ABOUT .

25 MR . SENIOR : RIGHT .

1 BUT I THINK THE QUESTION , THE POINT I'M
2 MAKING IS RELEVANT BOTH TO THE QUESTION OF WHY AND
3 WHETHER CDCR DECIDED TO KEEP IN A THREE DRUG VERSUS
4 ONE DRUG PROTOCOL .

5 IT'S RELEVANT TO THAT BECAUSE
6 PANCURONIUM , IF CDCR DECIDED TO USE A ONE DRUG
7 PROTOCOL INSTEAD OF A THREE DRUG PROTOCOL OR VICE
8 VERSA , THEY WOULD HAVE MADE A DECISION AS TO
9 OPINION PAN IN THERE .

10 AND OBVIOUSLY IT'S ALSO RELEVANT TO THE
11 DISCUSSION WE HAVE BEEN HAVING ABOUT REASON S FOR
12 IMPLEMENTING A PARTICULAR PROTOCOL .

13 SO FROM THE FIRST AMENDMENT PERSPECTIVE
14 THAT 'S GOING TO BE DISCOVERY .

15 THE COURT : IT IS A DIFFERENT ANALYSIS , I
16 THINK YOU ARE RIGHT .

17 OKAY . MR . GOLDMAN ?

18 MR . GOLDMAN : TO ADOPT MR . GRELE 'S POINT
19 OF VIEW , THE ONLY WAY TO DO IT IS THIS COURT , I
20 HATE TO SAY THIS , BUT IGNORES BAZE AND IGNORES
21 DICKENS WHICH I WOULD NEVER SAY IT WOULD
22 CONSCIOUSLY OR INTENTIONALLY DO , BUT IT WOULD BE AN
23 ERROR TO THAT MAGNITUDE , IN OUR POINT OF VIEW .

24 IF THE NUGGET OF HIS CASE IS NOT REALLY
25 WHAT 'S GOING ON IN PRACTICE , HOW WOULD THESE

1 REGULATIONS AS WE READ THEM BE PERFORMED BUT WHAT
2 SOMEBODY WAS THINKING AS THEY WROTE THEM , THEY
3 CAN 'T SATISFY THE SUBSTANTIAL RISK STANDARD .

4 THE COURT : WHEN YOU PUT IT THAT WAY .

5 MR . GOLDMAN : IN ANY WAY , SHAPE OR FORM .

6 THE COURT : WHEN YOU PUT IT THAT WAY ,
7 IT 'S HARD TO ARGUE WITH YOU .

8 LET ME JUST COME BACK TO YOU WITH A
9 QUESTION .

10 SO LET 'S SAY THE QUESTION IS , AND I 'M
11 SURE WE 'RE GOING TO LITIGATE THIS QUESTION IN THIS
12 CASE .

13 IS THE CONSCIOUSNESS CHECK EFFECTIVE ?
14 RIGHT ? BECAUSE THAT 'S ONE OF THE CHANGES THAT THE
15 STATE HAS MADE .

16 AND I AM EXPECTING TO HEAR SOME TYPE OF
17 SUBMISSION FROM THE PLAINTIFFS THAT IT DOESN 'T
18 WORK . BECAUSE IF IT WORKS THE CASE IS OVER . IF
19 THERE 'S AN EFFECTIVE WAY TO DETERMINE WHETHER
20 SOMEONE IS CONSCIENCE OR NOT THAT ELIMINATES THE
21 WHOLE THRESHOLD THING THAT GOT US HERE . SO THAT 'S
22 GOING TO BE A HOTLY CONTESTED ISSUE .

23 WHAT IF HYPOTHETICALLY SOMEONE WITHIN THE
24 STATE GOVERNMENT HAD SAID I DON 'T THINK THIS IS
25 GOING TO WORK ? WHAT IF THEY HAD SAID THAT ? IS

1 THAT A RELEVANT EVEN AT THE DISCOVERY LEVEL ?

2 MR. GOLDMAN : YES , IT IS .

3 LET 'S TURN IT AROUND . WHAT IF SOMEBODY
4 IN STATE GOVERNMENT SAID , BOY , I SURE THINK THIS
5 THING IS GOING TO WORK , IT'S GOING TO BE THE BEST
6 CONSCIOUSNESS CHECK EVER , DOES THAT MEAN WE WIN OUR
7 CASE , IS IT RELEVANT ? NO . BECAUSE UNDER THE CASE
8 LAW THAT HERE IS WHAT WOULD BE RELEVANT .

9 WE HAVE TO LOOK AT TWO THINGS , HOW IS
10 THAT PROTOCOL WRITTEN WHAT SAFEGUARDS ON THE PIECE
11 OF PAPER ARE THERE ? THAT 'S WHERE WE HAVE TO START .

12 AND THERE WE COME INTO THE SAFE HARBOR
13 ASPECTS . AND IS THIS METHOD , DOES THE METHOD FIT
14 THE SAFE HARBOR . IF IT DOESN 'T DOES IT -- AND THIS
15 WOULD BE REALLY EXPECT TESTIMONY , CREATE A
16 SUBSTANTIAL RISK OF SERIOUS HARM .

17 AND THEN OF COURSE EVEN IF IT TURNS OUT
18 THERE 'S -- EACH IF THERE WAS NO DISPUTE ABOUT THAT
19 PARTICULAR PROVISION AS WRITTEN IN TERMS OF HOW IT
20 IS JUST ON ITS FACE , WE STILL HAVE TO OF COURSE GO
21 AND SEE WHAT IS BEING DONE .

22 YOU KNOW , ARE FOLLOWING THE REGULATIONS
23 ARE THEY PRACTICING THE CONSCIOUSNESS CHECK WHAT
24 HAVE YOU THOSE ARE THE INQUIRIES .

25 THE COURT : IT'S A FACTUAL INQUIRY DOES

1 IT WORK OR NOT , NOT DOES SOMEBODY THINK IT'S GOING
2 WORK .

3 MR. GOLDMAN : RIGHT . BECAUSE IT IS
4 DETERMINATION , THE SUPREME COURT AND EVERY COURT
5 THAT HAS LOOKED AT THIS INCLUDING THE THIRD AND
6 FOURTH AND FIFTH CIRCUITS THAT I JUST MENTIONED
7 TALK ABOUT IS NOT SUBJECTIVE BLAMELESSNESS , IT IS
8 AN OBJECTIVE STANDARD . AND THE SUPREME COURT USES
9 THAT WORD OBJECTIVELY INTOLERABLE .

10 SO I MIGHT THINK IT'S -- OH , IT'S NOT SO
11 BAD OR THIS IS REALLY HORRIBLE , BUT IT'S
12 OBJECTIVELY INTOLERABLE .

13 SO IF IT DOESN'T FIT IN THE SAFE HARBOR
14 BENCH MARKS RECOGNIZED BY DICKENS , IT'S THE OTHER
15 SIDE DOESN'T WANT TO SAY THAT , IT IS THERE , WHAT
16 WOULD YOU WOULD STILL HAVE TO LOOK AT AS WRITTEN
17 BEFORE YOU COULD EVEN SEE WHETHER IT'S BEING
18 PERFORMED CORRECTLY AS APPLIED .

19 AND TO LOOK AT IT AS WRITTEN YOU WOULD
20 THEN HAVE TO HAVE , DEPENDING ON WHAT PROVISION YOU
21 ARE TALKING ABOUT , LET'S SAY THE CONSCIOUSNESS
22 CHECK I WOULD PRESUME EXPERT TESTIMONY , AND AFTER
23 CONSIDERING IT THAT WAY .

24 SOMEBODY WHO WAS A LAYPERSON OR HAPPENS
25 TO BE ON THE SECURITY SUB TEAM THINKS IT'S A BODY

1 OR GOOD IDEA , IT DOESN 'T MATTER . IN THE COURT , AND
2 DICKENS AND RABY AND EMMETT AND THE THIRD CIRCUIT
3 CASE , DALVERT ALL COMPORT WITH THAT .

4 TO ADOPT THE POINT OF VIEW THAT THEY
5 WOULD ASK THIS COURT TO ADOPT IN TERMS OF WHAT WERE
6 PEOPLE THINK AS THEY WROTE A PROTOCOL DOESN 'T
7 COMPORT WITH THE CASE LAW OF ANY COURT ANYWHERE
8 POST BAZE .

9 THE COURT : OKAY . ALL RIGHT .

10 I THINK I UNDERSTAND WHERE THE PARTIES
11 DISAGREE AND I 'LL MAKE A DECISION ABOUT THAT .

12 LET ME ASK COUNSEL A QUESTION WHICH IS
13 VERY MUCH ON MY MIND .

14 LET 'S ASSUME THAT WITHIN THE NEXT WEEK OR
15 SO I GET AN ORDER IN YOUR HANDS AS TO WHAT THE
16 PROPER RESOLUTION OF THE DISCOVERY DISPUTES IS AND
17 THAT THAT DISCOVERY THEN IS PROVIDED FORTH WITH , I
18 DON 'T KNOW WHAT THE TIME FRAME YOU 'VE DISCUSSED
19 WHETHER IT 'S 20 DAYS OR 30 DAYS .

20 BUT LET 'S JUST ASSUME FOR THE SAKE OF
21 DISCUSSION THAT YOU HAVE AN ORDER BY MARCH 11TH ,
22 AND I 'M NOT PROMISING THAT BUT I 'M GOING TO DO MY
23 BEST , AND YOU HAVE THE DISCOVERY COMPLETED BY SAY
24 THE END OF THE FIRST WEEK IN APRIL .

25 WHAT I 'M ENVISIONING IS A PROCEDURE THAT

1 IS PART CROSS MOTIONS FOR SUMMARY JUDGEMENT AND
2 THEN PART EVIDENTIARY HEARING ON SOME FOCUSED
3 FACTUAL DISPUTES .

4 IN OTHER WORDS , I WOULD EXPECT THE
5 PARTIES TO IDENTIFY WHAT SPECIFIC FACTS THEY
6 DISAGREE ABOUT AND WHAT WE WERE JUST TALKING ABOUT
7 IS A GOOD EXAMPLE .

8 IS A CONSCIOUSNESS CHECK PERFORMED BY A
9 LAY INDIVIDUAL , DOES THAT CREATE AN OBJECTIVELY --
10 CREATE A SUBSTANTIAL RISK OF AN 8TH AMENDMENT
11 VIOLATION ? THAT 'S A FACTUAL QUESTION .

12 SO I WOULD EXPECT THERE MIGHT BE A SHORT
13 LIST AND I DON'T THINK IT'S GOING TO BE VERY LONG ,
14 THERE MIGHT BE A SHORT LIST OF THE FACTUAL
15 QUESTIONS LIKE THAT , THAT WOULD REQUIRE THE COURT
16 TO IN SOME WAY DO SOME FACT FINDING .

17 AND IT SEEMS TO ME THAT THE REST OF THE
18 ISSUES IN THE CASE COULD PROBABLY BE RESOLVED AS
19 MATTERS OF LAW .

20 I WOULD LIKE THAT TRY TO DO THAT DURING
21 THE SPRING , AS I INDICATED SOME TIME AGO . AND SO I
22 WOULD LIKE THAT GET YOUR THOUGHTS ABOUT THAT .

23 GO AHEAD MR. QUINN ,

24 MR. QUINN : BRIEFLY .

25 IN OUR LETTER BRIEF WE MENTIONED THE

1 FOCUS SHOULD BE ON THE QUALIFICATIONS AND THE TEAM
2 AND TRAINING TEAM . SAN QUENTIN HAS A NEW WARDEN ,
3 SOMETIME AROUND PRESIDENT 'S DAY . WE GOT WORD
4 YESTERDAY AFTERNOON THAT HE 'S DECIDED TO DISSOLVE
5 THE EXECUTION ROOM AND REINITIATE THE PROCESS OF
6 HAVING POTENTIAL TEAM MEMBERS APPLY , INTERVIEW AND
7 ALL THE THINGS THAT ARE SET FORTH UNDER THE
8 REGULATIONS .

9 SO THAT COULD --

10 THE COURT : THAT MAKES MY SCHEDULE A BIT
11 PROBLEMATIC , DOESN 'T IT?

12 MR . QUINN : RIGHT . AND I FIGURED IT --

13 THE COURT : YEAH .

14 MR . QUINN : BUT I THOUGHT WE SHOULD LET
15 YOU KNOW WE DIDN 'T FIND OUT ABOUT IT UNTIL
16 YESTERDAY AFTERNOON .

17 THE COURT : WELL , THAT 'S AN IMPORTANT
18 FACT AND IT OBVIOUSLY IS GOING TO EFFECT WHEN
19 PLAINTIFFS CAN GET INFORMATION ABOUT THAT AND WHEN
20 THE COURT CAN GET INFORMATION ABOUT THAT .

21 BUT I WOULD STILL LIKE TO HAVE AN
22 UNDERSTANDING WITH COUNSEL THIS AFTERNOON AS TO
23 WHEN WE ARE GOING TO RESOLVE THE REMAINING ISSUES
24 IN THIS CASE AND HOW WE ARE GOING TO DO IT .

25 AND I STILL THINK UNLESS SOMEBODY TELLS

1 ME I'M WRONG THAT IT'S GOING TO BE SOME TYPE OF A
2 HYBRID PROCESS WHERE THE PARTIES MAKE CROSS MOTIONS
3 FOR SUMMARY JUDGEMENT , IDENTIFY THE FACTUAL ISSUES
4 THEY BELIEVE ARE DISPUTED THEN THE COURT SETS A WAY
5 OF RESOLVING THOSE FACTUAL ISSUES .

6 I JUST THINK THAT'S THE RIGHT WAY TO GO ,
7 AND THEN I THINK WE JUST NEED TO TALK PRACTICALLY
8 AND MR. QUINN HAS JUST TOLD US SOMETHING IMPORTANT
9 HERE . BUT WHEN ARE WE GOING TO DO IT .

10 MR. GRELE ?

11 MR. GRELE : YOUR HONOR , I DON'T THINK WE
12 HAVE ANY OBJECTION TO THAT CONCEPT OF THE
13 PROCEDURE . AND IT'S SOMEWHAT ANTICIPATED BY OUR
14 SIDE .

15 BUT THE ONLY WRINKLE IN THAT IS IF THE
16 COURT COMES OUT WITH A SERIES OF QUESTIONS THE
17 COURT IS INTERESTED IN , WE HAVE AN OPPORTUNITY WHY
18 A HANDFUL OF OTHER QUESTIONS MIGHT ALSO BE
19 IMPORTANT .

20 THE COURT : WHAT I WOULD ANTICIPATE IS
21 PROFFERS FROM BOTH SIDES AS TO WHAT YOU THINK THE
22 COURT NEEDS TO DO FACT FINDING ABOUT .

23 IF IT'S NOTHING THEN SAY THAT , IF IT'S
24 THESE 15 THINGS , YOU CAN SAY THAT .

25 THEN THE COURT CAN MAKE A DETERMINATION

1 AS TO WHAT FACTS NEED TO BE FOUND AND WHAT THINGS
2 BE CAN BE DECIDED AS A MATTER OF LAW WE CAN FIGURE
3 OUT HOW MUCH TIME YOU NEED TO DO IT WHETHER IT'S
4 HALF A DAY , ONE DAY , TWO DAYS , FIGURE IT OUT AND
5 SET THAT UP IT .

6 BUT I THINK WE'RE ALL ON THE SAME PAGE
7 THEN AS TO THE PROCEDURE .

8 WHAT I'M MOST CONCERNED ABOUT IS WHEN IS
9 IT REALISTIC TO AIM TO DO THAT?

10 I'M ASSUMING ONCE THE COURT ISSUES
11 DISCOVERY ORDER THAT THE PARTIES WILL COMPLY WITH
12 THAT ORDER AND PRODUCE THE DISCOVERY . WE WON'T
13 NEED FURTHER MOTIONS TO COMPEL OR ANYTHING LIKE
14 THAT .

15 AND THEN IT WOULD JUST BE A MATTER OF
16 WRITING THE MOTION PAPERS AND SERVING THEM AND
17 BRIEFING THE CASE .

18 SO MAYBE MY HOPES OF GETTING IT DONE IN
19 MAY ARE A BIT OPTIMISTIC GIVEN THAT WE DON'T
20 CURRENTLY HAVE AN EXECUTION TEAM , BUT I'M STILL
21 LOOKING FOR SOME HELP WITH THAT .

22 MR. KRISHNAN ?

23 MR. KRISHNAN : YOUR HONOR , THE ONLY POINT
24 I WANTED TO RAISE IS TO REQUEST THERE BE AN
25 EXPLICIT CONSIDERATION OF WHERE PNS PLAYS IN THE

1 PROCESS .

2 WE DON 'T WANT THE LITIGATION TO PROCEED
3 TOO FAR OUT GETTING OUR DISCOVERY , WE WANT TO BE
4 ABLE TO , AT THE APPROPRIATE TIME , BE ABLE TO
5 PRESENT OUR EVIDENCE AS WELL .

6 AND WITH KEEPING IN MIND THE COURT 'S
7 CONSIDERATION OF A CONSOLIDATED APPEAL AT THE END
8 OF THE PROCESS , IT WOULD BE HELPFUL AND EFFICIENT
9 FOR PNS TO GET ITS DISCOVERY AT THE SAME TIME AS
10 THE DISCOVERY IS PROCEEDING IN THE 8TH AMENDMENT
11 CASE .

12 THE COURT : WELL , I THINK THE
13 UNDERSTANDING HAS BEEN YOU WOULD GET WHAT THE 8TH
14 AMENDMENT PLAINTIFFS GET WITHOUT PREJUDICE TO
15 ANYTHING ELSE , YOU MIGHT WANT TO PURSUE AND WITHOUT
16 PREJUDICE TO ANY ARGUMENT THE STATE MIGHT MAKE AS
17 TO WHY YOU SHOULDN 'T GET IT .

18 I THINK THE ONE PIECE WE 'VE TALKED ABOUT
19 TODAY DOES HAVE TO DO WITH THE DIFFERENCE BETWEEN
20 THE EIGHTH AND THE FIRST AMENDMENT INQUIRIES AS TO
21 THE CHOICE OF PROCEEDING WITH PANCURONIUM BECAUSE
22 THAT 'S UNDER THE FIRST AMENDMENT , IT 'S THE
23 INFRINGEMENT OF THE FIRST AMENDMENT VERSUS THE
24 STATE INTEREST AND THAT BALANCING THE COURT HAS TO
25 DO .

1 SO I HAVE TO GIVE THAT SOME THOUGHT .

2 MR. KRISHNAN : RIGHT .

3 AND PART OF THE CONCERN REALLY IS THAT
4 DOCUMENTS GET PRODUCED , DEPOSITIONS GET TAKEN ONLY
5 WITH THE 8TH AMENDMENT DOCTRINE S IN MIND . CERTAIN
6 QUESTIONS DON 'T GET ASKED , CERTAIN DOCUMENTS DON 'T
7 GET PRODUCED , THEN WE HAVE TO LITIGATE THAT ENTIRE
8 PROCEDURE .

9 THE COURT : I FOLLOW .

10 CAN I GET ANY FURTHER INPUT THE STATE
11 HAS ?

12 MR. QUINN : I GUESS WITH REGARD TO
13 SCHEDULING I KNOW THAT THE NEWS THAT WE PROVIDED
14 YOU COMPLICATES THINGS .

15 IT MAY TAKE I HAVE BEEN TOLD SEVERAL
16 WEEKS INTO TWO TO THREE MONTHS TO PUT A TEAM
17 TOGETHER AND GET THEM TRAINED .

18 SO I DON 'T KNOW EXACTLY WHAT THE COURT --

19 THE COURT : I JUST -- YOU KNOW , IT 'S -- I
20 UNDERSTAND AND I RESPECT THAT AND HOPEFULLY IT WILL
21 BE -- IT WILL PRODUCE A SITUATION THAT THE WARDEN
22 FEELS COMPLETELY CONFIDENT ABOUT .

23 AND I THINK THAT 'S VERY IMPORTANT THAT
24 THAT HAPPEN . I KNOW THERE 'S A LOT OF FRUSTRATION
25 IN THE COMMUNITY ABOUT HOW LONG THIS PROCESS HAS

1 TAKEN AND IT'S A FRUSTRATION THAT I SHARE . I WOULD
2 LIKE TO BRING IT TO A CLOSE .

3 BUT OBVIOUSLY IF THERE 'S -- IF THERE 'S AN
4 IMPORTANT PIECE , AND OBVIOUSLY THE COMPOSITION OF
5 THE EXECUTION TEAM IS A CRITICAL PIECE , WE HAVE TO
6 LET THAT CHANGE BE ABSORBED INTO THE REST OF THE
7 CASE .

8 SO MAYBE WE OUGHT TO SHOOT FOR SOMETHING
9 LIKE THE END OF JUNE AND SEE IF WE CAN MAKE THAT
10 HAPPEN .

11 AND OBVIOUSLY THAT 'S ASSUMING EVERYBODY
12 DOES WHAT THEY ARE SUPPOSED TO AND , YOU KNOW , I
13 KNOW THAT THAT 'S A CONCERN ON BOTH SIDES , BUT I'M
14 GOING TO GIVE YOU SOME VERY EXPLICIT AND SPECIFIC
15 DISCOVERY GUIDELINES WITHIN THE NEXT WEEK OR SO ,
16 MAYBE A LITTLE LONGER NOW SINCE WE ARE NOT UNDER
17 SUCH OF A TIME PRESSURE , THEN I EXPECT THEM TO BE
18 FOLLOWED .

19 AND I REALLY DO WANT TO SET A DATE THAT
20 EVERYBODY TAKES SERIOUSLY .

21 MR . GRELE ?

22 MR . GRELE : YOUR HONOR , IN THAT REGARD
23 I'M HOPING THAT YOUR HONOR PREVIOUSLY RULED THAT
24 EVERYTHING PERTAINING TO THE BROWN EXECUTION
25 ATTEMPTED EXECUTION WAS ON THE TABLE .

1 THE COURT : CLEARLY RELEVANT .

2 MR. GRELE : OKAY .

3 AND SOME OF OUR MATERIAL REQUESTS THAT ,
4 AND NOW I'M HOPING WE DON'T GET , WELL WE'RE GOING
5 TO HAVE A NEW TEAM , SO THE TEAM WE HAD IN PLACE FOR
6 THE SIX-MONTH PERIOD SURROUNDING THE BROWN
7 EXECUTION IS NOT RELEVANT FOR ANY INQUIRY .

8 THE COURT : WELL , I'M GLAD YOU FLAGGED
9 THAT QUESTION AND I WILL TRY TO ADDRESS IT .

10 MR. SENIOR : I THINK THERE MAY BE A THIRD
11 EXECUTION TEAM IN BETWEEN THE FUTURE ONE THAT'S
12 COMING AND THE ONE IN BROWN .

13 MR. GOLDMAN : WELL , THAT'S NEWS TO US ,
14 YOUR HONOR .

15 MR. SENIOR : IT'S HARD TO TELL FROM THE
16 DESIGNATIONS .

17 THE COURT : MY UNDERSTANDING , AND LET'S
18 GET THIS CLEAR SO I CAN MAKE AN INTELLIGIBLE ORDER .
19 THERE WAS AN EXECUTION TEAM THAT WAS PREPARING TO
20 EXECUTE MR. BROWN . THERE IS NOW GOING TO BE A NEW
21 EXECUTION TEAM BASED ON WHAT MR. QUINN JUST TOLD
22 US .

23 SO THE QUESTION IS POST BROWN , PRE TODAY ,
24 WAS THERE ANOTHER ITERATION OF THE EXECUTION TEAM ?

25 MR. QUINN : NO . THERE WAS A DIFFERENT

1 NUMBERING SYSTEM WHICH I THINK THE PLAINTIFFS ARE
2 REFERRING TO .

3 SAN QUENTIN USED NUMBERS DIFFERENTLY THAN
4 OUR OFFICE NUMBERED THEM . WE ATTEMPTED TO SEND
5 THEM A LETTER AND HAD A KEY THAT PROVIDED THE
6 SAN QUENTIN NUMBERS OF THE INDIVIDUAL AND THE
7 NUMBER THAT WE PROVIDED THAT INDIVIDUAL .

8 MR . GOLDMAN : SO IN OTHER WORDS ,
9 SAN QUENTIN GIVES SOMEBODY NUMBER 3 AND IT 'S
10 SOMEBODY WE PREVIOUSLY IDENTIFIED TO THEM AS
11 WITNESS NUMBER 207 .

12 THE COURT : YEAH .

13 MR . GOLDMAN : WE GAVE THEM THE KEY . THEY
14 CAN LOOK AT IT AND SAY 3 , 207 .

15 THE COURT : I 'M THERE . IT 'S A MATTER OF
16 DOING THE CROSS REFERENCE .

17 MR . GRELE : RIGHT .

18 WE GOT IT TWO DAYS AGO , WE HAVE ALREADY
19 STARTED THAT PROCESS , YOUR HONOR .

20 THE ONE GLITCH ON THIS IS , AND I THINK WE
21 RAISED IT IN OUR STATUS MEMO , OUR POINT IS THE SAME
22 SELECTION AND TRAINING PROCEDURES HAVE BEEN IN
23 EFFECT SINCE MAY OF 2007 BECAUSE REALLY THE
24 REGULATIONS ARE THE SAME AS 2007 IN THAT REGARD AND
25 ALMOST EVERY RESPECT IN THAT REGARD .

1 THEREFORE , HOW THEY SELECTED A TEAM
2 WHETHER THEY WENT BEYOND THE REGULATIONS OR
3 VIOLATED THE REGULATIONS WHEN THEY SELECTED THAT
4 TEAM IS RELEVANT FROM THE POINT IN TIME IN WHICH
5 THE PROCEDURES WERE ACTUALLY IN PLACE

6 THE COURT : WELL , BUT THERE WASN 'T --
7 CORRECT ME IF I 'M WRONG , BUT THERE WAS NO EXECUTION
8 EVEN ON THE HORIZON AFTER 2007 UNTIL MR . BROWN HAD
9 HIS EXECUTION SCHEDULED .

10 THERE WAS NOTHING BECAUSE THERE WERE NO
11 REGULATIONS BECAUSE THE CASE IN THE MARIN SUPERIOR
12 COURT BASICALLY TOOK THE WHOLE MATTER OUT OF THIS
13 COURT 'S HANDS AND OUT OF THE STATE 'S HANDS .

14 MR . GRELE : YOUR HONOR , ONE WOULD THINK
15 THAT .

16 THE COURT : YEAH .

17 MR . GRELE : BUT THEY CAME INTO COURT WHEN
18 THEY WERE TRYING TO EXECUTE MR . BROWN AND PUT A
19 DECLARATION UNDER PENALTY OF PERJURY BEFORE THIS
20 COURT SAYING THAT THAT PROCEDURE THAT WAS IN PLACE
21 DURING THAT PERIOD OF TIME WE ARE TALKING ABOUT WAS
22 ENTIRELY RELEVANT AND COULD BE USED TO JUSTIFY TO
23 EXECUTE MR . BROWN .

24 AND IF THEY WANT TO PUT THAT KIND OF
25 MATERIAL BEFORE THE COURT AND STAND BY THAT

1 MATERIAL IN ORDER TO KILL SOMEBODY THEN THEY ARE
2 BOUND BY IT.

3 THE COURT : WELL , LET 'S KEEP THE RHETORIC
4 DOWN THIS AFTERNOON , PLEASE .

5 I UNDERSTAND THE RELEVANCE OF WHAT THEY
6 WERE GOING TO DO WITH MR . BROWN .

7 SO IF THERE 'S MATERIAL THAT RELATES TO
8 THE BROWN EXECUTION TEAM , AND SAY THAT MATERIAL
9 SAYS THIS IS THE SAME SETUP WE 'VE HAD SINCE 2007 ,
10 THAT 'S IN PLAY BECAUSE WHAT THE STATE WOULD HAVE
11 DONE WITH MR . BROWN IS VERY RELEVANT WITH WHERE WE
12 ARE TODAY THAT WAS AN EXECUTION UNDER THE NEW
13 REGULATIONS .

14 SO IF THAT 'S WHAT YOU ARE SAYING ,
15 MR . GRELE , MAYBE I AGREE WITH YOU .

16 MR . GRELE : MAYBE I 'M NOT BEING CLEAR ,
17 AND I APOLOGIZE FOR NOT BEING CLEAR AND I 'M GOING
18 TO TRY TO CLARIFY THE ISSUE AND SEE IF I CAN
19 CRYSTALIZE IT IN A WAY THAT IT MAKES SENSE BOTH FOR
20 MYSELF AND THE COURT .

21 THE FIRST PROBLEM WE HAVE IS THEY ISSUED
22 THESE REGULATION S ON TRAINING AND SELECTION IN
23 MAY 2007 .

24 WE WERE READY TO GO TO HEARING OR
25 PREPARING TO GO TO HEARING NOVEMBER 2007 . WE TOOK

1 SOME DISCOVERY , A LOT OF DISCOVERY , OKAY . THERE
2 WEREN 'T THESE PROBLEMS BACK THEN .

3 AND IN THAT DISCOVERY THEY SAID YEAH , WE
4 HAVE THIS SELECTION PROCEDURE IN PLACE BUT WE
5 VIOLATED IT WHEN WE GOT OUR TEAM . WE DIDN 'T LOOK
6 AT THE FILES . WE DIDN 'T LOOK AT THE MATERIALS .
7 AND WE VIOLATED IT .

8 THE COURT : WELL , YOU ARE FREE TO PUT ALL
9 OF THAT IN , YOU 'VE GOT THAT ALREADY .

10 MR . GRELE : WE HAVE .

11 BUT WHAT WE DON 'T HAVE , YOUR HONOR , IS
12 EVERYTHING STOPPED IN NOVEMBER 2007 . BUT THEY WENT
13 FORWARD , THEY KEPT SELECTING TEAM MEMBERS , THEY
14 KEPT TRAINING , THEY KEPT DOING THINGS TO PREPARE
15 FOR EXECUTIONS LIKE THEY PROBABLY FELT THEY SHOULD .

16 AND THEY GOT WORD OF -- WHAT WE ARE VERY
17 CONCERNED ABOUT YOUR HONOR , IS THAT IT WAS THE SAME
18 LACKEY DAZE CAL WE DON 'T REALLY PAY ANY ATTENTION
19 TO IT KIND OF ATTITUDE UNTIL THEY GOT WORD FROM THE
20 ATTORNEY GENERAL 'S OFFICE THE GOVERNORS OFFICE THAT
21 EXECUTION S ARE GOING TO START THAT WAS WE BELIEVE
22 SOMETIME IN JULY .

23 THE COURT : LET ME MAKE SURE I 'M HEARING
24 YOU AND TRY TO CONNECT THE DOTS .

25 SO WHAT WANTED TO DO WHEN I SAY THEY THE

1 STATE DEFENDANTS WHAT THEY INTENDED TO DO TO
2 EXECUTE MR. BROWN AND THAT INCLUDES THE COMPOSITION
3 OF THE EXECUTION TEAM , I THINK I CAN TELL YOU
4 WITHOUT MUCH QUESTION I'M GOING TO FIND THAT 'S
5 RELEVANT BECAUSE MR. BROWN WOULD HAVE BEEN EXECUTED
6 UNDER THE CURRENT PROTOCOL HAD THE EXECUTION GONE
7 FORWARD .

8 SO THAT 'S RELEVANT . TO THE EXTENT THAT
9 WHAT THE STATE DEFENDANTS DID PRIOR TO THE
10 IMPLEMENTATION OF THE NEW REGS WAS THE SAME AS WHAT
11 THEY INTENDED TO DO IN THE CONNECTION WITH
12 MR. BROWN 'S EXECUTION , THAT WOULD GO BACK TO THE
13 OPENING COMMENTS THAT I MADE .

14 THAT IS , YOU ARE NOW LOOKING AT A PERIOD
15 OF TIME IN THIS CASE IN 2007 IN WHICH ACTUAL
16 PERFORMANCE BY THE STATE UNDER THE NEW REGS , AND IF
17 THAT IS IDENTICAL TO SOMETHING THAT THE STATE DID
18 PRIOR THAT , THEN THAT PRIOR BEHAVIOR IS RELEVANT .
19 FOR PURPOSES OF DISCOVERY .

20 MR. GRELE : THAT 'S TRUE , YOUR HONOR .

21 BUT I WANT TO THROW A HYPOTHETICAL OUT
22 THAT I DON 'T THINK IS SO DIVORCED FROM POTENTIAL
23 REALTY .

24 THEY WENT THROUGH THE PROCESS IN A VERY
25 HAPHAZARD WAY THEY WEREN 'T VERY CONCERNED ABOUT IT

1 THEY DIDN 'T PAY MUCH ATTENTION TO IT AND THEY GOT
2 WORD FROM THE GOVERNORS OFFICE OR THE ATTORNEY
3 GENERAL 'S OFFICE THAT EXECUTIONS NEEDED TO GO
4 FORWARD .

5 THE COURT : IN 2010 ?

6 MR. GRELE : IN 2010 .

7 WE BELIEVE THAT THAT WAS BEFORE THE
8 REGULATIONS ACTUALLY TOOK EFFECT WE BELIEVE THAT
9 WAS IN JULY OF 2010 THAT THAT WORD CAME OUT BECAUSE
10 THEY STARTED SENDING NOTICES TO PEOPLE .

11 THE COURT : BUT THE RELEVANT ISSUE IS
12 WHETHER THE PERFORMANCE UNDER THE NEW PROTOCOL
13 REFLECTS WHAT YOU 'VE CHARACTERIZED AS HAPHAZARDNESS
14 OR I THINK DIFFERENCE S IN THE OLD ONE .

15 MR. GRELE : IT IS THE SAME PROCEDURES , IT
16 IS THE EXACT SAME PROCEDURES .

17 THE COURT : SO ESTABLISHING THAT FACT
18 SEEMS TO ME WOULD BE RELEVANT AT LEAST FOR PURPOSES
19 OF DISCOVERY .

20 MR. GRELE : THAT WAS MY WHOLE POINT ,
21 YOUR HONOR .

22 IF WE CAN SHOW THAT OVER THE COURSE OF
23 TIME WHILE THIS PROCEDURE HAS BEEN IN PLACE THAT IT
24 HAS NOT WORKED FOR THE VAST MAJORITY OF OCCASIONS ,
25 THAT UNQUALIFIED PERSONS WHO BE NAMED ON THE TEAM

1 THEY VIOLATED THEIR OWN REGULATIONS IN THE
2 SELECTION PROCEDURES . UNTIL THE MOMENT CAME WHERE
3 THEY NEEDED TO GET A TEAM AND THEY SAID WE BETTER
4 DO IT, YOU KNOW .

5 THE COURT : THIS IS ALL -- I THINK WE
6 UNDERSTAND EACH OTHER .

7 I THINK IT ALL MAY BE MOOTED OUT BY WHAT
8 THE WARDEN DOES . YOU KNOW , I DO NOT KNOW WHAT HE 'S
9 GOING TO DO AND I DON 'T WANT TO PRESUME WHAT HE 'S
10 GOING TO DO , BUT IF THE WARDEN COMES IN HERE A
11 MONTH FROM NOW AND SAYS I GOT A COMPLETELY
12 DIFFERENT PROGRAM , HERE IS IT IS , AND LOOK AT THESE
13 PEOPLE , ALL OF THIS MAY BE MOOT .

14 BECAUSE I THINK DICKENS DOES TELL US IF
15 THE MORE THE PRESENT IS UNLIKE THE PAST , THE LESS
16 THE PAST IS RELEVANT .

17 MR . GRELE : I THINK THE WARDEN 'S ACTIONS
18 ARE IN COMPORT WITH THE REGULATION , I THINK EACH
19 WARDEN HAS TO DO THAT .

20 THE COURT : MR . QUINN ?

21 MR . QUINN : I GUESS ON THAT ISSUE , DO YOU
22 WANT SOME SORT OF NOTIFICATION WHEN THE WARDEN IS
23 SELECTED ?

24 THE COURT : ABSOLUTELY . I WOULD LIKE YOU
25 TO TELL THE COURT AND TELL COUNSEL .

1 I THINK THE MORE INFORMATION WE GET AND
2 THE SOONER WE GET IT THE BETTER .

3 AND I WOULD LIKE TO AT LEAST TENTATIVELY
4 SCHEDULE A HEARING DATE . AND I'M GOING TO ASSUME
5 THAT WE WILL NEED TWO DAYS , AND WE MAY NEED MORE ,
6 WE MAY NEED LESS , BUT I WILL SET ASIDE SOME TIME .
7 I WANT TO MAKE SURE EVERYBODY IS AVAILABLE AND USE
8 THAT AS A TARGET .

9 I'M GOING TO SUGGEST JUNE 20TH . ANYONE
10 HAVE A CONFLICT WITH THAT ?

11 MR . GOLDMAN : THIS IS A HEARING DATE FOR
12 WHAT , YOUR HONOR ?

13 THE COURT : THE PROCEDURE I DISCUSS ED
14 EARLIER , CROSS MOTIONS FOR SUMMARY JUDGEMENT AND
15 TAKING EVIDENCE THE COURT NEEDS TO TAKE .

16 MR . GOLDMAN : COULD I ASK A QUESTION
17 ABOUT THAT BECAUSE MAYBE I DON 'T UNDERSTAND IT .

18 THE COURT : RIGHT .

19 MR . GOLDMAN : SO WE WOULD FILE MOTIONS
20 FOR SUMMARY JUDGEMENT .

21 THE COURT : YES .

22 MR . GOLDMAN : I GUESS I DON 'T KNOW IF YOU
23 ARE SAYING THAT 'S JUNE 20TH .

24 THE COURT : THAT WOULD BE THE ARGUMENT .

25 MR . GOLDMAN : OKAY .

1 THE COURT : THEN I ASSUME THAT I'M NOT
2 GOING TO BE ABLE TO DISPOSE OF THE ENTIRE CASE ON
3 JUDGEMENT .

4 I ASSUME THERE 'S GOING TO BE A NUMBER OF
5 ISSUES THAT CAN BE DISPOSED OF SUMMARILY AND THERE
6 ARE OTHER MATTER S THAT REQUIRE SOME EXPERT
7 TESTIMONY OR SOME OTHER TYPE OF TESTIMONY .

8 I DON 'T KNOW HOW MUCH SUCH ISSUES THERE
9 WILL BE , I DON 'T KNOW HOW MUCH TIME IT'S GOING TO
10 TAKE .

11 I KNOW WE 'VE DISCUSSED THIS IN THE PAST
12 THAT WE TALKED ABOUT A COUPLE OF DAYS . THE HEARING
13 IN 2006 WAS FOUR DAYS BUT THERE WAS A LOT OF
14 STIPULATED MATERIAL IN ADDITION TO THAT . IT WAS
15 THE ORIGINAL PLENARY HEARING IN THIS CASE .

16 AND JUST TO PUT THINGS IN PERSPECTIVE ,
17 THIS IS A FOLLOW -ON HEARING TO THAT HEARING . THE
18 ISSUES THAT ARE NOW IN PLAY IN THIS CASE HAVE BEEN
19 LIMITED BY WHAT HAPPENED AT THAT HEARING , THEN OF
20 COURSE BY THE DEVELOPMENTS IN BAZE AND DICKENS .

21 SO WE 'VE GOT A FAIRLY NARROW RANGE OF
22 FACTS THAT COULD REASONABLY BE DISPUTED HERE . SO
23 I'M THINKING TWO DAYS OUGHT TO BE ENOUGH AND MAYBE
24 TOO MUCH .

25 MR . GOLDMAN : SO YOUR HONOR , IF I GOT

1 THIS RIGHT --

2 THE COURT : YEAH .

3 MR. GOLDMAN : SO EVERYBODY FILES THEIR
4 MOTIONS FOR SUMMARY JUDGEMENT .

5 THE COURT : RIGHT .

6 MR. GOLDMAN : OBVIOUSLY IF SOMEONE IS
7 HUNDRED PERCENT DEAD ON IN THEIR MOTION , IT'S
8 SUMMARY JUDGEMENT GRANTED .

9 THE COURT : RIGHT .

10 MR. GOLDMAN : IF NOT , IF LET'S SAY EACH
11 SIDE HAS OR ONE SIDE HAS SOME ISSUES LEFT --

12 THE COURT : THEY WOULD PROFFER WHAT FACTS
13 THEY BELIEVE ARE DISPUTED .

14 MR. GOLDMAN : THEN IT'S REALLY KIND OF
15 LIKE A SUMMARY ADJUDICATION WHERE CERTAIN ISSUES
16 ARE SETTLED THEN THE REST ARE ISOLATE D BY THE THE
17 COURT .

18 THE COURT : YES .

19 THE CLOSEST ANALOG , AND IT REALLY IS
20 GOING TO SEEM COMPLETE LY OUT OF LEFT FIELD , BUT THE
21 CLOSEST ANALOG IS WHAT WE DO IN ERISA CASES IN
22 BENEFITS CASES WHERE YOU HAVE AN ADMINISTRATIVE
23 RECORD AND A LOT OF CASE LAW AND YOU GET ALL OF
24 THAT WORKED OUT AND THERE MIGHT BE SOME LIMITED
25 NUMBER OF FACTS THAT ARE DISPUTED .

1 AND THERE YOU TAKE EVIDENCE . AND YOU CAN
2 TAKE EVIDENCE EITHER BY DECLARATION OR YOU CAN TAKE
3 LIVE EVIDENCE .

4 AND WHAT I WOULD EXPECT IS THAT THERE
5 WOULD BE SOME PROFFER , I ASSUME MOST OF IT'S GOING
6 TO COME FROM THE PLAINTIFF 'S SIDE BUT , OBVIOUSLY
7 DEFENDANTS COULD ADD SOME TOO . I WOULD LIKE THERE
8 TO BE SOME PROFFER AS TO WHAT FACTUAL ISSUES YOU
9 BELIEVE ARE MATERIAL AND REQUIRE RESOLUTION BY THE
10 COURT .

11 THEN WE IDENTIFY THOSE ISSUES THEN THE
12 NEXT QUESTION WOULD BE HOW MANY OF THOSE ISSUE S ARE
13 GOING TO REQUIRE LIVE TESTIMONY HOW MANY OF THEM
14 CAN SIMPLY BE DONE BY DECLARATION .

15 AND THAT 'S THE PROCESS I ENVISION . BUT
16 I'M NOT ENVISIONING DAYS AND WEEKS OF TESTIMONY .
17 I'M ENVISIONING A VERY SHORT EVIDENTIARY
18 PROCEEDING .

19 MR . GOLDMAN : SO WOULD WE KNOW WHICH ,
20 BECAUSE I KNOW IT'S SHOCKING BUT I THINK THERE
21 COULD BE SOME DISAGREEMENT ON A FEW ISSUES DOWN THE
22 ROAD .

23 ASSUMING THERE IS , WOULD WE ALL GET THE
24 BENEFIT OF THE COURT FIRST LETTING US KNOW THEN
25 WHICH ARE THE ISSUES OUTSTANDING BEFORE THEN ?

1 THE COURT : YES .

2 MR. GOLDMAN : THEN WE HAVE TESTIMONY .

3 THE COURT : YES .

4 YOU WOULD PROFFER TO THE COURT , AND I SAY
5 YOU COLLECTIVELY WOULD PROFFER TO THE COURT WHAT
6 ISSUES YOU BELIEVE ARE FACTUAL AND DISPUTED .

7 THE COURT WOULD LOOK AT THAT LIST AND SAY
8 ALL RIGHT , I AGREE WITH YOU ABOUT THESE SIX , I
9 DON 'T AGREE WITH YOU ABOUT THOSE TWO . WE WILL HAVE
10 AN EVIDENTIARY HEARING ABOUT THESE SIX ISSUES .

11 THE COURT WOULD FIND LIVE TESTIMONY
12 HELPFUL AS TO THESE FOUR ISSUES , THAT KIND OF
13 INTERACTIVE PROCESS . WE MIGHT EVEN WANT TO HAVE A
14 TELEPHONE CONFERENCE OR SOMETHING LIKE THAT .

15 BUT WE WOULD HAVE A LIVE EVIDENTIARY
16 PROCEEDING AS TO THE KEY ISSUES THAT ARE FACTUAL
17 AND DISPUTED .

18 MR. GOLDMAN : SO THEREAFTER WE WOULD HAVE
19 SOME OTHER DATE WHERE WE COULD GET OUR WITNESSES ?

20 MR. GRELE : THAT 'S NOT HAPPENING ON THE
21 HEALS OF THE 20TH , 21ST , 22ND ?

22 THE COURT : NO , ACTUALLY -- I 'M SORRY . I
23 SEE WHERE THE CONFUSION IS .

24 I 'M ACTUALLY HOPING WE CAN DO IT ALL IN
25 JUNE . SO AT THE TIME THAT YOU FILE YOUR BRIEFS

1 WHICH WOULD BE IN MAY SOME TIME , YOU WOULD INDICATE
2 EITHER WE THINK THE ENTIRE CASE CAN BE RESOLVED ON
3 SUMMARY JUDGEMENT OR WE THINK THIS MUCH OF THE CASE
4 CAN BE RESOLVED ON SUMMARY JUDGEMENT AND THESE FIVE
5 ISSUES CAN 'T BE .

6 THEN WE -- WHEN I SAY "WE ," THE COURT
7 WOULD TRY AND GET BACK TO YOU AND SAY WE ARE GOING
8 TO HAVE ON THE 20TH OF JUNE , ORAL ARGUMENT ON THE
9 LEGAL ISSUES AND WE WILL HEAR EVIDENCE ON THE
10 FACTUAL ISSUES .

11 MR . GRELE : CAN I CONFER A SECOND WITH
12 COUNSEL ?

13 THE COURT : YEAH .

14 (OFF - THE - RECORD DISCUSSION .)

15 THE COURT : GO AHEAD .

16 MR . QUINN : THE INQUIRY I DON 'T THINK IS
17 CONFIDENTIAL WHETHER WE WOULD HAVE A TEAM READY BY
18 A PERIOD OF TIME AND I MENTIONED EARLIER WE THINK
19 TWO TO THREE MONTHS .

20 THE COURT : WE MAY HAVE TO MOVE IT .

21 MR . QUINN : IT 'S SOMETHING WE COULD
22 PROVIDE YOU WITH A NOTICE OF AND IF WE 'RE LAGGING
23 WE CAN --

24 THE COURT : YEAH .

25 I 'M ENVISIONING ABOUT MAYBE A MONTH

1 BEFORE THIS DATE , LIKE MIDDLE OF MAY YOU TELL ME
2 WHAT 'S LEGAL , WHAT 'S FACTUAL , OKAY .

3 WE FIGURE OUT WHAT THE SHAPE OF THE TABLE
4 IS GOING TO BE , WHAT 'S THE SCOPE OF THE HEARING ,
5 AND THEN WE CAN LOOK AT THE HEARING DATE AND IF WE
6 HAVE TO MOVE IT BECAUSE OF DEVELOPMENTS ON THE
7 GROUND , WE MOVE IT .

8 I WANT US TO HAVE ONLY ONE HEARING AND I
9 WANT IT TO BE BASED ON A COMPLETE RECORD SO
10 OBVIOUSLY IF THE RECORD IS STILL EVOLVING , THAT 'S
11 THE WAY IT IS .

12 BUT I WOULD LIKE TO GET A DEFINITION OF
13 WHAT EXACTLY THE COURT IS GOING TO BE MAKING --
14 DOING FACT FINDING ABOUT . I WOULD LIKE TO GET THAT
15 AS SOON AS POSSIBLE .

16 SO MAYBE MID-MAY CAN BE THE TARGET FOR
17 THAT . IF WE COULD HAVE A HEARING IN JUNE THAT
18 WOULD BE TERRIFIC , AND IF WE CAN 'T , WE CAN 'T . I
19 DON 'T HAVE ANY CONTROL OVER THAT .

20 MR . GOLDMAN : TWO OTHER SCHEDULING TYPE
21 FACTORS WHICH I THINK CAN IMPACT EVERYBODY IS ONE ,
22 OF COURSE IN TERMS OF -- I THINK I UNDERSTAND IT ,
23 THERE WERE -- IF THERE 'S DETERMINATION BY THE COURT
24 OKAY , SOME THINGS YOU FOLKS MAY DISAGREE ON OR
25 MAYBE EVERYTHING DEPENDING ON WHAT HAPPENS , THE

1 COURT IS GOING TO MAKE DETERMINATIONS . THAT'S
2 GOING TO LET EVERYBODY KNOW WHAT IS LEFT .

3 THE COURT : YES .

4 MR. GOLDMAN : AND THUS , WE WILL KNOW
5 THERE MIGHT BE LIKE FIVE PEOPLE OVER HERE , I WOULD
6 BRING AND TEN PEOPLE , THEY WOULD BRING ABOUT
7 VARIOUS ISSUES , THE TESTIMONY , BUT NOW WE DON'T
8 HAVE TO BECAUSE THOSE PERTAIN TO THINGS THE COURT
9 DID RESOLVE EVEN IF WE HAD A DISAGREEMENT .

10 THE COURT : YES .

11 MR. GOLDMAN : SO I THINK PRACTICALLY
12 SPEAKING AND IN LIGHT OF WHAT WITNESSES AND
13 EVERYTHING , IT WOULD BE -- IF THERE WAS SOME SORT
14 OF TIME GAP BETWEEN WHEN THE COURT SIZE WHAT ISSUES
15 ARE LEFT AND WHEN WE ARE GOING TO HAVE TESTIMONY ,
16 WE CAN GET OUR WITNESSES , WE CAN TELL WHICH ONES
17 THEY DON'T HAVE TO SHOW UP , IF THEY ARE EXPERTS WE
18 DON'T HAVE TO PAY THEM FOR NOTHING .

19 THE COURT : I FOLLOW YOU .

20 MR. GOLDMAN : ALSO DEPENDING ON WHAT
21 ISSUES THE COURTS ISOLATES AS REMAINING , WE MIGHT
22 NEED TO HAVE AN EXPERT DISCOVERY , PERIOD .

23 THE COURT : I TAKE YOUR POINT . IT'S A
24 GOOD IDEA .

25 LET'S DO THIS . LET'S SAY BY , THIS ALL

1 PRESUMES COMPLIANCE WITH THE DISCOVERY ORDER I'LL
2 ISSUE SHORTLY , LET'S SAY BY THE 6TH OF MAY YOU WILL
3 FILE YOUR MOTION FOR SUMMARY JUDGEMENT /DESIGNATION
4 OF MATERIAL ISSUES IN DISPUTE .

5 AND THEN I WILL CONSIDER THOSE , WE CAN
6 HAVE SOME TYPE OF SESSION I GUESS WE CAN CONTACT
7 YOU AT THAT POINT THEN I WILL SAY , ALL RIGHT EITHER
8 I'M PREPARED TO GRANT SUMMARY JUDGEMENT ENTIRELY
9 FOR ONE PARTY OR THE OTHER , OR I THINK OF THE SIX
10 ISSUES THAT HAVE BEEN DESIGNATED AS DISPUTED
11 FACTUAL ISSUES , I THINK THREE OF THEM ACTUALLY ARE
12 MATERIAL AND WE ARE GOING TO HAVE A HEARING ON
13 THOSE .

14 THEN WE CAN TALK ABOUT WHO NEEDS TO BE
15 THERE AND WHEN WE'RE GOING TO HAVE IT , WITH THE
16 IDEA WE WILL AIM FOR JUNE , AND MAY HAVE TO SLIDE A
17 LITTLE BIT BECAUSE OF DEVELOPMENTS AT SAN QUENTIN .

18 BUT I WOULD LIKE TO GET THE PARTIES IN
19 SHAPE AND PUT A POINT ON THEIR CASE AS SOON AS
20 POSSIBLE AND MAYBE THIS MAY DATE WILL WORK .

21 MR. GRELE : YOUR HONOR , IT DEPENDS ON
22 WHAT WE GET IN TERMS OF DISCOVERY . I'M HOPING WE
23 GET IT .

24 THE COURT : I PREFACE IT BY SAYING ,
25 ASSUMING YOU COMPLY WITH DISCOVERY ORDERS . IF

1 THERE 'S NO COMPLIANCE , NOT A LOT YOU CAN DO ABOUT
2 IT .

3 MR . GRELE : YOUR HONOR , WE HAVE BEEN
4 ASKING FOR TEAM MEMBER DESIGNATIONS FOR MONTHS .

5 THE COURT : BUT THIS IS THE FIRST
6 JUDICIAL HEARING YOU 'VE HAD ON THAT .

7 MR . GOLDMAN : JUST SO IT DOESN 'T GET LOST
8 IN THE MIX , WE HAVE INFORMATION AND DISCOVERY WE
9 HAVE BEEN WAITING FOR INCLUDING THE DISCLOSURE THE
10 COURT ORDERED PLAINTIFFS TO MAKE AND THEY HAVE TO
11 FILE IT .

12 THE COURT : I EXPECT BOTH SIDES TO COMPLY
13 WITH ORDERS THE COURT HAS MADE .

14 MR . GRELE : YOUR HONOR , WE WERE TOLD THEY
15 WANTED A STATEMENT BY US ABOUT A SINGLE DRUG
16 PROTOCOL AND WE OFFERED THE EXACT STATEMENT THE
17 COURT SAID WE SHOULD OFFER AND THEY ARE COMPLAIN ING
18 ABOUT IT .

19 THE COURT : ALL RIGHT .

20 MR . GRELE : I DON 'T KNOW WHY .

21 THE COURT : WELL , I DON 'T KNOW WHY EITHER
22 AND I GUESS WHAT I 'M TRYING TO COMMUNICATE TO ALL
23 OF YOU IS I THINK GIVEN THE CURRENT LEGAL LANDSCAPE
24 THERE OUGHT TO BE A RELATIVELY LIMITED NUMBER OF
25 FACTUAL DISPUTES LEFT .

1 AND I JUST WANT TO GET THEM TEED UP AND
2 DECIDED . AND I AM LOOKING FOR A WAY TO DO THAT .
3 AND I WILL GIVE YOU A DISCOVERY ORDER THAT , AS BEST
4 AS I CAN , THAT TELLS YOU WHAT YOU NEED TO DO . I
5 EXPECT EVERYONE TO COMPLY WITH IT .

6 MR . GRELE : THANK YOU , YOUR HONOR .

7 I JUST WANT TO THROW ONE MORE THING INTO
8 THE MIX . I KNOW THAT IN THE DICKENS CASE THE
9 PETITION FOR REHEARING ON THESE ISSUES THE COURT
10 HAS FOCUSED ON WILL BE FILED SHORTLY .

11 MR . GOLDMAN : I JUST CHECKED THE
12 NINTH CIRCUIT DOCKET AND THEY JUST GRANTED THE
13 PLAINTIFF 'S EXTENSION TO MARCH 25TH FOR THAT .

14 THE COURT : WELL , THERE 'S PANEL REHEARING
15 POSSIBILITY OF EN BANC REHEARING . AT THE MOMENT I
16 AM BOUND BY DICKENS AND I INTEND TO FOLLOW IT TO
17 THE LETTER .

18 SO THAT 'S HOW WE ARE GOING TO GO , BUT I'M
19 MINDFUL OF THE PRACTICAL --

20 MR . GRELE : YOUR HONOR , ALSO THE
21 NINTH CIRCUIT DID SAY SOME THINGS ABOUT WHAT WE
22 SHOULD BE DOING THE LAST TIME IT WEIGHED IN ON THIS
23 CASE .

24 THE COURT : WELL , YEAH , THE LAW OF THIS
25 CASE IS THE LAW NEEDS TO COMPLETE A THOROUGH

1 INQUIRY INTO THE NEW REGULATIONS AND THE COURT IS
2 TRYING TO GET THAT DONE OVER AND OVER AGAIN .

3 MR. GRELE : SO ARE WE , YOUR HONOR .

4 THE COURT : SO LET 'S LEAVE IT AT THAT .

5 MR. KRISHNAN : YOUR HONOR , JUST ONE POINT
6 WHICH IS I'M NOT SURE TO WHAT EXTENT THIS IS STILL
7 AN OPEN QUESTION , BUT I DO THINK IT WOULD BE
8 HELPFUL FOR PNS TO BE SUBMITTING BRIEFS AT THE SAME
9 TIME .

10 THE COURT : I TOLD YOU EARLIER THIS
11 AFTERNOON I WILL PUT IN THE DISCOVERY ORDER WHAT I
12 WANT YOU TO DO .

13 MR. KRISHNAN : OKAY .

14 THE COURT : YES , MR. SENIOR ?

15 MR. SENIOR : ONE QUICK QUESTION , IS THE
16 20TH OF JUNE STILL ON FOR A HEARING ON THAT ?

17 THE COURT : IT'S A TENTATIVE DATE RIGHT
18 NOW .

19 THE JUNE 20TH DATE IS A TENTATIVE DATE ,
20 THAT ASSUMES ALL GOES WELL AND ALL THE DISCOVERY IS
21 COMPLIED WITH IT ASSUMES THE EXECUTION TEAM IS
22 CONSTITUTE D AND WE CAN PROCEED .

23 I REALLY WANT TO KEEP THAT DATE . I THINK
24 GIVEN WHAT I'M HEARING , I'M REALISTIC ABOUT IT BUT
25 THE MAY 6TH DATE I WANT EVERYBODY TO BE ABSOLUTELY

1 FIRM ABOUT .

2 MR. SENIOR ?

3 MR. SENIOR : JUST ONE OTHER THING .

4 I'M NOT SURE THE COURT IS CONCERNED ABOUT
5 THIS OR NOT BUT I WANT TO MAKE SURE THE COURT IS
6 INFORMED .

7 THE PARTIES , TO MY KNOWLEDGE , HAVE
8 STIPULATE D THAT SUMMARY JUDGEMENT MOTIONS WILL BE
9 FILED IN THE APA CASE BY THE END OF MAY . I DON'T
10 KNOW HOW THAT WORKS IN WITH --

11 THE COURT : THE APA CASE THAT IS THE
12 FOLLOW ON TO THE ORIGINAL APA CASE , CORRECT , THE
13 ONE SUGGESTS THE ARGUMENT IS MADE BY MR. SIMS AND
14 MR. MORALES , AMONG OTHERS , THAT THE STATE DID NOT
15 FOLLOW THE APA WHEN IT PROMULGATED THE REGULATIONS
16 THAT CASE .

17 MR. SENIOR : YES .

18 THE COURT : OKAY . ALL RIGHT .

19 WELL , OKAY . WELL , YOU KNOW , I'M GOING GO
20 FULL SPEED AHEAD HERE AND IF THINGS HAPPEN IN OTHER
21 COURTS THEN OBVIOUSLY WE WILL MAKE ARGUMENT S .
22 OBVIOUSLY IF SOMETHING HAPPENS IN THE OTHER COURT ,
23 WE WOULD PROPERLY INFORM THIS COURT .

24 MS. COBRA : MAY I ASK A QUICK
25 HOUSEKEEPING QUESTION ?

1 THE COURT : YES .

2 MS . COBRA : I REQUEST THAT MR . SIMS AND
3 MR . FIELDS BE DEEMED JOINED TO MOTIONS IN INTEREST
4 OF AVOIDING ADDITIONAL --

5 THE COURT : SURE . DOUBLE FILING .

6 MS . COBRA : RIGHT .

7 THE COURT : UNLESS I HAVE SOME REASON TO
8 LOOK AT IT OTHERWISE , YOU 'VE GOT FOUR NAMED
9 PLAINTIFFS NOW BECAUSE MR . BROWN AND MR . FIELDS AND
10 MR . SIMS ALL INTERVENED IN MR . MORALES 'S ACTIONS .

11 MS . COBRA : GREAT . THANK YOU .

12 MR . SENIOR : ONE OTHER THING ON THE FOUR .

13 WE ENTERED A STIPULATION WITH DEFENDANTS
14 THAT MR . RALEY , DAVID RALEY IS GOING TO INTERVENE
15 FOR A STAY OF EXECUTION WHICH SHOULD BE FILED
16 SEPARATELY .

17 THE COURT : IS HE GOING TO BE REPRESENTED
18 BY AND YOU MR . GRELE --

19 MR . SENIOR : MR . STEINKEN .

20 THE COURT : WELL , I THINK RATHER THAN THE
21 COURT HAVING TO ISSUE STAYS MY UNDERSTANDING IS
22 THAT THERE 'S AN AGREEMENT WHICH HAS BEEN MADE BY
23 THE STATE IN THIS CASE THAT THEY WILL NOT ATTEMPT
24 TO EXECUTE ANYONE UNTIL AFTER THIS CASE IS
25 CONCLUDED AT THE DISTRICT COURT LEVEL .

1 AND I THINK THAT 'S AN AGREEMENT THAT CAN
2 BE RELIED UPON BY ANYONE WHO IS AN INTERESTED PARTY

3 THE COURT : I DON 'T KNOW , THE COURT
4 DOESN 'T NEED TO ISSUE STAYS OF EXECUTION I GUESS IS
5 THE POINT .

6 MR . GRELE ?

7 MR . GRELE : ONE OF THE -- IT 'S JUST A
8 GLITCH IN THE WAY STATE LITIGATION WORKS AND THAT
9 IS IF THERE 'S NO ACTIVE DISTRICT COURT CASE THEN
10 THERE 'S NO AVAILABILITY FOR STAYS PENDING APPEAL
11 AND THINGS OF THAT NATURE .

12 THE COURT : HE CAN INTERVENE .

13 I 'M JUST SAYING I DON 'T THINK ANYONE WHO
14 HAS EXHAUSTED ALL OF THEIR SUBSTANTIVE APPEALS IS
15 PRECLUDED FROM INTERVENING IN THIS CASE . THEY ARE
16 ALL SUBJECT TO EXECUTION IF WE LEARN THE NEW
17 PROTOCOL IS CLEARED .

18 I JUST DON 'T KNOW IF THIS COURT NEEDS TO
19 CONSTANTLY BE STAYING EXECUTIONS . I 'M NOT
20 COMFORTABLE DOING IT .

21 WE HAVE A BLANKET AGREEMENT BY THE STATE
22 THAT THEY ARE NOT GOING TRY TO EXECUTE ANYBODY
23 WHILE THIS CASE IS STILL PENDING IN THIS COURT .

24 OKAY . ALL RIGHT .

25 MR . GRELE : THANK YOU , YOUR HONOR .

THE COURT : THANKS VERY MUCH .

(WHEREUPON , THE PROCEEDINGS IN THIS
MATTER WERE CONCLUDED .)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA , 280 SOUTH
FIRST STREET , SAN JOSE , CALIFORNIA , DO HEREBY
CERTIFY :

THAT THE FOREGOING TRANSCRIPT ,
CERTIFICATE INCLUSIVE , CONSTITUTES A TRUE , FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER -AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY .

SUMMER A. FISHER , CSR , CRR
CERTIFICATE NUMBER 13185