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Los Angeles Superior Court

JUL 11 2012

John A. Clarke, Executive Officer/Clerk
BY Wendy Warren, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
MITCHELL CARLTON SIMS,
Defendant.

Case Number A591707

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
TIEQUON AUNDRAY COX,
Defendant.

Case Number A758447

**MOTION FOR LEAVE TO FILE
SURREPLY AND SURREPLY TO REPLY
TO OPPOSITION TO MOTION FOR
ORDER OF EXECUTION USING SINGLE
DRUG METHOD AND ORDER TO
SHOW CAUSE**

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

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6, 7

1 INTRODUCTION

2 Defendants request permission to file this Surreply to the District Attorney's Reply to
3 Oppositions of CDCR, Cox and Sims to Motion for Order of Execution Using Single Drug Method
4 ("Reply") to respond to the District Attorney's modification of his request for relief and legal
5 arguments that should have been—but were not—presented in the original Commitment and
6 Judgment of Death, Notice of Motion and Motion for Order of Execution Using a Single Drug
7 Method and Order to Show Cause ("Motion") regarding the application of the permanent injunction
8 issued by the Marin County Superior Court in *Sims v. California Dep't of Corrections &*
9 *Rehabilitation*, No. CIV1004019.

10
11 ARGUMENT

12 I. THE DISTRICT ATTORNEY'S MODIFICATION OF THE RELIEF HE
13 REQUESTS AMPLY DEMONSTRATES WHY THE MOTION SHOULD BE
14 DENIED.

15 In the Motion, the District Attorney requested that this Court order the California
16 Department of Corrections and Rehabilitation ("CDCR") "to perform the executions of [Mr. Sims
17 and Mr. Cox] in a particular manner," including designating "the type and quantity of drugs to be
18 used." Motion 33.¹ In his Reply, the District Attorney disavows this far-reaching request,
19 asserting that he is not "asking this court to craft a new execution protocol or establish new
20 standards for lethal injection." Reply 3. Instead, he states that his Motion seeks an order requiring
21 the "CDCR to perform executions in these specific cases using standards previously established by
22 CDCR," as modified by this Court to require the use of a single drug. *Id.*² As modified, the Motion

23 ¹ With the exception of the factual statements, the contents of the Motions filed in *People v. Cox*
24 and *People v. Sims* are the same, although the pagination is not. For ease of reference, the page
25 citations to the Motion in this Surreply are to the Motion filed in *People v. Sims*, although identical
26 content appears in the Motion filed in *People v. Cox*.

27 ² The Reply, however, contains contradictory language on this point. Compare Reply 3
28 (disavowing any intention for this Court to "craft a new execution protocol") and 15 (denying the
intention to ask this Court to "promulgate a regulation" or to "establish standards for execution on
behalf of the CDCR") with *id.* at 16 (first asserting that this Court should "issue an order identical to
an order that has already been upheld by the Ninth Circuit as a proper exercise of a court's
discretion" and then asserting that this Court "can make appropriate modifications" to the execution
protocol in light of "objections to certain procedures").

1 must be denied because (1) the CDCR does not have a lethal injection protocol that it may lawfully
2 employ, and (2) this Court lacks the authority to order the CDCR to use a single-drug procedure.

3 **A. The CDCR Cannot Perform Any Executions Because It Lacks A Lawfully**
4 **Created Execution Protocol.**

5 Penal Code Section 3604 provides that “[t]he punishment of death shall be inflicted by the
6 administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal
7 quantity sufficient to cause death, by standards established under the direction of the Department of
8 Corrections.” The District Attorney apparently believes that the CDCR has “standards” in place for
9 performing executions that merely need to be modified to utilize a single-drug procedure. Reply 3;
10 *see also id.* at 17 (requesting that this Court enter an order similar to that by District Court Judge
11 Jeremy Fogel in 2006 when Operational Protocol 770 was in effect); *id.* (requesting that this Court
12 order CDCR “to perform an execution by whatever means are currently available to it” which the
13 District Attorney asserts are “established standards” for a single-drug method). The only
14 “standards” that the CDCR has established are (1) Operational Protocol 770 (“OP 770”), which was
15 in effect in 2006 when the CDCR attempted to modify to comply with the District Court’s order to
16 perform the execution of Mr. Michael Morales—and (2) the set of regulations set forth in California
17 Code of Regulations, Title 15, Sections 3349, *et seq.* that were published in 2010.

18 Critically, however, neither of those “standards” may be used to perform a lawful execution.
19 OP 770 was invalidated in 2008 as an invalid underground regulation because it was not enacted in
20 compliance with the California Administrative Procedure Act (“APA”). *See Morales v. California*
21 *Dep’t of Corr. & Rehab.*, 168 Cal. App. 4th 729 (2008). Similarly, the set of regulations set forth in
22 California Code of Regulations, Title 15, Sections 3349, *et seq.* were declared invalid by the Marin
23 County Superior Court in *Sims v. California Dep’t of Corrections & Rehabilitation*, Marin County
24 Superior Court No. CIV1004019, because the CDCR failed to substantially comply with a number
25 of the APA’s mandatory procedural requirements. Reply 15 (conceding that the “regulation has
26 been ruled invalid and cannot legally be used”). Furthermore, neither of these procedures or
27 “standards” includes the use of a single-drug method.

28

1 The District Attorney apparently believes that the CDCR's modifications to OP 770 in 2006
2 and to the regulations in September 2010 in an attempt to comply with the District Court's concerns
3 about the constitutionality of the lethal injection protocols constitute a separate "standard" for
4 carrying out single-drug executions. Reply 16 (asserting that the CDCR can "perform an execution
5 using a method it has represented it can perform"); *id.* (describing CDCR's modification of the
6 regulations on September 22, 2010, as "standards previously established by CDCR"). However,
7 these modifications—setting forth in a few sentences how the existing protocol or regulations may
8 be altered to conduct a single-drug execution—do not constitute an execution protocol, which
9 consists of detailed procedures for conducting an execution. *Compare* Motion Ex. J (briefly
10 describing the changes to the regulations required for a single drug execution) *with id.* Ex. C (42
11 pages of detailed procedures for conducting a three-drug lethal injection execution).³ The CDCR
12 cannot comply with the order proposed by the District Attorney without creating procedures,
13 pursuant to the APA, to implement it. Accordingly, even if this Court decides to order the CDCR to
14 perform executions using a single-drug protocol, the CDCR may not lawfully perform a lethal
15 injection execution using a single-drug protocol—or any other method—without promulgating
16 regulations in compliance with the APA.

17 **B. This Court May Not Modify The CDCR's Execution Protocols By Ordering The**
18 **CDCR To Employ A Single Drug.**

19 This Court lacks the authority to order the CDCR to conduct single-drug executions, even
20 under the District Attorney's modified request.
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22
23

24 ³ As set forth in the regulations, the protocol includes provisions for presenting the inmate with his
25 or her choice of execution methods; the selection, recruitment and review of the lethal injection
26 team members; designation of the lethal injection team's duties; training of the lethal injection
27 team; security and maintenance of the execution site; documentation and record keeping;
28 designation of witnesses to the execution; communication with the State Supreme Court, the
Governor's Office, and the State Attorney General's Office; detailed instructions for staff from the
time of the receipt of the execution order through the execution; administration of the lethal
injection chemicals; and post-execution procedures. Motion Ex. C.

1 **1. This Court's Limited Post-Remittitur Jurisdiction Does Not Include**
2 **Ordering The CDCR To Employ A Single Drug.**

3 The District Attorney attempts to distinguish the cases cited in the oppositions uniformly
4 holding that a trial court's jurisdiction following the issuance of a remittitur in a capital case is
5 strictly limited to setting the date for the execution. *See, e.g., People v. Ainsworth*, 217 Cal. App.
6 3d 247, 251-52 (1990) ("Upon issuance of the remittitur, the trial court's jurisdiction with regard to
7 the 'remitted action' is limited solely to the making of orders necessary to carry the judgment into
8 effect") (citations omitted); *People v. Barwick*, 7 Cal. 2d 696, 700 (1936) ("After final judgment
9 has been rendered and sentence pronounced, the power of the court over the subject-matter is at an
10 end and all that remains to be done is the mere ministerial act of doing execution") (citation
11 omitted). Thus, as the District Attorney notes, a court may not modify the sentence imposed. *See,*
12 *e.g., People v. Rittger*, 55 Cal. 2d 849, 851 (1961). But the limitations on a court's jurisdiction also
13 preclude a court from granting a motion for discovery (*Ainsworth*, 217 Cal. App. 3d at 251-53), or
14 conducting proceedings to determine a defendant's sanity to be executed (*People v. Sloper*, 198 Cal.
15 601, 606-07 (1926)). Necessarily they preclude this Court from:

- 16 (1) adding the CDCR as "a party to these proceedings" (Reply 5);
17 (2) conducting a hearing that addresses the "CDCR's abilities" to conduct executions
18 and permits pre-execution and other execution procedures to be modified—
19 including, for example, not only the number and types of drugs used but also
20 whether "all inmates [sic] property must be removed" or inmates should be "bound
21 with waist restraints during visits" (*id.* at 16); and
22 (3) ordering to CDCR perform executions in a certain matter.

23 *See Ainsworth*, 217 Cal. App. 3d at 255 ("the limited powers of the trial court in postremittitur
24 proceedings do not encompass jurisdiction to entertain a detached motion for discovery").⁴ Indeed,
25

26 ⁴ Notably, the District Attorney's Reply fails to mention, let alone address, the decision in
27 *Ainsworth*. Nor does the District Attorney provide any case law that suggests this Court has the
28 authority to conduct any inquiry into the CDCR's execution procedures or determine "the manner in
which CDCR shall be ordered to perform an execution and the type and quality of drugs to be
used." Motion 33.

1 the District Attorney's concession that the Motion was not brought against the defendants, but
2 rather "is unquestionably directed at CDCR" (Reply 5)—which, despite the District Attorney's
3 unsupported assertion to the contrary, is clearly not a party to the criminal actions in either Mr.
4 Sims's or Mr. Cox's case—demonstrates that this proceeding is a collateral challenge to the
5 CDCR's authority to establish execution standards pursuant to Penal Code Section 3604. *See, e.g.,*
6 *Donald J. v. Evna M.*, 81 Cal. App. 3d 929, 933 (1978) ("It is not consonant with regular procedure
7 to raise in a motion wholly distinct and independent matters which generally should be the subject
8 of a formal petition or complaint").⁵

9 **2. Penal Code Section 3604 Precludes This Court From Ordering The**
10 **CDCR To Employ A Single Drug.**

11 The District Attorney concedes that, pursuant to Penal Code Section 3604, the Legislature
12 vested the CDCR with the authority to develop standards by which lethal injection executions are to
13 be conducted. Reply 12. Even if the CDCR did have "established standards" for implementing a
14 single-drug execution—which, as described above, it does not—this Court has no authority
15 pursuant to Section 3604, Code of Civil Procedure Section 187, or any other provision of California
16 law, to force the CDCR to use those standards in the place of other standards that the CDCR
17 selected in accordance with the Legislature's delegation of authority. *See, e.g., Ralphs Grocery Co.*
18 *v. Reimel*, 69 Cal. 2d 172, 180 (1968); *In re Lugo*, 164 Cal. App. 4th 1522, 1538 (2008).
19 Notwithstanding the District Attorney's desire that this Court order the CDCR to perform an
20
21

22 ⁵ The District Attorney asserts that in "the normal course of proceedings, judges of Superior Courts
23 daily make orders that must be carried out by CDCR." Reply 6. Tellingly, the only support the
24 District Attorney provides for this statement derives from orders the courts are explicitly authorized
25 to make by statute. *See* Penal Code §2901 ("duty of the wardens of the State prisons to receive
26 persons sentenced to imprisonment in a State prison"); *id.* §1203.03(a) (court may order placement
27 in a "diagnostic facility of the Department of Corrections[and] order that . . . the Director of the
28 Department of Corrections report to the court his diagnosis and recommendations concerning the
defendant within the 90-day period"); *id.* §1191 (establishing the time frame within which the
criminal court must pronounce judgment and providing extensions of the time frame for sanity
determinations and the court's ordering an insane defendant to be placed in a diagnostic facility). In
contrast, in Penal Code Section 3604, the Legislature expressly authorized the CDCR, not the
judiciary, to develop standards for performing executions.

1 execution “by whatever means are currently available to it” (Reply 17), this Court has no authority
2 to compel the CDCR to do so.

3 The District Attorney suggests that because a Federal District Court Judge, in the context of
4 a civil rights action under 28 U.S.C. §1983, prohibited the CDCR from proceeding with executions
5 by lethal injection without making specific modifications to the then-existing protocols, this Court
6 may make specific modifications to a protocol that has been declared unlawful and force the CDCR
7 to conduct executions using these modifications. Reply 15-17. This suggestion is ludicrous. As an
8 initial matter, it completely fails to recognize that the legal and factual issues in these matters are
9 completely distinct—the question in the federal case was whether the lethal injection procedure
10 complied with the Eighth Amendment to the Constitution, and here, the question is whether, under
11 state law, this Court is permitted to undertake any action to create or modify an execution protocol
12 or order the agency responsible for establishing standards for and conducting executions to take any
13 action. Moreover, it ignores the fact that the CDCR was not able to implement the changes the
14 District Court ordered in 2006 or in 2010.⁶

15 Moreover, as explained in Mr. Sims’s and Mr. Cox’s opposition briefs, where—as is the
16 case here with Section 3604—the relevant statute is not self-executing and assigns to an agency the
17 task of creating implementing regulations, the statute “has no legal effect without the enactment of a
18 regulation.” Office of Administrative Law, *What Must Be Adopted Pursuant to the APA?* at 1 (Apr.
19 6, 2006), available at www.oal.ca.gov/res/docs/pdf/what_is_a_regulation.pdf. (“*What Must Be*

20
21 ⁶ Contrary to the assertions in the Reply, the Ninth Circuit has never approved California’s use of
22 the single drug method. In 2006, the Circuit Court considered the constitutionality of using the
23 three-drug method with anesthesiologists being present for the execution. *See Morales v. Hickman*,
24 438 F.3d 926 (9th Cir. 2006). Later, when it became apparent the state could not execute with
25 anesthesiologists, the District Court ordered a single drug without the remote administration
26 contained within OP 770 and the current regulations: “Accordingly, while Defendants may proceed
27 with the execution this evening using only sodium thiopental, they may do so only if the sodium
28 thiopental is injected in the execution chamber directly into the intravenous cannula by a person or
persons licensed by the State of California to inject medications intravenously.” *Morales v. Tilton*,
465 F. Supp. 2d 972, 977 (N.D. Cal. 2006) (describing the February 21, 2006 Order). In 2010, the
District Court’s order—which offered Mr. Albert Brown with a choice of a single-drug or three-
drug method—was reversed by the Circuit for failing to undertake the exhaustive review necessary
in light of CDCR’s violations of the Eighth Amendment, and because the single drug option (which
inmate Brown declined) had not been properly approved through the state regulatory framework.
See Morales v. Cate, 623 F.3d 828 (9th Cir. 2010).

1 *Adopted*”). Such statutes are not functional until the agency charged with implementing them
2 adopts regulations for that implementation. *See Harrott v. County of Kings*, 25 Cal. 4th 1138, 1150
3 (2001) (noting that amendments to the Assault Weapons Control Act of 1989 were not self-
4 executing and thus regulations were required to define weapons covered by the statute); *Alfaro v.*
5 *Terhune*, 98 Cal. App. 4th 492, 502 (2002) (“Some statutory schemes, by their nature, cannot be
6 implemented without administrative regulations”). And the courts cannot enforce them on a case-
7 by-case basis.

8 The District Attorney claims that Mr. Cox and Mr. Sims have offered no authority for this
9 proposition. Reply 14. This is not so, as both opposition briefs cited *In re Ronje*, 179 Cal. App. 4th
10 509 (2009)—a controlling legal authority that the District Attorney initially cited (*see* Motion 26)
11 but now wishes to ignore. As Mr. Cox and Mr. Sims explained (*see* Sims Opp. 14; Cox. Opp. 15),
12 the Court of Appeal in *Ronje* invalidated a sexually violent predator Standard Assessment Protocol
13 (“SAP”) because it was not adopted in compliance with the procedural requirements of the APA.
14 *Ronje*, 179 Cal. App. 4th at 513. Because the underlying statute required regulations for its
15 enforcement, the court held that Mr. Ronje’s civil commitment proceedings *could not proceed* until
16 a valid SAP was adopted in compliance with the APA. *Id.* at 513-14; *see also Harrot*, 25 Cal. 4th at
17 1150; *What Must Be Adopted* at 1 (stating that stated that a non-self-executing statute “cannot be
18 legally enforced without a[n implementing] regulation).”

19 These authorities—all of which were cited in the oppositions filed by Mr. Sims and Mr.
20 Cox—amply support the proposition that because Section 3604 delegates to the CDCR the authority
21 to create implementing regulations, it cannot be enforced by the courts until valid regulations are
22 adopted by the agency.

23 24 **II. THE MARIN INJUNCTION EXPLICITLY PRECLUDES THE RELIEF THE** 25 **DISTRICT ATTORNEY REQUESTS.**

26 After failing to even acknowledge the existence of the Marin Injunction in his Motion, the
27 District Attorney now acknowledges that the injunction precludes the relief he seeks. Accordingly,
28 he offers a hodge-podge of meritless arguments as to why that injunction cannot or should not be

1 read to mean what it says. The Marin Injunction clearly states that the CDCR cannot “carry[] out
2 the execution of any condemned inmate by lethal injection unless and until new regulations
3 governing lethal injections are promulgated in compliance with the Administrative Procedure Act
4 [APA].” Declaration of Sara J. Eisenberg in Support of Opposition to Motion for Order of
5 Execution Using Single Drug Method and Order to Show Cause (“Eisenberg Decl.”) Ex. A at 1-2;
6 Cox Opp. Ex. 1. Despite this clear language, the District Attorney argues that the injunction should
7 be “construed as only invalidating the three-drug method enacted in Cal. Code Regs., tit. 15
8 §§3349-3349.4.6” (Reply 10) and not—as it expressly states—an order that the CDCR refrain from
9 carrying out executions until it promulgates new regulations in compliance with the APA. This is
10 nonsense.

11 The District Attorney has no response to the black letter rule that any attempt to modify the
12 terms of an injunction must be brought in the court that originally issued the order. *See Lockett v.*
13 *Panos*, 161 Cal. App. 4th 77, 96 (2008) (“If, for example, in *A v. B*, A obtains an injunction against
14 B, B cannot seek to lift that injunction based on changed circumstances in an unrelated ‘action,’ say,
15 *M v. X*. Obviously the ‘action’ referred to in section 533 is the very action which generated the
16 injunction in the first place”). Notably, the cases cited by the District Attorney reinforce this point.
17 In *Crowley v. Davis*, 37 Cal. 268 (1869), for example, the Supreme Court held that any “attempt to
18 restrain the execution of a judgment or decree of another [trial] Court. . . . should always be
19 instituted in the Court rendering the judgment or decree, and having control of its execution.” *Id.* at
20 270. But rather than intervene in the Marin County action or ask the Marin court to modify its
21 injunction, the District Attorney engages in rank speculation about what he believes the Marin
22 Superior Court judgment meant to say or would have said in counter-factual situations—and asks
23 this Court to do the same. That is neither appropriate nor permissible.

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CONCLUSION

For the foregoing reasons, and for those reasons set forth in the previously filed oppositions, this Court lacks jurisdiction and power to order the relief sought by the District Attorney. Mr. Sims and Mr. Cox, therefore, respectfully urge the Court to deny the Motion.

Dated: July 11, 2012

Respectfully,

ARNOLD & PORTER LLP

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PROOF OF SERVICE

I, Gigi Francisco-Ferrer, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024. On July 11, 2012, I served the following document(s) described as **MOTION FOR LEAVE TO FILE SURREPLY AND SURREPLY TO REPLY TO OPPOSITION TO MOTION FOR ORDER OF EXECUTION USING SINGLE DRUG METHOD AND ORDER TO SHOW CAUSE**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.
- ☐ by transmitting via email the document(s) listed above to the email address(es) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

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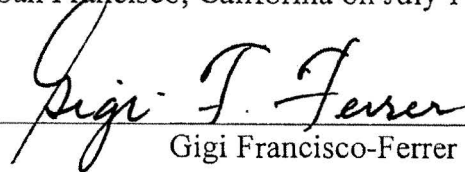
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5 I am readily familiar with the firm's practice of collection and processing
6 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
7 Service on that same day with postage thereon fully prepaid in the ordinary course of
8 business. I am aware that on motion of the party served, service is presumed invalid if
9 postal cancellation date or postage meter date is more than one day after date of deposit for
10 mailing in affidavit.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct. Executed at San Francisco, California on July 11, 2012.

13 
14 _____
15 Gigi Francisco-Ferrer

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