

## ANALYSIS OF JANUARY 2010 CHANGES TO LETHAL INJECTION PROCEDURE

On January 4, 2010, the California Department of Corrections and Rehabilitation (CDCR) proposed minor changes to the lethal injection procedures that had previously been released to the public for review in May 2009. Any member of the public may comment on the changes, whether or not that person commented on the original proposed regulations released in May. *The CDCR must read and respond to all relevant comments.* This analysis is provided to assist interested members of the public in understanding how the proposed changes impact individuals and the state, and in drafting relevant public comments.

Written comments may be submitted by mail, fax, or email. They must be **received by January 20 at 5:00 pm PDT.** Send comments to:

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Comments should reference “Proposed Amendments to *Title 15, Article 7.5, Sections 3349.*” If you send your comment by mail, please also consider sending a copy by email to ensure it arrives by January 20. *Comments should mention on one of the changes the CDCR made to the procedures—discussed below.* You should feel free, however, to make as many points in your comment as you want, and include any relevant attachments.

### Summary Analysis of Changes

#### **I. The Changes Create a Substantial Likelihood that the State will Violate the Constitutional Rights of Women Sentenced to Die.**

The changes to the regulations now specify that a woman sentenced to die may be transported to San Quentin as late as six hours prior to the scheduled execution. This change means that the prison can choose to transportation the woman during the critical last few hours before the execution, effectively preventing her from exercising the constitutional rights such as the right to counsel and the right to end of life religious ceremonies that male inmates are permitted to exercise under the regulations.

#### **II. Despite the Changes, the Regulations Continue to Treat Unfairly the Family Members of the Person to be Executed.**

The regulations continue to treat the witnesses for the person being executed differently from the witnesses for the victim, even though the CDCR now acknowledges they should be treated the same. The victim’s family is allowed an unlimited number of witnesses at the execution, while the person

being executed is limited to five individuals other than her or his spiritual adviser. In the event of limited space, the victim's family is provided with the option of remote viewing of the execution, while the same option is not extended to the family of the person being executed.

### **III. Despite the Changes, the Regulations Still Unduly Limit the Religious Rights of the Person to be Executed.**

The CDCR now acknowledges that state employed Chaplains and non-state employed Spiritual Advisors should have the same access to the person to be executed, but the changes fail to achieve this goal. A state employed Chaplain may perform religious ceremonies for the person to be executed at his or her cell front for five days prior to the execution. A non-state employed Spiritual Advisors is prohibited from performing cell front religious rituals until six hours prior to the execution. This is an unfair burden on the religious rights of the person to be executed.

### **IV. The CDCR Failed to Update the Execution Procedures, Even Though Recommended in an Article the CDCR Now Claims to Have Relied on.**

The CDCR now claims to have relied on a 2007 article from the *Santa Rosa Press Democrat* in creating its execution procedures. The article is an interview with Dr. Jay Chapman, the person who first suggested a three drug execution procedure. In the article, Dr. Chapman suggests several ways the execution procedure could be updated and improved. Yet, the CDCR continues to use exactly the same execution procedure first suggested by Dr. Chapman decades ago. The CDCR should take his advice and re-consider the drug combinations used, how they are administered, and by whom.

## **Full Analysis of Changes**

### **I. The Changes Create a Substantial Likelihood that the State will Violate the Constitutional Rights of Women Sentenced to Die.**

#### *Change Made:*

The CDCR added subsection 3349.3.6(e) stating: "Female inmates shall be transported to San Quentin no sooner than 72 hours prior to the scheduled execution and no later than 6 hours prior to the scheduled execution. The inmate will be secured in the Lethal Injection Facility Holding Area."

#### *CDCR Rationale for the Change:*

According to the CDCR, "[t]he public comments indicated that there were no specific provisions for female inmates. This change is made to clarify when a female inmate will be transferred to San Quentin and where she will be housed until the time of her execution."

#### *The Problem:*

The change to the regulations allows the CDCR to transport a woman sentenced to die to San Quentin as late as six hours prior to the scheduled execution, without providing any explanation as to how the

woman will be giving access to legal counsel and spiritual advisors. Women sentenced to die are housed at Chowchilla, more than 150 miles from San Quentin. The driving time for a normal passenger car is three hours; the time needed to transport a high security prisoner is likely to be much longer.

This change means that the CDCR can choose to transport the woman during the critical last few hours before the execution, effectively preventing her from exercising her constitutional rights such as the right to counsel and the right to end of life religious ceremonies. Because of the time needed to prepare, transport, and process the woman, this will be an effective “blackout period” on her constitutional rights that could last for five hours or more. This is an undue burden on the critical constitutional rights of women prisoners. The CDCR must ensure that women sentenced to die are given full and equal access to all of their constitutional rights, just like men sentenced to die.

The regulations specifically provide that, in the 30 days prior to an execution, the attorneys for the person to be executed must be given “priority accommodations” to visit their client (3349.3(f)(4)). The regulations further state that “[t]he Visiting Lieutenant shall . . . [e]nsure that the attorney(s) for the inmate is afforded assistance in expeditiously having access to the inmate” during the 30 day window before execution (3349.3(i)(4)). Other visitors are given “priority” status for the full 30 days (3349.3(i)(1)). In the five days before the execution, religious advisors are to be given special accommodation to perform rituals for the person to be executed (3349.3.4(e)(1)-(2)).

The changes to the regulations create a substantial risk that all of these rights will be violated for female inmates during the transportation period.

In addition, the regulations do not require the CDCR to provide any advance notice of the transport to the woman or her counsel, spiritual advisor or family. Currently, the CDCR regularly transports individuals on death row without warning to counsel, even when these individuals are days away from execution. For example, Clarence Ray Allen was removed from San Quentin and transported to a medical facility hundreds of miles away—without any notice to counsel—shortly before his execution.

Because it fails to require any advance notice, the regulation proposed here places an undue burden on the woman to be executed and her counsel, spiritual advisors and family, who for three days will live in fear that the woman may be transported at any time. Counsel, spiritual advisors and family may travel to Chowchilla only to discover the woman is already in-route to San Quentin. This is unreasonable and unnecessary.

## **II. Despite the Changes, the Regulations Continue to Treat Unfairly the Family Members of the Person to be Executed.**

*Change Made:*

The CDCR changes subsection 3349.2.3(i)(1) as follows (bolded added, strike out deleted):

(1) After the announcement of death, the official witnesses, **the inmate’s witnesses**, and victim’s witnesses shall be escorted back to their designated staging area. The ~~inmate’s~~ witnesses shall be transported to the West Gate and processed out of the institution.

The CDCR also changed subsections 3349.4.4(e) through 3349.4.4(e)(2) to provide that witnesses for both the person to be executed and the victim's family will be escorted to and from the execution by correctional guards.

*CDCR Rationale for the Change:*

According to the CDCR the first change was made because, “[t]he public comments indicated that there were concerns that the inmate’s witnesses were treated differently than the victim’s witnesses. This change will clarify that these witnesses will be processed and transported in the same manner.” Similarly, the second changes were made “to clarify that the inmate’s witnesses and the victim’s witnesses will be escorted to their designated witness areas in the same manner. The public comments indicated that there were concerns that the inmate’s witnesses were treated differently than the victim’s witnesses.”

***The Problem:***

It is a step forward that the CDCR now recognizes that all witnesses should be treated equally—with the same dignity and respect—regardless of whether they are family of the person being executed or family of the victim. But the changes fail to achieve this important goal. The victim’s family is allowed an unlimited number of witnesses at the execution, while the person being executed is limited to five individuals other than her or his spiritual adviser. The regulations also do not clarify whether the attorneys for the person being executed “count against” the five witnesses permitted. If three members of the legal team need to witness the execution, and the family of the person to be executed includes his or her father, mother and three adult children, will the CDCR make the person being executed choose among his or her loved ones? The regulations are unclear and do not answer this question.

Similarly, in the event of limited space, the victim’s family is provided with the option of remote viewing of the execution, while the same option is not extended to the family of the person being executed. If this technology is available, it is unfair and unreasonable to limit its use to only witnesses for the victim’s family. The regulations should clearly state that accommodations will be made for every immediate family member of the person being executed to witness the execution, including via remote viewing if space is needed. The regulations should also provide that legal observers are allowed to witness the execution regardless of the number of other witnesses for the person being executed.

**III. Despite the Changes, the Regulations Still Unduly Limit the Religious Rights of the Person to be Executed.**

*Change Made:*

The CDCR changed subsection 3349.1.1(f) to add a definition for Chaplain: “an individual duly designated by a religious denomination to discharge specified religious duties, including a Native American Indian spiritual leader.”

The CDCR also changed subsection 3349.1.1(dd) to add a definition for Spiritual Advisor: “a person who, by profession or practice, provides spiritual advice, assistance, or guidance.”

The CDCR changed subsection 3349.3.4(c)(9) to add the phrase “with the exception of Chaplains and approved Spiritual Advisors” to the first sentence, and changed subsection 3349.3.4(e)(3), related to the privileges of Spiritual Advisors, to add the words “state-employed and preapproved” and “non-state.”

*CDCR Rationale for the Change:*

According to the CDCR, these definitions were added to clarify the meaning of “Chaplain” and “Spiritual Advisor” so as to distinguish them from one another. The other changes were made to “clarify that both state and pre-approved non-state Spiritual Advisors have access to the inmate’s cell front to perform spiritual functions. The public comments indicated confusion and that the original language did not adequately explain this fact.”

***The Problem:***

It is a positive step that the CDCR now acknowledges that state employed Chaplains and non-state employed Spiritual Advisors should have the same access to the person to be executed, in order to perform spiritual functions. But the changes made by the CDCR fail to achieve this goal. A state employed Chaplain may perform religious ceremonies at the cell front for five days prior to the execution (3349.3.4(e)(1)). A non-state employed Spiritual Advisor is still prohibited from performing cell front religious rituals until six hours prior to the execution (3349.3.4(e)(2)). Some religious rights, such as fasting, may require days to complete. If a Spiritual Advisor is needed to perform related functions like prayers or religious offerings, it is inappropriate to require that this take place in the crowded public visiting area.

Six hours is simply an insufficient time to accommodate the wide range of end of life ritual and religious practices that exist. This is an unfair burden on the religious rights of the person to be executed. Further, given that state employed Chaplains are typically from mainstream faiths, while non-state employed Spiritual Advisors are often from minority religions, this distinction amounts to an unfair and unconstitutional restriction on the rights of persons practicing non-traditional religious faiths in particular.

In addition, the added definitions indicate that non-state employed Spiritual advisors must be “pre-approved.” But nothing in the regulations explains how this approval is done. The regulations should clearly explain the process for approving Spiritual Advisors, the standards that will govern who is approved, and provide that the approval process must be done in an unbiased manner, regardless of the faith of the Spiritual Advisor proposed.

**IV. The CDCR Failed to Update the Execution Procedures, Even Though Recommended in an Article the CDCR Claims to Have Relied on.**

*Change Made:*

The CDCR is required to disclose to the public all documents it relied on in drafting the lethal injection procedures. In the materials released January 4, the CDCR indicated for the first time that one of the materials reviewed and considered was a 2007 article from the *Santa Rosa Press Democrat*. The article

is about Dr, Jay Chapman, the person who first suggested a three drug execution procedure. The article is available at <http://www.pressdemocrat.com/article/20070429/NEWS/704290314>.

***The Problem:***

In the article, Dr. Chapman suggests several ways the execution procedure could be updated and improved. Here are some relevant excerpts from the article:

“We were much more humane to animals than people,” [Chapman] said of the earlier methods.

Chapman said but the lethal injection procedures “could be altered to keep up with changing drugs and science.”

“Drugs could be increased in quantity. Drugs might be substituted. (You) could use a simple, single-drug protocol. It just needs to be implemented properly,” Chapman said.

“[Chapman] said states that adopted the procedure should have established policies and procedures for how it would be done, including proper dosage, the order of drug delivery and training for those involved.”

“It's beyond belief how anybody could take a simple process and make such a mess of it,” Chapman said.

Despite these comments, the CDCR continues to use the same execution procedure first suggested by Dr. Chapman decades ago. In particular, the CDCR plan continues to be less humane to people than we are to animals: the proposed execution protocol uses a paralytic drug that is widely prohibited in animal euthanasia because it is considered inhumane. The use of the paralytic drug creates a substantial risk that the person being executed will suffer a torturous death and violates the First Amendment rights of the press and the public. Given that, as Dr. Chapman suggests, there are other alternatives, continued use of the paralytic drug is unreasonable, unnecessary and unduly burdensome to the rights of the public and the individuals being executed.